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AND TEXAS

WITH TABLE OF SOUTHWESTERN CASES IN WHICH  
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# CASES REPORTED

	Page		Page
Adams v. Burrell (Tex. Civ. App.).....	51	Benjamin, St. Louis Southwestern R. Co. of Texas v. (Tex. Civ. App.).....	379
Adams v. Button (Ky.).....	1100	Bennett v. Foster (Tex. Civ. App.).....	1078
Adams v. Chattanooga Co. (Tenn.).....	1131	Bennett-Sims Mill & Elevator Co., Barteldes Seed Co. v. (Tex. Civ. App.).....	399
Adams v. Wm. Cameron & Co. (Tex. Civ. App.).....	417	Berea College, Gott v. (Ky.).....	204
A. Layne & Bro., Dixie Fire Ins. Co. v. (Ky.).....	530	Bethel Grove Camp Ground Ass'n, Croninger v. (Ky.).....	230
Albert, Interstate Amusement Co. v. (Tenn.).....	488	Bickel Co. v. National Surety Co. (Ky.).....	1113
Alexander, Calhoun v. (Ky.).....	980	Bishop, Armistead v. (Ark.).....	182
Alexander, Rowe v. (Ky.).....	508	Black v. Texas & P. R. Co. (Tex. Civ. App.).....	1077
Alford v. State (Ark.).....	497	Blackshear, Trinity & B. V. R. Co. v. (Tex. Civ. App.).....	395
Alford, Western Union Tel. Co. v. (Ark.).....	1027	Bland & Fisher Lumber Co. v. Scanlan (Tex. Civ. App.).....	401
Allbright, Brown v. (Ark.).....	1036	Board of Com'rs of Tuberculosis Hospital Dist. of Buchanan County v. Peter (Mo.).....	1155
Allen v. Louisville & N. R. Co. (Ky.).....	203	Board of Council of City of Danville, Raum v., two cases (Ky.).....	1198
Ambrose, Gillispie v. (Tex. Civ. App.).....	937	Board of Council of City of Frankfort v. Kirby (Ky.).....	1115
American Nat. Life Ins. Co., Arkansas Life Ins. Co. v. (Ark.).....	136	Boles, International & G. N. R. Co. v. (Tex. Civ. App.).....	914
American Zinc Co. v. Smith (Tenn.).....	494	Bomar Cotton Oil Co., Snipes v. (Tex.).....	1
Annan-Burg Mill Co., Iroquois Mfg. Co. v. (Mo. App.).....	320	Boner v. Nicholson (Mo. App.).....	309
A. Rebori Fruit Co., Leesley Bros. v. (Mo. App.).....	861	Boonville Special Road Dist. v. Fuser (Mo. App.).....	583
Arkansas Life Ins. Co. v. American Nat. Life Ins. Co. (Ark.).....	136	Boothe v. Cheek (Mo.).....	791
Armistead v. Bishop (Ark.).....	182	Borders v. State (Tex. Cr. App.).....	483
Armor v. Cooper (Mo.).....	841	Bowden, Wendling v. (Mo.).....	774
Armor v. Frey (Mo.).....	829	Boyd v. State (Tex. Cr. App.).....	459
Armor v. Jester (Mo.).....	839	Boyle v. State (Ark.).....	1049
Armor v. Kearney (Mo.).....	840	Bracher v. State (Tex. Cr. App.).....	124
Armor v. Lewis (Mo.).....	251	Braden v. Chicago, B. & Q. R. Co. (Mo. App.).....	279
Arnett v. Howard (Ky.).....	531	Brazer, E. R. & D. C. Kolp v. (Tex. Civ. App.).....	899
Arrisman v. State (Tex. Cr. App.).....	118	Brenner, Brown v. (Tex. Civ. App.).....	14
Aul's Adm'r, National Co-op. Burial Ass'n v. (Ky.).....	1123	Brentlinger v. Louisville R. Co. (Ky.).....	1107
Autrey v. Collins (Tex. Civ. App.).....	413	Brewer, Stone & Webster Engineering Corp. v. (Tex. Civ. App.).....	88
Avery Co. v. Powell (Mo. App.).....	335	Bridwell v. Spencer (Mo. App.).....	874
Bailey, Pennsylvania Min. Co. v. (Ark.).....	200	Brinkley Car Works & Mfg. Co. v. Cook (Ark.).....	1065
Baird v. Smith (Tenn.).....	492	Brown v. Allbright (Ark.).....	1036
Baker v. Hahn (Tex. Civ. App.).....	443	Brown v. Bay City Bank & Trust Co. (Tex. Civ. App.).....	23
Baker, Lexington & E. R. Co. v. (Ky.).....	228	Brown v. Brenner (Tex. Civ. App.).....	14
Balch v. San Antonio, E. & N. R. Co. (Tex. Civ. App.).....	1091	Brown, City of La Grange v. (Tex. Civ. App.).....	8
Bange v. Supreme Council, Legion of Honor of Missouri (Mo. App.).....	652	Brown, Felton v. (Ark.).....	194
Bankers' Trust Co., Fidelity & Deposit Co. v. (Tex. Civ. App.).....	45	Bruder v. State (Ark.).....	1067
Bank of Des Arc v. Moody (Ark.).....	134	Bruton, State v. (Mo.).....	751
Bank of Miami, Young v. (Tex. Civ. App.).....	436	Burgess v. St. Louis & S. F. R. Co. (Mo. App.).....	858
Bank of Montreal, Shepherd v. (Ky.).....	214	Bunyard v. Farman (Mo. App.).....	640
Banks, Nashville, C. & St. L. R. Co. v. (Ky.).....	554	Bunyard, State v. (Mo.).....	756
Barber Asphalt Pav. Co. v. Field (Mo. App.).....	364	Burks v. Douglass (Ky.).....	225
Barber Asphalt Pav. Co., Richards v. (Ky.).....	1105	Burks, Jones v. (Ark.).....	177
Barclay's Trustee v. Commonwealth (Ky.).....	510	Burnett, State v. (Mo.).....	680
Barnes, Flynn v. (Ky.).....	523	Burns & Bell v. Lowe (Tex. Civ. App.).....	942
Barnes, Hardwicke v. (Mo.).....	744	Burrell, Adams v. (Tex. Civ. App.).....	51
Barteldes Seed Co. v. Bennett-Sims Mill & Elevator Co. (Tex. Civ. App.).....	399	Burton, Chesapeake & O. R. Co. v. (Ky.).....	1116
Bartley v. Robinson (Tex. Civ. App.).....	386	Burton & Beard v. Nacogdoches Crate & Lumber Co. (Tex. Civ. App.).....	25
Barton Lumber Co. v. Gibson (Mo. App.).....	357	Butler, Turner v. (Mo.).....	745
Bassett v. Lush (Ky.).....	227	Butler County R. Co., Martin v. (Mo. App.).....	631
Battles v. United Rys. Co. of St. Louis (Mo. App.).....	614	Button, Adams v. (Ky.).....	1100
Bauer Cooperage Co., Ferrell v. (Ky.).....	1120		
Baugh, Zimmermann v. (Tex. Civ. App.).....	943	Cabanne v. St. Louis Car Co. (Mo. App.).....	597
Bay City Bank & Trust Co., Brown v. (Tex. Civ. App.).....	23	Cabell, Ft. Worth Belt R. Co. v. (Tex. Civ. App.).....	1083
Beatty, McKneely v. (Tex. Civ. App.).....	18		
Belcher v. State (Tex. Cr. App.).....	459		
Benedetti, Fahey v. (Tex. Civ. App.).....	896		

	Page		Page
Calhoun v. Alexander (Ky.).....	980	Coffee, Ex parte (Tex. Cr. App.).....	975
Cameron & Co., Adams v. (Tex. Civ. App.)	417	Coleman, Marrowbone Coal & Coke Co. v. (Ky.) .....	238
Campbell v. Gibbs (Tex. Civ. App.).....	430	Collins, Autrey v. (Tex. Civ. App.).....	413
Campbell, Shackelford v. (Ark.).....	1019	Collins v. State (Tex. Cr. App.).....	115
Campfield, Ellerd v. (Tex. Civ. App.).....	392	Collins v. State (Tex. Cr. App.).....	1198
Carlton v. State (Ark.).....	145	Collin County Nat. Bank v. McCall Hardware Co. (Tex. Civ. App.).....	950
Carolina, C. & O. Ry. v. Shewalter (Tenn.)	1136	Comer, Griswold v. (Tex. Civ. App.).....	423
Carter, Wilson v. (Tex. Civ. App.).....	411	Commonwealth, Barclay's Trustee v. (Ky.)	510
Carter & Bro., Vinson v. (Tex. Civ. App.)	49	Commonwealth, Christian-Todd Tel. Co. v. (Ky.) .....	543
Case Threshing Mach. Co. v. Tomlin (Mo. App.) .....	286	Commonwealth, Mason v. (Ky.) .....	229
Casey v. Newport Rolling Mill Co. (Ky.)	528	Compton v. Moore (Ky.).....	540
Cave Hill Cemetery Co. v. Gosnell (Ky.)	980	Conn, Davis v. (Tex. Civ. App.) .....	39
Century Realty Co. v. Frankfort Marine Accident & Plate Glass Ins. Co. (Mo. App.) .....	624	Conn v. Rosamond (Tex. Civ. App.).....	73
Century Realty Co. v. Frankfort Marine Accident & Plate Glass Ins. Co. (Mo. App.) .....	631	Connell, City of Henderson v. (Ky.).....	1121
Century Realty Co. v. Travelers' Ins. Co. (Mo. App.) .....	630	Connor Realty Co. v. St. Louis Union Trust Co. (Mo. App.).....	865
Chappell v. State (Tex. Cr. App.).....	964	Continental Lumber & Tie Co. v. Miller (Tex. Civ. App.).....	927
Chattanooga Co., Adams v. (Tenn.).....	1131	Continental Nat. Bank of St. Louis, Havlin v. (Mo.) .....	741
Chavarlo v. State (Tex. Cr. App.).....	972	Conway v. Coursey (Ark.).....	1030
Cheek, Boothe v. (Mo.).....	791	Coody v. Shawver (Tex. Civ. App.).....	935
Chesapeake & O. R. Co. v. Burton (Ky.).....	1116	Cook, Brinkley Car Works & Mfg. Co. v. (Ark.) .....	1065
Chesapeake & O. R. Co. v. Weddington's Adm'r (Ky.).....	208	Cooke-Jellico Coal Co. v. Richardson's Adm'r (Ky.) .....	537
Chicago, B. & Q. R. Co., Braden v. (Mo. App.) .....	279	Cooper, Armor v. (Mo.).....	841
Chicago, R. I. & G. R. Co. v. Floyd (Tex. Civ. App.).....	954	Cooper v. State (Tex. Cr. App.).....	1094
Chicago, R. I. & G. R. Co. v. Pemberton (Tex.) .....	2	Coughlin, Wilt v. (Mo. App.).....	888
Chicago, R. I. & P. R. Co., Pontius v. (Mo. App.) .....	292	Coulter v. Coulter (Mo. App.).....	281
Chicago, R. I. & P. R. Co., State v. (Ark.)	1086	Coulter v. State (Ark.).....	186
Chicago & A. R. Co., Fife v. (Mo. App.)	300	Coursey, Conway v. (Ark.).....	1030
Childers, Derrington v. (Ky.).....	216	Cowley v. State (Tex. Cr. App.).....	471
Childress v. Robinson (Tex. Civ. App.).....	78	Crandall v. Scott (Tex. Civ. App.).....	925
Christian, State v. (Mo.).....	736	Creel, City of Richmond v. (Mo.).....	794
Christian v. State (Tex. Cr. App.).....	101	Croninger v. Bethel Grove Camp Ground Ass'n (Ky.).....	230
Christian-Todd Tel. Co. v. Commonwealth (Ky.) .....	543	Crowley v. Dagley (Mo. App.).....	366
Cincinnati, N. O. & T. P. R. Co. v. Goldston (Ky.).....	246	Cummings, Shull v. (Mo. App.).....	360
Cincinnati, N. O. & T. P. R. Co. v. Winningham's Adm'r (Ky.) .....	506	Cunniff, Texas & N. O. R. Co. v. (Tex. Civ. App.) .....	396
Citizens' Bank of Senath v. Douglass (Mo. App.) .....	601	Cunningham v. Keeshan (Ark.).....	170
Citizens' State Bank of Trenton v. Shanklin (Mo. App.).....	341	Currey, Standley v. (Tex. Civ. App.).....	416
City of Chattanooga, Doyle v. (Tenn.).....	997	Currington v. State (Tex. Cr. App.).....	478
City of Chattanooga v. Southern R. Co. (Tenn.) .....	1000	Dagley, Crowley v. (Mo. App.).....	366
City of Covington, Kenton Water Co. v. (Ky.) .....	988	Darnell v. State (Tex. Cr. App.).....	971
City of Henderson v. Connell (Ky.).....	1121	Davenport v. Davenport (Ark.).....	189
City of Jefferson, Trippensee v. (Mo. App.)	303	Davidson v. Laclede Land & Improvement Co. (Mo.) .....	686
City of La Grange v. Brown (Tex. Civ. App.) .....	8	Davillo v. State (Tex. Cr. App.).....	1198
City of Louisville, Stuessy v. (Ky.).....	564	Davis v. Conn (Tex. Civ. App.).....	39
City of Maryville, Price v. (Mo. App.).....	295	Davis, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.) .....	932
City of Newport v. Merkel Bros. Co. (Ky.)	549	Davis, Kaufman v. (Mo. App.).....	1180
City of Nacogdoches, Swanson v. (Tex. Civ. App.) .....	83	Davis v. Strange (Ky.).....	217
City of Newport v. South Covington & C. St. R. Co. (Ky.).....	222	Dawson v. State (Tex. Cr. App.).....	469
City of Richmond v. Creel (Mo.).....	794	Day v. Sharp (Tenn.).....	994
City of St. Joseph, Livingston v. (Mo. App.) .....	804	Dean v. State (Tex. Cr. App.).....	974
City of St. Louis, Union Electric Light & Power Co. v. (Mo.).....	1166	Dennington, Edwards v. (Tex. Civ. App.)	929
City of Sweetwater, Howell v. (Tex. Civ. App.) .....	948	Derrington v. Childers (Ky.).....	216
Clark v. McAtee (Mo.).....	698	Detreville, Southern Bitulithic Co. v. (Ky.)	560
Clarkson v. Garvey (Mo. App.).....	664	Dillon, Hill v. (Mo. App.).....	881
Clarkson v. Laiblan (Mo. App.).....	660	Dixie Fire Ins. Co. v. A. Layne & Bro. (Ky.) .....	530
Clegg v. Roscoe Lumber Co. (Tex. Civ. App.) .....	944	Doherty, First Nat. Bank v. (Ky.).....	211
Clemmons v. State (Tex. Cr. App.).....	973	Dosh v. State (Tex. Cr. App.).....	979
Clymer, Helsler v. (Mo. App.).....	337	Douglass, Burks v. (Ky.).....	225
Coby v. Quincy, O. & K. C. R. Co. (Mo. App.) .....	290	Douglass, Citizens' Bank of Senath v. (Mo. App.) .....	601
Cochran v. Kennon (Tex. Civ. App.).....	67	Dowdy, First Nat. Bank v. (Mo. App.).....	859
		Doyle v. Chattanooga (Tenn.).....	997
		Drainage Dist. No. 1 of Cross County v. Rolfe (Ark.).....	1034
		Drainage Dist. No. 2 of Conway County, Wood v. (Ark.).....	1057
		Duff, State v. (Mo.).....	683
		Duller v. McNeill (Tex. Civ. App.).....	45
		Dunn v. State (Tex. Cr. App.).....	467
		Dye v. Livingston Lumber Co. (Tex. Civ. App.) .....	53

	Page		Page
Eason, Williford v. (Ark.).....	498	Gillispie v. Ambrose (Tex. Civ. App.).....	937
Eastern R. Co. of New Mexico, Stamp v. (Tex. Civ. App.).....	450	Glogover, State v. (Mo. App.).....	274
Edwards v. Dennington (Tex. Civ. App.)..	929	Goff v. Renick (Ky.).....	983
Edwards' Adm'r, McDowell v. (Ky.).....	534	Goldston, Cincinnati, N. O. & T. P. R. Co. v. (Ky.).....	246
Ellerd v. Campfield (Tex. Civ. App.).....	392	Goller v. Henseler Mercantile Oil & Supply Co. (Mo. App.).....	584
Emmons, Greisser v. (Mo. App.).....	613	Gordon, State v. (Mo.).....	721
E. R. & D. C. Kolp v. Brazier (Tex. Civ. App.).....	899	Gosnell, Cave Hill Cemetery Co. v. (Ky.)..	980
Excelsior Stove Mfg. Co. v. Million (Mo. App.).....	298	Gott v. Berea College (Ky.).....	204
Fahey v. Benedetti (Tex. Civ. App.).....	896	Gray, Sams v. (Ky.).....	553
Fancher v. Kenner (Ark.).....	166	Green, St. Louis, I. M. & S. R. Co. v. (Ark.).....	148
Farman, Bunyard v. (Mo. App.).....	640	Greer v. Orchard (Mo. App.).....	875
Farmer v. St. Louis, I. M. & S. R. Co. (Mo. App.).....	827	Greisser v. Emmons (Mo. App.).....	613
Farmers' Bank of Estill County, Gahren, Dodge & Maltby v. (Ky.).....	1127	Grider, St. Louis & S. F. R. Co. v. (Ark.)..	1032
Farnsley's Adm'r v. Philadelphia Life Ins. Co. (Ky.).....	1111	Griffith v. Witten (Mo.).....	708
Featherstone v. Kansas City Terminal R. Co. (Mo. App.).....	284	Griswold v. Comer (Tex. Civ. App.).....	423
Felker v. Rice (Ark.).....	162	Gulf, C. & S. F. R. Co. v. Davis (Tex. Civ. App.).....	932
Felton v. Brown (Ark.).....	194	Gutheridge v. Gutheridge (Tex. Civ. App.)	892
Ferrell v. Bauer Cooperage Co. (Ky.).....	1120	Hahn, Baker v. (Tex. Civ. App.).....	443
Ferrell v. Ferrell (Mo.).....	719	Hall v. State (Tex. Cr. App.).....	457
Fidelity & Deposit Co. v. Bankers' Trust Co. (Tex. Civ. App.).....	45	Hammond v. McFarland (Tex. Civ. App.)	47
Field, Barber Asphalt Pav. Co. v. (Mo. App.).....	364	Hamner, Sweetwater Lumber Co. v. (Tex. Civ. App.).....	1075
Fife v. Chicago & A. R. Co. (Mo. App.)..	300	Hampton v. State (Tex. Cr. App.).....	966
Fine v. Lasater (Ark.).....	1147	Hansen, Supreme Ruling of Fraternal Mystic Circle v. (Tex. Civ. App.).....	54
First Nat. Bank v. Doherty (Ky.).....	211	Hardwicke v. Barnes (Mo.).....	744
First Nat. Bank v. Dowdy (Mo. App.).....	859	Hardy v. State (Tex. Cr. App.).....	1198
First State Bank of Paradise v. Wallace (Tex. Civ. App.).....	957	Harness, McAllister v. (Ark.).....	185
Fish v. Welch's Adm'r (Ky.).....	512	Harrington, Martin v. (Mo. App.).....	275
Fitzpatrick v. Garver (Mo.).....	714	Harris v. State (Tex. Cr. App.).....	125
Fitzpatrick, Tallent v. (Mo.).....	689	Harris v. Townley (Tex. Civ. App.).....	5
Floyd, Chicago, R. I. & G. R. Co. v. (Tex. Civ. App.).....	954	Harrison v. Knaff (Tenn.).....	1003
Floyd v. State (Tex. Cr. App.).....	974	Hart v. Lequeieu (Ark.).....	201
Flynn v. Barnes (Ky.).....	523	Hart v. State (Tex. Cr. App.).....	458
Ft. Worth Belt R. Co. v. Cabell (Tex. Civ. App.).....	1083	Hart v. State (Tex. Cr. App.).....	1198
Foster, Bennett v. (Tex. Civ. App.).....	1078	Harth, Williams v. (Ky.).....	1102
Fourth Nat. Bank v. Nashville, C. & St. L. R. Co. (Tenn.).....	1144	Hatfield v. Swift (Mo. App.).....	359
Fourth Street Bank, Mount v. (Ky.).....	220	Havelik, Wing v. (Mo.).....	732
Frankfort Marine Accident & Plate Glass Ins. Co., Century Realty Co. v. (Mo. App.).....	624	Havlin v. Continental Nat. Bank of St. Louis (Mo.).....	741
Frankfort Marine Accident & Plate Glass Ins. Co., Century Realty Co. v. (Mo. App.)	631	Hays v. Talley (Tex. Civ. App.).....	429
Frazier v. Houston Oil Co. (Tex. Civ. App.).....	20	Hearn, Western Union Tel. Co. v. (Ark.)..	1025
Freudenstein, Laclede Laundry Co. v. (Mo. App.).....	593	Heisler v. Clymer (Mo. App.).....	337
Frey, Armor v. (Mo.).....	829	Helmke v. Uecker (Tex. Civ. App.).....	17
Frost-Johnson Lumber Co. of Texas, Pruitt v. (Tex. Civ. App.).....	421	Henry, Moreland v. (Ky.).....	1106
Fulkerson v. Western Union Tel. Co. (Ark.)	168	Henry Bickel Co. v. National Surety Co. (Ky.).....	1113
Funk, Sails v. (Mo. App.).....	1175	Henseler Mercantile Oil & Supply Co., Goller v. (Mo. App.).....	584
Fuser, Boonville Special Road Dist. v. (Mo. App.).....	583	Herrin, Willett v. (Tex. Civ. App.).....	26
Gahren, Dodge & Maltby v. Farmers' Bank of Estill County (Ky.).....	1127	Hersman v. Hersman (Mo.).....	800
Galliton, State v. (Mo. App.).....	848	Hill v. Dillon (Mo. App.).....	881
Gamer Co. v. Newberg (Tex. Civ. App.).....	1077	Hill, Hodges v. (Mo. App.).....	633
Garrett v. Wiltse (Mo.).....	694	Hill v. State (Tex. Cr. App.).....	118
Garver, Fitzpatrick v. (Mo.).....	714	Hinton, Victoria Limestone Co. v. (Ky.)..	1109
Garvey, Clarkson v. (Mo. App.).....	664	Hixson v. Slocum (Ky.).....	522
Garvey v. Garvey (Ky.).....	526	Hodges v. Hill (Mo. App.).....	633
Gates v. Steckel (Mo. App.).....	1185	Hodges, Keet-Rountree Dry Goods Co. v. (Mo. App.).....	862
Geitzenauer, Willingham v. (Tex. Civ. App.)	376	Holmes, Waterman Lumber & Supply Co. v. (Tex. Civ. App.).....	70
George, Schuman v. (Ark.).....	1039	House v. State (Tex. Cr. App.).....	1198
George, Taylor v. (Mo. App.).....	1187	Houston Oil Co., Frazier v. (Tex. Civ. App.)	20
German Commercial Acc. Co., Mitchell v. (Mo. App.).....	862	Houston Oil Co. of Texas v. Jones (Tex. Civ. App.).....	92
Gesser v. McLane (Ky.).....	1118	Houston Oil Co. of Texas v. Lambert (Tex. Civ. App.).....	6
Gibbs, Campbell v. (Tex. Civ. App.).....	430	Howard, Arnett v. (Ky.).....	531
Gibson, Barton Lumber Co. v. (Mo. App.)..	357	Howe Scale Co. of Illinois, State ex rel. Jones v. (Mo.).....	789
Gillen v. New York Life Ins. Co. (Mo. App.)	667	Howell v. Sweetwater (Tex. Civ. App.)...	948
		H. O. Wooten Grocer Co. v. Smith (Tex. Civ. App.).....	945
		Hudgins Produce Co., Menasha Wooden Ware Co. v. (Ark.).....	198
		Humfeld, State v. (Mo.).....	735
		Hunt, Ex parte (Tex. Cr. App.).....	457
		Hynds v. Hynds (Mo.).....	812
		Indiana & O. Live Stock Ins. Co. v. Keelingham (Tex. Civ. App.).....	884

	Page		Page
International & G. N. R. Co. v. Boles (Tex. Civ. App.).....	914	Layne & Bro., Dixie Fire Ins. Co. v. (Ky.)	530
International & G. N. R. Co. v. Walker (Tex. Civ. App.).....	961	Leabo, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	382
International & G. N. R. Co. v. Walters (Tex. Civ. App.).....	916	Leach v. State (Tex. Cr. App.).....	977
Interstate Amusement Co. v. Albert (Tenn.)	488	Lebanon Cemetery Ass'n, Mahaffey v. (Mo.)	701
Iovanovich v. State (Tex. Cr. App.).....	98	Le Blanc v. Jackson (Tex. Civ. App.) ....	60
Iroquois Mfg. Co. v. Annan-Burg Mill. Co. (Mo. App.).....	320	Leasley Bros. v. A. Rebori Fruit Co. (Mo. App.).....	861
Ivy v. Pugh (Tex. Civ. App.).....	939	Leibtig, State v. (Mo.) .....	674
Jackson, Le Blanc v. (Tex. Civ. App.).....	60	Leonard v. State (Tex. Cr. App.).....	968
Jackson, School Dist. No. 56 v. (Ark.)....	153	Lequieu, Hart v. (Ark.).....	201
James v. State (Tex. Cr. App.).....	472	Lewis, Armor v. (Mo.).....	251
Jester, Armor v. (Mo.).....	839	Lewis v. State (Ark.).....	154
J. I. Case Threshing Mach. Co. v. Tomlin (Mo. App.).....	286	Lewis & Chambers, Taulbee v. (Ky.).....	1100
J. M. Radford Grocery Co. v. Owens (Tex. Civ. App.).....	911	Lewkowitz v. United Rys. Co. of St. Louis (Mo. App.).....	588
Jobe v. State (Tex. Cr. App.).....	966	Lexington & E. R. Co. v. Baker (Ky.).....	228
John H. Schroeder Wine & Liquor Co. v. Willis Coal & Mining Co. (Mo. App.)....	352	Licking Coal & Lumber Co., S. B. Reese Lumber Co. v. (Ky.) .....	1124
John H. Schroeder Wine & Liquor Co. v. Willis Coal & Mining Co., two cases (Mo. App.).....	356	Livingston v. St. Joseph (Mo. App.).....	304
John O'Brien Boiler Works Co., Rundelman v. (Mo. App.).....	609	Livingston Lumber Co., Dye v. (Tex. Civ. App.) .....	53
Johnson v. Springfield Traction Co. (Mo. App.).....	1193	Loewer v. Lonoke Rice Mill. Co. (Ark.)....	1042
Johnson v. State (Tex. Cr. App.).....	1098	Lonoke Rice Mill. Co., Loewer v. (Ark.)....	1042
Johnson v. State (Tex. Cr. App.).....	1199	Louisiana Rio Grande Canal Co. v. Quinn (Tex. Civ. App.).....	375
Johnson v. Tindall (Tex. Civ. App.).....	401	Louisville, H. & St. L. R. Co. v. Wilson's Ex'r (Ky.).....	513
Jones v. Burks (Ark.).....	177	Louisville R. Co., Brentlinger v. (Ky.)....	1107
Jones, Houston Oil Co. of Texas v. (Tex. Civ. App.).....	92	Louisville R. Co. v. Wiggington (Ky.).....	209
Jones v. State (Tenn.).....	1016	Louisville Realty Co., Oliver Co. v. (Ky.)	570
Kansas City v. Mastin Realty & Mining Co. (Mo.).....	1150	Louisville & I. R. Co. v. Kraft (Ky.).....	993
Kansas City, Union Cemetery Ass'n v. (Mo.).....	261	Louisville & N. R. Co., Allen v. (Ky.)....	203
Kansas City Terminal R. Co., Featherstone v. (Mo. App.) .....	284	Louisville & N. R. Co., McCormack v. (Ky.)	518
Kaufman v. Davis (Mo. App.).....	1180	Louisville & N. R. Co. v. Moore (Ky.)....	1129
Kearney, Armor v. (Mo.).....	840	Louisville & N. R. Co. v. Stewart's Adm'r (Ky.).....	557
Keene v. Trice (Ark.).....	499	Louisville & N. R. Co. v. Strange's Adm'r (Ky.).....	239
Keeshan, Cunningham v. (Ark.).....	170	Lowe, Burns & Bell v. (Tex. Civ. App.)....	942
Keet-Rountree Dry Goods Co. v. Hodges (Mo. App.).....	862	Lueders v. St. Louis & S. F. R. Co. (Mo.)	1159
Keinburgh, Indiana & O. Live Stock Ins. Co. v. (Tex. Civ. App.).....	384	Lush, Bassett v. (Ky.).....	227
Keller Co. v. Mangum (Tex. Civ. App.)..	19	Lyons v. Metropolitan St. R. Co. (Mo.)	726
Kenner, Fancher v. (Ark.).....	166	McAlister v. Harness (Ark.).....	185
Kennon, Cochran v. (Tex. Civ. App.).....	67	McAtee, Clark v. (Mo.).....	698
Kenton Water Co. v. Covington (Ky.)....	988	McCall Hardware Co., Collin County Nat. Bank v. (Tex. Civ. App.).....	950
Kersten, Western Union Tel. Co. v. (Tex. Civ. App.).....	369, 1091	McClaskey v. Quincy, O. & K. C. R. Co. (Mo. App.).....	277
Key v. State (Tex. Cr. App.).....	121	McConnell, St. Louis, I. M. & S. R. Co. v. (Ark.).....	496
Key v. State (Tex. Cr. App.).....	130	McCormack v. Louisville & N. R. Co. (Ky.)	518
Keys v. National Council, Knights & Ladies of Security (Mo. App.).....	345	McCormick, National Aeroplane Co. v. (Tex. Civ. App.).....	375
Kindorf v. Kindorf (Mo. App.).....	318	McCutchan, Landers v. (Tex. Civ. App.)	960
Kirby, Board of Council of City of Frankfort v. (Ky.).....	1115	McDonald v. McDonald (Mo. App.).....	850
Kirby Lumber Co. v. Stewart (Tex. Civ. App.).....	372	McDowell v. Edwards' Adm'r (Ky.).....	534
Kolp v. Brazier (Tex. Civ. App.).....	899	McFarland, Hammond v. (Tex. Civ. App.)	47
Knaff, Harrison v. (Tenn.).....	1003	McFarlane, Western Union Tel. Co. v. (Tex. Civ. App.).....	67
Koch, Marquez v. (Mo. App.).....	648	McKneely v. Beatty (Tex. Civ. App.).....	18
Kraft, Louisville & I. R. Co. v. (Ky.)....	993	McLane, Gesser v. (Ky.) .....	1118
Kuykendall v. State (Tex. Cr. App.).....	130	McLain v. State (Tex. Cr. App.).....	117
Kyle v. State (Tex. Cr. App.).....	1199	McMurrain, Turquett v. (Ark.).....	175
Laclede Land & Improvement Co., Davidson v. (Mo.).....	686	McNeill, Duller v. (Tex. Civ. App.).....	45
Laclede Laundry Co. v. Freudenstein (Mo. App.).....	593	McNeill v. McNeill (Mo. App.).....	858
Laiblan, Clarkson v. (Mo. App.).....	660	Madrid v. State (Tex. Cr. App.).....	93
Lambert, Houston Oil Co. of Texas v. (Tex. Civ. App.).....	6	Mahaffey v. Lebanon Cemetery Ass'n (Mo.)	701
Landers v. McCutchan (Tex. Civ. App.)..	960	Mallory v. Patterson (Mo. App.).....	306
Lara v. State (Tex. Cr. App.).....	99	Mangum, Theodore Keller Co. v. (Tex. Civ. App.).....	19
Lasater, Fine v. (Ark.).....	1147	Marcum v. Marcum (Ky.).....	516
Lattimore v. Puckett & Wear (Tex. Civ. App.).....	951	Marquez v. Koch (Mo. App.).....	648
		Marrowbone Coal & Coke Co. v. Coleman (Ky.) .....	238
		Marshall, Ex parte (Tex. Cr. App.).....	112
		Martin v. Butler County R. Co. (Mo. App.)	631
		Martin v. Harrington (Mo. App.).....	275
		Martin, St. Louis Southwestern R. Co. of Texas v. (Tex. Civ. App.) .....	405
		Marta v. Powell (Mo. App.).....	871
		Mason v. Commonwealth (Ky.).....	229
		Mastin Realty & Mining Co., Kansas City v. (Mo.) .....	1150
		Mathews, Winfrey v. (Mo. App.).....	583

	Page		Page
Matula v. State (Tex. Cr. App.).....	965	Pasche v. South St. Joseph Town Co. (Mo. App.) .....	322
Meehan v. Union Electric Light & Power Co. (Mo.) .....	825	Patterson, Ex parte (Ark.).....	173
Menasha Wooden Ware Co. v. Hudgins Produce Co. (Ark.).....	198	Patterson, Mallory v. (Mo. App.).....	806
Merkel Bros. Co., City of Newport v. (Ky.)	549	Pegram v. State (Tex. Cr. App.).....	458
Merrill v. Thompson (Mo.).....	674	Pemberton, Chicago, B. I. & G. R. Co. v. (Tex.) .....	2
Metropolitan St. R. Co., Lyons v. (Mo.)...	726	Pennsylvania Min. Co. v. Bailey (Ark.)...	200
Meyer, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.) .....	12	Perales v. State (Tex. Cr. App.).....	482
Middleton, Warden v. (Ark.).....	151	Perry v. Van Matre (Mo. App.).....	648
Miles, State v. (Mo.).....	766	Peter, Board of Com'rs of Tuberculosis Hospital Dist. of Buchanan County v. (Mo.) .....	1155
Miller, Continental Lumber & Tie Co. v. (Tex. Civ. App.) .....	927	Philadelphia Life Ins. Co., Farnsley's Adm'r v. (Ky.) .....	1111
Miller v. State (Tex. Cr. App.).....	128	Phillips v. State (Tex. Cr. App.).....	459
Million, Excelsior Stove Mfg. Co. v. (Mo. App.) .....	298	Pitts, Union Cold Storage & Warehouse Co. v. (Mo. App.).....	1182
Missouri, K. & T. R. Co. of Texas v. Leabo (Tex. Civ. App.) .....	382	Poncot v. St. Louis, I. M. & S. R. Co. (Mo. App.) .....	1190
Missouri, K. & T. R. Co. of Texas v. Meyer (Tex. Civ. App.) .....	12	Pontius v. Chicago, R. I. & P. R. Co. (Mo. App.) .....	292
Missouri, K. & T. R. Co. of Texas v. Western Automatic Music Co. (Tex. Civ. App.) .....	380	Popplewell, Record Co. v. (Tex. Civ. App.)	980
Missouri Lumber & Mining Co., Weller v. (Mo. App.) .....	853	Poulter v. State (Tex. Cr. App.).....	475
Missouri & N. A. R. Co. v. Reed (Ark.)...	192	Powell, Avery Co. v. (Mo. App.).....	335
Mitchell v. German Commercial Acc. Co. (Mo. App.).....	362	Powell, Marts v. (Mo. App.).....	871
Mixon v. Wallis (Tex. Civ. App.).....	907	Powell, State v. (Mo. App.).....	600
Montgomery v. Southwest Arkansas Tel. Co. (Ark.).....	1060	Preston, Ex parte (Tex. Cr. App.).....	115
Moody, Bank of Des Arc v. (Ark.).....	134	Price v. Maryville (Mo. App.).....	295
Moore, Compton v. (Ky.).....	540	Prickett v. Steiner (Tex. Civ. App.).....	35
Moore, Louisville & N. R. Co. v. (Ky.)...	1129	Prickett v. Williams (Ark.).....	1023
Moore, St. Louis Southwestern R. Co. v. (Tex. Civ. App.) .....	378	Printz, State v. (Mo.).....	674
Moreland v. Henry (Ky.).....	1105	Pruitt v. Frost-Johnson Lumber Co. of Texas (Tex. Civ. App.) .....	421
Mount v. Fourth Street Bank (Ky.).....	220	Puckett & Wear, Lattimore v. (Tex. Civ. App.) .....	951
Murgetroyd v. State (Tex. Cr. App.).....	962	Pugh, Ivy v. (Tex. Civ. App.).....	939
Murphy v. Murphy (Ky.).....	533	Pugh v. Whitsitt & Guerry (Tex. Civ. App.) .....	953
Murray v. Walker (Ky.).....	512	Quincy, O. & K. C. R. Co., Coby v. (Mo. App.) .....	290
Muth Realty Co. v. Timmerberg (Mo. App.)	589	Quincy, O. & K. C. R. Co., McClaskey v. (Mo. App.) .....	277
Nacogdoches Crate & Lumber Co., Burton & Beard v. (Tex. Civ. App.).....	25	Quinn, Louisiana Rio Grande Canal Co. v. (Tex. Civ. App.) .....	875
Nantz v. Sizemore (Ky.).....	552	Quinn v. St. Louis & S. F. R. Co. (Mo.)..	820
Nashville, C. & St. L. R. Co. v. Banks (Ky.) .....	554	Radford Grocery Co. v. Owens (Tex. Civ. App.) .....	911
Nashville, C. & St. L. R. Co., Fourth Nat. Bank v. (Tenn.).....	1144	Ratcliff v. Ratcliff (Tex. Civ. App.).....	30
National Aeroplane Co. v. McCormick (Tex. Civ. App.) .....	375	Raum v. Board of Council of City of Danville, two cases (Ky.).....	1198
National Co-op. Burial Ass'n v. Aul's Adm'r (Ky.).....	1123	Rea v. Rea (Mo. App.).....	278
National Council, Knights & Ladies of Security, Keys v. (Mo. App.).....	345	Rebore Fruit Co., Leesley Bros. v. (Mo. App.) .....	861
National Surety Co., Henry Bickel Co. v. (Ky.).....	1113	Record Co. v. Popplewell (Tex. Civ. App.)	930
Neese, Southwestern Land Corp. v. (Tex. Civ. App.) .....	1090	Reed, Missouri & N. A. R. Co. v. (Ark.)...	192
Nelson, Texas Midland R. R. v. (Tex. Civ. App.) .....	1088	Reed, Norton v. (Mo.).....	842
Newberg, Gomer Co. v. (Tex. Civ. App.)...	1077	Reed, St. Louis Sanitary Co. v. (Mo. App.)	815
Newport Rolling Mill Co., Casey v. (Ky.)	528	Reed v. State (Tex. Cr. App.).....	97
New York Life Ins. Co., Gillen v. (Mo. App.) .....	687	Reese Lumber Co. v. Licking Coal & Lumber Co. (Ky.).....	1124
Nicholson, Boner v. (Mo. App.).....	309	Reeves v. White (Tex. Civ. App.).....	43
Nineteenth Street in Kansas City, In re (Mo.).....	1150	Reich v. Workman (Ark.).....	180
Noe v. Morristown (Tenn.).....	485	Reilly, St. Louis, I. M. & S. R. Co. v. (Ark.)	1052
Norton v. Reed (Mo.).....	842	Renick, Goff v. (Ky.).....	983
Nunn v. Padgett Bros. (Tex. Civ. App.)...	921	Rice, Felker v. (Ark.).....	162
O'Brien Boiler Works Co., Rundelman v. (Mo. App.) .....	609	Richards v. Barber Asphalt Pav. Co. (Ky.)	1105
Oliver Co. v. Louisville Realty Co. (Ky.)...	570	Richardson's Adm'r, Cooke-Jellico Coal Co. v. (Ky.).....	537
Orchard, Greer v. (Mo. App.).....	875	Riney, Taylor v. (Ky.).....	203
Organ, Roney v. (Mo. App.).....	868	Risinger v. Sullivan (Tex. Civ. App.).....	397
Orth v. State (Tex. Cr. App.).....	1199	Robinson, Bartley v. (Tex. Civ. App.).....	886
Outcault Advertising Co. v. Young Hardware Co. (Ark.).....	142	Robinson, Childress v. (Tex. Civ. App.)...	78
Owens, J. M. Radford Grocery Co. v. (Tex. Civ. App.) .....	911	Robinson, State ex rel. Spriggs v. (Mo.)...	1169
Padgett Bros., Nunn v. (Tex. Civ. App.)..	921	Roddy, St. Louis, I. M. & S. R. Co. v. (Ark.) .....	156
		Rogers, State v. (Mo.).....	770
		Rolfe, Drainage Dist. No. 1 of Cross County v. (Ark.).....	1034
		Roney v. Organ (Mo. App.).....	868
		Rosamond, Conn v. (Tex. Civ. App.).....	73
		Roscoe Lumber Co., Clegg v. (Tex. Civ. App.) .....	944
		Rose, Texas Cent. R. Co. v. (Tex. Civ. App.)	387

	Page		Page
Ross v. Veltmann (Tex. Civ. App.).....	1073	Sizemore, Nantz v. (Ky.).....	552
Rowe v. Alexander (Ky.).....	508	Skelley v. St. Louis & S. F. R. Co. (Mo. App.).....	877
Rubey Trust Co. v. Weidner (Mo. App.)..	333	Slocum, Hixson v. (Ky.).....	522
Ruckman, State v. (Mo.).....	705	Smith, American Zinc Co. v. (Tenn.).....	494
Rundelman v. John O'Brien Boiler Works Co. (Mo. App.).....	909	Smith, Baird v. (Tenn.).....	492
Russell v. St. Louis & S. F. R. Co. (Mo. App.).....	638	Smith, H. O. Wooten Grocer Co. v. (Tex. Civ. App.).....	945
Russellville Water & Light Co. v. Sauer- man (Ark.).....	502	Smith v. State (Tex. Cr. App.).....	477
Ryan v. Strop (Mo.).....	700	Smith, Storths v. (Ark.).....	183
Salls v. Funk (Mo. App.).....	1175	Snipes v. Bomar Cotton Oil Co. (Tex.)..	1
St. Louis, B. & M. R. Co. v. Vernon (Tex. Civ. App.).....	84	Sonner, State v. (Mo.).....	723
St. Louis Car Co., Cabanne v. (Mo. App.)	597	South Covington & C. St. R. Co., City of Newport v. (Ky.).....	222
St. Louis, I. M. & S. R. Co., Farmer v. (Mo. App.).....	327	Southern Bitulithic Co. v. Detreville (Ky.)	560
St. Louis, I. M. & S. R. Co. v. Green (Ark.)	148	Southern R. Co., City of Chattanooga v. (Tenn.).....	1000
St. Louis, I. M. & S. R. Co. v. McConnell (Ark.).....	496	Southern R. Co. in Kentucky v. Thacker's Adm'r (Ky.).....	236
St. Louis, I. M. & S. R. Co., Poncot v. (Mo. App.).....	1190	South St. Joseph Town Co., Pasche v. (Mo. App.).....	822
St. Louis, I. M. & S. R. Co. v. Reilly (Ark.)	1052	Southwest Arkansas Tel. Co., Montgomery v. (Ark.).....	1060
St. Louis, I. M. & S. R. Co. v. Roddy (Ark.)	156	Southwestern Land Corp. v. Neese (Tex. Civ. App.).....	1090
St. Louis, I. M. & S. R. Co. v. Thurman (Ark.).....	1054	Spencer, Bridwell v. (Mo. App.).....	874
St. Louis Sanitary Co. v. Reed (Mo. App.)	315	Springfield Traction Co., Johnson v. (Mo. App.).....	1198
St. Louis Southwestern R. Co. v. Moore (Tex. Civ. App.).....	378	Stamp v. Eastern R. Co. of New Mexico (Tex. Civ. App.).....	450
St. Louis Southwestern R. Co. of Texas v. Benjamin (Tex. Civ. App.).....	379	Standley v. Currey (Tex. Civ. App.).....	416
St. Louis Southwestern R. Co. of Texas v. Martin (Tex. Civ. App.).....	405	State, Alford v. (Ark.).....	497
St. Louis Union Trust Co., Connor Realty Co. v. (Mo. App.).....	865	State, Arrisman v. (Tex. Cr. App.).....	118
St. Louis & S. F. R. Co., Burgess v. (Mo. App.).....	858	State, Belcher v. (Tex. Cr. App.).....	459
St. Louis & S. F. R. Co. v. Grider (Ark.)	1032	State, Borders v. (Tex. Cr. App.).....	483
St. Louis & S. F. R. Co., Lueders v. (Mo.)	1159	State, Boyd v. (Tex. Cr. App.).....	459
St. Louis & S. F. R. Co., Quinn v. (Mo.)..	820	State, Boyle v. (Ark.).....	1049
St. Louis & S. F. R. Co., Russell v. (Mo. App.).....	638	State, Bracher v. (Tex. Cr. App.).....	124
St. Louis & S. F. R. Co., Skelley v. (Mo. App.).....	877	State, Bruder v. (Ark.).....	1067
Sams, Ex parte (Tex. Civ. App.).....	368	State v. Bruton (Mo.).....	751
Sams v. Gray (Ky.).....	553	State v. Bunyard (Mo.).....	756
San Antonio, F. & N. R. Co., Balch v. (Tex. Civ. App.).....	1091	State v. Burnett (Mo.).....	680
San Antonio & A. P. R. Co. v. Schendel (Tex. Civ. App.).....	376	State, Carlton v. (Ark.).....	145
Sauerman, Russellville Water & Light Co. v. (Ark.).....	502	State, Chappell v. (Tex. Cr. App.).....	984
S. B. Reese Lumber Co. v. Licking Coal & Lumber Co. (Ky.).....	1124	State, Chavarro v. (Tex. Cr. App.).....	972
Scanlan, Bland & Fisher Lumber Co. v. (Tex. Civ. App.).....	401	State v. Chicago, R. I. & P. R. Co. (Ark.)	1066
Schendel, San Antonio & A. P. R. Co. v. (Tex. Civ. App.).....	376	State v. Christian (Mo.).....	736
Schomers, State v. (Mo. App.).....	1177	State, Christian v. (Tex. Cr. App.).....	101
School Dist. No. 56 v. Jackson (Ark.).....	153	State, Clemmons v. (Tex. Cr. App.).....	973
Schow Bros., Young Men's Christian Ass'n of Dallas v. (Tex. Civ. App.).....	931	State, Collins v. (Tex. Cr. App.).....	115
Schroeder v. Turpin (Mo.).....	716	State, Collins v. (Tex. Cr. App.).....	1198
Schroeder v. Willis Coal & Mining Co. (Mo. App.).....	357	State, Cooper v. (Tex. Cr. App.).....	1094
Schroeder Wine & Liquor Co. v. Willis Coal & Mining Co. (Mo. App.).....	352	State, Coulter v. (Ark.).....	186
Schroeder Wine & Liquor Co. v. Willis Coal & Mining Co., two cases (Mo. App.)	356	State, Cowley v. (Tex. Cr. App.).....	471
Schuman v. George (Ark.).....	1039	State, Currington v. (Tex. Cr. App.).....	478
Scott, Crandall v. (Tex. Civ. App.).....	925	State, Darnell v. (Tex. Cr. App.).....	971
Setzer v. State (Ark.).....	190	State, Davillo v. (Tex. Cr. App.).....	1198
Shaffer, State v. (Mo.).....	805	State, Dawson v. (Tex. Cr. App.).....	469
Shackleford v. Campbell (Ark.).....	1019	State, Dean v. (Tex. Cr. App.).....	974
Shanklin, Citizens' State Bank of Trenton v. (Mo. App.).....	341	State, Dosh v. (Tex. Cr. App.).....	979
Sharp, Day v. (Tenn.).....	994	State v. Duff (Mo.).....	683
Shaw v. State (Tex. Cr. App.).....	943	State, Dunn v. (Tex. Cr. App.).....	467
Shawyer, Coody v. (Tex. Civ. App.).....	935	State, Floyd v. (Tex. Cr. App.).....	974
Shepherd v. Bank of Montreal (Ky.).....	214	State v. Galliton (Mo. App.).....	848
Shewalter, Carolina, C. & O. Ry. v. (Tenn.)	1136	State v. Glogover (Mo. App.).....	274
Shipp v. State (Tenn.).....	1017	State v. Gordon (Mo.).....	721
Shull v. Cummings (Mo. App.).....	360	State, Hall v. (Tex. Cr. App.).....	457
Simpkins, Ex parte (Tex. Cr. App.).....	97	State, Hampton v. (Tex. Cr. App.).....	966
Singleton, Ex parte (Tex. Cr. App.).....	123	State, Hardy v. (Tex. Cr. App.).....	1198
		State, Harris v. (Tex. Cr. App.).....	125
		State, Hart v. (Tex. Cr. App.).....	458
		State, Hart v. (Tex. Cr. App.).....	1198
		State, Hill v. (Tex. Cr. App.).....	118
		State, House v. (Tex. Cr. App.).....	1198
		State v. Humfeld (Mo.).....	735
		State, Iovanovich v. (Tex. Cr. App.).....	98
		State, James v. (Tex. Cr. App.).....	472
		State, Jobe v. (Tex. Cr. App.).....	966
		State, Johnson v. (Tex. Cr. App.).....	1098
		State, Johnson v. (Tex. Cr. App.).....	1199
		State, Jones v. (Tenn.).....	1016
		State, Key v. (Tex. Cr. App.).....	121
		State, Key v. (Tex. Cr. App.).....	130
		State, Kuykendall v. (Tex. Cr. App.).....	130
		State, Kyle v. (Tex. Cr. App.).....	1199



	Page		Page
State, Lara v. (Tex. Cr. App.).....	99	Texas Midland R. R. v. Wiggins (Tex. Civ. App.).....	445
State, Leach v. (Tex. Cr. App.).....	977	Texas & N. O. R. Co. v. Cunniff (Tex. Civ. App.).....	396
State v. Leibtig (Mo.).....	674	Texas & P. R. Co., Black v. (Tex. Civ. App.).....	1077
State, Leonard v. (Tex. Cr. App.).....	966	Thacker's Adm'r, Southern R. Co. in Kentucky v. (Ky.).....	236
State, Lewis v. (Ark.).....	154	Theodore Keller Co. v. Mangum (Tex. Civ. App.).....	19
State, McLain v. (Tex. Cr. App.).....	117	Thompson, Merrill v. (Mo.).....	674
State, Madrid v. (Tex. Cr. App.).....	93	Thompson v. Stillwell (Mo.).....	681
State, Matula v. (Tex. Cr. App.).....	965	Threet v. State (Ark.).....	139
State v. Miles (Mo.).....	766	Thurman, St. Louis, I. M. & S. R. Co. v. (Ark.).....	1054
State, Miller v. (Tex. Cr. App.).....	128	Timmerberg, Muth Realty Co. v. (Mo. App.).....	589
State, Murgatroyd v. (Tex. Cr. App.).....	962	Tindall, Johnson v. (Tex. Civ. App.).....	401
State, Orth v. (Tex. Cr. App.).....	1199	Tiner v. State (Ark.).....	195
State, Pegram v. (Tex. Cr. App.).....	458	Tomlin, J. I. Case Threshing Mach. Co. v. (Mo. App.).....	286
State, Perales v. (Tex. Cr. App.).....	482	Town of Morristown, Noe v. (Tenn.).....	485
State, Phillips v. (Tex. Cr. App.).....	459	Townley, Harris v. (Tex. Civ. App.).....	5
State, Poulter v. (Tex. Cr. App.).....	475	Travelers' Ins. Co., Century Realty Co. v. (Mo. App.).....	630
State v. Powell (Mo. App.).....	600	Treadwell v. Walker County Lumber Co. (Tex. Civ. App.).....	397
State v. Printz (Mo.).....	674	Trevino v. State (Tex. Cr. App.).....	108
State, Reed v. (Tex. Cr. App.).....	97	Trice, Keene v. (Ark.).....	499
State v. Rogers (Mo.).....	770	Trinity & B. V. R. Co. v. Blackshear (Tex. Civ. App.).....	395
State v. Ruckman (Mo.).....	705	Trippensee v. Jefferson (Mo. App.).....	303
State v. Schomers (Mo. App.).....	1177	Tuggle, Stearns Coal & Lumber Co. v. (Ky.).....	1112
State, Setzer v. (Ark.).....	190	Turner v. Butler (Mo.).....	745
State v. Shaffer (Mo.).....	905	Turpin, Schroeder v. (Mo.).....	716
State, Shaw v. (Tex. Cr. App.).....	963	Turquett v. McMurray (Ark.).....	175
State, Shipp v. (Tenn.).....	1017	Tycrete Concrete Products Co., Yenawine v. (Ky.).....	1127
State, Smith v. (Tex. Cr. App.).....	477	Uecker, Helmke v. (Tex. Civ. App.).....	17
State v. Sonner (Mo.).....	723	Union Cemetery Ass'n v. Kansas City (Mo.).....	261
State, Strickland v. (Tex. Cr. App.).....	110	Union Cold Storage & Warehouse Co. v. Pitts (Mo. App.).....	1182
State v. Sydnor (Mo.).....	692	Union Electric Light & Power Co., Meehan v. (Mo.).....	825
State, Tafolla v. (Tex. Cr. App.).....	1091	Union Electric Light & Power Co. v. St. Louis (Mo.).....	1166
State, Threet v. (Ark.).....	139	United Rys. Co. of St. Louis, Battles v. (Mo. App.).....	614
State, Tiner v. (Ark.).....	195	United Rys. Co. of St. Louis, Lewkowicz v. (Mo. App.).....	588
State, Trevino v. (Tex. Cr. App.).....	108	Van Matre, Perry v. (Mo. App.).....	643
State v. Wade (Mo.).....	680	Veltmann, Ross v. (Tex. Civ. App.).....	1073
State v. Weinhardt (Mo.).....	1151	Venard, Wolz v. (Mo.).....	760
State v. Wellman (Mo.).....	795	Vernon, St. Louis, B. & M. R. Co. v. (Tex. Civ. App.).....	84
State, White v. (Tex. Cr. App.).....	977	Victoria Limestone Co. v. Hinton (Ky.).....	1109
State, White v. (Tex. Cr. App.).....	1199	Vinson v. W. T. Carter & Bro. (Tex. Civ. App.).....	49
State v. Williams (Ark.).....	159	Wade, State v. (Mo.).....	680
State v. Woollen (Tenn.).....	1006	Walck, Western Union Tel. Co. v. (Tex. Civ. App.).....	902
State, Young v. (Tex. Cr. App.).....	973	Walker, International & G. N. R. Co. v. (Tex. Civ. App.).....	961
State, Young v. (Tex. Cr. App.).....	1199	Walker, Murray v. (Ky.).....	512
State ex rel. Behrens v. Wilson (Mo. App.).....	1179	Walker County Lumber Co., Treadwell v. (Tex. Civ. App.).....	397
State ex rel. Jones v. Howe Scale Co. of Illinois (Mo.).....	789	Wallace, First State Bank of Paradise v. (Tex. Civ. App.).....	957
State ex rel. Spriggs v. Robinson (Mo.).....	1189	Wallis, Mixon v. (Tex. Civ. App.).....	907
Stearns Coal & Lumber Co. v. Tuggle (Ky.).....	1112	Walters, International & G. N. R. Co. v. (Tex. Civ. App.).....	916
Steckel, Gates v. (Mo. App.).....	1185	Warden v. Middleton (Ark.).....	151
Steiner, Prickett v. (Tex. Civ. App.).....	35	Waterman Lumber & Supply Co. v. Holmes (Tex. Civ. App.).....	70
Stewart, Kirby Lumber Co. v. (Tex. Civ. App.).....	372	Weddington's Adm'r, Chesapeake & O. R. Co. v. (Ky.).....	208
Stewart's Adm'r, Louisville & N. R. Co. v. (Ky.).....	557	Weidner, Rubey Trust Co. v. (Mo. App.).....	333
Stillwell, Thompson v. (Mo.).....	681	Weinhardt, State v. (Mo.).....	1151
Stone & Webster Engineering Corp. v. Brewer (Tex. Civ. App.).....	38	Welch's Adm'r, Fish v. (Ky.).....	512
Storths v. Smith (Ark.).....	183	Weller v. Missouri Lumber & Mining Co. (Mo. App.).....	853
Strange, Davis v. (Ky.).....	217		
Strange's Adm'r, Louisville & N. R. Co. v. (Ky.).....	239		
Strickland v. State (Tex. Cr. App.).....	110		
Strop, Ryan v. (Mo.).....	700		
Stuessy v. Louisville (Ky.).....	564		
Sullivan, Risinger v. (Tex. Civ. App.).....	397		
Supreme Council Legion of Honor of Missouri, Range v. (Mo. App.).....	652		
Supreme Ruling of Fraternal Mystic Circle v. Hansen (Tex. Civ. App.).....	54		
Swanson v. Nacogdoches (Tex. Civ. App.).....	83		
Sweetwater Lumber Co. v. Hamner (Tex. Civ. App.).....	1075		
Swift, Hatfield v. (Mo. App.).....	859		
Sydnor, State v. (Mo.).....	692		
Tafolla v. State (Tex. Cr. App.).....	1091		
Tallent v. Fitzpatrick (Mo.).....	689		
Talley, Hays v. (Tex. Civ. App.).....	429		
Taulbee v. Lewis & Chambers (Ky.).....	1100		
Taylor v. George (Mo. App.).....	1187		
Taylor v. Riney (Ky.).....	203		
Terry, Wilborn v. (Tex. Civ. App.).....	33		
Texas Cent. R. Co. v. Rose (Tex. Civ. App.).....	387		
Texas Midland R. R. v. Nelson (Tex. Civ. App.).....	1088		

	Page		Page
Wellman, State v. (Mo.).....	795	Willis Coal & Mining Co., John H. Schroeder Wine & Liquor Co. v., two cases (Mo. App.) .....	856
Wendling v. Bowden (Mo.).....	774	Willis Coal & Mining Co., Schroeder v. (Mo. App.) .....	857
Westbrook, Western Union Tel. Co. v. (Ark.) .....	1062	Wilson v. Carter (Tex. Civ. App.).....	411
Western Automatic Music Co., Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.) .....	880	Wilson, State ex rel. Behrens v. (Mo. App.).....	1179
Western Union Tel. Co. v. Alford (Ark.).....	1027	Wilson's Ex'r, Louisville, H. & St. L. R. Co. v. (Ky.) .....	513
Western Union Tel. Co., Fulkerson v. (Ark.)	168	Wilt v. Coughlin (Mo. App.).....	888
Western Union Tel. Co. v. Hearn (Ark.).....	1025	Wiltse, Garrett v. (Mo.) .....	694
Western Union Tel. Co. v. Kersten (Tex. Civ. App.).....	1091	Winfrey v. Matthews (Mo. App.).....	583
Western Union Tel. Co. v. McFarlane (Tex. Civ. App.).....	57	Wing v. Havelik (Mo.).....	732
Western Union Tel. Co. v. Walck (Tex. Civ. App.).....	902	Winningham's Adm'r, Cincinnati, N. O. & T. P. R. Co. v. (Ky.).....	506
Western Union Tel. Co. v. Westbrook (Ark.) .....	1062	Witten, Griffith v. (Mo.) .....	708
White, Reeves v. (Tex. Civ. App.).....	43	Wolz v. Venard (Mo.).....	760
White v. State (Tex. Cr. App.).....	977	Wood v. Drainage Dist. No. 2 of Conway County (Ark.) .....	1057
White v. State (Tex. Cr. App.).....	1199	Woollen, State v. (Tenn.) .....	1006
Whitsitt & Guerry, Pugh v. (Tex. Civ. App.) .....	953	Wooten Grocer Co. v. Smith (Tex. Civ. App.) .....	945
Wiggington, Louisville R. Co. v. (Ky.).....	209	Workman, Reich v. (Ark.) .....	180
Wiggins, Texas Midland R. R. v. (Tex. Civ. App.) .....	445	W. T. Carter & Bro., Vinson v. (Tex. Civ. App.) .....	49
Wilborn v. Terry (Tex. Civ. App.).....	33	Yenawine v. Tycrete Concrete Products Co. (Ky.) .....	1127
Willett v. Herrin (Tex. Civ. App.).....	26	Young v. Bank of Miami (Tex. Civ. App.)	436
Wm. Cameron & Co., Adams v. (Tex. Civ. App.) .....	417	Young v. State (Tex. Cr. App.).....	973
Williams v. Harth (Ky.).....	1102	Young v. State (Tex. Cr. App.).....	1199
Williams, Prickett v. (Ark.) .....	1023	Young Hardware Co., Outcault Advertising Co. v. (Ark.) .....	142
Williams, State v. (Ark.) .....	159	Young Men's Christian Ass'n of Dallas v. Schow Bros. (Tex. Civ. App.).....	931
Williford v. Eason (Ark.).....	498	Zimmermann v. Baugh (Tex. Civ. App.)...	943
Willingham v. Geitzenuer (Tex. Civ. App.)	376		
Willis Coal & Mining Co., John H. Schroeder Wine & Liquor Co. v. (Mo. App.)...	852		

## REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

### KENTUCKY.

Burnett v. Young Men's Building & Loan Ass'n, 159 S. W. 609.	Landers v. Cincinnati, N. O. & T. P. R. Co., 160 S. W. 1050.
Cumberland R. Co. v. Baird, 160 S. W. 919.	Louisville & I. R. Co. v. Kraft, 160 S. W. 803.
Ellis' Adm'r v. Louisville, H. & St. L. R. Co., 160 S. W. 512.	Louisville & N. R. Co. v. Burch, 159 S. W. 782.
Grinstead v. Monroe County, 160 S. W. 1041.	Louisville & N. R. Co. v. Gamble's Adm'r, 160 S. W. 795.
Holzbog v. Bakrow, 160 S. W. 792.	Louisville & N. R. Co. v. Greenwell's Adm'r, 160 S. W. 479.
Interstate Coal Co. v. Trivett, 160 S. W. 728.	Louisville & N. R. Co. v. Waller & Co., 159 S. W. 590.
Interstate Coal Co. v. Trivett, 160 S. W. 731.	Morgan v. Chamberlain, 160 S. W. 1066.
Kraver v. City of Henderson, 160 S. W. 257.	Muir v. Edelen, 160 S. W. 1048.
	Pickergill v. Nelson Creek Coal Co., 160 S. W. 936.
	West Kentucky Coal Co. v. Kelley, 159 S. W. 1152.

# WRITS OF ERROR

WERE DENIED, DISMISSED, OR GRANTED BY THE

## SUPREME COURT OF TEXAS

IN THE FOLLOWING CASES IN THE  
COURT OF CIVIL APPEALS

PRIOR TO JAN. 28, 1914

[Cases in which writs of error have been denied, dismissed, or granted, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

### WRITS OF ERROR DENIED

#### FIRST DISTRICT

Dupont v. Texas & N. O. R. Co., 158 S. W. 195.  
Freund v. Sabin, 159 S. W. 168.  
Holman v. Cowden & Sutherland, 158 S. W. 571.  
Jones v. Missouri, K. & T. R. Co. of Texas, 157 S. W. 213.  
Missouri, K. & T. R. Co. of Texas v. Brown, 158 S. W. 259.  
Oswald Realty Co. v. Broussard, 159 S. W. 153.  
Sachs v. Goldberg, 159 S. W. 92.  
Ward v. Walker, 159 S. W. 320.  
William Miller & Sons Co. v. Wayman, 157 S. W. 197.

#### SECOND DISTRICT

Austin Fire Ins. Co. v. Sayles, 157 S. W. 272.  
Douthitt v. Farrar, 159 S. W. 182.  
Ft. Worth Belt R. Co. v. Perryman, 158 S. W. 1181.  
Mitchell v. Inman, 156 S. W. 290.  
Order of United Commercial Travelers of America v. Roth, 159 S. W. 176.  
Richards v. Creighton, 157 S. W. 456.  
St. Louis, B. & M. R. Co. v. True Bros., 159 S. W. 152.  
Sanders v. Moore, 157 S. W. 441.  
Whitaker v. Browning, 155 S. W. 1197.  
Whitten v. Whitten, 157 S. W. 277.

#### THIRD DISTRICT

First Nat. Bank of Beaumont v. Union Trust Co., 155 S. W. 989.  
Harvey v. Provident Inv. Co., 156 S. W. 1127.  
Hill v. Hunter, 157 S. W. 247.  
Indiana & Ohio Live Stock Ins. Co. v. Smith, 157 S. W. 755.  
Jaffray Realty Co. v. Solomon's Estate, 157 S. W. 170.  
Missouri, K. & T. R. Co. of Texas v. Humphries, 157 S. W. 1174.  
Morrow v. Harvey, 157 S. W. 206.  
State v. Dayton Lumber Co., 159 S. W. 391.  
Thompson v. Waits, 159 S. W. 82.

#### FOURTH DISTRICT

Galveston, H. & S. A. R. Co. v. Huegle, 158 S. W. 197.  
Houston Ice & Brewing Co. v. Clint, 159 S. W. 409.  
King v. Boerne State Bank, 159 S. W. 433.  
161 S. W.

National Life Ass'n v. Hagelstein, 156 S. W. 353.  
Peck v. Morgan, 156 S. W. 917.  
Rainer v. Durrill, 156 S. W. 589.  
Rips v. Herman, 158 S. W. 781.  
Rishworth v. Moss, 159 S. W. 122.  
San Antonio Traction Co. v. Badgett, 158 S. W. 803.  
Sovereign Camp Woodmen of the World v. Ruedrich, 158 S. W. 170.  
Thompson v. Price, 157 S. W. 288.

#### FIFTH DISTRICT

American Nat. Ins. Co. v. Briggs, 156 S. W. 909.  
Bowman v. Farmersville Mill & Light Co., 158 S. W. 200.  
Davis v. Parks, 157 S. W. 449.  
Erwin v. E. I. Du Pont De Nemours Powder Co., 156 S. W. 1097.  
Jones Lumber Co. v. Guaranty State Bank & Trust Co., 157 S. W. 472.  
Missouri, K. & T. R. Co. of Texas v. Taylor, 156 S. W. 544.  
O'Connor v. Camp, 158 S. W. 203.  
Peters v. Rice, 157 S. W. 1181.  
Phoenix Land Co. v. Exall, 159 S. W. 474.  
Texas Midland R. R. v. Cummins, 156 S. W. 542.  
Western Union Telegraph Co. v. Vickery, 158 S. W. 792.

#### SIXTH DISTRICT

Atkinson v. Shelton, 160 S. W. 316.  
Bryson v. Moore, 157 S. W. 233.  
General Bonding & Casualty Ins. Co. v. Beckville Independent School Dist., 156 S. W. 1161.  
James v. Chaney, 154 S. W. 679.  
London v. G. A. Kelly Plow Co., 155 S. W. 556.  
Long v. Shelton, 155 S. W. 945.  
St. Louis, Southwestern R. Co. of Texas v. Missildine, 157 S. W. 245.  
St. Louis Southwestern R. Co. of Texas v. Pruitt, 157 S. W. 236.  
Southwestern Telegraph & Telephone Co. v. Davis, 156 S. W. 1146.  
Stansberry v. Booghery, 158 S. W. 247.  
Texas & P. R. Co. v. Villafuerte, 156 S. W. 1155.  
Thornton v. McReynolds, 156 S. W. 1144.  
Wauhup v. Sauvage's Heirs, 159 S. W. 185.

**SEVENTH DISTRICT**

Atchison, T. & S. F. R. Co. v. Word, 159 S. W. 375.  
 Bowles v. Belt, 159 S. W. 885.  
 Canadian Long Distance Telephone Co. v. Seiber, 159 S. W. 897.  
 Chicago, R. I. & G. R. Co. v. Johnson, 156 S. W. 253.  
 First State Bank of Seminole v. Shannon, 159 S. W. 898.  
 Ft. Worth & D. C. R. Co. v. Caruthers, 157 S. W. 238.  
 Mote v. Thompson, 156 S. W. 1105.  
 Red Deer Oil Development Co. v. Huggins, 155 S. W. 949.  
 Shaw v. Windham, 155 S. W. 636.  
 Southern Kansas R. Co. of Texas v. Vance, 155 S. W. 696.  
 Taylor v. White, 156 S. W. 349.  
 United States Express Co. v. Taylor, 156 S. W. 617.  
 Western Union Telegraph Co. v. Glenn, 156 S. W. 1116.  
 Woolley v. Canyon Exch. Co., 159 S. W. 403.

**EIGHTH DISTRICT**

Atchison, T. & S. F. R. Co. v. Fiedler, 158 S. W. 265.  
 Chambers v. Grisham, 157 S. W. 1177.  
 Chambers v. Rawls, 158 S. W. 208.  
 Co-operative Vineyards Co. v. Ft. Stockton Irrigated Lands Co., 158 S. W. 1191.  
 El Paso Electric R. Co. v. Mebus, 157 S. W. 955.  
 Moore v. Cobe, 156 S. W. 1142.  
 Morrow v. Conoway, 157 S. W. 430.  
 Posener v. Long, 156 S. W. 591.  
 Purington v. Broughton, 158 S. W. 227.  
 Spotts v. Whitaker, 157 S. W. 422.  
 Texas & P. R. Co. v. El Paso & N. E. R. Co., 156 S. W. 561.

**WRITS OF ERROR DISMISSED****FIRST DISTRICT**

Beebe v. Sweeney, 158 S. W. 235.  
 Houston Motor Car Co. v. Brashear, 158 S. W. 233.  
 Mayes v. Mayes, 159 S. W. 919.  
 Petty v. McReynolds, 157 S. W. 180.

**SECOND DISTRICT**

Reeves v. Bomar, 157 S. W. 275.  
 Ross v. Kell, 159 S. W. 119.

**THIRD DISTRICT**

J. F. Sienshelter & Co. v. Maryland Motor Car Ins. Co., 157 S. W. 228.

**FIFTH DISTRICT**

Banner v. Thomas, 159 S. W. 102.  
 First State Bank of Mt. Calm v. Fain, 157 S. W. 454.  
 Missouri, K. & T. R. Co. of Texas v. Halley, 156 S. W. 1119.

**SIXTH DISTRICT**

Baker v. Texas & P. R. Co., 158 S. W. 263.  
 Nail v. Wolfe City Nat. Bank, 158 S. W. 1166.

National Surety Co. v. American Compound Door Co., 158 S. W. 1177.  
 Niagara Fire Ins. Co. v. Lollar, 156 S. W. 1140.

**SEVENTH DISTRICT**

Garrett v. Grisham, 156 S. W. 505.  
 Hunker v. Estes, 159 S. W. 470.  
 Shriver v. McCann, 155 S. W. 317.

**EIGHTH DISTRICT**

Rosenthal v. Sun Co., 156 S. W. 513.

**WRITS OF ERROR GRANTED****FIRST DISTRICT**

Houston Belt & Terminal R. Co. v. Ashe, 158 S. W. 205.  
 Kirby Lumber Co. v. Williams, 159 S. W. 309.

**SECOND DISTRICT**

Bennett v. Gulf, C. & S. F. R. Co., 159 S. W. 132.  
 Swartz v. Park, 159 S. W. 338.  
 Webb v. Reynolds, 160 S. W. 152.

**THIRD DISTRICT**

Hawkins v. Stiles, 158 S. W. 1011.  
 Houston & T. C. R. Co. v. Ellis, 160 S. W. 606, 607.  
 International & G. N. R. Co. v. Williams, 160 S. W. 639.  
 San Antonio & A. P. R. Co. v. Tucker, 157 S. W. 175.

**FOURTH DISTRICT**

Daugherty v. Wiles, 156 S. W. 1089.  
 Holt v. Guerguin, 156 S. W. 581.  
 Raley v. D. Sullivan & Co., 159 S. W. 99.

**FIFTH DISTRICT**

Houston & T. C. R. Co. v. Fox, 156 S. W. 922.  
 St. Louis Southwestern R. Co. of Texas v. Woodall, 159 S. W. 1012.  
 St. Louis & S. F. R. Co. v. Cox, 159 S. W. 1042.

**SIXTH DISTRICT**

Clay v. Marmar, 156 S. W. 1125.  
 North Texas Lumber Co. v. McWhorter, 156 S. W. 1152.  
 Pitts v. Van Orden, 158 S. W. 1043.  
 St. Louis Southwestern R. Co. v. Wilkes, 159 S. W. 128.  
 Texas & P. R. Co. v. Wiley, 155 S. W. 356.  
 Waterman Lumber & Supply Co. v. Robins, 159 S. W. 360.

**SEVENTH DISTRICT**

Bush v. Merrill, 156 S. W. 606.  
 Heaton v. State Nat. Bank, 159 S. W. 874.  
 Hutcheson v. Massie, 159 S. W. 315.  
 Taylor v. White, 156 S. W. 349.  
 Wells v. Globe Fire Ins. Co., 157 S. W. 289.

**EIGHTH DISTRICT**

El Paso Electric R. Co. v. Lee, 157 S. W. 748.  
 Southern Pac. Co. v. Walters, 157 S. W. 753.

See End of Index for Tables of Southwestern Cases in State Reports

THE  
SOUTHWESTERN REPORTER  
VOLUME 161

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SNIPES et al. v. BOMAR COTTON OIL CO.  
(Supreme Court of Texas. Dec. 10, 1913.)

**1. MASTER AND SERVANT (§ 256\*)—ACTIONS FOR INJURIES—PETITION.**

In an action for the death of an engineer of a stationary engine, a petition alleging that the base around the engine was too narrow, that the space between such base and the wheel pit was too narrow, that the employer negligently permitted such space to become greasy and slippery, that the engineer slipped on the greasy floor, and fell, or stepped, or otherwise got into the pit, and was injured by contact with the wheel, was insufficient, as it failed to advise the employer upon what ground a recovery was sought.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.\*]

**2. MASTER AND SERVANT (§ 209\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.**

An experienced engineer, who for ten days had exclusive control of a stationary engine, assumed the risk of an injury from the height of the base on which the engine rested, the narrowness of the space between such base and the wheel pit, the absence of any guard for the pit except an iron bar, four feet high, running across the middle thereof, and the slippery condition of the floor caused by oil dropped thereon by himself while oiling the drivewheel and engine, and hence could not recover for slipping and falling into the pit, coming in contact with the drivewheel, as he knew the danger involved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 552, 553; Dec. Dig. § 209.\*]

**3. PLEADING (§ 34\*)—PETITION—CONSTRUING AGAINST PLEADER.**

In an action for the death of an engineer in exclusive control of a stationary engine, where the petition alleged that he had oiled the engine and a drivewheel connected therewith, and that the floor was greasy and slippery, but failed to show that any other person caused the greasy and slippery condition, it would be construed against plaintiff, and concluded that he spilled the oil on the floor himself.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.\*]

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Mrs. Agnes Snipes and others against the Bomar Cotton Oil Company. A judgment for defendant on demurrer was affirmed by the Court of Civil Appeals (137 S. W. 428), and plaintiffs bring error. Affirmed.

Potter, Culp & Culp, of Gainesville, and Jas. T. Miller, of Dallas, for plaintiffs in error. Davis & Thomason and Garnett & Garnett, all of Gainesville, and Walter F. Seay, of Dallas, for defendant in error.

BROWN, C. J. We copy from the opinion of the Court of Civil Appeals the following statement: "The suit is by the wife and children of James A. Snipes to recover the damages suffered on account of his death. The court sustained a general demurrer to the petition, and, upon the appellants declining to amend, judgment was entered in favor of the appellee. The ruling of the court in sustaining the demurrer is made the basis of the assignment for error. The petition alleged the facts to be that James A. Snipes was employed by appellee as an engineer to run and operate the engine and machinery at its cotton oil mill. The engine was set on a cement base, which was about six inches wider on the side than the engine, and about six inches higher than the surrounding floor of the room. In order to reach and oil the knuckle, or eccentric, on the engine, it was necessary and required that the engineer should stand on this extended space of the cement base upon which the engine rested. Connected to the engine by a shaft was a large drivewheel, which revolved with great rapidity and force. It was situated to the north and near the engine, and extended farther west than the engine. The space between the engine and the wheel was used as a passageway in performing duties about the machinery. This wheel revolved partly above the floor of the room and partly below the floor. To enable the wheel to properly revolve below the floor, an opening was made in the floor, and there was excavated beneath a pit just large enough for the wheel to have clear space in its revolutions. The opening in the floor on the side of the wheel was about fourteen inches, and was safeguarded by an iron rail, about four feet high, running across the middle of the same. It was alleged that Snipes had worked about the machinery and engine and room for about ten days before his death, and had frequently stepped upon and occupied the extension of the cement base to oil and handle

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
161 S.W.—1

the eccentric, as was his duty, and constantly used the passageway for his work. It is alleged that on October 15, 1909, 'the said James A. Snipes, acting prudently and in the performance of his duty, went between the engine and the drivewheel and pit, and his feet slipped under him on the broken, uneven, and greasy floor, and he was precipitated into the unprotected pit around said wheel, or he stepped into said pit while at his work, or otherwise came into contact with said unprotected wheel when said wheel was revolving with much rapidity and force, and, his clothes and limbs becoming entangled in said wheel, he was instantly torn, and mutilated, and killed.'

"The object of pleading is to notify the opposite party of what it is expected to prove as the ground of plaintiff's action or the defendant's defense, so that he may prepare for the trial of the issues thus tendered. *Lemmon v. Hanley*, 28 Tex. 220. To determine whether or not a pleading presents a certain issue, it is a safe rule to look at the pleading from the standpoint of the party against whom it is exhibited, and ascertain if the allegations are sufficient to notify him that the evidence offered will be produced, or that he will be called upon to present evidence to meet it." *W. H. Ware v. Shafer & Braden*, 88 Tex. 46, 29 S. W. 756. See *Lemmon v. Hanley*, 28 Tex. 220.

[1] Relying upon the allegations of the petition, could the defendant tell upon which of the grounds alleged plaintiff would rely for recovery? The petition alleged that the base around the engine was too narrow; but no allegation points out in what manner that fact contributed to the death of Snipes. It is alleged that the space between the base on which the engine rested and the pit in which the wheel was operated was too narrow; but it is not alleged that the fact caused or contributed to the injury. It is alleged that defendant negligently permitted the cement space around the pit to become greasy and slippery, and that deceased slipped on the greasy cement, and fell into the pit, or that he stepped into the pit, or otherwise got into the pit, and was injured. How could defendant have prepared to meet proof that deceased slipped and fell into the pit, or that he stepped into the pit, whereas, plaintiffs might prove that deceased got into the pit "otherwise," that is, in any unknown manner? It is manifest that there was no such certainty in the allegations of petition as the law required; therefore the general demurrer was properly sustained.

[2, 3] Each fact alleged to have caused or contributed to the death of Snipes was unquestionably obvious to him. He was an experienced engineer, and for ten days had exclusive control of the machinery. The height of the base on which the engine rested and the width of the space between the base and the pit were physical conditions which must

have been observed in their use. The fact that there was but one iron bar to guard the pit must have been known to a man who approached it so frequently, and who must have come into contact with the bar; he could not possibly have failed to observe the fact that but one rod guarded the pit. Deceased is alleged to have oiled both drivewheel and engine, and no allegation is made from which it may be concluded that another person caused the cement floor to be "greasy and slippery"; therefore the conclusion must be reached that Snipes spilled the oil on the cement. The allegations, being indefinite as to that fact, must be construed against the pleader. *Webb County v. School Trustees*, 95 Tex. 137, 65 S. W. 878.

It is manifest that Snipes must have known of the defects alleged, and, being experienced in such service, knew the danger involved in performing the service; therefore he assumed the risk. *Texas & Pacific Railway Company v. Bradford*, 66 Tex. 732, 2 S. W. 595, 59 Am. Rep. 639.

The judgments of the district court and of the Court of Civil Appeals are affirmed.

#### CHICAGO, R. I. & G. RY. CO. v. PEMBERTON.

(Supreme Court of Texas. Dec. 3, 1913.)

#### 1. APPEAL AND ERROR (§ 361\*)—PETITION FOR WRIT OF ERROR—SUFFICIENCY.

Where the Court of Civil Appeals refused to consider the assignments of error on the ground that they did not comply with the rules, it in effect overruled them, and a motion for a rehearing and a petition to the Supreme Court for a writ of error were not defective because they complained only of the "overruling" of the assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1941-1959; Dec. Dig. § 361.\*]

#### 2. APPEAL AND ERROR (§ 743\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

The purpose of rule 23 for Courts of Civil Appeals (142 S. W. xii), requiring the record to contain an assignment of errors, rule 24 (142 S. W. xii), providing that the ground of error presented in an assignment must have been set forth in a motion for a new trial unless fundamental, and rule 25 (142 S. W. xii), requiring the assignment to refer to that portion of such motion where the same error was complained of, is to confine the appellant in the Court of Civil Appeals to such grounds of error as were brought to the attention of the trial court in the motion, to assure the Court of Civil Appeals that the error assigned was urged in such motion, and to enable it to verify the identity of the errors; and where the assignments, though not in literal compliance with the rules, substantially perform this purpose, they should be considered, since, while the rules constitute a necessary limitation upon the exercise of the right of appeal, the preservation of that right is of equal concern with the enforcement of rules of practice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3011; Dec. Dig. § 743.\*]

### 3. APPEAL AND ERROR (§ 743\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error, referring by number to the paragraphs of the motion for a new trial, where the assigned errors were complained of, but not referring to the page of the transcript where the motion or the particular paragraphs mentioned might be found, were in literal compliance with rule 24 for Courts of Civil Appeals (142 S. W. xii), providing that the ground of error assigned must have been set forth in the motion for a new trial, and rule 25, requiring the assignment to refer to that portion of the motion where the same error was complained of; and hence the Court of Civil Appeals improperly refused to consider them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2999, 3011; Dec. Dig. § 743.\*]

### 4. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—STATEMENTS.

Under rule 31 for Courts of Civil Appeals (142 S. W. xiii), providing that there shall be subjoined to the propositions under an assignment of error a brief statement, in substance, of such proceedings, or part thereof, in the record as will be necessary and sufficient to explain and support the proposition with a reference to the pages of the record, the statement need not refer to the page of the transcript where the motion for a new trial complaining of the assigned error may be found, unless such motion is necessary to explain and support the proposition, as the statement need not refer to such page for the purpose of showing that the error was presented in such motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

### 5. APPEAL AND ERROR (§ 742\*)—JURISDICTION OF SUPREME COURT—DISCRETIONARY MATTERS.

Under such rule, where the statements did not refer to the pages of the transcript, where the proceedings necessary to support and explain the propositions might be found, the refusal of the Court of Civil Appeals, in its discretion, to consider the assignments of error would not be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Henry Pemberton against the Chicago, Rock Island & Gulf Railway Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals (155 S. W. 652), and defendant brings error. Reversed and remanded to the Court of Civil Appeals.

Lassiter, Harrison & Rowland, of Ft. Worth, and Bennett Hill, of Dallas, for plaintiff in error. W. L. Crawford, Jr., and Carden, Starling, Carden & Hemphill, all of Dallas, for defendant in error.

PHILLIPS, J. The plaintiff in error was the appellant in the honorable Court of Civil Appeals, and, on the appeal of the case, filed in that court its brief submitting four assignments of error. The court declined to consider any of the assignments, for the reason, as stated in its opinion, that none of them complied with rules 23, 24, and 25 prescribed by this court (142 S. W. xii) for the preparations of briefs, in that the brief failed to point out the page of the transcript

where the alleged error was called to the attention of the trial court in a motion for new trial, or to anywhere point out the page of the transcript where the motion for a new trial was to be found, and affirmed the judgment of the trial court.

[1] Objection is made by the defendant in error to our reviewing the action of the Court of Civil Appeals, upon the ground that the petition for the writ of error, as did the motion for rehearing, complains only of the "overruling" of the assignments as distinguished from the refusal to consider them. While they were not expressly overruled, the effect of the court's action upon the appeal amounted to that result. The appellant was at liberty, therefore, to treat them as overruled, and its assignments of error in the motion for rehearing and petition for writ of error, so framed, sufficiently challenge the ruling. We are not disposed, at all events, to deny them consideration because not couched in exact and technical phrase.

[2, 3] The first assignment of error presented in the brief of the plaintiff in error in the Court of Civil Appeals is as follows: "The court erred in overruling defendant's motion for a new trial on the first ground stated therein, to wit, that the verdict of the jury was excessive, and in overruling defendant's motion for a new trial, for this reason, as stated in the first paragraph thereof." Under it the following proposition is submitted: "A fair consideration of the evidence in this case shows that the plaintiff's injury was comparatively inconsiderable, and that the verdict is grossly excessive." To the proposition is subjoined a statement of the testimony, constituting nearly three pages of the brief, in which at intervals reference is made to the pages of the statement of facts by number. Each of the other three assignments of error concludes with substantially the same sentence as the first assignment, containing in each instance a reference by number to the paragraph of the motion for a new trial where the same ground of error is presented. It is true that the page of the transcript for the particular paragraph of the motion is not given in any assignment, or in the statement under it. Nor does the brief anywhere designate the page of the transcript where the motion for a new trial may be found. But this was not necessary in our opinion under either of the rules upon which the honorable Court of Civil Appeals predicates its refusal to consider the assignments.

Rule 23 provides that the record shall contain an assignment of errors as required by the statute. It makes no reference to the motion for a new trial. In rule 24 it is provided that the ground of error presented in an assignment must have been set forth in the motion for a new trial; otherwise it will be considered as waived unless it be funda-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mental in its nature. And under rule 25 it is required that the assignment refer to that portion of the motion for a new trial where the same error is complained of. The purpose of rules 24 and 25 in their relation to the motion for a new trial is obvious. It is, first to confine the appellant in the Court of Civil Appeals to the submission of only such grounds of error as were brought to the attention of the trial court in the motion; second, to assure the Court of Civil Appeals that the error assigned was urged in the motion; and, third, to enable the court to verify their identity. It is plain, however, that the rules do not require that the brief furnish the court any further means for such verification than "the reference" in the assignment "to that portion of the motion for a new trial in which the error is complained of," as is stated in rule 25, since they make no other provision in that respect. There is no suggestion that, in addition to the reference to that portion of the motion complaining of the error, required by rule 25, there shall also be given the page of the transcript containing such part of the motion, or where the motion may be found. This court in its amendment of rule 25, incorporating this provision, doubtless considered the reference to such particular part of the motion a sufficient designation of the record. It is not improbable that it recognized the difficulty of complying with any requirement that the assignment contain any further designation, particularly the transcript page of the motion—and it is evident that it regarded the assignment as the appropriate place for the designation—since the appellant complies fully with another rule if he faithfully copies in his brief the assignment as filed in the trial court; and in filing his assignments in that court it is frequently impossible for him to know the transcript page of the motion, as generally the transcript is not prepared until after the assignments of error are filed.

In the application of rules 24 and 25 the brief does not involve the motion for a new trial, except for the purpose we have stated, and, whenever the brief makes faithful attempt to accomplish such purpose by the assignment only of errors presented in the motion, a statement to that effect, with a reference in the assignment to the particular part of the motion, or a designation of the pages of the record in immediate connection with the assignment, such as will enable the court to readily compare the assignment with the motion; in other words, whenever the presentation of the assignment of error substantially performs the office in respect to the motion for a new trial intended by these rules, it is entitled to consideration, though the letter of the rules be not strictly followed. The rules were enacted for the benefit of the Courts of Civil Appeals, and to facilitate their labors by relieving them of some part

of the burden which the examination of the numerous and voluminous records before them necessarily imposes. They should be observed; and as they relate to the work of those courts, we are at all times reluctant to revise their enforcement of them. But it was not intended in their adoption to incumber the Courts of Civil Appeals with technical and arbitrary requirements, or to enjoin such rigid adherence to them as precludes their observance by a reasonable and substantial compliance. While they constitute a necessary limitation upon the exercise of the right of appeal, the preservation of that right is of equal concern with the enforcement of rules of practice; and, in our opinion, it should never be denied where by a substantial compliance with their provisions the purpose of such rules is effectually subserved and their end practically accomplished. These assignments comply literally, we think, with rules 24 and 25, and, so far as affected by those rules, were entitled to consideration by the court.

[4] The Court of Civil Appeals, as we have stated, based its refusal to consider the assignments only upon the failure of the brief to comply with rules 23, 24, and 25. The defendant in error, however, insists that under rule 31 (142 S. W. xiii), which relates to the preparation of the statement subjoined to the proposition submitted, it was required that the transcript page of the motion for a new trial be given. That rule provides that under the proposition there shall be made a brief statement, in substance, of such proceedings, or part thereof, in the record, "as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record." If it had been necessary to state any part of the motion for a new trial in order to explain and support the several propositions under the assignments, this rule would have been applicable, but such does not appear to have been the case. It has no application to the motion for any other purpose, and distinctly not for the purpose of its being shown that the ground of error specified in the assignment was likewise presented in the motion.

[5] It is further urged by the defendant in error that the statements as made, subjoined to the propositions submitted under the second, third, and fourth assignments, are not in compliance with rule 31, and that the court properly refused to consider those assignments, because of the want of reference to the pages of the record. The statements under the assignments just named are defective in this particular. The second assignment is based upon the refusal to give a special charge. The statement gives the number of the charge and copies it literally, but omits to give the page of the transcript where it may be found. It further purports to give the substance of certain testimony upon the issue submitted in the charge, and



with respect thereto gives the transcript pages. The third and fourth assignments both relate to matters made the subject of bills of exception. In the statements the bills are referred to by number, and copied in full, but reference to the pages of the transcript where found is omitted. While the statements under these three assignments are defective in the particular stated, their accuracy was not questioned in the Court of Civil Appeals by the defendant in error, and for this reason we believe the court would have been warranted in considering the assignments, but we do not consider it within our province to revise the exercise of discretion by the Court of Civil Appeals, where the statement wholly fails to refer to the pages of the record, and the assignment is not considered for that reason.

The judgment of the Court of Civil Appeals is reversed, and the cause is remanded to that court for the consideration of the first assignment of error in the brief filed in that court by the plaintiff in error, and for the consideration of the remaining three assignments, unless the court is of the opinion it should refuse to do so because of the statements thereunder being defective in the respect stated, under rule 31.

Reversed and remanded to the Court of Civil Appeals.

### HARRIS v. TOWNLEY.

(Court of Civil Appeals of Texas. Austin.  
Nov. 19, 1913.)

#### 1. EXEMPTIONS (§ 45\*)—ARTICLES OF TRADE—TOOLS—"APPARATUS."

Rev. Civ. St. 1911, art. 3785, subd. 5, exempts all tools, apparatus, and books belonging to any trade or profession from attachment, execution, and any other species of forced sale for the payment of debts, except as otherwise provided. *Held*, that the word "apparatus" means a complex device or machine designed for the accomplishment of a special purpose; a complex instrument or appliance, mechanical or chemical, for a specific action or operation; machinery; mechanism—and included a printing press, engine, and other articles in daily use by the publisher and proprietor of a newspaper and necessary for the conduct of his business.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 439, 440.]

#### 2. LANDLORD AND TENANT (§ 246\*)—LIEN—PROPERTY SUBJECT.

Under Rev. Civ. St. 1911, art. 5490, providing that the landlord and tenant act was not intended to repeal the exemption laws of the state, a landlord has no lien on property of the tenant which is exempt from execution and forced sale.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 991-1002; Dec. Dig. § 246.\*]

Appeal from Lampasas County Court; M. M. White, Judge.

Action by F. J. Harris against M. D. Townley. Judgment for plaintiff for less than relief demanded, and he appeals. Affirmed.

A. McFarland, of Lampasas, for appellant.  
H. F. Lewis and Word & Walker, all of Lampasas, for appellee.

RICE, J. Appellant brought this suit against appellee to recover the sum of \$384.50, balance claimed to be due for rent of a certain building situated in the town of Lampasas, which had been rented to him by appellant and which was used by appellee as a printing office, and to foreclose his landlord's lien upon one 6-column quarto Country Campbell press, one typewriter, certain type and type cases, one desk, iron safe, together with a certain gasoline engine used for the operation of said press, as well as other furniture and fixtures belonging thereto. After a general and several special exceptions, defendant answered that he was a resident of said state and county and was the owner of said property, using it in connection with his business, that of editing, publishing, and printing the "Lampasas Blade," a weekly newspaper, together with his job or commercial printing business; that he was a printer and publisher by trade and had no other trade or profession by which to support his family; that said articles were in daily use by him in his business and useful and necessary in the prosecution thereof, and without them he could not continue the printing and publication of said newspaper—for which reasons he claimed that they were exempt under the laws of this state from forced sale. A jury being waived, there was a trial before the court, resulting in judgment for appellant in the amount sued for, with foreclosure of his landlord's lien on the safe and certain merchandise, unnecessary to mention; but the court refused to foreclose said lien upon the rest of said property, from which judgment this appeal is taken.

[1] Revised Statutes, art. 3785, subdiv. 5, exempts all tools, apparatus, and books belonging to any trade or profession from attachment, execution, and every other species of forced sale for the payment of debts, except as otherwise provided; and the present case does not fall within any of said exceptions. If said printing press and engines are exempt from such sale under the law, then it is conceded by appellant that the judgment is correct, otherwise it should be reversed.

The question presented is not an open one in this state but has been settled by several of our decisions, among others that of *Green v. Raymond*, 58 Tex. 80, 44 Am. Rep. 601, wherein a printing press and cases used in the printing office and owned by an editor and publisher were held exempt from forced sale under this statute. In discussing the expression "apparatus," used in the statute,

the court says: "The word 'apparatus' is strikingly apt, a generic term of the most comprehensive signification. The trade or profession of Raymond was that of editor and publisher of a weekly newspaper. What tools and apparatus belonged to that trade or profession? It is the printing press, type, cases, etc., and not alone the pair of scissors, bottle of ink, and goosequill pen of the editorial department. The apparatus belonging to the trade of a publisher must of necessity include the press, type, cases, etc., which are essential to the conducting of that business. The blacksmith could as well dispense with his anvil and hammer, the shoemaker with his awl and last, the farmer with his plow and hoe, as could the publisher dispense with his press, type, and cases; and yet all of these are exempt as belonging to these respective trades." See, also, *St. Louis Type Foundry v. Taylor*, 35 S. W. 691; *Same v. International Live Stock Journal Ptg. Co.*, 74 Tex. 651, 12 S. W. 842, 15 Am. St. Rep. 870; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710; *Patterson v. English*, 142 S. W. 18.

[2] Article 5490, Revised Statutes of 1911, specially provides that the landlord and tenant act is not intended to repeal the exemption laws of this state; and it has always been held by our courts that the exemption statutes should be liberally construed. We think it is immaterial that the press in this case was not run by hand but by this gasoline engine.

The word "apparatus" is not used in a restricted sense, as contended for by appellant. The Standard Dictionary defines "apparatus" thus: Any complex device or machine designed or prepared for the accomplishment of a special purpose. And Webster defines it as: Any complex instrument or appliance, mechanical or chemical, for a specific action or operation; machinery; mechanism. Under the word "tools," in Bouvier's Law Dictionary, a printing press is referred to as an "apparatus." In *Wood v. Bresnahan*, 63 Mich. 614, 30 N. W. 206, 208, a steam engine, shingle machine, and saw gummer in use or lately used in business are articles exempt from execution as being apparatus, enabling the person to carry on the business in which he is principally engaged.

The court having found that appellee was the owner, publisher, and proprietor of a newspaper, and that the press, engine, and other articles above mentioned were in daily use by him and necessary for conducting his business, we conclude that he was correct in holding as matter of law, that they were exempt from forced sale under this statute, and that he properly refused to foreclose the landlord's lien thereon, for which reason the judgment of the court below is in all things affirmed.

Affirmed.

# HOUSTON OIL CO. OF TEXAS v. LAMBERT et al.

(Court of Civil Appeals of Texas. Galveston. Oct. 18, 1913. Rehearing Denied Nov. 13, 1913.)

## 1. ADVERSE POSSESSION (§ 115\*) — ACTIONS — EVIDENCE—SUFFICIENCY.

In an action for land which plaintiff claimed by prescriptive title, evidence held sufficient to go to the jury on the issue of plaintiff's claim to the specific land described in his petition and in the field notes of the surveyor, and of such claim for the period of limitations.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.\*]

## 2. TRIAL (§ 260\*) — INSTRUCTIONS — REFUSAL OF REQUEST COVERED BY THOSE GIVEN.

In a suit over land which plaintiff claimed by prescriptive title, where defendant requested two special charges on the issue as to whether plaintiff's grantor had ever claimed a definite tract, the giving of one of the special charges was sufficient, and defendant cannot complain of the refusal of the other.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from District Court, San Augustine County; L. D. Guinn, Judge.

Action by W. D. Lambert against the Houston Oil Company of Texas in which Ned Douglas intervened. From a judgment for plaintiff and intervener, defendant appeals. Affirmed.

Hightower, Orgain & Butler and J. D. Campbell, all of Beaumont, for appellant. June C. Harris, of Nacogdoches, and S. M. Davis, of Davis, Okl., for appellees.

McMEANS, J. W. D. Lambert, claiming the merchantable pine timber on 85 acres of land, part of a 160-acre survey out of H. T. & B. section No. 15 in San Augustine county, and Ned Douglas, intervener, claiming title to said 85 acres, brought this suit against the Houston Oil Company of Texas for the recovery of same. It was agreed that the record title to the land is in the Oil Company, and that it is entitled to a judgment for the land and timber unless its right of recovery is defeated by the claim of Lambert and Douglas, based on the statutes of limitation of ten years. A trial before a jury resulted in a verdict and judgment for the plaintiffs, and the defendant Oil Company has appealed.

Appellant requested the court to give to the jury its first and second charges, both of which were peremptory instructions to return a verdict for it, and also requested the court to give its third special charge, which contained the instruction in effect, that before the plaintiff and intervener can recover anything in this suit the jury must be satisfied from the evidence that the land embraced in the field notes set out in plaintiffs' petition was the identical land which was claimed by Ned Douglas for a period of ten consecutive years prior to the institu-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

tion of the suit on January 3, 1911, and that said land as so described was by some means designated or defined on the ground during such period before the suit was filed. The refusal of the court to give said charges is made the basis of appellant's first, second, and third assignments of error, and under these the appellant asserts the proposition, in substance, that in order to recover land under the statute of limitation of ten years the claimant must show statutory possession of the identical land sued for by the identical boundaries in his petition, and that this had not been shown by the testimony on the trial in the court below.

[1] The 160 acres is described by field notes in plaintiffs' petition. It appears that before the filing of the suit Ned Douglas sold 75 of the 160 acres, and his vendee did not join in the suit as party plaintiff, nor was he made a party. According to the testimony of Douglas, he bought the 160 acres in question from Zetta Curl in 1886 by an instrument in writing which was introduced in evidence, and which is as follows: "Know all men by these presents, that I, Zetta Curl, of the county of San Augustine and state of Texas, for and in consideration of the sum of \$160.00, one hundred and sixty dollars cash paid me in hand by Ned Douglas for a firm 160 acres, I bargain, sell and convey, bargained, sold and conveyed and by these presents grant sell to Ned Douglas my homestead premises included and do bind myself." Douglas testified that the land he bought from Zetta Curl is the same 160 acres that he had sued the Houston Oil Company for; that he had it surveyed out about five years before bringing the suit; and that the land so surveyed was the same that he so purchased and intended to occupy and live upon. We quote his testimony: "This very land that is involved in this suit has a house upon it with somebody living in it, and I remained there from 1886 to 1898, farming each year. The whole tract of 160 acres was surveyed at the same time five years ago. I don't suppose that is the first time the land has ever been surveyed. There were hacks around it—old hacks. I guess the property I am claiming has been surveyed. As to how I know what land I was claiming until that was done, it was claimed by other places adjoining it. The other place was 160 acres. The 160-acre tract is what I bought from Aunt Zetta. I reckon it was five years ago I had it run out. Up to that time I did know where my 160 acres of land was because I knew where the house was. I can map it out to you mighty quick. Here is the Ned Garrett place, and here is the Zetta Curl place. This was claimed from here to this branch here. Here was the way the place was lying. This dotted line was the line. Those are the metes and bounds I had." Again he says: "Over there is the Ned Gar-

rett place on the east end. \* \* \* My western boundary line, as I understood in my purchase from Zetta Curl and as she conveyed it to me, extended to the branch. The north line was to run with this land to the branch. The south line was to run from the corner to the branch—the first corner I mentioned there—we call it the northwest corner of the Ned Garrett. This (the 160 acres in controversy) is on the western side of the Ned Garrett. It was to run from the northwest corner to the branch, and from the southwest corner to the branch. The east line was the Ned Garrett west line. When I bought this land from Zetta Curl in 1886, there were some hacks around that 160 acres where this last survey is—some old hacks there. The last survey made by the surveyor ran with those hacked lines. Now and then we could find some hacks on the trees. We couldn't find them all the way but we could part of the way." The "dotted" line to which Douglas referred indicates on a map or plat the 160 acres claimed by him as run out by the surveyor.

We think the testimony of Douglas above quoted is sufficient to raise the issue of his claim to the specific 160 acres described in his petition and in the field notes of the surveyor, and of such claim for a continuous period of time to perfect his title thereto under the ten-year statute of limitation, and that the requirements stated by the Supreme Court in *Louisiana & Texas Lumber Co. v. Kennedy*, 103 Tex. 297, 128 S. W. 1110, and by this court in *Louisiana & Texas Lumber Co. v. Stewart*, 130 S. W. 199, were substantially met. See *Davis v. Receivers of Houston Oil Co.*, 50 Tex. Civ. App. 597, 111 S. W. 219. It follows therefore, that the court did not err in refusing to instruct a verdict in favor of appellant, as complained of in its first and second assignments of error.

[2] There was testimony, and notably that of the surveyor, McLaurin, who ran out the 160 acres for Douglas, which was sufficient to raise the issue as to whether the lines which Douglas claimed had ever been surveyed before and, incidentally, as to whether Douglas ever claimed a definite 160 acres. On the issue thus raised two special charges were asked by appellant and one of them, which follows, was given: "You are instructed that before you can find in favor of plaintiff or intervener for anything in this suit you must believe from a preponderance of the evidence that Ned Douglas at some period of the ten consecutive years before the filing of this suit claimed the specific land as described in his petition herein, and that during all of such period of ten consecutive years he had and held open and notorious adverse possession of the land so described, and if you do not so find your verdict must be for the defendant in this case." The giving of this special

charge rendered the giving of the charge set out in the third assignment of error unnecessary.

The appellant having requested the giving of two special charges covering the same issue, one of which was given, cannot complain that the other was not also given. The assignments are overruled.

We have carefully considered appellant's remaining assignments of error, and are of the opinion that none of them points out reversible error. The seventh and eighth assignments are not followed by such a statement as is required by rule 31, and are not therefore entitled to consideration. The record discloses no reversible error, and the judgment of the court below is affirmed.

Affirmed.

#### CITY OF LA GRANGE v. BROWN et al.

(Court of Civil Appeals of Texas. Austin.  
Oct. 29, 1913. Rehearing Denied  
Dec. 3, 1913.)

##### 1. DEDICATION (§ 37\*)—ACCEPTANCE—WHAT CONSTITUTES.

Where the streets in a subdivision were dedicated to the public, the use of the streets by the public, and the removal of gravel therefrom by the city, under the claim that they were a public street, is sufficient to show acceptance of the dedication, even though the streets were not always maintained in a fit condition for travel.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.\*]

##### 2. DEDICATION (§ 63\*)—STREETS—ABANDONMENT.

Mere nonuser or delay in the improvement of a street, so that parts of it became practically impassable, and were not used by travelers, is insufficient to establish an abandonment by the city of that portion of the street, where it was a part of the general street system which was dedicated in laying out a subdivision.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 663\*)—STREETS—CARE FOR STREETS.

Even though the abutting owner owns the fee of the street, the city is entitled to remove soil or gravel therefrom when necessary to properly grade it, and to use the gravel or soil in improving the streets in another locality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.\*]

##### 4. MUNICIPAL CORPORATIONS (§ 663\*)—STREETS—IMPROVEMENT.

As Rev. Civ. St. 1911, art. 769, expressly authorizes cities owning waterworks to improve a highway to their plants even though they be without the corporate limits, a city may use gravel and soil, removed from a street within its corporate limits, for the purpose of improving the highway to its water plant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.\*]

Appeal from District Court, Fayette County; Frank S. Roberts, Judge.

Suit by A. J. Brown and others against the City of La Grange. From the judgment,

defendant appeals, and plaintiffs prosecute a cross-appeal. Affirmed in part, and in part reversed and rendered.

L. D. Brown, of La Grange, for appellant.  
John T. Duncan, of La Grange, for appellees.

KEY, C. J. This is an injunction suit, the nature and result of which are sufficiently indicated by the trial judge's findings of fact and conclusions of law, which are as follows:

#### "Findings of Fact.

"I find that the original town tract of La Grange was laid out into streets, blocks, and alleys about the year 1838, and I find that as an addition to the original town tract of La Grange W. W. Ligon and N. W. Faison laid out on the north side of La Grange what is known as the Faison & Ligon addition of the town of La Grange, and I find that lots 1, 2, 3, and 4 and lot 6 in block 504 in the Faison & Ligon addition belong to the plaintiffs herein, and that they have succeeded to whatever rights the original proprietors, to wit, Faison & Ligon, had in and to said lots. I find that Washington street was a street in the original town tract, and that when the Faison & Ligon addition was laid out it was projected through said addition, and terminated at the north boundary of said town. I find that lots 1, 2, 3, and 4, in block 504, abut upon the east side of Washington street, and I find that plaintiffs own block No. 503, and it abuts upon the east side of Washington street. I find that all property lying opposite blocks 503 and 504, and on the west side of Washington street, lie outside of the town of La Grange, and that there are no blocks or lots in said town lying on the west side of Washington street, and opposite blocks 503 and 504. I find that the Faison & Ligon addition to the town of La Grange was laid out into blocks, lots, streets, and alleys about the year 1854, and that said streets and alleys were mapped and platted and dedicated to the public. I find that about the year 1856 the city of La Grange was incorporated by an act of the Legislature, and has remained an incorporated town ever since said date, and is now incorporated, but I find that about the year 1879 or 1880, it abandoned its Legislature charter and adopted the charter which is provided for cities and towns of 1,000 inhabitants and over, as set out in the Revised Statutes of the state of Texas. I find that Washington street is 60 feet in width, and that all streets running north and south are of similar width. I find that the streets running east and west through the Faison & Ligon addition are 30 feet in width, and none of these have been opened through plaintiff's property by the city. I find that the lots in the Faison & Ligon addition are 160 feet in length and 91 feet in width. I find

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the blocks in the Faison & Ligon addition are 320 feet long by 364 feet in width. I find that North Line street is the northernmost street running east and west in the town of La Grange and in the Faison & Ligon addition. I find that its west end abuts upon Washington street, and that it also abuts upon lot 4 belonging to these plaintiffs in block 504 for a distance of 160 feet, and I find that while said west end of said street was laid out and dedicated in 1854, and if accepted it has never been worked, used, or traversed by the city of La Grange for street purposes, I am of opinion the evidence shows, and I find, that it was abandoned by the city, and I find that it has reverted to the plaintiffs, who are the owners of the lot No. 4 which is adjacent to and abutting upon said street.

"I find that the defendant has removed gravel from lot No. 4 belonging to the plaintiffs, and also removed gravel from the abandoned portion of the west end of North Line street, and that they were removing it at the time that this writ of injunction was applied for and granted, and also that said gravel was being removed from with (within) the city limits of La Grange, and was being carried and deposited in a roadway outside of the city limits of La Grange, and leading from the power house and the waterworks of the city to the city of La Grange, which was owned by the city of La Grange. I find that, for the purpose of improving the north end of Washington street and making it more traversable, the defendant has removed gravel, earth, and material, and has removed it to other places and used it in other portions of the city for public purposes, and without compensation to the plaintiffs, and that they are likely to continue to do the same hereafter; that the gravel, earth, and material in that part of Washington street upon which plaintiffs' property abuts, and over which the defendant has an easement or right of way, is valuable and merchantable and salable and has a market value, and I find that the plaintiffs have a fee-simple title to all that portion of Washington street upon which block 503 abuts, and upon which lots 1, 2, 3, and 4 abut, but such fee-simple title is subject to the easement or right to pass and repass by the defendant; that the defendant owns no title to the soil, but only a right to pass and repass, repair and maintain said street for use of the public; that Washington street has been dedicated to and accepted by the city of La Grange.

#### "Conclusions of Law.

"As a matter of law I find that the plaintiffs are entitled to a perpetuation of their preliminary injunction in so far as it prohibits the defendant from removing gravel from their lots, and in so far as it prohibits the defendant from removing gravel from the west end of North Line street which

abuts upon and lies adjacent to the lots of plaintiffs.

"I hold that the defendant, by virtue of its corporation, is entitled under the law to improve the north end of Washington street in order to make the same traversable and more useful to the traveling public, and I find as a matter of law that the defendant has the right to remove the excess gravel and material, etc., from said street, and to carry it to any portion of the city and use it on the streets of the city without compensation to the plaintiffs pursuant to a general plan of street improvement. I find that the plaintiffs are entitled to recover all costs in this behalf expended, and I direct that judgment be entered according."

In pursuance of the foregoing findings and conclusions, judgment was rendered perpetually restraining the city of La Grange from removing gravel from the property belonging to the plaintiffs, and from that portion of North Line street upon which the plaintiffs' property abuts, and which is designated as lot 4 in block 504. But the temporary injunction which had previously been issued, restraining the city of La Grange from removing gravel or dirt from Washington street where it abuts upon plaintiffs' property was dissolved. The city of La Grange has prosecuted an appeal, and is complaining only of that portion of the judgment which relates to North Line street; and the plaintiffs, by cross-assignment of error, are complaining of that portion which relates to Washington street.

#### Opinion.

[1, 2] 1. The questions dealt with in this opinion are presented by proper assignments, and we will now proceed to a consideration of those questions. Counsel for appellant contends, and we sustain the contention, that the trial court committed error in finding and holding that the city had not accepted the dedication of North Line street, and, if it had been accepted, that it was subsequently abandoned. It is not denied, and the undisputed proof shows, that the street referred to, as well as all others in the Faison & Ligon addition, was dedicated to the public in 1854; and, while no formal acceptance was shown, the proof disclosed such use of the street referred to by the city and the public as constituted an acceptance. The very fact that the city was removing gravel from that street, claiming the right to do so because of its being a public street, was a sufficient evidence of an acceptance of the dedication. But, in addition to that, it was shown that the greater portion of the street was used by the public as a highway. And what has been said in reference to the question of acceptance virtually disposes of the question of abandonment. The trial court seems to have been of the opinion that because it was not shown that that portion of

North Line street which abuts upon appellee's property had ever been worked by the city, and as it was shown that there was but little travel on that part of the street, and as a small portion of it was practically impassable, thereby causing travel to diverge and go around that portion, that therefore that portion of the street had been abandoned. In that holding we think the trial court fell into error.

"In determining whether a highway has been abandoned, it is proper to consider the mode in which the abutters and the public acquired their rights, as well as what the necessity and convenience brought about by subsequent progress and growth may require. Roads and streets are frequently laid out or dedicated with reference to future requirements, as well as with reference to the existing condition of things, and it is not just to assume that, because all of the way is not used by the public or by the abutters, it has been abandoned." Elliott on Roads & Streets, p. 660.

"But except where it is otherwise provided by statute, mere nonuser by the public, or the payment of taxes on such property by an individual, or delay in opening or improving the street, or a lease of the street, or permitting a steam railroad to occupy a part of the street, or continued encroachments on the streets by structures, or the inclosure of the street, or a part thereof, is ordinarily not sufficient of itself to show an abandonment." 28 Cyc. 841, 842.

In *Relly v. City of Racine*, 51 Wis. 526, 8 N. W. 417, it was said: "Until the time arrives when any street or part of a street is required for actual public use, and where the public authorities may be properly called upon to open it for the public use, no mere nonuser, of any length of time, will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public."

[3] 2. But appellees present the contention that, although North Line street may have been a public street, and may not have been abandoned, as was the condition as to Washington street, the city owns nothing but an easement, which is the right to use the land as a public highway, and that the fee remains in appellees; and therefore it is contended, as a necessary corollary, and more particularly because the Constitution of this state prohibits the taking of private property for a public use without compensation, that the city of La Grange had no authority to remove gravel or soil from either Washington or North Line street where those streets abutted upon appellees' property, and use the same for the purpose of improving other streets not abutting upon appellees' property, and one of which streets was not within the corporate limits of the city. There is some plausibility in the contention referred to, but, after due considera-

tion, we have reached the conclusion that it is not in fact correct, and that the correct rule is that when a street, or other highway, has been legally established, the officer or governing body charged with the duty of opening up, constructing, and maintaining such street or highway has the right to remove soil, gravel, and other like material from one part of such street or highway to another portion of that or some other street or highway, for the purpose of constructing or maintaining the latter; and our views upon the subject are so well expressed by the Supreme Court of Connecticut in the case of *City of New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360, that we copy as follows from the opinion of the court in that case:

"It is apparent in this case that the real question is whether the city of New Haven has a right, as against an adjoining proprietor, to take soil from one street, in the network of streets in one particular part of the city, and use it in another street of that network near, but not directly connected with, the street from which the soil is taken, for the purpose of making and grading such other street; such soil being reasonably necessary for that purpose. Whether, in other words, the city has a legal and exclusive right, as against the respondent, to carry the soil from in front of his land (which must necessarily be removed by some one in grading the street), and deposit it in a depression in Derby avenue for the necessary purpose of raising that avenue up to a conforming grade. Whenever the performance of a public duty is imposed upon any person or corporation, the powers necessary for its full performance are impliedly, if not expressly and specifically, given. The duty of laying out, making, and maintaining public highways has been imposed upon the towns in which they are situate. In relation to the laying out of highways their powers and duties are expressly prescribed, but in relating to making and maintaining them their powers are not prescribed, but are implied, and are commensurate with the duty imposed. We must look, then, at the character of the duty, and see what powers are necessary for its performance.

"There has never been in our history a statutory provision prescribing the manner in which highways should be made. Nor has there been any provision in respect to the material of which to make them. By immemorial usage material has been taken for their construction within the limits of the highways of the town. Hills have been excavated and swamps and valleys filled up with the material taken from the excavation, and material existing in excess at one place has been taken to another where it was deficient. These things and many more have been done from the necessity of the case and the nature of the duty, according to the discretion of the officers appointed to do them; and, where they have acted reasonably, their

power has never been successfully questioned. The inference derivable from the silence of the statute in relation to the manner in which material was to be obtained for the construction of the highways, from the immemorial usage in relation to it, and the necessity in which it originated, and from whatever judicial decision we have respecting it, is very clearly that it has always been contemplated and understood by the General Assembly and the public that material for the construction of highways was to be taken within their limits, and might be removed from any place where unnecessary to any place where its use was necessary, without regard to the rights of adjoining proprietors, if the necessity was a reasonable one, and the power was exercised in a reasonable manner. So, too, in relation to the manner in which highways should be maintained and repaired, and the places from which material should be obtained for that purpose, the statutes have been silent. In 1643 the towns were directed to appoint surveyors of highway to 'mend' them, and the surveyors were authorized to 'call out for that purpose every team and person fit for labor.' No provision was made as to the manner in which material was to be obtained, or the extent to which the ways should be mended. That statute was extended in the Code of 1650, and a preamble added as follows:

"Whereas the maintaining of highways in a fit posture for passage, according to the severall occasions that occure, is not onely necessary for the comfort and safety of man and beast, but tends to the proffit and advantage of any people, in the issue,—

"It is thought fitt and ordered' etc.

"This quaint preamble does not *prescribe* the manner in which highways are to be maintained, but it recognizes the principles which should govern, and have ever since governed, the legislation of the state and the officers of the towns in the maintenance of them. These principles contemplated their maintenance in a 'fit posture for passage according to the several occasions that should occur,' not only 'for the comfort of man and beast,' but for 'the profit and advantage of the people,' and therefore contemplated all such improvements in structure and grade as 'occasions' occurring in consequence of the advancement and growth of the country, and particularly of populous and growing cities, should make necessary. At a subsequent revision this preamble was dropped, probably because thought unnecessary, and because preambles were usually omitted when the laws were digested, and the statute was silent on the subject until the Revision of 1821, when it was remodeled, and the present provision inserted, requiring the towns to keep their highways 'in good and sufficient repair.' The same usage in relation to the taking of material from any part of the highways, and using it in any other place in the highways, without regard to any of the supposed rights

of adjoining proprietors, originating in the same necessity, has existed in respect to the maintenance of highways, as to their construction, and the same inference may be drawn from it.

"Railroads are usually authorized to take additional land outside of their limits for the purpose of obtaining material for the construction of their roads, because it is deemed possible that more material may be required than can be readily obtained within their prescribed limits. No such provision has ever been made in favor of towns, and it is perfectly obvious that the Legislature and the towns have considered the right and the power to take material where it could be found within the limits of the highways, and use it in any other place where it was necessary to use it, and where it was not to be found, as a right and power necessarily incident to the easement, and adequate to the wants of the public in respect to such material.

"It seems clear to a majority of the court, upon this review of the statutes and usages of the state in regard to the making of highways, that the power of the officers of the town to remove material from place to place upon its highways, for the purposes of construction, improvement, or repair, and their right to do so are commensurate with the duties imposed and the limits of the highways, and paramount to the rights of adjoining proprietors, and that presumptively that right was paid for when the land was subjected to the easement.

"If the foregoing propositions are true in relation to the officers and highways of a town, they are a fortiori true of the corporation and streets of the city of New Haven; for that city is not only a highway district, with all the powers possessed by towns, but by a special provision of its charter it is authorized to grade its streets. The power to grade is not simply the power to level one street so that its parts shall conform with each other, but the power to grade numbers of streets so that they shall conform to each other in a common grade. Such a construction of the charter is necessary to enable them to provide proper drainage and sewerage. No provision is made for the acquisition or disposition of material, and presumptively it was contemplated by the Legislature when they granted the power to grade, and by the board who assessed damages or benefits to the respondent when the street was laid out, that material excavated therein could, and probably would, be removed on some other street which required to be elevated to grade.

"We think therefore that the power and right of the city to remove the soil in question to Martin street or Derby avenue, where it is reasonably required, are undoubted; that the right is paramount to the rights of the respondent; that presumptively he has been paid for the soil which has been or is

to be taken, and has no just cause of complaint; and that, in attempting to remove that soil onto his own premises and deprive the city of it, after being apprised of their immediate intentions and necessities, and to the injury of the city, he was a wrongdoer, and should be restrained by injunction."

While one expression in that opinion would seem to indicate a dissent on the part of some member of the court, it is subsequently stated, at the end of the opinion, that the other judges concur. But, be that as it may, we think the opinion is sound; and, as it deals with conditions substantially similar to those existing in this state, we cite and quote from it in support of the conclusion we have reached upon the question now under consideration. That question, in so far as our own and the researches of the counsel representing the respective parties disclose, has not been decided in this state. In fact, the Connecticut case, and *Deniston v. Clark*, 125 Mass. 216, are the only cases which we have found which are directly in point. The Massachusetts case is to the same effect as the Connecticut case; but it appears to have been controlled, to some extent, by certain statutory provisions not involved in the case at bar, nor in the Connecticut case.

[4] 3. If it be contended that the doctrine announced in the Connecticut case is not applicable to that portion of this case which involves the right of the city of La Grange to remove gravel and soil from the streets abutting upon appellees' property for the purpose of improving a highway outside the limits of the city, we think a sufficient answer is that, under article 769 of the Revised Statutes of 1911, the city of La Grange was authorized to construct and maintain a street or roadway from the city limits to its waterworks plant, and that it had the same power and authority in reference to that street or roadway that it had as to any street within the corporate limits.

4. For the reasons above stated, the judgment of the trial court, in so far as it restrains the city of La Grange, its officers and employes, from removing gravel, soil, and similar material from North Line street, is reversed and here rendered for appellant; but in all other respects that judgment is affirmed.

Affirmed in part, and in part reversed and rendered.

## MISSOURI, K. & T. RY. CO. OF TEXAS v. MEYER.

(Court of Civil Appeals of Texas. Austin. Nov. 19, 1913.)

### 1. RAILROADS (§ 414\*)—INJURIES TO STOCK—LIABILITY.

There being no law in this state requiring a railroad to fence its right of way or inclose its track, the only statute on the subject merely declaring that when it has not done so, and

an animal is injured by a passing train, the injury shall constitute prima facie evidence of negligence on its part, a railroad company, though its right of way fence at one time inclosed a deep hole on the right of way, was under no duty to keep such hole inclosed for the purpose of preventing live stock from falling therein and was not liable for the death of a cow which fell therein after it had moved its fence so as not to inclose such hole.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1474, 1475; Dec. Dig. § 414.\*]

### 2. RAILROADS (§ 411\*)—INJURIES TO STOCK—LIABILITY.

A railroad company which constructed a fence at right angles to its road connecting with its right of way fence, which after it moved its right of way fence closer to the track served no purpose except to separate the fields of an adjoining owner, was under no obligation to such adjoining owner or any one else to maintain such fence, and for its failure to do so was not liable to the owner of a cow which escaped from its pasture through such fence and fell into a hole.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

### 3. RAILROADS (§ 411\*)—CONDITION OF LAND—EXCAVATIONS.

A railroad company which removed considerable dirt from its right of way, leaving a basin into which surface water flowed and washed a deep hole, was under no obligation to guard such hole to prevent persons or animals falling therein, as the excavation was lawful and the hole was caused by natural causes.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

Appeal from Fayette County Court; Geo. Willrich, Judge.

Action by H. W. F. Meyer against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Geo. E. Lenert, of La Grange, for appellant. Edward H. Moss, of La Grange, for appellee.

KEY, C. J. This suit originated in a justice of the peace court but was appealed to and finally tried in the county court, where the plaintiff obtained a judgment against the defendant for \$125, and the defendant has appealed.

The cause of action was predicated upon the fact that a cow belonging to the plaintiff fell in a deep hole in the ground and broke her neck. The hole referred to was on the defendant's right of way. About ten years prior to the trial, during an overflow of the Colorado river, the track and road-bed of the defendant were washed away from the approach to the bridge across the river, and the defendant in repairing that injury removed considerable dirt from the right of way, leaving a cut or basin of some length which subsequently formed a ravine, into the upper end of which surface water flowed; and, as a result of the concentration of the flow of water at that place, a large hole, some 8 or 10 feet deep and 17 feet wide, was washed out, and it was into that hole

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that the plaintiff's cow fell and was thereby killed. The proof shows that the defendant formerly had its right of way so fenced as to include the greater portion of the ravine referred to and all of the hole in question within the defendant's right of way inclosure. However, about four years prior to the accident the defendant moved its right of way fence nearer to its railroad track and left the hole and all of the ravine outside of its right of way fence. The proof shows that the defendant at the time in question still had control of and had been maintaining a fence which extended straight out from its track and trestle to and beyond its fence parallel to its track. The fence referred to constituted the dividing fence between a pasture and a field which belonged to one William Hermes. The proof shows that the plaintiff was pasturing his cow in Mr. Hermes' pasture; that the cross fence referred to, which extended straight out from the defendant's trestle, got out of repair, so that stock could pass through it at a point near the ravine on the defendant's right of way but beyond and outside of the right of way fence; and that the plaintiff's cow passed through that place and went from there to where she fell in the hole. It seems that at that time there was no fence between the defendant's right of way and Mr. Hermes' field, but on account of the bluff formed by the north bank of the ravine there were only one or two places that the cow could have gone into the field, but of course she could have gone back into the pasture at the same place she got out of it. There was no proof that the cow was frightened by a passing train, or that the defendant did anything proximately contributing to its death, unless the failure to keep the fence repaired at the place where the cow got out of the pasture was the proximate cause of the injury. It was also shown that the hole referred to was surrounded by a considerable growth of vines and grass, which partially obscured its existence.

[1] The foregoing is substantially a correct statement of the material facts, all of which are established by uncontroverted testimony. Counsel for appellant contends, and we sustain the contention, that the facts referred to disclose no cause of action against appellant. There is no law in this state which requires a railroad to fence its right of way or inclose its track, and the only statute we have upon the subject merely declares that, when a railroad has not done so, and an animal is injured by a passing train, the fact of such injury shall constitute prima facie evidence of negligence on the part of the railroad. Therefore it must be held that while, at one time, appellant had the hole in question inclosed within its right of way fence, it was under no duty to keep it so inclosed for the purpose of preventing live stock from falling therein; and from this it follows that it had the right to withdraw

its fence and leave the hole referred to outside of the fence which inclosed the track.

[2] Also, and for the same reason, we think it must be held that appellant owed appellee no duty and was under no obligation to keep in repair the cross fence which extended beyond the fence which inclosed the track. Granting that appellant had constructed that cross fence so as to connect with its right of way fence as it originally stood, still, after the right of way fence was moved in nearer the railroad track, the cross fence which extended beyond the right of way fence served no purpose except to separate Mr. Hermes' pasture from his field, and appellant was under no obligation to the owner of the pasture, or to any one else, to maintain that fence; and, being under no such obligation, it was not guilty of negligence when it failed to do so. 1 Thompson, Neg. (2d Ed.) § 985; 29 Cyc. 442, 444; Railway Co. v. Oakes, 94 Tex. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835; Padgitt v. Railway Co., 90 S. W. 67. In the case last cited the proof showed that the railroad ran through Mrs. Padgitt's farm, leaving her residence on one side and her pasture on the other; that she had a lane, fenced on both sides, leading from the house to the pasture; that the railroad had fenced its right of way but had put in the cattle guards on the right of way in such manner as that live stock could pass over; and that a horse belonging to Mrs. Padgitt passed over one of the cattle guards, went upon the track for a distance of about 100 yards to a bridge, and fell in the bridge and was injured. The court states that the cattle guard was so constructed as to form no obstacle to animals crossing over it. The trial court directed a verdict for the defendant, and upon appeal the Fourth Court of Civil Appeals said: "The animal was not injured through the locomotives or cars of appellee. The case of appellant is no better than if appellee had never inclosed its right of way across the farm. At best the evidence shows that appellee had its track in such condition that animals had free access to it. Appellee was not required to keep its track or bridges in such condition as not to injure animals that went upon the right of way." We fail to see any distinction in principle between that case and the case at bar.

This case is readily distinguishable from Railway v. Cluck, 99 Tex. 130, 87 S. W. 817, relied on by counsel for appellee. In that case the railroad had leased a spring from the plaintiff's father converted it into something like a well and covered it over, and was using it to obtain water for its engines. There was a pathway passing by it, which, to the knowledge of the railroad, was in constant use by Cluck and persons at his residence, which was near by. The covering over the well was washed away, and the railroad negligently failed to replace it, and, as a result thereof, Cluck, the plaintiff in that

case, who was visiting his father's house, while traveling the path in question during the nighttime, fell in the well and was injured; and it was held that the railroad owed him the duty of exercising reasonable care and diligence for the purpose of preventing such accidents. The case in hand is no such case as that.

[3] Nor is this a case in which the owner of premises had dug a hole in the ground and left it in such condition as to constitute a pitfall into which persons or animals might unconsciously step and be injured; and therefore it is not necessary to consider what would be the law in such a case. Appellant had the right to make the excavation it did upon its right of way, and it is not claimed that any injury would have resulted to appellee's animal if conditions had remained as they were after the excavation referred to. The hole, which was subsequently formed by surface water being concentrated at a particular point and flowing into the excavation, was a condition brought about by natural causes and not by any act of the railroad, and therefore it was under no obligation to appellee, or any one else, to take any steps to prevent live stock from falling therein.

For the reasons stated, the judgment of the trial court is reversed, and judgment here rendered for appellant.

Reversed and rendered.

### BROWN et al. v. BRENNER et al.

(Court of Civil Appeals of Texas. Galveston. Nov. 20, 1913. Rehearing Denied Dec. 11, 1913.)

#### 1. APPEAL AND ERROR (§ 732\*)—ASSIGNMENTS OF ERROR—REQUISITES.

An assignment that the court erred in refusing to grant specified defendants' amended motion for new trial was too general to present any question for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3022-3024; Dec. Dig. § 732.\*]

#### 2. DEEDS (§ 78\*)—VACATION — GRANTOR — MENTAL INCOMPETENCY — QUESTIONS FOR JURY.

In suit to set aside a deed, evidence held to authorize submission to the jury of the question whether the grantor was mentally incompetent to make the conveyance at the time he signed it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 648; Dec. Dig. § 78.\*]

#### 3. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—PROPOSITION—RELEVANCY.

A proposition that the court erred in permitting certain witnesses to testify that in their opinion the grantor in a deed in controversy did not have mental incapacity to transact business, and in the witnesses' opinion he was not in his right mind when he executed the deed, was not germane to an assignment that the court erred in refusing to grant defendants a new trial because the evidence was insufficient to warrant a finding that the gran-

tor had not mental capacity when he executed the deed and therefore could not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 4. APPEAL AND ERROR (§ 760\*)—REVIEW — BRIEFS—OBJECTIONS AND EXCEPTIONS.

A ruling on admission of testimony cannot be reviewed where appellant's brief does not indicate that any objection was interposed to the testimony when offered and does not refer to bills of exception as having been taken to the court's ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.\*]

#### 5. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—PROPOSITIONS—APPLICABILITY.

A proposition that, plaintiff having introduced several witnesses to show that the grantee in a deed in controversy had mental capacity when he executed it, it was error for the court to render a judgment canceling the deed but should have directed a verdict for defendants was not germane to an assignment that the court erred in refusing to grant defendants a new trial because the evidence was insufficient to warrant the jury in answering in the affirmative an interrogatory as to whether the grantees had notice of the grantor's alleged mental incapacity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 6. INSANE PERSONS (§ 66\*)—CONVEYANCE — EXECUTION—CONSIDERATION—DUTY TO RETURN.

Where, in a suit to set aside a deed alleged to have been executed by an insane person, there was no evidence that he had any money at the time of his death except \$125, which was the proceeds of rents of the property in controversy, and there was no proof that he purchased necessities with the consideration nor that it was invested by or for him for the benefit of his estate or was still on hand, defendants were not entitled to a return of the consideration as a condition to canceling the deed.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 100-102, 104, 105; Dec. Dig. § 66.\*]

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Action by W. F. Brenner and others against Carrie Brown and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Heldingsfelders and Jas. Slyfield, both of Houston, for appellants. Van Velzer & Lewis, D. F. Rowe, and Leonard Doughty, all of Houston, for appellees.

McMEANS, J. This suit was brought by appellee W. F. Brenner against Carrie Brown, O. Frosch, V. T. Watson, C. E. Heldingsfelders, and Camille Blue in the nature of a bill in equity for the purpose of securing the cancellation of a deed of conveyance of certain lots of land in the city of Houston, wherein plaintiff's father, Henry Brenner, was grantor and Carrie Brown was grantee, and to secure the cancellation of various instruments subsequently executed, whereby the title to the grantee from Henry Brenner was conveyed to appellants. Cancellation was sought upon the grounds that: (1) Carrie Brown was a fictitious person; (2) the

deed to her was a forgery; (3) it was induced by active fraud; (4) that the grantor was mentally incompetent to make the conveyance at the time he signed it; and (5) the appellants took with knowledge of his mental infirmity. After the institution of the suit appellee Brenner conveyed to Camille Blue an undivided interest in the lots, and thereafter she intervened in the suit, setting up the title thus acquired, and became plaintiff with Brenner as against the other named defendants. The defendants answered, setting up various defenses, the character of which, in view of the disposition we shall make of this appeal, need not be stated. The case was submitted to a jury upon special issues, and, upon the coming in of the verdict, judgment was rendered for plaintiffs, and defendants have appealed.

One of the hotly contested issues of fact on the trial was whether, at the time Henry Brenner signed the deed conveying the property in controversy to Carrie Brown, he was mentally incompetent. The court submitted this issue to the jury as follows: "Sixth issue: If in answer to the first issue you find that the purported deed from Henry Brenner to Carrie Brown, therein inquired about, was not a forgery, then and only in such event you will answer this question: Did Henry Brenner have sufficient mental capacity to know and understand the nature and result of the transaction of making and executing the said deed at the time same was made and executed?" To which question the jury answered, "No."

[1] Appellants' first assignment of error is as follows: "The court erred in refusing to grant defendants Frosch, Heldingsfelder, and Watson's amended motion for a new trial." That this assignment is too general to authorize or require consideration is too well settled to require the citation of authorities.

[2] The second assignment complains that the court erred in refusing to grant said defendants a new trial because the answer to the jury to the sixth special issue, above quoted, is against the preponderance of the evidence, and there was no evidence, or not sufficient evidence, to warrant the jury in answering the question in the negative. Upon this issue the following is part of the evidence introduced:

Dr. G. W. Larendon testified: "My present profession is physician and surgeon. I have been so occupied since 1889, about 23 years, here in the city of Houston, practicing medicine since 1889. I am city physician at the present time. I have held that position 12 or 15 years. I have also been county health officer several times. My practice has brought me in contact with patients suffering from mental alienation to quite an extent, years' experience with them. I am investigating cases of mental alienation every week or two throughout my work as city and county health officer; we see them. I knew Mr. Brenner during his lifetime very

well. I have known Mr. Brenner about 20 years. I did have an opportunity during Mr. Brenner's lifetime to observe him in his acts and conduct or business transactions. I was his physician. I attended to him during the life of my father and after his death continuously up to his last illness. I attended to him off and on for 15 years. I was attending him during his last few months of his lifetime; up to the last week, I lost track of him. I did notice peculiarities of conduct or of conversation which would indicate his mental condition. He was suffering with senile dementia, insanity due to old age. It had been coming on him for years. That is a progressing disease, the result of age. This disease does affect a man as to his soundness of mind; it makes them incompetent. My professional opinion in regard to Mr. Brenner, during the last three months of his lifetime, is that he was of unsound mind. He did not have sufficient mental capacity during the last three months of his lifetime to understand ordinary business transactions. I am a graduate of Jefferson College of Philadelphia, class of 1889. In the course of my work as health officer I have been called upon to examine hundreds of cases of insanity. I am still so employed in examining such cases as they come up, but not in court proceedings. I come in contact with them constantly as health officer. Old man Brenner died February 12, 1911, just a year ago. I make this statement under oath, as my judgment as a physician, from what I knew of him and my general knowledge of such cases, that he did not have mental capacity to transact business affairs understandingly; that he was of unsound mind then and a year prior to that. He was in my office every day for a year, most every day or every other day, for the past year. He never left me. In my opinion I think he was of unsound mind prior to his death in February, 1912, of such character that he was incapable of transacting any business or understanding any business transactions for about a year or 18 months. He was mentally unsound prior to that time. I could not say how long prior to a year or 18 months before his death, but he has been going from bad to worse for years. From actual observation with him for years that I know of, he has been of such mental condition. I do not think he did understand any business dealings. I do not think he was capable of transacting any business; not capable of attending to his own business."

Judge J. A. Breeding, a practicing lawyer of the Houston bar, testified: "I have resided in the city of Houston very close to 32 years. It will be 32 years in June. I am a practicing lawyer. I was acquainted with Henry Brenner in his lifetime. I first knew Henry Brenner, I think it was, about 1885. I was never very intimate with him, but frequently he would consult with me or come to my office on business, and we always spoke when

we passed by. I never was at his house, and he never was at mine, but I knew him just like I know hundreds of other people that I meet daily almost. He has consulted me on some of his matters. I would not be accurate as to the time prior to his death that I had my last conference with him, but it strikes me about five or six months. During my acquaintanceship with him I did have occasion to ascertain whether he had any peculiarities or not. The old man in his late years, well, I will say three or four years of his life, became to my mind very peculiar. He would come to my office and ask me questions or consult me about matters, and, when I would give the information that he wanted, he would sit there; he would pick at himself this way (indicating); and directly he would seem to wake up and go out of the office and come back and ask me what it was he was talking about when he was in before. I had him to do that three or four times. I know that the old man had a mania for making wills. I know of three he made, and he applied to me to make a couple more, but I told him I thought it was useless. Outside of those I had connection with I know of one that Mr. Heidingsfelder made, or attempted to make. From my observation of this man my judgment is that he was not competent in mind to transact business, and I refused to transact business for him on that account."

There was other testimony along the same line, notably that of plaintiff, W. F. Brenner, but that which we have quoted is sufficient to raise the issue and require its submission to the jury and to warrant the jury in answering the question in the negative.

[3, 4] A second proposition under the second assignment is to the effect that the court erred in permitting the witnesses Larendon, Breeding, and Brenner to testify that in their opinion Henry Brenner did not have mental capacity to transact business, and that in their opinion he was not in his right mind. This proposition is clearly not germane to the assignment, which complains that the evidence of these witnesses did not authorize the jury to answer the sixth special issue in the negative. Besides this there is nothing in appellants' brief to indicate that any objection was interposed to this testimony when it was offered in the court below, nor are any bills of exception referred to as having been taken to the action of the court in permitting the witnesses to testify. The proposition cannot be considered. The second assignment is overruled.

[5] By their third assignment of error appellants complain that the court erred in not granting to them a new trial because the evidence was insufficient to warrant the jury in answering in the affirmative the seventh special issue submitted by the court, which is as follows: "If you answer the preceding issue, and in the negative, then and

only in such event you will answer this question: Was the want of mental capacity in Henry Brenner to make the deed in question known to defendants Frosch and Heidingsfelder, or either of them, at the time of the execution and delivery of the purported deed from Carrie Brown to Frosch, if any such deed you find was executed and delivered?" The proposition under this assignment is as follows: "The plaintiff in this cause, having introduced in the trial of this cause several witnesses in their behalf, who had known Henry Brenner—some of them for several years, and one of the said witnesses being Camille Blue, the intervener herein, and who attended to the wants of Henry Brenner for a term of some months next preceding his death, and who attended to his burial, and she and each of said witnesses having had opportunities of seeing the acts and the deeds of said Henry Brenner in the conduct of his business transactions, and the said acts and deeds as detailed in evidence by the said witnesses to the jury, proving clearly that Henry Brenner, on and before the 1st of December, 1910, was in full possession of his mental faculties and fully able to transact business up and until his death, then it was fundamental error of law for the court to render the said judgment it did render herein, canceling the two said deeds under which the defendant O. Frosch now holds the title to the property in controversy in this suit, and it was the duty of the court to have directed a verdict for the defendants." The proposition is not germane to the assignment, and, even if it were, the testimony set out in the statement in support of the assignment does not remotely refer to knowledge or want of knowledge on the part of defendants Frosch and Heidingsfelder of the want of mental capacity of Henry Brenner at the time the deed to Carrie Brown was signed. There is no merit in the contention that the assignment points out fundamental error. Appellees object to the consideration of this assignment, and the objection must be sustained.

[6] The jury found that Carrie Brown paid to Henry Brenner \$1,500 as the purchase price of the lots, and this was the consideration recited in the deed. Appellants by their fourth assignment contend in effect that, the jury having found that said Brenner at the time he made the deed to Carrie Brown was mentally incompetent, the court should not have rendered judgment for appellees, unless plaintiffs should place the said Carrie Brown in statu quo by restoring to her the amount of money she so paid Henry Brenner for the land, and that the court should have granted defendants' motion for a new trial in order that plaintiff and intervening plaintiff might amend their pleadings and offer to do equity.

The jury found that, at the time Henry Brenner executed the deed to Carrie Brown and received the recited consideration, he

was mentally incompetent. There is no evidence in the record that Henry Brenner had any money at the time of his death except \$125 (and this was the proceeds of collection of rents of property belonging to him and now in controversy), nor that he had purchased necessities with the \$1,500, nor that it had been invested by or for him for the benefit of his estate, nor that it was still on hand. To entitle appellants to this character of relief it was incumbent upon them to show by their pleadings for affirmative relief, and to establish by evidence, that the money received by Henry Brenner from Carrie Brown was expended for necessities, or that it was on hand at the time of his death, or that it had been invested by or for him for the benefit of his estate. In the absence of such proof, plaintiffs would not be required to return the consideration. *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 328, 77 Am. St. Rep. 849; *Williams v. Sapieha*, 94 Tex. 436, 61 S. W. 115; *Bank v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495, on page 496, and authorities cited. The point raised by this assignment was not made an issue upon the trial in the court below either by the pleadings or the evidence; hence the assignment points out no error and is overruled.

The record discloses no reversible error, and the judgment of the court below is affirmed.

Affirmed.

### HELMKE v. UECKER.

(Court of Civil Appeals of Texas. Austin.  
Nov. 26, 1913.)

#### 1. BILLS AND NOTES (§ 94\*)—CONSIDERATION—DEBT BARRED BY LIMITATION.

A previous debt, though barred by limitation, was a sufficient consideration for the execution of a new note to the extent that it was given for such indebtedness.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 166-173, 175-181, 185-189, 192, 193, 196-198, 200, 202-207, 212; Dec. Dig. § 94.\*]

#### 2. CHATTEL MORTGAGES (§ 241\*)—CANCELLATION—DESTRUCTION OF NOTE.

Where the holder of a note for \$240 secured by a chattel mortgage verbally agreed that, if the mortgagor executed a note for a larger amount in consideration of the surrender of the smaller note and the cancellation of the mortgage, the mortgagor's execution and delivery of the larger note, without more, canceled the mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 503, 504; Dec. Dig. § 241.\*]

#### 3. CHATTEL MORTGAGES (§ 241\*)—COVENANT TO CANCEL.

In such case, if the action of the parties did not amount to a present cancellation of the mortgage, it was a covenant on the part of the mortgagee to cancel it in the future, which the mortgagor could enforce in a suit on the mort-

gage note, or for breach of which he might recover damages.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 503, 504; Dec. Dig. § 241.\*]

#### 4. CHATTEL MORTGAGES (§ 241\*)—FORECLOSURE.

Where a debt evidenced by a note for \$240, secured by a chattel mortgage, was merged in a larger note executed by the mortgagor, without any agreement to release the chattel mortgage, the mortgagee would be entitled to judgment for the principal of the larger note, with foreclosure of the chattel mortgage to the extent of the debt represented by the \$240 note.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 503, 504; Dec. Dig. § 241.\*]

Appeal from District Court, Comal County; Frank S. Roberts, Judge.

Action by Heinrich Helmke against Herman Uecker. Judgment for plaintiff for less than the relief claimed, and he appeals. Reversed and remanded for new trial.

H. M. Wurzbach, of Seguin, and Martin Faust, of New Braunfels, for appellant. E. E. Fischer and James Harley, both of Seguin, for appellee.

JENKINS, J. This is a suit to recover upon a note for \$659.20, executed by appellee in favor of appellant.

According to appellee's testimony, on October 2, 1912, he was indebted to appellant in the sum of \$240 principal and \$19.20 interest, represented by his note, and secured by a chattel mortgage, and also the sum of \$480 principal, with interest for some nine or ten years, which latter amount was barred by the statute of limitation. Being unable to pay the \$240, he made an agreement with appellant that he would execute his note due January 1, 1913, for \$659.20, which note was to include the \$259.20 due on his note and \$400 of the old indebtedness, in full satisfaction of the old indebtedness and of the chattel mortgage, the appellant agreeing to surrender the \$240 note, and to cancel and to deliver to him the chattel mortgage; that in pursuance of this agreement he executed the note herein sued on for \$659.20; that appellant destroyed in his presence the \$240 note, but has never canceled nor delivered to him the chattel mortgage; and that the bringing of this suit to enforce said mortgage is a breach of the contract on the part of appellant, for which reason the consideration for the execution of the note sued on has failed to the extent of \$400 thereof.

According to appellant's testimony, appellee, on October 2, 1912, was indebted to him in the sum of \$791.20, besides some interest on \$532 of such amount, none of which was barred by limitation; that \$240 principal and \$19.20 interest of said indebtedness was represented by a note secured by the chattel mortgage herein sought to be foreclosed; that on said date he agreed with plaintiff to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
161 S.W.—2

give him \$132 of said indebtedness, and take his note due January 1, 1913, for the remainder, \$659.20; that nothing was said about the chattel mortgage; that he complied with his part of said agreement. The parties hereto are brothers-in-law.

The court instructed the jury as follows: "If you believe from the evidence that defendant renewed the \$240 note due plaintiff and secured by a mortgage lien described in the pleadings, and at the time he did so he executed the note for \$659.20 as a renewal for said \$240 and interest thereon, and as a renewal of the old indebtedness barred by limitation to the amount of \$400, but that he did so upon the express condition and promise upon the part of the plaintiff that he (the plaintiff) would release and cancel said mortgage lien on the property theretofore given to secure payment of said \$240 note, and you further find that plaintiff did promise to cancel said mortgage lien, and, in consideration of that promise, the defendant renewed or promised to pay the old indebtedness of \$400, and that said \$400 was merged with the \$240 note, and that said note for \$659.20 was so executed, and that the plaintiff did not and has not canceled and released said mortgage, then the plaintiff would not be entitled to recover from the defendant the said \$400 included in said note, and, if you so find and believe from the evidence, you will return a verdict for the plaintiff in the sum represented by the \$240 note, together with interest and attorney's fees, and for foreclosure of said mortgage lien, and so state in your verdict."

The jury returned the following verdict: "We, the jury, find plaintiff entitled to the sum represented by the \$240, together with the interest and attorney's fees, and for foreclosure of said mortgage lien." Judgment was entered in accordance with said verdict, from which plaintiff in the court below has appealed.

Without taking them up serialim, we dispose of the propositions and counter propositions of appellant and appellee as follows:

[1] 1. The previous debt, though barred by limitation, if such was the fact, was a sufficient consideration for the execution of the new note to the extent that the same was given for such indebtedness. *Burnham v. McMichael*, 6 Tex. Civ. App. 496, 26 S. W. 888.

[2] 2. If, in pursuance to a previous verbal agreement that appellee would execute the note herein sued on in consideration of the cancellation and surrender of the \$240 note, and the cancellation of the mortgage securing the same, and the promise to pay \$400 of a previous existing debt, appellee executed and delivered to appellant the note herein sued on, and appellant destroyed the \$240 note, without anything further being said about the mortgage, such action operated as a cancellation of the mortgage at said time, and ap-

pellee, upon proper pleading, was entitled to have it so decreed in the judgment herein.

[3] 3. If it could be held under appellee's testimony that the action of the parties did not amount to a cancellation of the mortgage in eo present, then it was a covenant on the part of appellant to cancel same in the future, which appellee, under proper pleading, would be entitled to have enforced, in this suit, or for breach of which he might recover damages, if any he has suffered thereby. *Johnson v. Gurly*, 52 Tex. 226; *Byars v. Byars*, 11 Tex. Civ. App. 565, 32 S. W. 926.

[4] 4. If the facts should be found as claimed by appellant, viz., that the debt evidenced by the \$240 was merged in the note sued on, but without any agreement to release the chattel mortgage, appellant will be entitled to judgment for the principal, interest, and attorney's fees of the note sued on, with foreclosure of the chattel mortgage to the extent of the debt originally represented by the \$240 note and interest thereon.

For the reasons indicated, the judgment of the trial court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

#### McKNEELY v. BEATTY.

(Court of Civil Appeals of Texas. Galveston. Nov. 20, 1913.)

#### 1. JUSTICES OF THE PEACE (§ 174\*)—APPEAL—NEW TRIAL IN APPELLATE COURT—NEW CAUSE OF ACTION.

On the trial in the county court of an action appealed from justice court, the county court cannot entertain a cause of action on a demand in excess of that of which the justice court had jurisdiction, and hence where, in an action to recover \$152, plaintiff on appeal amended the petition so as to seek a recovery of \$350, in addition to that sought in the justice court, the allegations to sustain this additional recovery should have been stricken.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

#### 2. APPEAL AND ERROR (§ 1042\*)—HARMLESS ERROR—RULING ON MOTION TO STRIKE.

Where, though the county court on an appeal from justice court denied a motion to strike out a cause of action not set up in the justice court, when made, the judgment recited that it was sustained, thus indicating that the new cause of action was not considered, the error was cured.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.\*]

Appeal from Galveston County Court.

Action by Henry Beatty against C. E. McKneely. Judgment for plaintiff, and defendant appeals. Affirmed.

J. V. Meek, of Houston, for appellant. Geo. G. Clough, of Galveston, for appellee.

McMEANS, J. [1, 2] Henry Beatty brought suit against C. E. McKneely in the justice court of Galveston county to recover

\$152, alleged to be double the amount of usurious interest he had paid defendant, and on a trial in that court recovered a judgment for \$144. Defendant prosecuted an appeal from this judgment to the county court, where the plaintiff amended his pleadings, and therein, in addition to the claim asserted in the justice court, claimed actual damages in the sum of \$100, and exemplary damages in the sum of \$250. The case was tried before the court without a jury on the 4th day of March, 1913, and resulted in a judgment for plaintiff for the sum of \$136, from which the defendant has appealed.

On the day the case was tried the defendant filed a motion to strike out and hold for naught the allegations of plaintiff's amended petition praying for \$100 as actual and \$250 exemplary damages in addition to plaintiff's original demand. This motion appears, by an order entered upon the minutes on March 4, 1913, to have been overruled by the court, and this action of the court is made the basis of appellant's only assignment of error. It has been so frequently and consistently held that the county court, in a case to be tried de novo on appeal from the justice court, has no jurisdiction to entertain a cause of action on a demand in excess of that of which the justice court had jurisdiction, that we are at a loss to understand why the new cause of action was pleaded, and that the court did not sustain the motion to strike it out when first presented is inexplicable. However, while it appears from the order entered of record that the court refused to sustain the motion, the judgment rendered in favor of plaintiff upon the trial recites that the motion was sustained. We take it from this that the court did not consider the new cause of action for actual and exemplary damages, and that the sustaining of the motion as shown by the judgment, after overruling it as shown by the order, cures the error here complained of. The judgment is affirmed.

Affirmed

THEODORE KELLER CO. v. MANGUM.  
(Court of Civil Appeals of Texas. El Paso.  
Nov. 20, 1913.)

1. APPEAL AND ERROR (§ 916\*) — PRESUMPTIONS—ALLEGATIONS AS TO VENUE.

In determining, on appeal, the question whether a plea of privilege to be sued in the county of defendant's residence, was properly sustained, it will be presumed that the allegations of the petition which are material for the purposes of determining the proper venue of the action are true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3699-3705; Dec. Dig. § 916.\*]

2. VENUE (§ 21\*)—CONTRACTS—STATUTE.

Under Rev. St. 1895, art. 1194, providing that where a person has contracted in writing to perform an obligation in any particular county, suit may be brought against him either

in such county or in the county of his domicile, a consignor of cotton, whose bill of lading with draft attached was taken up and the cotton received in H. county, could not, in the consignee's action to recover an overpayment, plead the privilege to be sued in T. county, where he resided.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 34; Dec. Dig. § 21.\*]

3. VENUE (§ 21\*) — COMMISSION CONTRACT — FREIGHT CHARGES.

In such case, and to avoid a multiplicity of suits, the venue for the consignee's recovery of its overpayment of freight charges might also be laid in H. county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 34; Dec. Dig. § 21.\*]

Appeal from Harris County Court; Clark C. Wren, Judge.

Action by the Theodore Keller Company against E. L. Mangum. From the sustaining of a plea of privilege and the transferring of the cause to the county court of Taylor county, plaintiff appeals. Reversed and remanded.

A. R. & W. P. Hamblen, of Houston, for appellant. Cole, Wilson & Cole, of Houston, for appellee.

MCKENZIE, J. This action was commenced in the county court of Harris county by the Theodore Keller Company against E. L. Mangum, to recover \$214.58 alleged to be due. The following are, substantially, the allegations in the petition: "That said defendant is justly and truly indebted unto your petitioner in the sum of \$214.58, and for cause says that your petitioner are cotton factors engaged in the business of buying and selling cotton on commission, and allege that on the 6th day of September, 1911, the said defendant shipped to your petitioner 25 bales of cotton, and drew a draft on petitioner payable at Houston, to which was attached the bill of lading for said cotton for the sum of \$1,375, which said draft your petitioner paid; that the freight charges on said cotton amounted to the sum of \$59.24, which your petitioner paid, and that the interest on said sum so advanced amounted to the sum of \$20.89, your petitioner advancing to said defendant the sum of \$55 per bale; that at the request of said defendant your petitioner held said cotton for instructions as to when to sell the same, and that before the said defendant authorized your petitioner to sell said cotton, the value of said cotton had declined to less than the amount advanced by petitioner to defendant, and upon your petitioner demanding of said defendant the margin to cover such decline, said defendant refused and failed to furnish said margin, and thereupon your petitioner sold said cotton, and received therefor the sum of \$1,230.55, leaving a balance due your petitioner amounting to the sum of \$214.58, with interest thereon from this date at the rate of 6 per cent, as shown by the itemized

statement hereto attached marked 'Exhibit A,' and made a part hereof, whereby the said defendant became liable, undertook and promised to pay unto your petitioner said sum \$214.58, with interest as aforesaid, but to pay the same, or any part thereof, he has wholly failed. Wherefore your petitioner prays that said defendant be cited in terms of law to appear and answer this petition, and upon a hearing hereof petitioner have judgment against said defendant in such sum of money, interest, and costs, and for such other and further relief to which your petitioner may be entitled in law and equity." The itemized statement Exhibit A was sworn to, and an examination of it bears out the allegations of the items of indebtedness of the petition. The defendant interposed a plea of privilege to be sued in Taylor county. This plea was sustained by the trial court, and the case transferred to the county court of Taylor county.

The plaintiffs introduced in evidence the original draft, which shows to have been accepted and paid by them. The draft and indorsements thereon are as follows:

"Theo. Keller Co., Wholesale Grocers, Importers & Cotton Factors, Houston, Texas. Trent, Texas, Sept. 1st, 1911. Pay to the order of First State Bank, Trent, Texas, \$1375.00, Thirteen hundred seventy-five no/100 dollars. Charge to our account payable at Houston. [Signed] E. L. Mangum. To Theo Keller Co., Houston, Texas."

Indorsements:

"Sept. 6, 1911. Accepted payable at the First National Bank, Houston, Texas. Theo. Keller Co., by Alex Keller.

"First National Bank, Houston, Texas, Dec. 7, 1911. Paid."

It was admitted that at the time of trial and at the time of bringing the suit in the county court of Harris county that the defendant resided in Taylor county. It was proved by the defendant that the only writing evidencing a contract was the draft for \$1,375 introduced in evidence by the plaintiff, as drawn on Theodore Keller Company, with bills of lading attached for 23 bales of cotton shipped.

[1] The single issue is: Did the trial court err in sustaining the plea of privilege? It will be presumed that the allegations of the petition which are material for the purpose of determining the proper venue of the action are true. *Hoffman v. Association*, 85 Tex. 409, 22 S. W. 154; *Ry. Co. v. Short*, 51 S. W. 261; *Baldwin v. Richardson*, 87 S. W. 353.

It is shown by the pleadings and evidence that the draft was for \$1,375, interest amounted to \$20.89, and the amount of freight paid was \$59.24. The cotton, when sold, brought only \$1,230.55, leaving an amount due as alleged.

[2] We are of the opinion that this case is analogous to *Callender, Holder & Co. v. Short*, 34 Tex. Civ. App. 364, 78 S. W. 366.

It was there held that bills of lading and drafts attached, sent by the consignor to the consignee through a bank, when on payment of the draft the consignee received the bills of lading, and upon presentation of the bills of lading to the carrier received the consignment in Harris county, pursuant to the terms of the bills of lading, constituted a written contract, as between the consignor and the consignee, to deliver the consignment in Harris county. If the consignee overpaid the consignor for the cotton bought under contract to be delivered in Harris county, a plea of privilege by the consignor, in an action for the overpayment brought in Harris county, where the cotton was delivered, to be sued in the county of the consignor's domicile is unavailing under R. S. 1895, art. 1194, providing that where a person has contracted in writing to perform an obligation in any particular county, suit may be brought against him either in such county or in the county where defendant has his domicile.

Of the alleged amount due, \$144.45, was for overpayment on the draft, and \$20.89, the accrued interest on this overpayment. The draft, by its terms was payable in Houston, and Houston is in Harris county. According to the authority just quoted, we hold that the contract, consisting of the draft and the bills of lading, was in writing, to be performed in Harris county, and as to the overpayment made on the draft, the venue of the suit is properly laid in Harris county, and to avoid a multiplicity of suits, it was proper to embrace in the suit the freight charges, which in this cause is alleged to be \$59.24. *Middlebrook & Brother v. David Bradley Mfg. Co.*, 86 Tex. 708, 26 S. W. 935.

[3] It is also our opinion that, since the contract is one in writing and performance is to be in Houston, the freight charges paid being by plaintiff necessary to the performance of the contract, the venue for the collection of such freight charges so paid would also be in Harris county. The trial court in our opinion erred in sustaining the plea of privilege. The cause will therefore be reversed and remanded for trial upon the merits.

Reversed and remanded.

#### FRAZIER et ux. v. HOUSTON OIL CO. et al.

(Court of Civil Appeals of Texas. Galveston. Oct. 31, 1913.)

#### 1. ADVERSE POSSESSION (§ 25\*)—POSSESSION BY LESSEES.

Where the owners of land leased it under an instrument providing that in consideration for the use and occupancy, rent free, of the improvements, the lessee acknowledged himself to be a tenant of and in possession for the owner, and agreed to occupy and hold possession of the land, the tenant had the right to possession of the entire tract of land and could not, by limiting his occupancy to the inclosed land,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



limit his lessor's constructive possession of the entire tract.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 116-120; Dec. Dig. § 25.\*]

## 2. ADVERSE POSSESSION (§ 13\*)—WHAT CONSTITUTES.

One who has adverse, peaceable, and continuous possession of land for more than ten years acquires a prescriptive title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-235; vol. 8, p. 7568.]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Trespass to try title by W. S. Frazier and wife against the Houston Oil Company and others. From the judgment, plaintiffs appeal. Affirmed.

Jno. L. Little, of Kountze, for appellants. Hightower, Orgain & Butler and J. D. Campbell, both of Beaumont, for appellees.

REESE, J. This is an action in trespass to try title by W. S. Frazier and wife against the Houston Oil Company, to recover the title and possession of 160 acres of land, part of the G. W. Brooks survey in Hardin county. Plaintiffs sought to recover upon a limitation title under the statute of limitation of ten years. It was agreed "that the record title was, from 1882 until about the first of 1890, in E. A. Irvin, and from then until about 1898 was in J. P. Irvin, and from that time until July 31, 1901, the record title was in the Texas Pine Land Association, and since the last-named date the record title has been in the defendant. E. A. Irvin and J. P. Irvin and the Texas Pine Land Association are all vendors of the defendant through whom the title passed into the defendant, who now owns all of it, unless the title to the land in controversy has been perfected in the plaintiffs by limitation at any time between the dates of 1875 and the time of the filing of this suit, and is thus owned by them." It was further agreed that plaintiffs' possession began in 1875. The evidence showed that plaintiffs had had actual possession by inclosure and improvements of 12 acres of the land, included within his inclosure. As to the remainder of the 160 acres, the defense rested upon constructive possession of the league in the several owners in defendant's chain of title through tenants, under leases, from 1883 up to the date of filing of the suit, thus limiting appellants' right of recovery to the land actually inclosed. The case was tried by the court, resulting in a judgment for appellants for this 12 acres and for appellees for the remainder. Appellees were adjudged to pay the costs. From the judgment appellants prosecute this appeal. Incidentally, appellants claimed that J. W. Hilton had cut and

removed timber from the land of the value of \$50, which had been deposited with one Collier to await the event of the suit. For this sum appellees also had judgment.

The first, sixth, and eighteenth assignments of error are addressed solely to appellant's right to recover the 160 acres upon the evidence as to his actual possession under the ten-year statute, without reference to the evidence as to appellees' constructive possession of the entire league (except that actually inclosed) limiting appellant's right to recovery to the 12 acres; the questions arising upon this latter claim being presented by other assignments. As to these assignments, the undisputed evidence seems to bear out appellant's contention as to his adverse possession of the 160 acres sued for, and his right to recover the same, less the several tracts sold by him, except in so far as that right is limited by the constructive possession of appellee and its vendors as aforesaid.

[1] This brings us to the assignments of error from 8 to 11, also the thirteenth and fourteenth assignments of error, which complain of the action of the court in admitting in evidence certain lease contracts entered into by certain persons with the several owners in appellees' chain of title. Under these assignments appellant states the following proposition of law: "Where a tenant in possession of land is holding under a lease which describes the property as the 'premises' occupied by the lessee, or in any manner designates the property the tenant is to occupy, the possession of the tenant inures to the benefit of the landlord only to the extent designated in the lease, and the landlord has no constructive possession of the balance of the tract without the designated portion."

Each of the leases referred to was substantially to the following tenor and effect: "The State of Texas, County of Hardin. For and in consideration of the use, occupancy and enjoyment, rent free, of the house, field and improvements, now occupied by me and situated on the league of land in said county granted to G. W. Brooks on the 22d day of August, A. D. 1835, by the government of Coahuila and Texas, and in further consideration of the right granted me to make use of any timber necessary for firewood and to keep in repair the fence and house—part of the improvements, I acknowledge myself the tenant of, and to be in possession for, —, the owner of said league of land and agree, as such tenant, to occupy and hold possession of said league of land."

These several lease contracts were executed, at different times, by different persons, to the respective owners of the land, to wit: J. P. Irvin, E. A. Irvin, the Texas Pine Land Association, and the Houston Oil Company. Clearly, under such a lease the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tenant had the right of possession of the entire league. His contract is that he "will occupy and hold possession of" the entire league. What is said with reference to the use, occupancy, and enjoyment of the improved portion is that, in consideration of his contract to occupy and hold possession of the league, he is to pay no rent for this improved portion. This does not have the effect of limiting his right of possession to the improvements. He is granted the special privilege, in connection with his occupancy of the league, to make use of any timber on it for certain purposes. In so far as this right to use the timber is restricted to certain purposes, this is not inconsistent with the right of the tenant to occupy and possess, to exercise dominion over, the entire league. The case does not fall within the doctrine of *Land Co. v. Williams*, 51 Tex. 51, *Read v. Allen*, 63 Tex. 154, *Craig v. Cartwright*, 65 Tex. 414, and other cases on this point, nor the proposition of law stated by appellants and quoted above.

In support of the foregoing proposition, appellants cite *Houston Oil Company v. Kimball*, 103 Tex. 105, 122 S. W. 533, 124 S. W. 85, as decisive of the questions arising upon the construction of these leases. In their argument, in the brief, they undertake to quote from the opinion in that case that possession under the lease there being discussed, and which appears to have been substantially identical with those in the present case, "does not establish possession of the entire league of land in the owners thereof." It is true that the language quoted appears in the opinion (at page 106 of 103 Tex., at page 539 of 122 S. W.), but not in the connection stated by appellants. We quote the entire paragraph to show the sense in which the language quoted was really used: "Hester was occupying a small portion of the land and the improvements thereon when the lease was executed, and continued to do so up to his death, which was within a year from the date of the lease. A short time after his death his wife and son sold the improvements to S. A. J. Haire, who did not in any way assume the tenancy contract of Hester. The proof shows that Haire and his son together did occupy the part of the land and improvements which had been in cultivation and which had been occupied by Hester, but there was no evidence that they asserted any right of possession either for themselves or the owner of the land to any other portion of the league. No doubt it is true that Haire could not have disputed the title in the Irvins to the portion of the land which he received possession of from Hester, but this does not establish the possession by Haire, nor by his son, or those who were claiming under them, of the entire league of land in the name of owners thereof, which is a necessary element in order to sustain

the plea of limitation to the whole league." Haire was not in possession under any lease from the owner of the league. Hester had such contract, and was in actual possession, with improvements, of a part of the league under such lease. Haire simply bought Hester's improvements, but did not assume his lease contract. It was this possession of Haire which the court held did not establish the possession of the entire league in the owners thereof. There is at least an intimation in the opinion that if Haire had assumed the tenancy contract of Hester, and, a fortiori, if he had gone into possession under such a contract between himself and the owner, his possession would have been that of the owner as to the entire league. Having gone into possession under these leases, none of such tenants could have rid themselves of the obligation imposed upon them to occupy and hold possession of the entire league by merely limiting their actual possession, or their claim to the right of actual possession and dominion, to the inclosed land and improvements.

[2] The second proposition under said assignments is that "appellants, having had the peaceable, continuous, and adverse possession of the land, were entitled to the land embraced within their inclosure; such possession being for more than ten years." The proposition is sound. The trial court evidently thought so, as appellant was given judgment for all the land embraced in his inclosure, and for costs.

The agreement under which the case was tried, and which has been set out, eliminated every issue except that of appellant's right under the statute of limitation of ten years. This eliminates the questions sought to be presented by the remaining assignments, which became immaterial in the trial court and need not be considered here. The evidence was amply sufficient to support the judgment. It showed, it is true, actual possession in appellant of the 12 acres awarded to him by the judgment, with claim of title to the 160 acres sued for. By agreement this possession began in 1875. The evidence further showed, however, that beginning in 1883, and continuing up to the time of the filing of the suit, with possibly one or two short intervals of a year or two, there was actual possession by tenants of the respective owners of part of the league, under such leases as are herein described, the effect of which was to give the owners constructive possession of the entire league, except as to the 12 acres in the actual possession of appellant, for which they had judgment, and to limit appellant's claim under the ten-year statute of limitations to such portion.

We find no error in the judgment, and it is affirmed.

Affirmed.

# **BROWN v. BAY CITY BANK & TRUST CO.**

(Court of Civil Appeals of Texas. Austin.  
Nov. 26, 1913.)

## **1. APPEAL AND ERROR (§ 879\*)—PERSONS WHO MAY ALLEGE ERROR—PERSONS NOT APPEALING.**

Where a petition in intervention was dismissed, but the intervener neither appealed nor assigned errors, the effect of the decision of the appellate court on his rights cannot be considered, though he filed a brief asking that judgment for plaintiff be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3581-3583; Dec. Dig. § 879.\*]

## **2. BILLS AND NOTES (§ 520\*)—ACTIONS—MISTAKE.**

In an action on vendor's lien notes, evidence held to show that the notes by mistake recited that the conveyance was from the payee to the maker instead of reciting in accordance with the deed that the conveyance was from a third person to the maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.\*]

## **3. VENDOR AND PURCHASER (§ 267\*)—PAYMENT—WHAT CONSTITUTES.**

Defendant gave vendor's lien notes in payment for land, and, upon being adjudicated a bankrupt, claimed the land as a homestead, and, to protect his possible interest, deposited with the payee the amount of the note then due under an agreement that it should be returned to him in case it was adjudged that the land was not his homestead. Held, that the deposit did not constitute a payment, even though the payee wrongfully retained it after an adjudication against the claim of homestead; and hence the deposit would not prevent the transferee of the notes declaring the whole series due.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 326; Dec. Dig. § 267.\*]

## **4. JUDGMENT (§ 251\*)—PLEADINGS TO SUPPORT.**

In an action to foreclose vendor's lien notes, where the plea of intervention filed by the purchaser of the maker's interest was stricken, the court could not in its judgment determine the rights of the intervener to the surplus, if any, after foreclosure; such determination having no support in the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\*]

## **5. CONSTITUTIONAL LAW (§ 75\*)—POWER OF JUDICIARY—DELEGATION OF POWER.**

In a suit to foreclose vendor's lien notes on land, where there were several who claimed the surplus, if any, after foreclosure sale, it was improper for the court to direct a sheriff to pay the surplus proceeds to such person as he might conclude was the equitable owner of the land; that question being a judicial one, and the court having no right to delegate its authority.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 138; Dec. Dig. § 75.\*]

Appeal from District Court, Matagorda County; Samuel J. Styles, Judge.

Action by the Bay City Bank & Trust Company against G. R. Brown, in which B. E. Norvell filed a plea of intervention. The intervener's plea was stricken, and judgment

was rendered for plaintiff, and defendant appeals. Reformed and affirmed.

Linn, Conger & Austin, of Bay City, for appellant. Gaines & Corbett, of Bay City, for appellee. Rowland Rugeley, of Bay City, for intervener.

KEY, C. J. The Bay City Bank & Trust Company brought this suit against G. R. Brown, predicated its right of recovery upon four promissory notes, executed by the defendant and secured by a vendor's lien on a certain tract of land, which lien the plaintiff sought to have foreclosed. The defendant pleaded a general denial and averred that the first note had been paid, and that the others were not due when the suit was brought.

[1] By permission of the court one B. E. Norvell filed a plea of intervention, alleging that the defendant G. R. Brown had been adjudged a bankrupt and his interest in the land had been sold under order of the bankruptcy court and purchased by him (Norvell), subject to the lien by which the notes sued on by the plaintiff were secured, and he asked that the land be sold to pay the plaintiff's debt, and that whatever excess might remain be paid to him. Upon motion of the defendant Brown, Norvell's plea of intervention was stricken out. As between the plaintiff and defendant, the case then proceeded to trial before the court without a jury, and judgment was rendered for the plaintiff for the full amount of the debt sued for, with a foreclosure of the vendor's lien upon the land, and the defendant Brown has appealed. The intervener Norvell has not appealed nor assigned error, though his counsel have filed a brief, asking that the judgment be affirmed. It may be that his failure to appeal will result in compelling him to pay off and discharge the plaintiff's judgment and thereby prevent a sale of the land, but that is a matter that cannot be considered by this court, as he is not complaining of anything done in the court below.

The decree of foreclosure stipulates and directs that, if a suit shall be brought by any person setting up title to the land before the foreclosure sale is made, then the sheriff shall not pay the excess to any one but shall deposit the same in the registry of the court subject to the determination of the subsequent suit. But, if no such suit is brought, then the decree directs the sheriff to pay over the excess to the person who may then be the owner of the equitable title to the land and be entitled to receive such excess.

The trial judge filed findings of fact which sustain the material allegations in the plaintiff's petition, and also the material allegations in the plea of intervention which was stricken out. Most of the assignments of error presented in appellant's brief relate to the action of the trial court in admitting tes-

timony; but it is further contended on behalf of appellant that error was committed in foreclosing the lien and in not awarding to appellant whatever excess might remain of the proceeds of the foreclosure sale after paying the plaintiff's debt and costs of the litigation. And it is also contended that the proof shows that the first note sued on had been paid before it was assigned to the plaintiff, and that none of the other notes were due at the time the suit was brought. Disregarding the order in which the questions referred to have been stated, we dispose of them as follows:

[2] 1. It is alleged in the plaintiff's petition that the notes sued on were given in part payment for 200 acres of land, part of the Amos Rawls league in Matagorda county, Tex., and described in the petition by metes and bounds; that on the 16th day of March, 1905, J. W. Brown conveyed to the defendant G. R. Brown the tract of land referred to, and as part of the consideration defendant executed the four notes sued on and made them payable to Eliza Kempner, who subsequently transferred them to the plaintiff bank. It was also alleged in the petition that the notes recite that they were given in part payment of the purchase money for a tract of land conveyed to G. R. Brown by Eliza Kempner, which recital it is alleged was an inadvertence and mutual mistake, and that the conveyance was in fact made by J. W. Brown to G. R. Brown, while the purchase-money notes were made payable to Mrs. Kempner, as appears from the deed made by J. W. Brown to G. R. Brown. The deed referred to was introduced in evidence and showed upon its face that it was executed in consideration of ten promissory notes, executed on that day by G. R. Brown, and made payable to the order of Mrs. Kempner, the last four being described in the deed in all respects as they are described in the plaintiff's petition and in the notes put in evidence, except those mentioned in the deed do not contain the recital that the land was conveyed to G. R. Brown by Mrs. Kempner, and the deed showed on its face that it was made by J. W. Brown to G. R. Brown, and that it conveys the land described in the plaintiff's petition and in express terms retains a vendor's lien to secure the payment of the notes.

Considering the notes and deed together, we think it clearly appears that the recital in the notes that the land was conveyed by Mrs. Kempner to G. R. Brown was a mutual mistake, and that the trial court committed no error in holding that the notes sued on were secured by a lien upon the land described in the petition. It was not shown that Mrs. Kempner had ever executed a deed to G. R. Brown conveying any land; and it is altogether improbable that, on the very day that J. W. Brown conveyed to G. R. Brown the 200 acres of land here involved, Mrs. Kempner also conveyed to G. R. Brown another 200 acres of the Amos Rawls league

and received from him four notes, exactly similar as to amount, date of maturity, rate of interest, etc., to the notes described in the deed from J. W. Brown.

[3] 2. The notes sued on are numbered 7, 8, 9, and 10; and, according to its face, No. 7 was past due before the suit was brought, and, as that note contained a stipulation providing that the failure to pay it when due would authorize the holder to declare all the notes due, the plaintiff bank exercised its option in that regard and sued on all the notes. The defendant Brown undertook to plead and prove that the first note had been paid before the plaintiff elected to declare all the notes due, and therefore the plaintiff was not only not entitled to recover on that note but that the suit was prematurely brought on the others. The plea of appellant alleged the following facts as constituting such payment: "Defendant would further show: That on January 11, 1912, this defendant sent to H. Kempner, who is a firm composed of Eliza Kempner, the original payee of the said notes, the sum of \$410.30 in Galveston exchange at Galveston, Tex., the said sum being the principal of note No. 7, \$320, and interest due on note No. 7, and also the interest accrued to December 31, 1911, upon notes Nos. 8, 9, and 10; said notes Nos. 8 and 9 each being for the sum of \$320, and note No. 10 being for \$330, and each of said notes bearing interest at the rate of 7 per cent. per annum from date until paid. That said money was deposited to protect the payment of said note No. 7, together with interest on notes Nos. 8, 9, and 10, and that the said money was deposited, however, under an agreement and understanding that, if G. R. Brown lost his homestead claim to said land in a controversy then pending in the Bankrupt Court of the United States, he would have the right to withdraw the money, but it was understood between the defendant and Kempner that the said deposit would protect the said note in so far as this defendant was concerned from maturing, and therefore the protection against its payment until said question as to the homestead in the Bankrupt Court should be decided, and that, if the said defendant should lose his claim to the said homestead, then he should have the right to withdraw said sum of \$410.30. That the said defendant did lose his homestead claim to the said land in the Bankrupt Court, and the decision was there rendered that the said lands herein was not the homestead of the bankrupt G. R. Brown, the defendant in this case, and that thereafter, on the 1st day of October, A. D. 1912, and prior to the purchase by the plaintiffs in this case of the said notes, this defendant drew upon H. Kempner for the \$410.30 so deposited with said H. Kempner to protect the said note No. 7 and the accrued interest on the said notes Nos. 8, 9, and 10, the payment of which said draft was by the said H. Kempner, a firm composed of Eliza Kempner, refused, and

that the said Kempner now retains in his possession the said sum of \$410.30, which was placed with him for the protection of said note No. 7 and the interest on said notes Nos. 8, 9, and 10, which matured December 31, 1911."

We agree with counsel for appellee that the facts stated in the plea do not constitute what is termed in law a payment, and appellant did not allege and prove that Mrs. Kempner was insolvent, and therefore in equity he was entitled to have the special deposit referred to in the plea treated as a payment upon the notes. In fact, the record indicates that it will be to appellant's benefit for the judgment in this case to be affirmed and be paid through the foreclosure sale of the land, appellant's interest in which, it seems, has been sold in the bankruptcy proceeding and purchased by B. E. Norvell, who sought to intervene. Now, if this course is pursued, then Mrs. Kempner will be owing appellant \$410.30, the amount of his special deposit, and there is nothing in the record to indicate that he cannot compel payment of the same. And it is undoubtedly true that, if he collects that money from Mrs. Kempner, the affirmance of this judgment will result in no loss to him, if the judgment is satisfied with property in which he now has no interest; but, on the contrary, it would seem quite to his advantage. If he has been divested of all of his interest in the land involved, we can readily see why the purchaser of his interest would be interested in having the special deposit referred to treated as a payment upon the plaintiff's debt, because such payment would inure to his benefit, whereas, if the deposit is not so treated, then it belongs to appellant, and he is that much better off than he would be if it was credited on his indebtedness to the plaintiff.

[4, 5] 3. Conceding that counsel for appellant are correct in the contention that the trial court committed error when it admitted in evidence proof of the bankruptcy proceedings against G. R. Brown, including the sale of his interest in the land here involved, the only harm that resulted therefrom to appellant is the failure of the decree to award to him the remainder of the proceeds of the foreclosure sale after paying the judgment and costs, and that error will be corrected in this court. For some reason, not apparent to this court, the trial court struck out Norvell's plea of intervention; and, after doing so, there was no pleading before the court that authorized proof of what had been done in the bankruptcy court. After that plea was stricken out, the litigation was between the plaintiff bank and the defendant G. R. Brown, and the rights of no one else should have been considered. But, even if it had been proper to consider such rights, it was wholly improper for the trial court to incorporate in its decree a provision directing the sheriff, upon any contingency, to pay the sur-

plus proceeds from the sale of the land to such person as the sheriff might conclude was the equitable owner of the land and entitled to such excess. Who was entitled to such excess was a question of law which should have been determined and decreed by the trial court; and, being a judicial question, that court committed fundamental error when it undertook to delegate to the sheriff the decision of that question. Such decision involves the exercise of a judicial function, which the court could not delegate to the sheriff.

Therefore that portion of the judgment of the trial court relating to the disposition of whatever surplus may remain after paying the judgment, interest, and costs will be set aside, and the judgment so reformed as to require the sheriff to pay such surplus to appellant; and, as thus reformed, the judgment will be affirmed.

Reformed and affirmed.

#### BURTON & BEARD v. NACOGDOCHES CRATE & LUMBER CO.

(Court of Civil Appeals of Texas. Texarkana. Nov. 20, 1913.)

#### 1. SALES (§ 161\*) — CONTRACTS — CONSTRUCTION.

Where defendants ordered a car of crates to be shipped to third persons, the sellers, by delivering the shipment to the carrier in the time stipulated, comply with the contract and are entitled to recover the purchase price, even though the shipment is so delayed that the consignees refuse to receive it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. § 161.\*]

#### 2. SALES (§ 82\*)—CONTRACTS—CONSTRUCTION.

Where goods are ordered to be delivered to a third person and charged to defendant, the purchase price cannot be collected until delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 229-233; Dec. Dig. § 82.\*]

#### 3. SALES (§ 79\*)—CONTRACTS—"F. O. B."

Where a defendant ordered one car of crates complete 6% f. o. b. Magnolia, the expression merely indicated that the price was to be 6% cents, including freight to Magnolia, and not that the goods were to be delivered at that place.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 214-216; Dec. Dig. § 79.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2636; vol. 8, p. 7659.]

Appeal from Nacogdoches County Court; June C. Harris, Special Judge.

Action by the Nacogdoches Crate & Lumber Company against Burton & Beard. From a judgment for plaintiff, defendant appeals. Affirmed.

King & King, of Nacogdoches, for appellant. V. E. Middlebrook and Ingraham & Hodges, all of Nacogdoches, for appellee.

HODGES, J. In 1905 the appellee was engaged in the business of manufacturing and selling crates and fruit baskets at Nacogdoches, Tex. In July of that year it re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ceived the following order from the appellants, Burton & Beard:

"Mt. Selman, Texas, July 6, 1905. Nacogdoches Crate & Lumber Company, Nacogdoches, Texas—Gentlemen: Inasmuch as the phone service was so poor this afternoon when we were trying to talk to you, we thought we had better write you also. The order was as follows: Ship to Gibson & Williams at Magnolia, Arkansas, one car 8,000 pine head crates complete at 6¼¢ f. o. b. Magnolia. Ship at once and follow with tracer. Send us B/L here, also invoice. We will want about forty days on this car in order to allow parties time to sell their fruit. Your prompt attention will oblige Burton & Beard.

"P. S. If you can allow us a brokerage on this car same will be appreciated."

As indicated in the above letter, there had been some previous negotiations between the parties over a long distance telephone, but it is not contended that the letter quoted above does not contain substantially all the terms and conditions of the contract between the parties. The evidence shows that the goods were delivered by the appellee to the carrier at the point of shipment within the time contemplated by the parties, consigned to Gibson & Williams as directed. The following is introduced in evidence as the substance of the way bill:

"Houston East & West Texas Railway Company. Date: 7/11/1905. Series: S. W. No. 6. 1st via Shreveport, via Texas, via Arkansas, Cotton Belt. Weight at Nacogdoches: 61,800. Tare: 37,000. Net: 24,800. Car initials: S. W. No. 5132. Shipper: N. C. & L. Co. Consignee and destination: Gibson & Williams, Magnolia, Ark. Car crate weight: 30,000. Date and authority: 22. Freight charges: \$66.00."

For some reason, due probably to the fault of the railway company, the goods did not reach their destination as soon as Gibson & Williams thought they should, and upon their arrival the consignees declined to receive them. Payment being demanded and refused, the appellees brought this suit in the county court against the appellants, Burton & Beard, and the Houston East & West Texas Railway Company for the purchase price of the goods. A trial before the county judge without a jury resulted in a judgment for the appellees against the appellants, Burton & Beard, for the amount sued for. It appears that, upon exceptions interposed by the railway company in the trial court, it was dismissed from the suit.

[1, 2] There are several assignments of error, but all of them in substance complain of the action of the court in rendering a judgment against the appellants in view of the evidence presented. It is contended that under the undisputed facts the contract between the parties was one by which the seller bound itself to deliver the goods to Gib-

son & Williams at Magnolia, Ark., and that, this contract not having been complied with, the appellants incurred no liability; that the proper remedy of the appellee was against the railway company for damages for conversion. The trial court did not put that construction on the contract but held that the appellee had complied with its agreement when it delivered the goods to the carrier within the time stipulated by the parties. In this we think the court was correct. *Grief & Bro. v. Seligman*, 82 S. W. 533; *Orthwein's Sons v. Wichita Mill & Elevator Co.*, 32 Tex. Civ. App. 600, 75 S. W. 364. It is true, as contended by counsel for the appellants, that, when the parties to a contract of this kind stipulate that the seller shall deliver the goods to the consignee at some particular destination, the purchase price cannot be collected till the goods are delivered in accordance with the contract. According to the terms of the letter relied on as showing the contract between these parties, the goods were to be consigned to Gibson & Williams at Magnolia, Ark., and time was given to the appellants for the payment of the purchase price.

[3] The expression "at 6¼¢ f. o. b. Magnolia" does not necessarily imply that the goods were to be delivered f. o. b. at Magnolia. It merely indicated that the price was to be 6¼ cents with the freight allowed.

The judgment of the county court is affirmed.

#### WILLETT v. HERRIN et al.

(Court of Civil Appeals of Texas. Galveston. Oct. 17, 1913.)

#### 1. JUSTICES OF THE PEACE (§ 141\*)—APPEAL—JURISDICTION.

The county court acquires no jurisdiction upon appeal in an action originating in the justice court but over which that tribunal was without jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 467-476; Dec. Dig. § 141.\*]

#### 2. JUSTICES OF THE PEACE (§ 44\*)—ACTIONS—PLEADING.

In an action in justice court, the jurisdictional amount is determined by the amount shown in the statement of the cause of action; hence, where the petition stated a cause of action for the recovery of \$200 delivered to defendant under an agreement that he should repay on demand, the jurisdiction of the justice court is not ousted by the general averment of \$500 damages for the defendant's refusal to pay.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 157-172; Dec. Dig. § 44.\*]

#### 3. JUSTICES OF THE PEACE (§ 91\*)—ACTIONS—JURISDICTION—PETITION.

A petition in an action in justice court, alleging that plaintiff delivered \$200 to defendant, receiving his obligation in writing to repay the money on demand, with interest, but that defendant failed to repay the same, states a cause

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of action upon contract, and the claim of interest, being for interest eo nomine and not as damages, does not oust the justice of jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-323; Dec. Dig. § 91.\*]

**4. JUSTICES OF THE PEACE (§ 159\*)—APPEAL—DEFECTIVE BOND—EFFECT—REVIEW—HARMLESS ERROR.**

Where plaintiffs' cause of action was dismissed by the justice and the only judgment against them was for costs, no bond is required to perfect an appeal to the county court; and hence the defendant cannot move to dismiss the appeal because the bond given was defective.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.\*]

**5. JUSTICES OF THE PEACE (§ 45\*)—ACTIONS—JURISDICTION—PLEADING.**

In an action in justice court, where defendant set up a counterclaim alleging several amounts, the total of which exceeded \$200, the counterclaim was beyond the jurisdiction of the justice, even though defendant prayed for a recovery of only \$200.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 173-175; Dec. Dig. § 45.\*]

**6. JUSTICES OF THE PEACE (§ 174\*)—REVIEW—HARMLESS ERROR.**

Where defendant's counterclaim was beyond the jurisdiction of the justice court, defendant cannot complain that on appeal to the county court that tribunal improperly allowed plaintiff to interpose a defense not pleaded in the justice court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

**7. APPEAL AND ERROR (§ 742\*)—REVIEW—ASSIGNMENTS.**

Assignments of error complaining of the charge, when not followed by propositions subjoined to a sufficient statement to explain the propositions, as required by rule 31 (142 S. W. xiii), will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**8. INTEREST (§ 31\*)—RECOVERY—AMOUNT.**

Where an obligation providing for the return of money did not stipulate any rate of interest, the obligee can recover only the legal rate of 6 per cent.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 64-67; Dec. Dig. § 31.\*]

**9. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR.**

In an action on an obligation providing for the payment of \$200, without mention of interest, the error of the court in charging that the jury might find for plaintiffs, with 10 per cent. interest, is harmless, where the record does not show that they did so find and the judgment for plaintiff only carries 6 per cent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

Appeal from Newton County Court; W. E. Gray, Judge.

Action by Mrs. S. P. Herrin and others against H. L. Willett, begun in justice court, where the cause was dismissed. From a judgment for plaintiff on appeal to the county court, defendant appeals. Affirmed.

Forse & Wigley, of Newton, for appellant. Wightman & Hancock, of Newton, for appellees.

PLEASANTS, C. J. This suit was brought by appellees against the appellant in a justice court of Newton county. Plaintiffs' original petition filed in the justice court on August 29, 1911, contains the following allegations and prayer: "That heretofore, to wit, on the 30th day of August, 1907, defendant executed and delivered to plaintiff his obligation in writing to pay to plaintiff in the sum of \$200, which obligation was given for \$200 in cash, which plaintiff delivered to defendant to be kept for plaintiff by defendant subject to her order; that at the time of receiving said \$200 defendant agreed to pay plaintiff 10 per cent. interest on said \$200 for such time as he should keep said money; that said obligation in writing is hereto attached and made a part hereof; that said sum of \$200 and interest thereon at 10 per cent. is now due and unpaid; and that defendant, though often requested, has hitherto failed and refused and still refuses to pay the same or any part thereof, to plaintiff's damage in the sum of \$500. Wherefore plaintiff prays the court that defendant be cited to appear and answer this petition and that she have judgment for her debt in the sum of \$200 and interest and cost of suit, and for such other and further relief, special and general, in law and in equity, and that she may be entitled to and in duty bound will ever pray," etc.

The defendant on the day the cause was called for trial in the justice court filed a motion to dismiss the suit on the ground that the amount in controversy was beyond the jurisdiction of the court. He also filed an answer containing a general demurrer and a special exception challenging the petition on the ground that it showed on its face that plaintiffs' cause of action accrued more than four years before the suit was filed, a general denial, and the following plea of offset or counterclaim: "Now comes the defendant in the above cause, by his attorney, and says that the said plaintiff before and at the time of the commencement of this suit, to wit, on the 29th day of August, 1911, was and still is indebted to this defendant in the sum of \$200 for a doctor bill for 39 trips made by the defendant to visit the plaintiffs' child while sick, which is reasonably worth \$5 per trip, which makes the sum of \$195, by cash paid by defendant to plaintiff, \$10, for medicine sold and delivered to the plaintiff by defendant, \$3.90. That said visits were made to see the plaintiffs' child, while sick, at the special instance and request of plaintiff, and that said medicine was sold and delivered to the plaintiff by the defendant at the special instance and request of the plaintiff, and that said \$10 in cash was paid to the plaintiff by this defendant at the special instance and request of the plaintiff; in consideration whereof the said plaintiff promised and became liable and bound to pay this defendant the sum of \$200

for prices charged therefor, which said sum of money is so due and unpaid, and it is yet due this defendant by the plaintiff, as above set forth, which exceeds the damages sustained by the plaintiff by reason of the matters alleged in their petition, and out of which said sums this defendant is ready and willing, and hereby offers, to offset and allow to the said plaintiffs the full amount of their said damages, and of this he is ready to verify. Wherefore the defendant prays judgment of the court, that the plaintiffs take nothing by their suit, and that this defendant do have and recover from them judgment for all costs in this behalf expended."

The justice court sustained the motion to dismiss for want of jurisdiction and entered the following judgment: "On this the 4th day of November, A. D. 1911, came on to be heard the above-entitled and numbered cause. The plaintiff appeared by attorney and announced ready for trial, whereupon came the defendant by attorney and pleaded to the jurisdiction of this court. After hearing said plea and argument of counsel, the court was of the opinion that the law is with the defendant, and that said plea in all things be sustained, and that said cause be dismissed for want of jurisdiction, and that the defendant recover of and from the plaintiff all costs in this behalf expended, for which let execution issue." Plaintiffs excepted to the judgment and gave notice of appeal to the county court of Newton county. Thereafter plaintiffs executed an appeal bond, and the transcript from the justice court was duly filed in the county court.

Defendant moved in the county court to dismiss the suit on the ground that the amount in controversy was beyond the jurisdiction of the justice court, and therefore the county court acquired no jurisdiction by the appeal, and also on the ground that the appeal bond was fatally defective because it misdescribed the judgment appealed from.

Plaintiffs filed an exception to defendant's counterclaim or plea of offset on the ground that the amount claimed in said plea was beyond the jurisdiction of the justice court, and also excepted to said plea on the ground that the cause of action therein set up by defendant was barred by the statute of limitation of two years. They also pleaded a general denial and limitation of two years. The defendant excepted to the plea of limitation on the ground that it was not pleaded in the justice court.

The motion to dismiss and all of the exceptions presented by each of the parties were overruled by the court. The cause was tried with a jury and resulted in a verdict in favor of the plaintiffs for the sum of \$129.20. Upon this verdict judgment was rendered in favor of plaintiffs for said amount, with interest from date of the judgment at the rate of 6 per cent. per annum.

We shall not discuss the various assign-

ments of error in detail but will content ourselves with a decision of the material questions presented by appellant's brief. It is first contended that the trial court erred in not sustaining appellant's motion to dismiss for want of jurisdiction because: First, the petition shows that the amount in controversy was \$500, which amount is above the jurisdiction of the justice court; and, second, that the interest claimed in the petition was claimed as damages and not as interest nomine, and that such damages, added to the \$200 claimed, produced a sum beyond the jurisdiction of the justice court.

[1] It is unnecessary to cite authority to sustain the proposition that if the justice court, in which the suit originated, was without jurisdiction, the county court acquired no jurisdiction by the appeal, and the only question for us to determine is whether upon the face of the petition the amount in controversy was beyond the jurisdiction of the justice court.

[2] The only question upon this issue which presents any difficulty is whether the general allegation in the petition that by the failure and refusal of the defendant to pay the \$200 and interest, in accordance with his contract, the plaintiffs were damaged in the sum of \$500, coupled with the prayer of the petition for general and special relief, shows that the amount in controversy was the sum of \$500. It has been generally held that the amount shown in the statement of the cause of action, and not the amount for which recovery is sought in the prayer of the petition, must be looked to in determining the amount in controversy in a suit, and that the sum of the items shown in the statement of the cause of action, and not the general statement of the amount claimed to be due, will determine the question of what is the amount in controversy. *Railway Co. v. Coal Co.*, 102 Tex. 478, 119 S. W. 294; *Railway Co. v. Hood*, 125 S. W. 983; *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806; *Oppenheimer & Co. v. Fritter*, 3 Willson, Civ. Cas. Ct. App. § 263. In all of these cases, except the one last cited, the question was whether, when the sum shown to be due in the statement of the cause of action was above the jurisdiction of the court, the plaintiff could confer jurisdiction upon the court by praying for a sum within the jurisdiction. Whatever conflict on this question there may have formerly been in the authorities, it is now well settled that the prayer of the petition will not control, and that the amount in controversy is the sum of the indebtedness shown in the statement of the cause of action. In the case last cited this rule was applied where the petition, as in the instant case, contained in addition to a specific statement of the indebtedness due by the defendant, which was an amount within the jurisdiction of the court, a general allegation that, by the failure of the defendant to pay the indebtedness so due, the plaintiff was



damaged in a named sum which was above the jurisdiction of the court. The court in that case said: "This suit being upon a promissory note, it is manifest that plaintiff could recover no more than legal interest as damages, and in fact his suit is brought to recover no more than the principal and interest of the debt. The ad damnum allegation in the petition claiming \$1,000 damages is surplusage and should have been so treated. The real amount in controversy was the debt and interest thereon, and of this amount the court had jurisdiction." This decision was approved and followed by the Court of Appeals for the Fifth District in the case of *Ellis v. Bank*, 38 Tex. Civ. App. 619, 86 S. W. 776, in which case a writ of error was refused by our Supreme Court.

The general rule seems to be that when the demand is on a note or contract that the principal and interest due upon the instrument declared upon will control the amount of the judgment that should be rendered in the case, regardless of the amount claimed in the general ad damnum allegation, and if the sum laid as damages in the ad damnum allegation does not correspond with the amount of the principal and interest due on the note or contract, it will be regarded as a clerical misprision. *Kennedy v. Young*, 25 Ala. 563; *Johnson v. Rider*, 84 Iowa, 50, 50 N. W. 36.

We think the decisions above cited sustain the trial judge in his holding that the amount in controversy in this cause was the \$200, with interest, and not the sum of \$500 alleged to be the damages sustained by the plaintiffs because of the failure of defendant to pay the amount due upon his contract.

[3] The second ground upon which the jurisdiction of the justice court is attacked is wholly untenable. There is no element of tort in the cause of action alleged by plaintiffs, and the interest claimed is not claimed as damages. The demand is upon a contract for the payment of money, and the statute allows interest upon such demand from the time the payment was due, which in this case was upon the request or demand of the plaintiffs. Clearly in such case the interest claimed is claimed as interest eo nomine and not as damages. *Schulz v. Tessman*, 92 Tex. 489, 49 S. W. 1031. This disposes of appellant's motion to dismiss the appeal because the justice court was without jurisdiction.

[4] The next contention is that the trial court erred in refusing to dismiss the appeal on the ground that the appeal bond filed in the justice court was fatally defective in that it misdescribed the judgment appealed from. This objection to the bond is sustained by the record, but the trial court did not err in refusing to dismiss the appeal on this ground. The judgment in the justice court being against plaintiffs for cost only, they were not required to execute an appeal bond in order to perfect their appeal to the county court. *Railway Co. v. Stock Farm*, 91 Tex. 628, 45

S. W. 375. No appeal bond having been required, it necessarily follows that the trial court properly refused to dismiss the appeal on the ground that the bond filed by plaintiffs was insufficient.

[5, 6] Defendant's exception to plaintiffs' plea of limitation against defendant's counterclaim on the ground that said plea was not filed in the justice court was valid, but the refusal of the court to sustain the exception was not prejudicial to appellant because the counterclaim was for an amount beyond the jurisdiction of the justice court, and plaintiffs' plea to the jurisdiction of the court to hear and determine such counterclaim should have been sustained. The sum of the amounts alleged to be due by said counterclaim, before set out, exceeded the amount of which the justice court had jurisdiction, and under the authorities before set out that sum was the amount in controversy, notwithstanding the defendant only asked to recover the sum of \$200. It goes without saying that the appellant cannot complain of the refusal of the trial court to sustain exceptions to a plea of limitation against a claim which could not have been adjudicated in the suit.

[7-9] The several assignments of error complaining of the charge of the court are not entitled to consideration because none of them is followed by a sufficient statement from the record as required by rule 31 (142 S. W. xiii). If this objection to the assignments should be waived and all of them be considered, the only one which presents any error is that complaining of the paragraph of the charge which permits the jury to find in favor of plaintiffs for 10 per cent. interest on the amount due upon the instrument on which the suit is based. This instrument is as follows: "Aug. 30th, 1901. Received of Mrs. S. P. Terry the sum of \$200.00 two hundred dollars the same to be taken care of and returned at her request at any time. [Signed] H. L. Willett, M. D." No interest being stipulated in the written instrument, in the absence of allegations and proof of fraud or mistake, plaintiffs could not show by parol that the agreement between the parties was that defendant should pay interest on the \$200 at 10 per cent. and only the legal rate of 6 per cent. could be recovered. But the error of the court in submitting to the jury the question of whether the parties agreed that the \$200 should bear interest at the rate of 10 per cent. was harmless because the record fails to show that the jury found in favor of plaintiffs on this issue, and the judgment rendered by the court only bears 6 per cent. interest.

The appellees would be entitled to a reversal of the judgment on their cross-assignment complaining of the refusal of the trial court to sustain their exception to appellant's counterclaim on the ground that the amount claimed thereon was beyond the jurisdiction

of the justice court, but they ask that the judgment be affirmed.

There being no error in the record of which the appellant can complain, the appellees being satisfied with the judgment, notwithstanding the error against them in submitting appellant's counterclaim to the jury, it follows that the judgment should be affirmed, and it is so ordered.

Affirmed.

### RATCLIFF v. RATCLIFF et al.

(Court of Civil Appeals of Texas. Galveston. Nov. 11, 1913. Rehearing Denied Dec. 4, 1913.)

#### 1. APPEAL AND ERROR (§ 877\*)—PERSONS ENTITLED TO ALLEGE ERROR.

In trespass to try title, where plaintiff counted on adverse possession, and defendant set up that the property was deeded to her as trustee, and that she held for the beneficiary, plaintiff cannot complain that the court allowed the beneficiary to file a plea of intervention setting up the same facts as those alleged by defendant; the rights of the beneficiary under the trust not affecting his claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

#### 2. TRUSTS (§ 31\*)—ESTABLISHMENT.

A showing of accident, fraud, or mistake is not necessary to ingraft a trust upon a deed conveying the legal title on its face.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 42; Dec. Dig. § 31.\*]

#### 3. APPEAL AND ERROR (§ 194\*)—EXCEPTIONS—WAIVER.

Exceptions to the answer of an intervenor, where not called to the attention of the trial court, must be regarded as waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.\*]

#### 4. EVIDENCE (§ 598\*)—WEIGHT AND SUFFICIENCY.

A finding of fact in a cause tried to the court without a jury may be based upon the positive testimony of one witness, though it was contradicted by that of another.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.\*]

#### 5. ADVERSE POSSESSION (§ 85\*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In trespass to try title, where plaintiff claimed only by adverse possession, evidence held sufficient to sustain a finding that the holding was not adverse for the whole period of limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 498-503, 656, 657, 660, 668, 688-690; Dec. Dig. § 85.\*]

#### 6. ADVERSE POSSESSION (§ 43\*)—POSSESSION OF TRUSTEE.

Where a party who held land in trust for another, although his conveyance was absolute on its face, possessed the property adversely to other claimants, the trustee's adverse holding inured to the benefit of the cestui que trust.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-224; Dec. Dig. § 43.\*]

#### 7. TRIAL (§ 397\*)—FINDINGS—SUPPORT IN PLEADINGS.

In trespass to try title plaintiff counted on adverse possession, and defendant, who was his former wife, alleged that the property was conveyed to her by an absolute deed to hold in trust for her stepfather, that her possession and that of plaintiff was with his consent, and that the beneficial interest in the property belonged to the stepfather's heirs. It appeared that after the stepfather had purchased the land suit was brought against him, in which the plaintiff recovered, but that the property was quitclaimed to the stepfather and defendant. Held that, as defendant traced no title through the quitclaim deed, and as plaintiff made no claim thereunder, he could not insist that the court should have found that such deed gave defendant an interest in the property, part of which would pass to him as community estate; there being no foundation for those claims in the pleadings or issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.\*]

Appeal from District Court, Jefferson County; J. M. Conley, Judge.

Action by Eli Ratcliff against Sarah Ratcliff, in which Lou Turner intervened. From a judgment for defendant and intervenor, plaintiff appeals. Affirmed.

V. A. Collins, of Beaumont, for appellant. W. W. Cruse, of Beaumont, for appellees.

McMEANS, J. Action of trespass to try title brought by Eli Ratcliff against Sarah Ratcliff to recover one-half of a certain tract of land in Jefferson county. In addition to the ordinary allegations in suits of trespass to try title, the plaintiff pleaded the statute of limitations of ten years. Defendant answered by general denial and a plea of not guilty and further pleaded that in 1893 the land in controversy was deeded to her by one George Turner, the deed reciting a consideration of \$1 paid and love and affection, but that said deed was in fact a deed in trust, and that no title passed or was intended to be passed thereby, and that there was no real consideration for its execution, but that said deed was made by said George Turner to her in order that she and the plaintiff, Eli Ratcliff, who was then her husband, might get a house built on the land, and with the understanding and agreement that the land would be reconveyed by plaintiff and defendant to said George Turner at some future date. Lou Turner, alleging that she was the widow of George Turner, deceased, and that he left no children, that the land in question was community property and that she was his sole heir, that there had been no administration of the estate of said George Turner, deceased, and no necessity for any, intervened in the suit, alleging in substance the same facts alleged by Sarah Ratcliff, and further pleading the statutes of limitation of five and ten years. The case was tried before the court without a jury and resulted in a judgment for the intervenor, Lou Turner, and from this judgment the plaintiff has appealed.

The court upon proper request of appellant filed findings of fact and conclusions of law. The evidence in the record justifies the following fact findings, which in substance accord with the court's findings of fact: The land in controversy was deeded to George Turner, the husband of intervenor, Lou Turner, by Long & Co. on March 16, 1882. On October 5, 1893, George Turner conveyed to defendant Sarah Ratcliff, his stepdaughter, the land in controversy; the deed reciting as a consideration the payment of \$1 and love and affection, and was so conveyed for the purpose of enabling said Sarah Ratcliff and her husband, the plaintiff, Eli Ratcliff, to mortgage the land in order to secure lumber to build a house thereon for a home. It was understood and agreed between George Turner and Sarah and Eli Ratcliff at the time of the execution and delivery of this deed that Eli should build the house and pay for it, and that he and his wife, Sarah, should use and occupy the same as their home. It was also understood and agreed at the time said deed was made that, after the purposes above stated had been accomplished, the land should be reconveyed to George Turner by Sarah and Eli, but said conveyance was never made. The house was built in the spring of 1895 by George Turner and Eli Ratcliff. Turner paid part of the purchase money for the lumber that went into the house, and Eli paid the balance. Eli and Sarah moved into the house July 4, 1895, and occupied it continuously until the spring of 1901, at which time they moved to the city of Beaumont and occupied a house belonging to George Turner, where they resided for three years without paying any rent therefor, and during said time George Turner had the actual possession of the land in controversy occupying and using it, keeping up the fences, raising crops on it, and rented the house to tenants, and collecting and keeping the rents. In April, 1903, Eli and Sarah moved back on the land and lived there until September 28, 1911, when Eli abandoned Sarah and moved into the city of Beaumont, but Sarah retained possession of the land through a tenant. Thereafter Sarah sued Eli for and obtained a divorce, and it was after this that Eli brought this suit for a half interest in the land. The court found as a fact, and the evidence in the record justified the finding, that George Turner was in possession of and exercised ownership over said land, except that actually used by Eli and Sarah during their periodical occupancy, continuously from 1893 to the time of his death in 1912; that he paid all taxes on the land from 1883 to 1911, inclusive; from 1893 to the time of his death he cultivated a portion of the land each year and kept up the fences and at various times sold off portions of the land to various persons. He died in February, 1912, and there is no administration upon his estate and none necessary. Lou Turner, the intervenor, is his surviving

wife and his sole heir. After George Turner purchased the land in 1882 from Long & Co., suit was brought against him in the district court of Jefferson county therefor, and the land was recovered by the plaintiff, and thereafter the successful party to that suit, V. A. Collins, conveyed the land by quitclaim deed to Sarah Ratcliff, George Turner, and J. V. Flemming.

On the trial in the court below Eli Ratcliff did not claim the land in controversy under the deed from George Turner to Sarah Ratcliff but asserted title only under the ten years' statute of limitation, and Sarah Ratcliff asserted that she was holding the legal title thereto in trust for George Turner.

Under substantially the foregoing facts the court concluded as a matter of law, and we think correctly so, that the proof failed to show title in Eli Ratcliff under the ten years' statute of limitation, and that plaintiff therefore having no title to the land, and defendant Sarah Ratcliff asserting that her possession was for George Turner, Lou Turner, his sole heir, was entitled to recover, and rendered judgment accordingly.

[1, 2] Appellant by his first and second assignments of error complains of the refusal of the court to sustain his general demurrer to the intervenor's petition; his contention being: First, that there was no allegation therein of fraud or mistake in the execution of the deed by George Turner to Sarah Ratcliff; and, second, that the facts stated therein were not sufficient for setting the deed aside.

As stated in our fact findings, appellant did not claim under the deed in question but only under his claim of adverse occupancy for a period of time sufficient to perfect the title in himself by limitation, and therefore the question of whether Sarah Ratcliff held the absolute title to the land under the deed to herself from George Turner, or whether she held the legal title in trust for him, were matters of no concern to appellant. We think the averments of the pleading assailed, when tested by general demurrer, were sufficient. It is not true that in cases such as this a trust cannot be ingrafted upon a deed which upon its face shows the legal title in the grantee, except where there are other allegations to show that the failure to express the trust in the deed itself was the result of accident, fraud, or mistake. *Du Perier v. Du Perier*, 126 S. W. 10.

[3] Appellant's third, fourth, fifth, seventh, and eighth assignments of error are predicated upon the alleged refusal of the court to sustain his several special exceptions to the answer of the intervenor. The record does not disclose that these exceptions were called to the attention of the trial court or that they were ruled upon; therefore they must be regarded as waived. *Miller v. Barler*, 26 S. W. 1105; *Pullman v. Vanderhoeven*, 48 Tex. Civ. App. 414, 107 S. W. 147; *Sterling v. Railway Co.*, 38 Tex. Civ. App. 451, 86 S. W. 659.

[4] The ninth assignment attacks that part of the court's findings of fact wherein it was found that, during the three years that Eli and Sarah Ratcliff did not live on the land, George Turner collected the rents.

The eleventh assignment assails the finding of the court to the effect that the deed from George Turner to Sarah Ratcliff was executed for the purpose of enabling the latter to mortgage the land to secure lumber to build a house upon it, and in further finding that there was an understanding between George Turner and Eli Ratcliff to that effect, and in further finding to the effect that it was the understanding between George Turner and Eli Ratcliff that the land should belong to the former but should be occupied by the latter and his wife for the use and benefit of George Turner. These facts were testified to by Sarah Ratcliff, and, although her testimony on this point was contradicted by Eli, it nevertheless warranted the findings complained of.

The thirteenth assignment complains that the court found as a fact that the conveyance from V. A. Collins to George Turner passed the title to the land in the latter. We do not find that the court so found; the only finding in that regard being that V. A. Collins "made a quitclaim deed to George Turner and Sarah Ratcliff for the land in controversy."

[5] By his fourteenth assignment appellant complains that the court erred in holding that the evidence failed to show that plaintiff had title under the ten years' statute of limitations, and in further holding that the burden was upon plaintiff to make out his title as against the claim of intervenor, who was claiming the title against both plaintiff and defendant. He contends in his first proposition under this assignment that where the undisputed proof shows that plaintiff in person or by tenant has held peaceable and adverse possession of a tract of land of 160 acres or less, cultivating, using, and enjoying the same from July 4, 1895, to November 1, 1912, it is error for the court to hold that his title is not perfect under the statute of ten years' limitation. The proposition is sound but assumes the very question in issue. Were we left with the appellant's testimony alone, we would probably conclude that the judgment against him was radically wrong. The record does not bear out the contention that the undisputed evidence shows that Eli had and held such possession and for such length of time as to perfect his title by limitation, for there is abundant evidence in the record from which a contrary conclusion would be warranted. In this connection Sarah Ratcliff testified that during the time she lived on the land she was holding it for George Turner; that she heard Eli admit in George Turner's presence that he was not claiming the land, and the first she knew of his claiming it was after Turner's death; that she had discussed with Eli the

matter of reconveying the land; that he did not set up any claim to it then; that he would not claim it; and that he said the reason why he would not do anything more on the place was because it was not his. Lou Turner testified that Eli "never in my presence claimed the land, always George's land. He told me it was George's land. \* \* \* I never heard him claim this land until after George died." The further complaint in the fourteenth assignment that the court held that the burden of proof was upon plaintiff to make out his title against intervenor does not appear to be sustained by the record. It does not appear that the court made any ruling as to who had the burden of proof in the case.

[6, 7] By his fifteenth assignment appellant complains that: "The court erred in his conclusions of law that intervenor had such title or possession of said premises as would entitle her to recover against the claim of plaintiff herein. The court having held in paragraph 8 of his findings of fact that the quitclaim deed from V. A. Collins to Sarah Ratcliff, George Turner, and J. V. Flemming passed title to the grantees to the land in controversy, he erred in not holding that at least one-half of the title so passed in said deed to Sarah Ratcliff was the property of Eli Ratcliff; it being shown in evidence that Eli Ratcliff and Sarah Ratcliff were husband and wife at the date of the execution of said deed, and it not being shown that it was conveyed to Sarah Ratcliff for her own separate use and benefit." Under this assignment the following proposition is advanced: "Where an intervenor claiming against both plaintiff and defendant introduces a certain deed to show common source and attempts then to show said deed ineffectual to pass title, but offers another deed from another source which, if effectual to pass title, puts some interest in plaintiff, intervenor must then trace the common source of title to the sovereignty of the soil and show it superior to the other title she has introduced before she will be permitted to recover against plaintiff." We will not pause to determine the accuracy of the proposition as an abstract question of law. That it has no application to the facts of this case we have no doubt. We repeat that the court did not hold that the deed from V. A. Collins passed the title to George Turner, Sarah Ratcliff, and J. V. Flemming. The court found as a fact that neither party claimed title under the deed executed by George Turner to Sarah Ratcliff in 1893. This finding is not questioned. The court further found that the plaintiff claimed the land under the statute of limitation of ten years. This finding is not attacked. The court in effect further found, and we think the finding is warranted by the evidence, that from 1895, the time when Eli and Sarah moved onto the land, to the date of George Turner's death, such possession as they held was held for Turner. Any title

perfected by their adverse possession inured to Turner. In *Thomson v. Welsmann*, 98 Tex. 170, 82 S. W. 503, the Supreme Court holds that one who has bought and paid for land, the deed to which was taken in the name of a third party who held in trust for the purchaser, could prescribe under the statute; the other requirements of the statute having been fulfilled. See *Kirby v. Hayden*, 44 Tex. Civ. App. 207, 99 S. W. 747. It is true that the deed by V. A. Collins might have vested title to a portion of the land in Sarah and at such a time as to make it the community property of Sarah and Eli, but Sarah did not assert title under this deed but asserted that such title as she held was held in trust for George Turner. Eli did not claim title under this deed but expressly asserted title by limitation; and, having so pleaded and having failed to prove the allegations of his petition in this regard, he was not entitled to recover.

We find no reversible error in the record, and the judgment of the court below is affirmed.

**Affirmed.**

#### WILBORN v. TERRY et al.

(Court of Civil Appeals of Texas. Galveston. Oct. 31, 1913. Rehearing Denied Dec. 4, 1913.)

#### 1. WATERS AND WATER COURSES (§ 118\*)—SURFACE WATERS.

Where a lower landowner erects a dam or other obstruction which prevents ordinary surface waters from flowing over his land, thus obstructing natural drainage, though not interfering with the water course, he is not liable for injuries caused to the lands of other proprietors upon which the surface waters are thrown back.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 128-130; Dec. Dig. § 118.\*]

#### 2. WATERS AND WATER COURSES (§ 38\*)—WHAT CONSTITUTES "WATER COURSE"—MARSH.

A depression of the ground in a flat marshy country, filled with rank vegetation, from a quarter of a mile to a mile in width, with no defined banks and no channel, and through which water only oozes, is not a water course.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 30; Dec. Dig. § 38.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7410-7413, 7833.]

#### 3. WATERS AND WATER COURSES (§ 118\*)—SURFACE WATERS.

A landowner who erected a dam, thus collecting surface waters in a lake upon his own property and retaining them so that they were thrown back on the land of higher proprietors, is liable for the injury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 128-130; Dec. Dig. § 118.\*]

#### 4. WATERS AND WATER COURSES (§ 126\*)—SURFACE WATERS—ACTIONS.

In an action for damages for damming a lake so that surface waters were collected and

thrown back on plaintiff's land, evidence held insufficient to show that the dam cast water upon plaintiff's land, at most showing only that it prevented the surface water from flowing off as rapidly as before.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 139, 141, 142; Dec. Dig. § 126.\*]

Appeal from District Court, Chambers County; L. B. Hightower, Judge.

Action by George F. Wilborn against J. W. Terry and others. From a judgment for defendants, plaintiff appeals. Affirmed.

A. W. Marshall and R. J. McMurrey, both of Anahuac, and E. B. Pickett, Jr., of Liberty, for appellant. C. F. Stevens, of Liberty, and Ballinger Mills, of Galveston, for appellees.

REESE, J. The following statement of the nature and result of the suit is taken from appellant's brief, which is admitted by appellees to be correct:

The appellant, George F. Wilborn, filed this suit on August 16, 1912, against J. W. Terry, Daniel Ripley, and F. G. Pettibone. Before trial the suit as to Pettibone was dismissed. Recovery of damages in the sum of \$3,534 is sought, and to support his action appellant alleged that he is the owner of sections 1, 3, and 7, T. & N. R. R. Co. survey, in Chambers county, which are located northeast and east of Lake Stephenson, and that about December, 1910, and January and February, 1911, defendants, having leased said lake, and a strip of land bordering and entirely surrounding same, from the owners thereof, constructed a dam at the head of Gordy Marsh, into which Lake Stephenson flows, said dam being 2,410 feet in length and 2 feet high; that the natural outlet and drainage of Lake Stephenson is into said Gordy Marsh, which flows into Lone Oak bayou, and that bayou empties into Trinity Bay; that such course is the natural flow and drainage of the water from plaintiff's said lands when not obstructed, and that other lands in the vicinity thereof drain into Lake Stephenson, but that the dam, as erected by defendants, did and does obstruct the natural flow of water from Lake Stephenson and banks the water up in said lake, thus obstructing the natural flow of the waters of said lake and that which falls upon the adjoining lands and naturally flows into said lake, thereby backing said waters upon plaintiff's lands and causing same to remain thereon, thus damaging and destroying the grass and for a time depriving him entirely of his pasture, to which purpose only is the land devoted, and that that is practically its only value. Plaintiff further alleged that defendants still maintain said dam, and that the natural flow of the waters of said Lake Stephenson and adjoining lands is thereby obstructed, and that the water will thereby be caused to continue to back up and cover

plaintiff's land, as above stated, if said obstruction is permitted to remain. In addition to the damages prayed for, an injunction is asked to require defendants to remove the dam and permit the waters from said Lake Stephenson, and those that accumulate therein from adjoining lands, to flow therefrom in their natural course, as above indicated, without obstruction.

Terry answered by general denial and pleaded specially that he and his associate had leased from the owner the body of water known as Lake Stephenson and a strip of land 200 feet in width around the lake, and that he had had the dam in question erected for the purpose of preventing the inflow of salt water from the bay into the lake in order to prevent the killing of vegetation in the lake and to preserve the water fresh for use as drinking water for his cattle. The purpose in preventing the destruction of the vegetation by salt water was to preserve and increase the value of the lake for hunting purposes. Wild ducks resorted to the lake to feed upon this vegetation. It is not necessary further to set out the allegations of defendants' pleadings. Ripley adopted Terry's answer.

The case was tried with a jury, and, after the conclusion of the evidence, the court instructed the jury to return a verdict for defendants, which was done, and judgment rendered accordingly, from which plaintiff appeals.

Lake Stephenson (sometimes spoken of as White's Lake) is a body of shallow water, never more than about two feet deep, collected in a natural depression of the ground in the flat plain lying along the bays connecting with the Gulf of Mexico. The lake is about one mile wide and about  $1\frac{1}{2}$  miles long. It is fed by the collection of rainwater naturally draining into it as surface water from the surrounding territory and is much resorted to by wild ducks during the winter, which feed on the vegetation of the lake. The entire surrounding territory is flat and marshy but affords pasturage for cattle. At the north end of the lake there is a wide depression of the ground, which extends northwardly to Lone Oak bayou, which leads into Trinity Bay. During seasons of heavy rainfall, filling up the lake with surface water above the level of this marsh, this water drains off from Lake Stephenson through this marsh into Lone Oak bayou and thus finds its way into Trinity Bay, and in the same way, at seasons of very high tides, the waters of Trinity Bay find their way, through this bayou and marsh, into the lake. The undisputed evidence with regard to this marsh is that it is simply a depression of the ground with no defined banks, varying in width from a quarter of a mile to a mile or more. The length of the dam, at the junction with the lake, 2,410 feet, indicates its width at that point. About  $1\frac{1}{2}$  miles below this dam there begins something like a de-

fined way of exit, or water course, called Lone Oak bayou. The bed of this marsh is covered with a rank growth of grass and sea cane. There is no defined channel in the marsh for the passage of water, which just oozes through the vegetation in the marsh without perceptible current. Appellant is the owner of three sections of land lying north and east of Lake Stephenson. The nearest point of any one of these sections is from a half to three-quarters of a mile from the lake, and east of it. These sections are inclosed and used by appellant for pasturage for his cattle. This land is all low, flat, and marshy, and after anything like a heavy rainfall, before as well as since the erection of the dam, at least that part of the land claimed to be affected by the backwater from the lake on account of the erection of the dam is to some extent covered with water. This surface water falling on appellant's land finds an outlet, some of it into East Bay, and some of it into Lake Stephenson. The evidence leaves no doubt that the erection of the dam obstructs to some extent the outflow of water from the lake through Gordy Marsh, whenever there is a sufficient accumulation of water in the lake. The surrounding country is so flat that engineers, in making surveys, compute elevation in inches and fractions thereof.

[1, 2] Appellant's contentions are generally that by reason of the dam in question, after a heavy rainfall, the water accumulating in the lake backs up over and upon his land and remains there for such a length of time as to injure and destroy his grass. It is not contended that water would not accumulate and lie on his land in such circumstances, to some extent, without this dam, but that it would not be so deep and remain so long. Appellant contends: First, that Gordy Marsh is a water course and on this account its obstruction, to his damage, unlawful; and, second, that if this is not true the effect of the erection of the dam is to collect in the lake the surface water from the surrounding lands, filling up the lake and casting the water there collected back upon his lands, and that he was damaged thereby. If there was any evidence to support either of these last two contentions, the case should have been submitted to the jury. These questions may be more satisfactorily disposed of without confining ourselves to a discussion seriatim of the several assignments of error as they are presented in the brief of appellant. It is sufficient to say that the questions discussed are sufficiently presented by the assignments. If the effect of the dam was only to obstruct or prevent the outflow from appellant's land of the surface water arising from rain falling thereon or falling on other lands surrounding, and which, in seeking an outlet, flowed over appellant's lands, there would be no liability on the part of appellees, unless Gordy's Marsh had the characteristics of a water course. Passing upon this last ques-

tion first, our conclusion is that the undisputed evidence shows that this marsh cannot be treated as a water course in dealing with the questions presented. The various definitions of what is meant in this connection by water course, and the enumeration of the characteristics thereof, are voluminous, and in conforming to these definitions it is sometimes difficult to determine whether in the particular case the obstruction of the flow of water is unlawful on this account; but in the present case, we think, there is no difficulty, and it would not be profitable to incur this opinion with a discussion of the essential characteristics of a water course, as distinguished from the ordinary flow of surface water from higher to lower ground, as determined by the general topography of the country. A depression of the ground, in a flat marshy country, from a quarter of a mile to a mile in width, with no defined banks and no channel in the depression over the entire width of which surface water passes, without perceptible current, to lower ground, has not an element of a water course. *Farnham on Waters*, § 455a et seq.; 40 Cyc. 553 et seq.; *Gross v. Lampasas*, 74 Tex. 195, 11 S. W. 1086; *Gramann v. Eicholtz*, 36 Tex. Civ. App. 309, 81 S. W. 756.

[3, 4] While appellees, then, would not be liable if the effect of the erection of the dam would be merely to obstruct the drainage from appellant's land of its natural surface water (*Barnett v. Irrigation Co.*, 98 Tex. 355, 83 S. W. 801, 107 Am. St. Rep. 636), he would be liable if such effect was to collect in Lake Stephenson the surface water falling upon the lands surrounding it and throw this water on appellant's lands. *Gembler v. Echterhoff*, 57 S. W. 813. There was plenty of testimony that appellant's lands were covered with water after a heavy rainfall, both before and after the erection of the dam. From the flat, marshy topography of the country, this was inevitable, and there was plenty of testimony that the dam obstructed the passage of water out of Lake Stephenson through Gordy Marsh. This also was its necessary consequence. But this is about as far as the testimony goes. Appellant testified that: "Before the building of that dam I never did see water backed up on my land and pasture between my pasture and Stephenson's Lake to the extent I saw it last winter; that is, I do not think it was ever a foot and a half. The pasture remained in that flooded condition from December, 1911, until March." The evidence showed that this was a season of unusually heavy rainfall. This was not disputed. The nature of the country must be considered and the distance of appellant's land from the lake. A map made by appellant's witness and introduced in evidence by him shows that a point of one of appellant's sections runs down to within 3,468 varas of the lake, but very

little of his land lies within a mile, and most of it was much over a mile from the lake. We have examined the evidence very carefully; and we can find none that would have authorized a verdict for appellant. The most that can be gotten out of it for appellant is that, on account of the erection of the dam, the surface water did not flow off as readily as it did before. To the extent that this was done at all, the case falls within the doctrine of *Barnett v. Irrigation Co.*, supra, and does not come within the doctrine of *Gembler v. Echterhoff*, supra.

We have carefully examined the several assignments and the propositions thereunder presented in the able brief of appellant and conclude that none of them presents any ground for reversal. The trial court did not err in instructing a verdict for appellees. Finding no error, the judgment is affirmed. Affirmed.

# PRICKETT v. STEINER et al.

(Court of Civil Appeals of Texas. Galveston. Nov. 14, 1913.)

## INJUNCTION (§ 59\*)—RIGHT TO.

Defendant, the proprietor of a moving picture show, agreed to admit plaintiff and his family free in consideration for permission to use the walls of plaintiff's building as supports for the roof of a picture show and a strip of land adjacent to the walls. Held that, defendant being insolvent, an injunction restraining him from refusing plaintiff and his family permission to visit his show was proper, where defendant at the instance of his lessor, who claimed that plaintiff had no right to the strip of land in question, had refused such permission, for the continuation of plaintiff's visits to the show would not affect the title to the land in controversy, and the denial of plaintiff's right might deprive him of any remedy against the defendant.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 114-116, 128; Dec. Dig. § 59.\*]

Appeal from District Court, Colorado County; *M. Kennon*, Judge.

Suit by Dave Steiner and others against B. E. Prickett. From an order granting temporary injunction, defendant appeals. Affirmed.

PLEASANTS, C. J. This appeal is from an order of the district judge of Colorado county, made in chambers, granting a temporary injunction in a suit for injunction brought by appellees against appellant. The petition upon which the injunction was granted alleges in substance: That plaintiffs are the owners of certain lots in the city of Columbus, which are fully described in the petition. That some time in the spring or summer of 1912 the defendant, who was the lessee of a lot adjoining the lots so owned by plaintiffs, placed a temporary uncovered inclosure around said lot and began to exhibit or conduct therein a moving picture show. That said inclosure, which was erect-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed with plaintiffs' consent, connected with the walls of the buildings situated on the lots owned by plaintiffs and covered a strip of land along the south line of one of plaintiffs' lots 18 inches in width and 66½ feet long and a strip along the east line of the other lot owned by plaintiffs 3 feet wide and 31½ feet in length. "That thereafter defendant conceived the idea of continuing the operation of said show through the following winter, and in order to keep out the cold and rain decided to place a roof over said open structure and was proceeding to carry out said idea when plaintiff protested and caused him to desist and to refrain from using plaintiffs' said land or further connecting with their said walls, whereupon defendant importuned plaintiffs to allow him the use of said lands and walls as he could not conduct his show throughout the winter without placing a cover over his said structure, and that it would occasion him great expense and loss, if plaintiffs refused him the use of said lands and said walls, in that he would be compelled to build two other independent walls upon which to construct his said covering, and he did then and there promise and agree with plaintiffs that, if plaintiffs would allow him to continue to use said lands and said walls, as a consideration therefor that plaintiffs and the following parties should have free access to said inclosure and to the nightly performances of his said picture show, and which right was to be also reserved by plaintiffs so long as defendant should continue to operate said theater, and that they would not be prevented from such access and attendance nor be charged any fee for admission whatever, said parties' names being as follows: Leo Steiner, son of plaintiff, and his wife, Susie E. Steiner, A. L. Steiner, son of plaintiff, and his wife, Ruth Steiner, Vivian Steiner and Melvin Steiner, children of the said A. L. Steiner and wife, Mrs. C. Wampold, mother of Mrs. Ruth Steiner, and Emma Moulden, a small girl living with the family of said A. L. Steiner. Whereupon, and because of said consideration, plaintiffs accepted said proposition, and because of which defendant became bound and obligated himself that he would allow plaintiffs and said above-named parties free access and entry into said theater and said nightly performances, as aforesaid, without let or hindrance and without charge. That immediately after plaintiffs had accepted said proposition defendant at once placed a roof on said inclosure, joining same to plaintiffs' said walls and otherwise attaching same to plaintiffs' said two buildings, and which had the effect of obstructing said light, and by reason of which defendant made the said open structure a warm, comfortable, weather and rain proof building and which it so continued until this time. That, acting under and by virtue of said agreement, defendant permitted plaintiffs and all of said parties above mentioned to

enter his said theater without charge or molestation and to attend said nightly performances continuously and at all times that they so desired until the 26th of October, A. D. 1912, when the defendant, in utter disregard of his agreement and of his obligations not to refuse plaintiffs and the above-named parties access free of charge in his said theater and to his said nightly performances, and notwithstanding his obligations and agreement that he would collect no entrance fees from plaintiffs or said above-named parties, nor in any other manner hinder or refuse them admission, as aforesaid, did fail and refuse to carry out and comply with his part of said contract and did refuse to allow plaintiffs and the above-named parties to enter said theater and to attend said nightly performances, and did refuse to allow them to so enter and attend said performances free of charge, but on the contrary did demand that plaintiffs and said above-named parties should pay to him the price charged all other people before he would allow them to enter said theater or attend his said nightly performances, and did, upon plaintiffs' and said above-named parties' demanding such entrance, procure the services of an officer, and did through such officer prevent plaintiffs and said above-named parties from entering into said theater and from access thereto, thereby ejecting plaintiffs and said above-named parties therefrom in violation of his said undertaking. And plaintiffs now say that defendant still refuses and threatens to continue to refuse to allow plaintiffs and the above-named parties free access to said theater and to said nightly performance and is threatening to use the same force to prevent plaintiffs and said above-named parties from entering said theater and attending said nightly performances, and by which means defendant will entirely prevent plaintiffs and said above-named parties from entering said theater and of obtaining the benefit of the said nightly performances."

It is then alleged that the fees charged by defendant for admission to the performances given in said structure vary from 10 cents to 35 cents; that said performances are highly entertaining and instructive, especially to the younger of the persons for whose benefit said agreement was made, and not to be obtained elsewhere in the city of Columbus, where plaintiffs reside, there being no other moving picture theaters in said city, and that the refusal of defendant to comply with his said contract works an irreparable injury to plaintiffs, for which they have no adequate remedy at law; that defendant is insolvent; and there is no way of arriving at the measure of damages plaintiffs have suffered and will suffer by the continued breach by defendant of said contract.

It is further alleged that defendant is claiming that the strip of land before described, which belongs to plaintiffs, is owned by the party from whom he leased the lot ad-



joining plaintiffs' said lots and is thereby casting a cloud upon plaintiffs' title and has entered into a conspiracy with said party for the unlawful purpose of acquiring plaintiffs' said land by prescription.

The prayer of the petition is as follows: "Wherefore plaintiffs bring this suit, upon hearing, pray judgment that defendant be required to specifically perform his said agreement, and for a temporary mandatory injunction enjoining defendant from refusing plaintiffs and said above-named parties from free access to said theater and attendance upon said nightly performances and from charging or collecting or demanding from plaintiffs and said above-named parties anything for admission to said theater and to such performances, and from forcibly preventing and ejecting plaintiffs and said above-named parties from entering said theater and attending said nightly performances, as aforesaid, and that defendant be enjoined from acknowledging or atoning to any other person, firm, or corporation as landlord or as owner of plaintiffs' said two strips of land in order that plaintiffs' said rights be maintained in statu quo, and that same be made perpetual upon final hearing, for costs of suit and general and special relief in equity. In the alternative, plaintiffs pray for possession of said premises and for a temporary mandatory injunction compelling defendant to remove his said structure away from off of plaintiffs' said land, and from in any manner obstructing plaintiffs' said light, or from tortiously and unlawfully seeking to obtain prescriptive title to plaintiffs' said property upon final hearing, for costs of suit and general and special relief, both at law and in equity."

The defendant presented a general demurrer and numerous special exceptions to plaintiffs' petition, and, answering same under oath, denied many of the allegations of said petition, and especially denied that plaintiffs owned the strip of land claimed by them, and averred that same was the property of the I. O. O. F. Lodge of Columbus, from whom he had leased the lot occupied by him. He admitted the execution of the contract as alleged by plaintiffs. He also specially denied that he was insolvent. His answer also contains the following averments: "Defendant further says that after he and plaintiffs entered into the agreement hereinbefore set out, and in accordance with the terms of said agreement, he permitted not only plaintiffs' immediate family free entrance into each and every performance of said show thereafter but also permitted Leo Steiner and his wife, Susie E. Steiner, A. L. Steiner and his wife, Ruth Steiner, Vivian Steiner, Melvin Steiner, Mrs. C. Wampold, and Emma Boulden free entrance to each and every performance until about the 28th day of October, A. D. 1912, when defendant was informed by the

representatives and some of the members of the I. O. O. F. Lodge that the plaintiffs owned no portion or part of the land and premises within the walls of the Airdome theater, and he was then and there requested by them not to recognize any rights or title that plaintiffs may assert or claim in or to any portion of the premises then occupied by him, for the reason that a recognition on his part at time, being acquiesced in by them, might possibly be construed as an admission on their part that plaintiffs owned and were entitled to a portion or part of the lot upon which is situated said Airdome and is inclosed by the Airdome theater walls. Said agents and representatives also representing to defendant that all of said premises so inclosed and the title thereto belonging to said I. O. O. F. Lodge in fee simple, and by right of prescription, as said lodge, has been in and held actual, notorious, adverse, and peaceable possession of all the property and premises so inclosed, and had been using, claiming, and enjoying the same and paying all taxes due thereon, claiming the same under deeds registered in the office of the county clerk of Colorado county, Tex., for more than three, for more than five, and for more than ten years prior thereto, and by reason of which said lodge claimed title to said property and premises. Defendant further says that said representatives and agents of said lodge informed him that, if plaintiffs claimed any portion of said premises, they did so fraudulently and without any good or sufficient reason and for the purpose of gaining free admission to defendant's show. Thereupon defendant informed plaintiffs that said lodge denied plaintiffs' ownership and claim to any portion of said premises, and he then requested plaintiffs to confer with said lodge and for them to determine the ownership of the property in dispute, defendant agreeing that if the property in dispute was shown to belong to plaintiffs he would continue to carry out the terms of his contract with them, or that he would lease the property in dispute and pay a reasonable rental therefor, but that defendant could not, as the tenant of said lodge, recognize plaintiffs' claim to any portion of said premises until the matter was finally settled between plaintiffs and said lodge. But plaintiffs refused to adjust this matter in this way, but on the contrary demanded and tried to induce this defendant to recognize plaintiffs' claim by executing a written lease therefor, for which he was to pay as rental therefor the sum of \$1 per month. This lease is hereto attached and marked Exhibit D and made a part hereof. Defendant thereupon submitted said lease to said lodge for their approval, which they refused to approve. For the reasons hereinbefore assigned this defendant refused to carry out the terms of his contract and agreement with said plaintiffs, but for no reason whatsoever did he

so refuse. Defendant specially denies that, as reason for refusing to abide by the terms of said contract on his part, he was a minor at the time that he entered into said agreement, but on the contrary defendant alleges and says that while it is true that at the time he entered into said agreement with said plaintiffs he was then a minor, but that he became of legal age thereafter, to wit, on the 29th day of October, A. D. 1912, and he thereafter was ready and willing to ratify said contract and is now ready and willing to so ratify the same should the title to the premises in dispute be satisfactorily shown to be in plaintiffs."

Upon a hearing before the judge upon the bill and answer and affidavits and oral testimony offered by the parties, the judge made the following order: "In chambers, Columbus, Tex., June 30, 1913, upon notice and hearing of the within petition, I am of the opinion that the injunction should be granted. Therefore, upon the plaintiffs giving bond as required by law in the sum of \$250, W. C. Papenberg, Esq., clerk of this court, is hereby directed to issue the writ of injunction prayed for, restraining B. E. Prickett, his agents, attorneys, servants, and employees, until further orders of this court, from refusing Dave Steiner, Henrietta Steiner, Leo Steiner, Susie E. Steiner, A. L. Steiner, Ruth Steiner, Vivian Steiner, Melvin Steiner, Mrs. C. Wampold, and Emma Moulden free access to the Airdome theater of the said Prickett, and attendance upon the nightly performances thereof and from charging, collecting, or demanding of said parties, or either of them, anything for admission to said theater and to said nightly performances, and from forcibly preventing said parties, or either of them, from entering said theater and from attending said nightly performances, and from ejecting said parties, or either of them, therefrom. To all of which defendant excepts and gives notice of appeal to the Court of Civil Appeals at Galveston, Tex."

There are no assignments of error and no brief filed by either party.

We do not think, from an examination of the pleadings and the affidavits presented on the hearing, that the learned trial judge erred in granting the injunction in the terms of the order above set out. Upon the issue of defendant's insolvency, the affidavits are conflicting, and the judge was justified in finding that he was insolvent. The order granting the injunction can have no possible effect upon the issues as to the ownership and right of possession of the property, which are the main issues raised by the pleadings. If defendant is insolvent, plaintiffs cannot by any action at law be compensated for the damages they may sustain by the continued refusal of the defendant to permit them to attend the performances as

he agreed and contracted to do, and as he expresses a willingness in his answer to continue to do if upon a trial it is found that plaintiffs own the strip of land claimed by them.

In these circumstances the injury to plaintiffs which would result from a refusal to grant the injunction is much greater than any that defendant could possibly sustain by reason of said injunction. The doctrine of "balance of convenience" is applicable to the case made by the pleadings and evidence, and the judge, sitting as a chancellor, did not err in granting the injunction. *Townsite Co. v. McFaddin, Weiss & Kyle*, 56 Tex. Civ. App. 611, 121 S. W. 721; *Canal Co. v. Markham Irr. Co.*, 154 S. W. 1176; *Houston Electric Co. v. Glen Park Co.*, 155 S. W. 965.

The judgment is affirmed.

#### STONE & WEBSTER ENGINEERING CORPORATION v. BREWER.

(Court of Civil Appeals of Texas. El Paso. Nov. 20, 1913. Rehearing Denied Dec. 11, 1913.)

NEGLIGENCE (§§ 121, 134\*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Not only must negligence upon defendant's part be shown, but the causal connection between it and the injury must be shown. Neither negligence nor causal connection will be presumed from the fact of injury alone.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 267-273; Dec. Dig. §§ 121, 134.\*]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by Reid Brewer against the Stone & Webster Engineering Corporation. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood, of Houston, for appellant. Dowell & Dowell, of Houston, for appellee.

HIGGINS, J. This is an appeal from a judgment in appellee's favor in the sum of \$2,500, account damages arising from personal injuries. Appellant was engaged in the construction of a line of railway between the cities of Galveston and Houston, and appellee was in its employ as driver of a track automobile. While driving the automobile in the discharge of his duties, the same was derailed, and appellee sustained the injuries complained of. Appellant is alleged to have been guilty of negligence in furnishing a defective automobile for appellee to drive, in that the rear axle was defective, which negligence is alleged to have been the proximate cause of the derailment and consequent injuries.

Under the view entertained by the court of the state of the evidence, it becomes unnecessary to review the numerous assignments presented except those which relate to the

sufficiency of the evidence. In view of a retrial, however, it may be remarked that it would be well to avoid the criticism made of the court's charge under the fifteenth, sixteenth, and seventeenth assignments, relative to the master's duty. A question is here presented which may be readily avoided.

The evidence disclosed a rear axle had become defective as alleged, and appellant's failure to replace same with a new one would warrant a finding of negligence; but it conclusively appears that it had been temporarily repaired by a process of "bushing," and had been so repaired by appellee upon the date of the accident. It will serve no useful purpose to discuss the evidence further than to say that the same wholly fails to show with any degree of certainty any causal connection between the negligence alleged and the accident. Not only must negligence upon appellant's part be shown, but the causal connection between the negligent act or omission and the injury as well. Neither negligence or causal connection will be presumed from the fact of injury alone; but it must be proven by competent evidence. *Railway Co. v. Shoemaker*, 98 Tex. 451, 84 S. W. 1049; *Railway Co. v. Porter*, 73 Tex. 307, 11 S. W. 324; *Railway Co. v. Crowder*, 63 Tex. 505; *Railway Co. v. Baker*, 99 Tex. 452, 90 S. W. 869.

As stated above, the facts here proven are wholly insufficient to show any causal connection between the appellant's alleged negligence and the accident from which appellee's injuries resulted. Only by conjecture and surmise could the jury have found that the accident resulted from the negligent acts complained of, and this is insufficient. *Railway Co. v. Greenwood*, 40 Tex. Civ. App. 252, 89 S. W. 810; *English v. Railway Co.*, 44 Tex. Civ. App. 467, 98 S. W. 914; *Duerler, etc., v. Dullnig*, 83 S. W. 889; *Railway Co. v. Baker*, 99 Tex. 452, 90 S. W. 869; *Railway Co. v. Anson*, 101 Tex. 198, 105 S. W. 989; *Jones v. Railway Co.*, 47 Tex. Civ. App. 596, 105 S. W. 1007; *Railway Co. v. Robinson*, 53 Tex. Civ. App. 12, 114 S. W. 658; *Coffman v. Railway Co.*, 126 S. W. 619; *Railway Co. v. Byrd*, 124 S. W. 738; *Railway Co. v. Hall*, 46 Tex. Civ. App. 493, 102 S. W. 740; *Parks v. Railway Co.*, 29 Tex. Civ. App. 551, 69 S. W. 125; *Broadway v. San Antonio, etc.*, 24 Tex. Civ. App. 603, 60 S. W. 270; *Railway Co. v. Faber*, 77 Tex. 154, 8 S. W. 64; *Patton v. Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 364; 3 Ency. of Ev. 70; 14 Id. 76, 99.

We desire to comment upon the brief filed herein by appellant. It is framed in utter disregard of the rules which have been promulgated by the Supreme Court respecting the manner and form of briefing. Appellant's counsel have evidently preferred to brief the case according to their own idea of a proper method of briefing rather than with

regard to the rules which it was intended they should observe. Violations of this character do not commend themselves to this court where counsel knew the rules, and in the instant case no indulgence of ignorance or inexperience can be indulged in, and the violation can be explained upon no other theory except that the rules have been deliberately disregarded. Such disregard is inexcusable, and in the instant case is tolerated only because the appeal did not originate in this district, but came to this court upon transfer, and because the various trial and appellate courts have so long permitted practically all of their rules to be violated and disregarded at will that the bar, perhaps, can scarcely be blamed for regarding them as dead letters, to be observed or not as they chose.

Reversed and remanded

### DAVIS et al. v. CONN.

(Court of Civil Appeals of Texas. Texarkana. Nov. 25, 1913. Rehearing Denied Dec. 4, 1913.)

#### 1. LOGS AND LOGGING (§ 3\*)—SALES OF STANDING TIMBER—DISTINCTION BETWEEN REALTY AND PERSONALTY.

Where it is contemplated by a conveyance of growing trees that the purchaser shall have some beneficial use of the land in connection with the trees, which shall remain on the land and receive their sustenance therefrom, the sale is of an interest in land, and carries the right to the use of the land for the sustenance of the trees and of entering thereon to enjoy the interest conveyed.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

#### 2. LOGS AND LOGGING (§ 3\*)—SALES OF STANDING TIMBER—DISTINCTION BETWEEN REALTY AND PERSONALTY.

Where, in conveying growing trees, a severance and taking away from the land is contemplated, the sale is of an interest in chattels only, and the right of removal must be exercised within the time agreed.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

#### 3. LOGS AND LOGGING (§ 3\*)—SALES OF STANDING TIMBER—DISTINCTION BETWEEN REALTY AND PERSONALTY.

A sale of growing trees with the privilege of removing them within five years, or after that time if an annual rental shall be paid, operates as a sale of chattels rather than of an interest in realty.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

#### 4. CONTRACTS (§ 10\*)—LOGS AND LOGGING (§ 3\*)—MUTUALITY—SALES OF STANDING TIMBER—CONSTRUCTION.

A stipulation, in a conveyance of all trees of 12 inches or greater diameter growing on certain land, that the agreed time for removing them may be extended as long as the buyer "may want" upon payment of certain rental, is not unilateral and void, but is to be construed as meaning that the time may be extended for as long as needed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10;\* *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**5. LOGS AND LOGGING (§ 3\*)—SALES OF STANDING TIMBER—CONSTRUCTION OF CONTRACT.**

Under a conveyance of growing trees with the right of removing them within five years, or thereafter if an annual rental should be paid, the buyer had the right to turpentine the trees while standing, where he proceeded, with diligence, to remove them in accordance with the contract, and no damage was done the soil beyond that necessarily incident to turpentering the trees.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

**6. LOGS AND LOGGING (§ 3\*)—SALE OF TIMBER—TURPENTINING—INJURY—PERSONS LIABLE.**

Where the buyer of all trees of 12 inches or greater diameter growing on certain land sold the right of turpentering such trees, he was not liable in damages because those turpentering the trees destroyed trees under 12 inches diameter, since that was a trespass with which he had nothing to do.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

Appeal from District Court, Jasper County; W. B. Powell, Judge.

Action by J. R. Davis and another against R. C. Conn. From a judgment for defendant, plaintiffs appeal. Affirmed.

By their petition the appellants claim to be the owners of three several tracts of land, and allege that appellee in February, 1911, wrongfully and without right entered upon the land and turpented the pine trees, and in so doing injured the soil and the grasses and a number of the trees, and then later did remove from the land a large quantity of the pine timber growing thereon. Appellee answered by denial and not guilty, and specially that by conveyance in writing he purchased all pine timber 12 inches in diameter and upwards from appellants, and that the extensions of time authorized by the conveyance had been complied with according to the terms. By a cross-bill of appellee Rosemond & Day, as partners, were made parties defendant, and judgment asked by appellee over and against such partnership in the event any judgment should be rendered against appellee for their alleged trespass. A trial was had to the court without a jury, and there was a judgment for appellee and against appellants.

The evidence shows that appellants were the owners of the lands described in the petition, and that on January 9, 1906, by deed they sold and conveyed the pine timber on the land above 12 inches in diameter. The cash consideration recited in the deed was actually paid, and at the time the note mentioned in the deed was due it was fully paid. On August 26, 1907, appellee Conn leased in writing to Rosemond & Day the timber conveyed by the deed of appellants to him, for turpentine and resin purposes; Rosemond & Day agreeing to pay appellee therefor the sum of \$8,000. Rosemond & Day both began and ceased their operations on the timber for turpentine during and be-

fore the expiration of five years from the date of Conn's deed from appellants. Turpentine of considerable value was taken from the trees. In turpentering the trees exclusive use of the land was not made, and there was only such use of the land as was incident and necessary to the removing of turpentine from the land, and no injury was done to the soil. Just before the expiration of five years from January 9, 1906, appellee Conn tendered to appellants the amount of the yearly rental provided for in the deed, which was refused by appellants, and during the sixth year from January 9, 1906, began to remove trees from the lands. At the end of the sixth year appellee had not finished the removal of the trees and tendered appellants, the yearly rental provided in the deed, which was refused by appellants, and continued to remove trees from the land. At the time of the trial about two-thirds or three-fourths of the trees had been removed from the land by appellee or his vendees, Simmons Bros., and the only trees removed were of the specification and kind described in the deed. The deed made and delivered by appellants to appellee, after omitting formal parts and description, reads as follows: "For and in consideration of the sum of \$6,700.00 to us in hand paid and secured to be paid by R. C. Conn, as follows: \$3,700.00 cash and one promissory note for \$3,000.00 due in two years from the 10th day of January, A. D. 1906, with 8 per cent. interest, have granted, sold and conveyed, and by these presents do sell, grant and convey unto the said R. C. Conn, of the county of Jasper and state of Texas, all pine timber from 12 inches and up, now standing, lying or growing on three certain tracts or parcels of land now lying and being situated in Jasper county, Texas, and about 15 miles south of Jasper, and described as follows: (We here omit the description.) To have and to hold the above-described timber with all and singular the rights and privileges to enter upon said land with teams, tools and men to cut and remove said timber off of said land, with this exception, that the said R. C. Conn or his successors is not to enter into my present inclosures, and we hereby give R. C. Conn five years to cut and remove the said timber off the said land, beginning the 19th day of January, A. D. 1906, and end the 19th day of January, A. D. 1911, and should the said R. C. Conn fail to cut the timber in the period of time or five years, we do hereby agree to extend the time for as long as the said R. C. Conn may want, provided the said R. C. Conn and his successors shall pay unto us two hundred and thirty-six dollars (\$236.00) per annum each year that he may hold the timber and the said land, but it is understood and agreed that when all the said timber is cut and removed off of said land from 12 in.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dia. measuring 18 ins. from the ground and upward, this deed shall become null and void. We do hereby reserve all timber under 12 ins. at the time it is cut off of said land. To have and to hold the above-described timber and right of way through said land thereunto in any wise belonging unto the said R. C. Conn, his heirs and assigns, and we do hereby bind ourselves, our executors and administrators to warrant and forever defend all and singular the said premises unto the said R. C. Conn, his heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof. But it is expressly agreed and stipulated that the vendor's lien is retained against the above-described property until the above-described note and all interest thereon are fully paid according to its face and tenor effect in reading when this deed shall become absolute. Witness our hands, \* \* \* Texas, this 9th day of January, A. D. 1906." (Here signed, acknowledged, and also recorded.)

The court made findings of fact, and, as here material, these were: (1) That appellee had in fact nothing to do with the turpentine of the trees, but merely sold Rosemond & Day his right thereto by reason of the sale and conveyance from appellants; (2) that no material injury was done to the land or the grass by turpentine the timber thereon; and (3) that appellee, through his vendees, had cut and removed from the land during the sixth and seventh years after the date of the deed from appellants about two-thirds of the pine timber growing on the land, after tendering each year the rental value provided in the deed, which each time was refused by appellants. The rental value of the sixth and seventh years were tendered in court. On the facts of the case the court concluded appellee had purchased the absolute right of the trees and could convey the right to turpentine the trees, and was not liable for the value of the timber removed, and, there being no damage done to the soil, judgment should be for the appellee.

Holland & Holland, of Orange, and Roi Blake, of Jasper, for appellants. Smith & Blackshear, of Jasper, and J. B. Warren, of Houston, for appellee.

LEVY, J. (after stating the facts as above.) [1, 2] The principal questions made on the appeal are founded on the several assignments of error, which may here be disposed of together, that challenge the conclusions of law made by the court that appellee was not owing appellants in damages for the value: (1) Of the trees cut and removed from the land; or (2) for the turpentine taken from the trees; or (3) for the rental value of the land during the time the trees were being turpentine. The questions made are predicated, of course, upon the established facts as found and considered by the

trial court. In order to determine the rights of the parties in respect to the questions, it is required that the timber deed from appellants to appellee be construed and given legal effect. There are quite a number of generally reported cases dealing with the sale of growing trees upon the principal question of whether such sale operated to pass an interest in land or to be a sale of chattels only. By one line of the cases the question is answered that according to the facts therein the sale of growing trees operates to be a sale of an interest in land. By the other line of cases a sale of growing trees is held under the facts therein to be a sale of chattels only. And the reasons and principles determining the ruling in such cases upon the effect that should be ascribed to the sale could well be considered as furnishing a criterion to determine the effect to be given the sale in this case. A number of the cases rather turn on the point that in them the agreement of the parties was not made with a view to the removal and severance of the trees from the soil, but their remaining thereon; and standing trees being legally regarded as part and parcel of the land in which they are rooted and from which they draw their support, therefore, in that sense, the sale passed an interest to real estate. And the reason for the holding in a number of cases that a sale of growing trees is a sale of chattels only is that in the contemplation and agreement of the parties in such particular cases the sale was made in prospect of the severance and removal of the trees from the land, and not to remain on the land, and therefore the sale was intended and operated to be a sale as chattels only. It is quite unnecessary to cite these numerous cases. And if the distinction made in the cases is to be observed as a property rule, the two doctrines are announced that in a sale of trees growing upon land where in the particular case (1) it is contemplated by the conveyance that the vendee is to have some beneficial use of the land in connection with the trees and that the trees shall remain thereon so as to receive profit and growth from the growing surface of the land, the sale operates as a sale of an interest in land; and (2) where it is contemplated and intended by the conveyance that there shall be a severance and taking away of the growing trees from the land, such sale must be regarded and operates to be a sale as of chattels only. It is quite well settled by the cases that growing trees may by the agreement of the parties be severed, in contemplation of law, from the land, and be dealt with in the contract as personalty removable immediately or timely without an actual severance at the time. In this state the two rules above stated have been announced and followed. The first rule is applied in the case of *Lodwick Lbr. Co. v. Taylor*, 100 Tex. 270, 98 S. W. 238, 123 Am. St. Rep. 803. The second rule is applied in the cases of *Beauchamp v. Williams*, 115 S. W.

130; Development Co. v. Lumber Co., 139 S. W. 1015; Carter v. Clark & Boyce Lbr. Co., 149 S. W. 278; Lumber Co. v. McWhorter, 156 S. W. 1153; Lancaster v. Roth, 155 S. W. 597. From the Taylor Case, supra, firstly referred to, flows the rule that, an interest in the nature of realty being conveyed, there goes with the title to the timber the right to the use of the soil for its sustenance and of entry upon the land for its enjoyment. And from the cases immediately above, secondly mentioned, flows the rule that the trees being conveyed in the nature of personality in prospect of severance and removal within a reasonable time or agreed time, the extent and duration of the grant is limited to and the right determined at the end of the agreed time.

[3] Bearing in mind the principle and rules stated, the deed in this case is to be referred to in order to see the rights it conveys and effect of the rights. It appears therefrom that appellants purported to and did convey to appellee, for the consideration therein stated, "all pine timber from 12 inches and up now standing or growing" on the land described. And appellee was "to have and to hold the above-described timber, with all and singular the rights and privileges to enter upon the said lands with teams, tools and men to cut and remove said timber off of said land, with this exception, that the said R. C. Conn or his successors is not to enter into my present inclosures, and we hereby give R. C. Conn five years to cut and remove the said timber off the said land, beginning the 19th day of January, A. D. 1906, and end the 19th day of January, A. D. 1911, and should the said R. C. Conn fail to cut the timber in the period of time or five years, we do hereby agree to extend the time for as long as the said R. C. Conn may want, provided the said R. C. Conn and his successors shall pay unto us two hundred and thirty-six dollars (\$236.00) per annum each year that he may hold the timber and the said land." According to the language of the parties, as seen, there is stipulated and agreed that a severance and removal of the growing trees shall be, first, within five years from the date of the deed; and failing to sever and remove the trees within that time, then within an extended period thereafter, upon payment of a rental for their occupying the land during such extended period. Thus there is made to plainly appear a sale made by the parties with the view and intention to the severance and removal of the trees from the land within a stipulated time. And so there is present in the sale all elements within the principle governing the effect given such conveyances of growing trees as a sale of chattels only. Concluding, as we do, that the result of the deed, construed as a whole, evidences the intention and agreement to pass the trees as chattels only, "with all and singular the rights and privileges to enter upon said land with teams, tools and

men to cut and remove said timber off of said land," then the rule in such cases would be applicable that the extent and duration of the grant is limited to and the right determined at the end of the agreed time.

[4] Recurring to the stipulation in the deed, in order to determine the time limit for severance and removal of the trees from the land, it appears that after five years from the date of the deed, which time in this case had actually expired, appellee, upon paying a stipulated sum, should have extension of as much time more in which to sever and remove the trees as he "may want." Appellants contend that this latter stipulation is unilateral and void. We think, however, that the word "want" should be construed in the sense and meaning of "need," and that the language of the entire stipulation was intended by the parties to express the agreement that appellee should on paying the rental have the time needed to sever and remove the trees from the land. This construction makes consistent and harmonizes the further provision of the deed, "But it is understood and agreed that when all the said timber is cut and removed off of said land from 12 in. dia. measuring 18 ins. from the ground and upward, this deed shall become null and void."

[5] Now it is conclusive, as found by the court, that appellee tendered the rental within the time of six and seven years from the date of the deed, and was proceeding in diligence during that time to cut and remove the trees. And it is not questioned by appellants that the time was not proper and such as was reasonably required to remove the trees if the stipulation was not void. It follows therefore that appellee was not cutting and removing the trees in violation of his contract. And consequently appellee, under his conveyance and under the facts, had the right to the enjoyment of his property to the extent of turpentineing the trees and using such products and cutting and removing the timber, and the trial court correctly so held. And in view of the finding of fact by the trial court that no damage was done to the soil, or use made of the soil beyond what was necessary and usually incident to turpentineing trees, the ruling of the court denying appellants any damages or rental value therefor was correct. This ruling overrules and disposes of all the assignments except the fourth.

[6] The fourth assignment challenges the conclusion of fact made by the court that appellee had nothing to do with the turpentineing of the trees on the land, but merely sold Rosemond & Day his right thereto by reason of the conveyance and sale he had from appellants. The finding is supported by the evidence, and the assignment is overruled. The contract of appellee with Rosemond & Day by its terms leased to them for turpentine and resin purposes only all the standing and growing pine timber which measured 12

inches in diameter 18 inches from the ground, as passed by appellants to appellee; and appellee had nothing to do with the turpentine of the trees. It is true Rosemond & Day in violation of the contract destroyed in turpentine 192 trees under the dimensions, but it was a trespass, in the facts, for which Rosemond & Day were liable. And appellants did not sue Rosemond & Day.

The judgment is affirmed.

### REEVES v. WHITE.

(Court of Civil Appeals of Texas. Austin.  
Nov. 19, 1913.)

#### 1. COURTS (§ 169\*)—COUNTY COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

In an action in the county court between former partners, where defendant by counterclaim sought to recover the specific sum of \$999 alleged to have been received by the plaintiff, who refused payment thereof, the court was not called upon to adjudicate a partnership transaction of double that amount, so as to exceed the jurisdiction of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-425, 428-436, 443, 456, 458, 465; Dec. Dig. § 169.\*]

#### 2. PLEADING (§ 330\*)—PARTICULARS—EXCUSE.

The fact that plaintiff was in possession of the account books and would not permit defendant, his former partner, to inspect them afforded a sufficient excuse for not particularly itemizing the amount alleged by counterclaim to be due to defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 996-1002; Dec. Dig. § 330.\*]

#### 3. SET-OFF AND COUNTERCLAIM (§ 3\*)—CONSTRUCTION OF STATUTE.

Rev. Civ. St. 1911, art. 1325, providing that, in any suit brought for the recovery of any debt due by judgment, bill, or otherwise, the defendant may counterclaim against the plaintiff, was enacted to avoid a multiplicity of suits and should be liberally construed.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 3; Dec. Dig. § 3.\*]

#### 4. SET-OFF AND COUNTERCLAIM (§ 28\*)—CLAIM UPON TORT—STATUTE.

Under Rev. Civ. St. 1911, art. 1329, providing that, where suit is founded on a certain demand, defendant cannot set off unliquidated or uncertain damages founded on a tort or breach of covenant, defendant, in an action by his former partner on a note, might set off a debt due from the plaintiff.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 47, 48; Dec. Dig. § 28.\*]

#### 5. PARTNERSHIP (§ 108\*)—ACTION BETWEEN PARTNERS.

The rule that one partner cannot sue another except for dissolution of the copartnership and for a general accounting has no application to a suit between former partners after dissolution by consent.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 157-158, 160, 162-166; Dec. Dig. § 108.\*]

#### 6. SET-OFF AND COUNTERCLAIM (§ 44\*)—SUBJECT-MATTER—JOINT OR SEPARATE DEBT.

The rule that set-offs or counterclaims must be due in the same right and that a separate debt cannot be set off by a joint debt does not prevent the setting off of a separate

individual debt from one of two partners to the other.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 82-96, 98, 99; Dec. Dig. § 44.\*]

#### 7. SET-OFF AND COUNTERCLAIM (§ 33\*)—SUBJECT-MATTER.

Where plaintiff was individually indebted to defendant upon any claim not founded upon a tort or breach of covenant, defendant might set off such debt against his individual indebtedness to the plaintiff founded on a note, and it was immaterial that defendant's demand arose out of former partnership transactions.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 1, 32, 54, 55; Dec. Dig. § 33.\*]

#### 8. ACTION (§ 25\*)—EQUITABLE AND LEGAL DEMANDS.

The distinction that, except where otherwise provided by statute, an equitable demand cannot be pleaded in a court of law in set-off against a legal demand has been abolished in this state.

[Ed. Note.—For other cases, see Actions, Cent. Dig. §§ 124-145, 147-149, 153, 156-159, 313; Dec. Dig. § 25.\*]

Appeal from Falls County Court; W. E. Hunnicutt, Judge.

Action by G. F. White against G. P. Reeves. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

J. H. Anderson, of Marlin, for appellant.  
Tom Connally, of Marlin, for appellee.

JENKINS, J. Appellee brought this suit to recover of appellant a balance alleged to be due on a promissory note for \$800, executed by appellant in favor of appellee December 6, 1907. Appellant, by a verified plea, alleged that he and appellee on April 26, 1909, entered into a copartnership for the purpose of buying and selling cattle, setting out the terms of said copartnership, among which was that the profits of said business were to be shared equally; that each party complied with the terms of said copartnership, and that the same was dissolved by mutual consent on March 11, 1911; that appellant's part of the profits in said business was \$999, which was in the hands of appellee, who refused to pay the same over to appellant or to credit the same on the note sued on; that it was specially agreed that appellant's part of the profits in said business should be applied to the liquidation of said note, but that appellee had failed and refused so to do, except for the sum of \$359.95, credited on said note.

Appellant alleged that the books and accounts of said copartnership were in the hands of appellee, for which reason he could not more particularly set out the items of profit due him. He prayed that appellee be required to produce in court said books and accounts; that the amount due him be applied first as a set-off against the amount due on the note sued on, and that he have judgment over for the balance. Appellee excepted to said answer because: (a) It ap-

peared that the amount pleaded in set-off was beyond the jurisdiction of the county court; (b) the items of profit were not pleaded with sufficient certainty; and (c) it appeared that the matters pleaded arose out of a partnership transaction and were not proper items of set-off against a suit upon a note. These exceptions were sustained, and the action of the court is before us for review.

[1] 1. As to the amount in controversy it is the contention of appellee that, inasmuch as appellant alleges that his share of the profits were \$999, the court is called upon to adjudicate a partnership transaction of double that amount. It is immaterial what was the amount of the copartnership transactions. Appellant is not suing for a dissolution and settlement of a copartnership but for a specific sum, to wit, \$999, which he alleges appellee has received and refuses to pay over to him.

[2] 2. Appellant gives a sufficient excuse for not more particularly itemizing the amounts alleged to be due him, viz., that appellee is in possession of the account books and will not permit him to inspect them.

[3, 4] 3. The common-law doctrine as to set-off has been modified by our statute, which reads as follows: "Whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill, or otherwise, the defendant shall be permitted to plead therein any counterclaim which he may have against the plaintiff, subject to such limitations as may be prescribed by law." R. S. art. 1325. The object of this statute is to avoid a multiplicity of suits and it should be liberally construed. The only limitations prescribed by law are found in article 1329, R. S., which reads: "If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff; and, if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff."

In this case the plaintiff's suit is founded on a certain demand, to wit, a note; but defendant's demand is not founded on a tort or breach of covenant. Appellant alleges that the terms of the copartnership were complied with by both parties; and the fact that appellee refuses to pay over to appellant his portion of the profits is no more a tort or breach of covenant than would be the refusal to repay money which had been loaned to appellee by appellant.

[5] 4. Expressions found in the text-books and decisions, to the effect that one partner cannot sue another, except for dissolution of

the copartnership and for a general accounting, have no application to the instant case. Appellant and appellee are not partners. The copartnership formerly existing between them is alleged to have been dissolved by mutual consent prior to the institution of this suit.

5. In many cases it has been held that a debt arising from a pre-existing partnership cannot be set off against an individual claim of one of the former partners against another. But these were cases in which there were more than two partners; and, there having been no final settlement of the partnership affairs, the debt is not due to the partner who is sued in his individual right but jointly to him and the other partner or partners.

[6] It is a well-established principle that set-offs or counterclaims must be due in the same right, and that a separate debt cannot be set off by a joint one. *Allbright v. Aldrich*, 2 Tex. 166; *Hamilton v. Van Hook*, 26 Tex. 306. Our statute does not modify this principle. *Greathouse v. Greathouse*, 60 Tex. 598. But in the instant case, there having been but two partners, if appellee has refused to pay over to appellant, as alleged, the half of the partnership profits due appellant, he is indebted to appellant individually to the amount so withheld.

[7] 6. If appellee is individually indebted to appellant or is liable to him individually upon any claim not founded on a tort or breach of covenant, the appellant may set off the same against any individual indebtedness due to appellee founded on a certain demand; and it is immaterial whether appellant's demand against appellee arose out of the transaction of a former copartnership or otherwise, or partly out of such transactions and partly otherwise. *Barber v. Morgan*, 76 S. W. 319.

[8] 7. Some confusion seems to have arisen by not keeping in view the fact that a suit upon a note is a suit at law, and that a suit for partnership accounting is a suit in equity, and that, except where otherwise provided by statute, an equitable demand cannot be pleaded in a court of law in set-off against a legal demand. This was the basis of the decision in *Willis v. Barron*, 143 Mo. 459, 45 S. W. 291, 65 Am. St. Rep. 673, cited by appellee, wherein it was said: "A mere suggestion of an accounting and an equitable defense will not oust a court of law of its jurisdiction." This distinction has been abolished in this state. But, independent of this fact, appellant's demand was a proper set-off against the demand of appellee.

For the reasons stated, the judgment of the trial court is reversed, and this cause is remanded for trial in accordance with this opinion.

Reversed and remanded.



**DULLER v. McNEILL.**

(Court of Civil Appeals of Texas. Galveston.  
Oct. 24, 1913.)

**APPEAL AND ERROR (§ 467\*)—SUPERSEDEAS BOND—PARTIES—PRINCIPAL.**

It is not necessary that a supersedeas bond be signed by the principal, so that the fact that a married woman, who was a party, could not legally sign the supersedeas bond did not affect its validity if the sureties were sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2230, 2233; Dec. Dig. § 467.\*]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Suit by W. A. McNeill against Carrie Nell Duller and husband. From a judgment for plaintiff, defendant wife appeals, and plaintiff moves to dismiss the appeal. Motion overruled.

Baldwin & Baldwin, of Houston, for appellant.

REESE, J. In a suit by W. A. McNeill against Carrie Nell Duller and her husband, McNeill recovered a judgment for money against both defendants, and foreclosing mortgage and vendor's liens against certain real estate. From this judgment Mrs. Duller appeals. She gave a supersedeas bond signed by herself and several sureties. The bond is payable to McNeill and also against Duller, the husband. Appellee, McNeill, has filed a motion to dismiss the appeal on the ground that Mrs. Duller, being a married woman, cannot bind herself or her separate estate by the execution of such bond, and that it is void as to her.

It seems to be settled by a long line of decisions in this state that it is not necessary that such bond be signed by the principal. *Shelton v. Wade*, 4 Tex. 148, 51 Am. Dec. 722; *Lindsay v. Price*, 33 Tex. 280; *McKellor v. Peck*, 39 Tex. 381; *Bridges v. Cundiff*, 45 Tex. 439; *San Roman v. Watson*, 54 Tex. 254; *Palmer v. Spandenbergh*, 49 Tex. Civ. App. 331, 108 S. W. 478.

The motion is overruled.

**FIDELITY & DEPOSIT CO. v. BANKERS' TRUST CO.**

(Court of Civil Appeals of Texas. El Paso.  
Nov. 20, 1913. Rehearing Denied  
Dec. 11, 1913.)

**1. APPEAL AND ERROR (§ 736\*)—ASSIGNMENTS OF ERROR—MULTIFARIOUS ASSIGNMENTS.**

In an action on a bond executed by defendant to indemnify against nonperformance of a contract to build a house and to protect plaintiff, who made a deposit of \$5,400 to assist the contractor in building, there were assignments of error in rendering judgment for plaintiff, because there is no evidence that the contractor was insolvent, or that the \$5,400 advanced by plaintiff could not be collected from him, and defendant should not be required to reimburse plaintiff for additional expenditure which plaintiff voluntarily elected to make, to get back

its deposit, and also that the court erred in rendering judgment for plaintiff because, in completing the building and making an additional expenditure, plaintiff acted as volunteer, without request, and that it was not shown that the contractor was insolvent, so as to make it necessary to do so in order to collect the \$5,400 advanced to him. Held that the assignment was multifarious.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3028, 3029; Dec. Dig. § 736.\*]

**2. PRINCIPAL AND SURETY (§ 163\*)—SURETY'S LIABILITY.**

Where, in an action on a bond executed to secure the performance of a contract to erect a house and to secure plaintiff in making a deposit to assist the contractor brought by such depositor, judgment was rendered against both the surety and the contractor, with execution to issue first against the contractor and judgment for the surety over against him, it was immaterial whether the contractor was solvent with respect to the surety's liability to reimburse such depositor.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 446-454; Dec. Dig. § 163.\*]

**3. PRINCIPAL AND SURETY (§ 160\*)—CONSTRUCTIVE CONTRACTS—ACTION ON BOND—ADMISSION OF EVIDENCE.**

In an action on a bond to indemnify against the failure of a building contractor to construct a building and to indemnify plaintiff, who made a deposit to assist the contractor, evidence that plaintiff was not an owner of the house, though so designated in the bond, but merely advanced the money to the contractor, was admissible to establish plaintiff's interest in the subject-matter.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 436-438; Dec. Dig. § 160.\*]

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Action by the Bankers' Trust Company against the Fidelity & Deposit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gill, Jones & Tyler, of Houston, for appellant. Hunt, Myer & Teagle and W. S. Bailey, all of Houston, for appellee.

HARPER, C. J. The appellee, Bankers' Trust Company, instituted this suit against appellant, Fidelity & Deposit Company, on a bond of indemnity in the sum of \$4,000. The petition alleges, in substance: That B. M. Levy contracted in writing with J. R. Darnell, whereby Darnell bound himself to furnish all material and construct a certain house, for the sum of \$5,400. That for the purpose of assisting said Darnell in financing the contract the Bankers' Trust Company agreed in writing to, and did, deposit \$5,400 in the Houston National Exchange Bank, to remain in escrow until the building was completed. And said company further agreed that in case Darnell should fail to complete the building according to the plans and specifications, and in the event that the Fidelity & Deposit Company failed to take over the contract after breach, then the Bankers' Trust Company to have the privilege of tak-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing over the work of completing the house. And that for the purpose of securing the said Levy and said trust company in the full performance of the said contract by Darnell, the defendant executed its indemnity bond. That Darnell expended the full amount of the contract price, and then found that it would require more money to complete the house, which he could not command, nor could he secure credit for material. Thereupon he notified the parties. That he then refused to further continue the work under the contract. That immediately thereafter said Levy notified the defendant company; in response to this notice the plaintiff trust company furnished the material and finished the building at an additional cost of \$2,763.07. That thereafter Levy transferred and assigned his interest in the bond sued on to plaintiff. Defendant pleaded general denial, and specially pleaded that it had an agreement with J. R. Darnell, C. J. Brown, and W. F. Patterson in writing to indemnify the Fidelity Company against loss, including attorney's fees and costs.

The trial court filed the following findings of fact:

"No. 1. I find from the undisputed testimony that on the 8th day of October, 1909, the defendant Darnell entered into a written contract with B. M. Levy to construct a residence for said Levy in the city of Houston, Tex.; Darnell to furnish all labor and material, and to complete said house for the sum of \$5,400. That on the 12th day of October, 1909, the defendants, Darnell and Fidelity & Deposit Company, executed and delivered to Levy and the Bankers' Trust Company the bond sued on herein, in the sum of \$4,000, and which was conditioned upon the faithful performance by said Darnell of said builder's contract, which was, by the terms of the bond, made a part of the bond.

"No. 2. I find that before this bond was executed and delivered a written application was made therefor by Darnell, filed with the local agent of the Fidelity & Deposit Company, and was sent by said agent to the said company's head office at Baltimore, Md. I find that before the bond was issued, the defendant deposit company had notice, in addition to the recital in its said bond, that the Bankers' Trust Company had an insurable interest in the Darnell-Levy building contract, and knew that said Bankers' Trust Company was seeking indemnification by having said bond issued as aforesaid, and that the deposit company knew, prior to issuing the bond, that said trust company had incurred some liability or assumed risk of financial loss in connection with the construction of said building by said Darnell.

"No. 3. I find that Darnell, Levy, and the Bankers' Trust Company had negotiations looking to the construction of this building by Darnell, and that the Bankers' Trust Company would only finance said Darnell on

the condition of his giving it indemnity, and after such bond was given with said deposit company as surety, said Darnell, Levy, and Bankers' Trust Company reduced their prior agreement to writing on the 13th day of October, 1909, as shown by the 'escrow' or 'three party' agreement introduced in evidence. I find that the parties complied with the terms of said escrow agreement, Levy deposited the \$5,400 in the bank, the Bankers' Trust Company advanced a like amount to Darnell in purchasing labor and material used by him on said building, and that Darnell proceeded with the work of construction of said house.

"No. 4. I find that Darnell proceeded with the construction of said house until the sum of \$5,400, the contract price, had been exhausted, which was all advanced by the Bankers' Trust Company, and that Darnell then quit work and abandoned said contract because of his inability to purchase same on credit. I find that immediate notice of these facts was given to the deposit company by registered notice in the manner required by said bond, that said deposit company made no reply to said notice, and did not offer to complete said building, and that after a lapse of about 10 days the Bankers' Trust Company did take charge of said building, and complete the same at a cost of \$2,756.03 to it over and above the contract price of \$5,400; that said house was completed by said Bankers' Trust Company according to the plans and specifications agreed on by Darnell and Levy; that the additional labor, supplies, and material necessary to the completion were purchased at the market prices then prevailing, and same were so purchased, supplied, and paid for by the Bankers' Trust Company, and that said company has not been repaid any part thereof; that on completion and acceptance of the house by said Levy the escrow money \$5,400 was released to the Bankers' Trust Company.

"No. 5. I find that at the time this bond was issued by the deposit company it took an indemnity bond from said Darnell with C. J. Brown and W. S. Paterson as sureties, which last bond also provided for costs and attorney's fees in favor of said Fidelity & Deposit Company in the event of loss or litigation involving said company; that by reason of Darnell's default, as aforesaid, the Fidelity & Deposit Company has been required to defend this action and retain attorneys, and that \$150 is a reasonable fee for such services.

"No. 6. I find that prior to the execution of the deposit company bond of October 12, 1909, sued upon herein, Levy, Darnell, and the Bankers' Trust Company had verbally agreed among themselves upon the terms afterward embodied in the 'escrow agreement,' and that the deposit company when it executed said bond knew the substantial details of said three party agreement."

In its first, second, third, sixth, eleventh,

twelfth, fifteenth, and twentieth assignments of error, the appellant complains that the court erred in rendering judgment for the plaintiff, Bankers' Trust Company, because the bond sued on indemnifies the "owner" of the building, and that plaintiff was not an owner in contemplation of the bond, and because there is no evidence that plaintiff was guarantor of Darnell's performance of the contract, and therefore plaintiff had no legal right to bind the defendant by its voluntary act of completing the building. The trial court's second finding of fact is a complete answer to the contentions of appellant in these assignments, which we approve, as supported by the evidence. Without any evidence of insurable interest in plaintiff at the time the bond was executed, the meaning of the language used in the bond is to insure the parties therein named against the default of Darnell, and if by reason of the default the plaintiff was injured, it is entitled to recover to the extent of such loss.

[1] The fourth and fifth assignments, if considered together as grouped, are multifarious:

"The court erred in rendering judgment for the plaintiff, against this defendant, because there is no evidence in the record that Darnell was insolvent, or that the \$5,400 advanced him by plaintiff could not, or cannot be, collected from him, and this defendant should not be required to reimburse plaintiff for an additional expenditure of \$2,756.03 sued for in this suit, which plaintiff voluntarily elected to make in order to get the specific \$5,400 placed in escrow by Levy; no evidence of the peculiar charm, value, or attractiveness of that particular \$5,400 being given to this defendant.

"The court erred in rendering judgment for the plaintiff, against this defendant, because in voluntarily completing said building, and in voluntarily making the additional expenditure of \$2,756.03, plaintiff acted wholly as a volunteer, being under no obligation so to do, being unrequested so to do, no right being given it by this defendant so to do in the bond sued on, or any other written contract to which this defendant was a party, and the record disclosing no evidence of insolvency on the part of Darnell that would render it necessary or advisable or expedient so to do in order to collect the \$5,400 advanced Darnell by plaintiff."

[2] But, the fifth assignment being followed by the proposition that, there being no evidence that Darnell was insolvent, there can be no liability upon the part of defendant to reimburse plaintiff, it is considered by the observation. Judgment is against both the surety company and Darnell, with execution to issue first against Darnell, and with judgment for the defendant over and against him. So it matters not whether he is solvent or not.

[3] The seventh and eighth assignments are as follows:

"The court erred in allowing plaintiff to introduce, over the objection of this defendant, the oral testimony of W. S. Bailey, to the effect that plaintiff was not an owner of the house contracted to be built by Darnell, though so designated in the bond sued on, but that plaintiff merely advanced Darnell the money with which to build said house, and was to have the right to reimburse itself by means of the \$5,400 placed in escrow by Levy, upon completion and acceptance of the house, etc., and that said facts were known to the agents of this defendant, as said testimony varied, contradicted, and amplified and enlarged the terms of the instrument sued on."

"The court erred in allowing plaintiff to introduce, over the objection of this defendant, the oral testimony of J. R. Darnell, to the effect that the plaintiff was not an owner of the house contracted to be built by Darnell, though so designated in the bond sued on, but that plaintiff merely advanced Darnell the money with which to build said house, and was to have the right to reimburse itself by means of the \$5,400 placed in escrow by Levy, upon the completion and acceptance of the house, etc., and that said facts were known to the agents of this defendant, as said testimony varied, contradicted, amplified, and enlarged the terms of the written instrument sued on."

The evidence complained of was properly admitted, as it tended to establish the plaintiff's interest in the subject-matter of the indemnity bond. This observation disposes of the ninth assignment.

The thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth assignments are overruled because the evidence supports the finding of facts, upon these points, by the court, and the said assignments are to the effect that the court erred in his findings of fact and conclusions of law.

The assignments are therefore overruled, and the cause affirmed.

#### HAMMOND et al. v. McFARLAND.

(Court of Civil Appeals of Texas. Galveston.  
Nov. 5, 1913. Rehearing Denied  
Nov. 27, 1913.)

#### 1. EXEMPTIONS (§ 45\*)—PROPERTY SUBJECT—TOOLS OF "TRADE."

The conducting of a butcher shop by a person who slaughters very few animals, and buys most of the meat sold in his shop from packing houses, is a "trade" within Sayles' Ann. Civ. St. 1897, art. 2395, subd. 5, exempting from execution all tools, apparatus, and books belonging to any trade or profession, the fact that he sells the meat which he cuts up or butchers not making him merely a merchant or dealer in meats, and any tool or apparatus belonging to such trade is exempt; but a tool or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

apparatus belonging to and used only in the business of selling meat is not exempt.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7037-7041, 7818.]

**2. EXEMPTIONS (§ 45\*)—PROPERTY SUBJECT—TOOLS OF TRADE.**

Neither a cash register nor a refrigerator or ice box is a tool or apparatus belonging to the trade of a butcher who also sells the meat cut up or butchered by him, and hence they are not exempt from execution under Sayles' Ann. Civ. St. 1897, art. 2395, subd. 5, exempting the tools and apparatus belonging to any trade or profession.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.\*]

Appeal from Harris County Court at Law; Clark C. Wren, Judge.

Suit for injunction by C. E. McFarland against M. F. Hammond and others. From a decree granting a temporary injunction, defendants appeal. Reversed and rendered.

Gibson & Wander, of Houston, for appellee.

**PLEASANTS, C. J.** This appeal is from a decree of the county court at law of Harris county granting a temporary injunction restraining the defendants from seizing and selling under execution a cash register machine and a refrigerator or ice box owned and used by the appellee in carrying on his trade of butcher. The appellant M. F. Hammond is the sheriff of Harris county. The other appellant, the Houston Packing Company, a corporation organized under the laws of this state, having recovered a judgment in the county court of Harris county against the appellee for the sum of \$215 and costs of suit, procured the issuance of an execution on said judgment, and placed same in the hands of appellant Hammond, who proceeded to levy upon the articles above named, and advertise same for sale. This suit was brought to restrain appellants from taking the possession of the property from appellee, and selling it under the execution before mentioned.

The contention of appellee is that the property is exempt from forced sale under subdivision 5 of article 2395, Sayles' Civil Statutes, which reserves to every family exempt from attachment or execution and every other species of forced sale for the payment of debts, unless the debt is secured by lien on the property, "all tools, apparatus and books belonging to any trade or profession."

The evidence shows that appellee is a married man and head of a family. He conducts a butcher shop in the city of Houston, and has been engaged in that trade or business for two years or more. He testified: "I have no other trade or occupation and no other income. I am dependent for support of myself and family entirely upon my trade in keeping and carrying on said butcher shop. The trade of a butcher is like

that of a skilled mechanic; it requires training and practice to be a butcher so as to develop necessary skill in cutting the meat. The common meaning of a butcher as understood here in this part of Texas is one that is skilled in cutting up meat for retail, and who keeps a butcher shop or meat market. The common, usual, and necessary tools and apparatus used in such are knives of different kinds for cutting meat, cleavers, saws (meat saws), meat blocks, on which meat is cut, scales for weighing, electric fans to keep butcher and helpers cool while at work, and the meat also, and to keep off flies, a cash register, counters, an ice box or meat box, in which meat is kept refrigerated, a fish box, and some other implements. That the ice box or meat box levied on by the sheriff under the execution in this case is one of the most serviceable and necessary apparatus for the trade. That in this warm and humid climate it would be impossible to run the butcher's trade or keep butcher shop without an ice box, where the meat could be kept cool; meat would spoil and rot in a few minutes without same. That the sanitary officer would not permit a butcher shop conducted without such apparatus. That plaintiff kept all of these mentioned articles in his shop. That the cash register was also necessary and serviceable in being a place to make quick change of money. That it also kept a register of all sales and did away with necessity of a book-keeper."

The evidence further shows that appellee had slaughtered very few animals, most of the meat sold in his shop being obtained from the packing houses, and this is true of the butcher trade generally in cities. A cash register is commonly used in butcher shops and is necessary for making quick change and keeping account of sales.

[1] We think conducting a butcher shop as appellee did his should be regarded as a trade in the purview of the statute before cited. It requires mechanical skill and experience to conduct a shop of this kind and a person so engaged is following a trade. The fact that he sold the meat which he cut up or butchered would not make him merely a merchant or dealer in meats and defeat his right to claim as exempt from forced sale the tools and apparatus belonging to his trade as butcher or meat cutter. Any tool or apparatus belonging to this trade would be exempt; but a tool or apparatus belonging to and used only in his business of selling meat would not be exempt. *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120.

[2] Under the very liberal construction which the courts have generally given remedial statutes of this kind (*vide Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710, and cases cited in that case), we would, if the question was an open one in this state, hold that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the refrigerator or ice box in which appellee kept his meat, and which the evidence shows was necessary and essential to a proper conduct of the butcher's trade in this climate, was a tool or apparatus belonging to such trade; but we do not think a cash register under any proper construction of the statute could be called a tool or apparatus belonging to the trade of a butcher. *Wallace v. Bartlett*, 108 Mass. 52; *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120; *McCord-Collins v. Lazarus*, 50 S. W. 1048; *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 402.

The question presented by this appeal has, we think, been settled by our Supreme Court in the case of *Simmang v. Insurance Co.*, 102 Tex. 39, 112 S. W. 1044, 132 Am. St. Rep. 846. In that case the Supreme Court holds that a cash register and ice box or refrigerator used by a restaurant keeper in conducting his restaurant are not exempt from forced sale as tools or apparatus belonging to the trade of a restaurant keeper. It is conceded in the opinion in the case cited that the keeping of a restaurant is a trade in the purview of the statute, and the evidence showed that the articles named were used in carrying on said trade. We think it a matter of which the courts could take judicial notice that in this climate an ice box or refrigerator is not only useful and convenient but essentially necessary in conducting a restaurant. It is just as necessary and essential for a restaurant keeper to have an ice box in which to keep food he prepares for his customers as it is for a butcher to have such a receptacle in which to keep the meats butchered or cut up by him. If an ice box is not a tool or apparatus belonging to the trade of a restaurant keeper, it is not one belonging to the trade of a butcher. This is just as true of a cash register.

In support of the opinion in the *Simmang Case* the court cites the cases of *Heidenheimer v. Blumenkron*, 56 Tex. 314, and *Dodge v. Knight* (Sup.) 16 S. W. 626. We do not think these cases, which only decide that household and kitchen furniture used by a restaurant or hotel keeper is not exempt from forced sale under the subdivision of the statute above cited, which exempts such articles when used for family purposes, have any bearing upon the question of whether an ice box and cash register are exempt as tools or apparatus belonging to the trade of a restaurant keeper. But the court also cites with approval the case of *Frank v. Bean*, 3 Willson, Civ. Cas. Ct. App. § 211, which holds that the articles named are not tools or apparatus belonging to the trade of a restaurant keeper.

We think the decision in the *Simmang Case* is conclusive of the question presented on this appeal, and that in accordance with that opinion the judgment of the court below should be reversed, and judgment here

rendered in favor of appellant, vacating the order granting the injunction, and it is so ordered.

Reversed and rendered.

VINSON et al. v. W. T. CARTER & BRO.  
et al.

(Court of Civil Appeals of Texas. Texarkana.  
Nov. 20, 1913.)

1. APPEAL AND ERROR (§ 281\*)—PRESERVATION OF GROUNDS OF REVIEW—NECESSITY OF MOTION FOR NEW TRIAL.

Assignments of error not supported by a motion for new trial cannot be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1650-1661, 3024, 3281; Dec. Dig. § 281.\*]

2. MORTGAGES (§ 105\*)—INSTRUMENTS SIMULTANEOUSLY EXECUTED—CONSTRUCTION.

A deed and a bill of sale with a mortgage and notes simultaneously executed by the grantee as security for the purchase price, referring to the same subject-matter, constitute but one act and should be construed as one and the same agreement.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 214, 215; Dec. Dig. § 105.\*]

3. VENDOR AND PURCHASER (§ 315\*)—EVIDENCE—PAYMENT OF PURCHASE MONEY.

A deed and bill of sale of personality, with the grantee's simultaneously executed mortgage and notes to secure the payment of the purchase price, was proof that the purchase money was not fully paid at the time of the conveyance to the grantee.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 928-931; Dec. Dig. § 315.\*]

4. VENDOR AND PURCHASER (§ 79\*)—CONTRACT—EXECUTORY CONTRACT.

Such instruments, construed together, showed an executory contract for the conveyance of a tract of land, the superior title to remain in the grantor and his wife, and which would be divested by the grantee or his vendees only by the payment of the purchase price.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 7, 8, 127-131; Dec. Dig. § 79.\*]

5. VENDOR AND PURCHASER (§ 265\*)—BONA FIDE PURCHASER—NOTICE.

Plaintiff in trespass to try title, claiming under a purchaser from a vendee with notice of the vendor's lien and superior title, and who did not pay or offer to pay his proportionate part of the purchase money and did not exercise or attempt to exercise his right of redemption but abandoned it, could not recover against those claiming under the vendor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 492, 700-712; Dec. Dig. § 265.\*]

Appeal from District Court, Tyler County; W. P. Powell, Judge.

Trespass to try title by John F. Vinson and others against W. T. Carter & Bro., and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

V. A. Collins, of Beaumont, for appellants. Baker, Botts, Parker & Garwood, of Houston, Joe W. Thomas, of Woodville, and C. L. Carter, of Houston, for appellees.

LEVY, J. The action was by appellants against appellees in trespass to try title to about 388 acres of land out of the southeast corner of the 1555-acre tract in the Tatman league. The appellants were the heirs of R. N. Dicken, to whom U. M. Gilder conveyed the same land on October 16, 1863. The appellees pleaded not guilty and vouched in their warrantor. The appellees claimed the land under deed from the heirs of Wm. Minter. The case was tried to a jury, and upon the conclusion of the testimony the court directed a verdict in favor of the appellees.

[1] The appellees object to consideration of the assignments as presented by appellants in their brief, and the objection must be sustained for the reasons so given, except as to the second assignment in the brief, which is, we think, supported by a motion for new trial. The effect of the second assignment is to predicate error upon the action of the court in peremptorily instructing a verdict for appellees. The precise contention of error is that the recitation in the deed from Wm. Minter and wife to U. M. Gilder, of date March 11, 1863, recites the payment of the purchase money for the land, and there is not any evidence to show that the recitation in the deed is not correct, and therefore the appellees, as a matter of law, had failed to show title against the appellants. The evidence established that on the 11th day of March, 1863, Wm. Minter and wife, who were the owners, conveyed to U. M. Gilder a tract of 1555.9 acres of land, part of the N. Tatman league (which tract involves the land in controversy), and by the same conveyance a tract out of the Ann Fisher league in the same county; the consideration recited being \$3,661 in hand paid. On the same date of March 11, 1863, Wm. Minter executed a bill of sale to U. M. Gilder for a number of negro slaves, wagons, mules, horses, and oxen for a consideration recited of \$42,440 in hand paid. On the same date of March 11, 1863, U. M. Gilder executed three notes payable to Wm. Minter, aggregating \$25,471.12. On the same date of March 11, 1863, U. M. Gilder and wife executed a mortgage to Wm. Minter, to secure the identical three notes mentioned, on the same land described in the deed of the same date, and including other lands, and on the same personal property covered by the bill of sale. The deed and the mortgage were both filed for record in the county clerk's office on the same day and recorded in the same record book on consecutive pages. On January 6, 1866, U. M. Gilder having defaulted in the payment of these notes, Wm. Minter filed suit thereon in the district court of Tyler county, seeking to enforce the mortgage upon the land and asking that it be sold to satisfy the lien. It appears that to this action defendants U. M. Gilder and wife answered setting up in substance a failure of consideration by reason of the

emancipation of the negroes, and asking a rescission of the contract as follows: "Defendants here tender the said negroes or persons of color as mentioned in said mortgage purchased from the said Minter, plaintiff, together with all of the property purchased from the said plaintiff at the time the negroes were purchased, and asks that said contract based upon said mortgage and the promissory notes be canceled and that said mortgage be declared null and void and of no effect." And the defendants in that suit also sued in reconviction to recover back \$23,000 paid on the contract of purchase on March 11, 1863. It appears that this suit continued on the docket of the court for some years thereafter; and Gilder and wife having died, their heirs were made parties defendant by *scire facias*; and Minter and his wife having died, their heirs were properly made parties plaintiff. The plaintiffs in that suit, the heirs of Minter, on December 22, 1884, filed their amended petition in the form of ordinary action of trespass to try title to recover the land described in the mortgage above referred to. The defendants in that suit, heirs of Gilder, answered by general demurrer, general denial, and plea of not guilty, filed on the same date. Thereupon an agreed judgment was entered in the cause in December, 1884, in which the heirs of Wm. Minter, as plaintiffs, recovered back the 1555.9 acres of the Tatman league and the tract of the Ann Fisher league, being the identical lands which Minter and his wife had conveyed to Gilder; and the heirs of Gilder recovered from the heirs of Minter the other tracts of land described in the mortgage; and, the personal property having been lost by the freeing of the negroes, it was so declared. It appears, however, that on October 16, 1863, U. M. Gilder conveyed to R. N. Dicken the identical tract of 388 acres in this suit and covered by the mortgage previously given and recorded by Gilder to Minter. R. N. Dicken is the ancestor under whom plaintiffs in this case claim. It was proven, though, that R. N. Dicken stated that he knew the Minter heirs had always asserted title to the land and had a mortgage on it, and after he got the land he learned that Gilder could not make him a good title, and he just moved off of it, and that he had never lived on it since or paid taxes on it or claimed it. It was further proven that R. N. Dicken was sheriff of the county from 1870 and for many years during the pendency of the suit between the heirs of Minter and the heirs of Gilder and never took any steps to assert any right to the property now claimed by his heirs. Also the record does not show, and appellant offered no proof, that the consideration named in the deed from Gilder to Dicken was in fact paid.

Under all these undisputed facts it would appear that it should be properly ruled that there was proof going to show that the pur-

chase money for the land was not in fact fully paid, and that R. N. Dicken, under whom appellants claim as heirs, so knew, both actually and constructively, at the time of his deed, and that the superior title remained in Minter, and Dicken did not acquire the legal title, and, he having abandoned his claim and failed to avail himself of an equity of redemption, that appellants had no title to the land.

[2] The deed, mortgage, notes, and bill of sale were all executed by the same parties and simultaneously. The mortgage is based upon the notes, and they are proven by the admissions of Gilder in his answer to the suit thereon by Minter to have been executed as a part of the consideration for the sale of the personalty and realty under mortgage. All the instruments being parts of and in reference to the same subject-matter, the effect of the simultaneous execution of the same would be to constitute them but one act and require them to be construed as but one and the same agreement. *Howard v. Davis*, 6 Tex. 181; *Dunlap v. Wright*, 11 Tex. 597, 62 Am. Dec. 506.

[3, 4] And, being so considered, they evidence the fact that Minter and wife owned two tracts of land, slaves, and other property, and that Gilder desired to acquire these two tracts and the slaves and personal property, and to that end he executed the three promissory notes for the amount of unpaid purchase money of the slaves, personalty, and lands, executing contemporaneously the mortgage upon the property thus conveyed to him to secure payment of the purchase-money notes, and, in addition to the land and personal property thus being acquired, mortgaged also other real estate then owned by him. Consequently there was proof that the purchase money was not fully paid at the time of the conveyance to Gilder. By virtue of these instruments thus construed together, it would follow as a legal proposition that there was an executory contract for the conveyance of the tract of land out of the Tatman league, the superior title remaining in Minter and wife, and which could be divested by Gilder or his vendees only by the payment of the purchase price. *Masterson v. Cohen*, 46 Tex. 520; *Jackson v. Palmer*, 52 Tex. 427; *Webster v. Mann*, 52 Tex. 416; *Hale v. Baker*, 60 Tex. 217. And it is further to be observed that a complete rescission of the entire original contract evidenced by the deed, mortgage, bill of sale and notes took place and was given effect by the terms of the decree of 1884 upon the property; there being restored to Gilder, through his heirs, the land which he owned prior to the execution of the mortgage, independent of his purchase from Minter, and there being restored to Minter, through his heirs, the title to the land which he had contracted by the executory agreement to convey to Gilder out of the Tatman league and Fisher league.

The effect was to revest the heirs of Minter with their ancestor's title, free from the Gilder claim.

[5] And the effect of the fact of which Dicken had notice is that, if Dicken secured any right or title, it was taken subject to the vendor's lien and superior title of Minter. And he not having paid or offered to pay his proportionate part of the purchase money, nor having exercised or attempted to exercise his right of redemption, but having abandoned same, appellants cannot recover. *Ufford v. Wells*, 52 Tex. 617; *Pierce v. Moreman*, 84 Tex. 596, 20 S. W. 821. The second assignment must therefore be overruled.

The judgment is affirmed.

#### ADAMS et al. v. BURRELL et al.

(Court of Civil Appeals of Texas, Texarkana. Nov. 14, 1913. Rehearing Denied Nov. 27, 1913.)

#### 1. APPEAL AND ERROR (§ 302\*)—SUFFICIENCY OF ASSIGNMENTS—RULES OF COURT.

Assignments of error not distinctly specifying the ground of error relied on, and distinctly setting them forth in the motion for new trial, as required by rule 24 of Courts of Civil Appeals rules (142 S. W. xii), are not ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1744–1752; Dec. Dig. § 302.\*]

#### 2. SEQUESTRATION (§ 20\*)—JUDGMENT FOR DEFENDANT—DAMAGES.

In trespass to try title to timber land, plaintiffs, in order to protect the timber pending suit, filed a replevin bond by agreement, and obtained possession of the land. *Held*, that whether the bond was a common-law or statutory bond, plaintiffs, on judgment for defendant, were liable for unlawfully cutting and removing timber belonging to the defendant.

[Ed. Note.—For other cases, see *Sequestration*, Cent. Dig. §§ 42–49; Dec. Dig. § 20.\*]

Appeal from District Court, Jasper County; W. B. Powell, Judge.

Action between W. J. B. Adams and others against Arthur Burrell, R. C. Conn, and R. B. Ritchie and others. Judgment for defendants Conn and Ritchie, and Adams and others appeal. Affirmed.

See, also, 104 Tex. 183, 135 S. W. 1156.

W. J. B. Adams, R. F. Adams, and Abel Adams, appellants here, were plaintiffs in the court below. Their suit was against appellees R. C. Conn and R. B. Ritchie and others, and was to try the title to a tract of 640 acres of land in Jasper county and for damages. On the ground that they feared the defendants would make use of the possession they had of the land to injure it, and would convert to their own use the timber growing on it, appellants, at the time they commenced their suit, to wit, March 24, 1908, procured the issuance of a writ of sequestration and a levy thereof on the land. April 10, 1908, Tom Bilbo, one of the defendants, who claimed to own the northeast quarter of the tract, ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pellees Conn and Ritchie who claimed to own the timber on said northeast quarter and on the northwest quarter of the tract, and Arthur Burrell, who claimed to own the south one-half of the tract, replevied the land by filing a bond as authorized by the statute (article 7103, R. S. 1911). July 14, 1908, in accordance with an agreement between the parties, the replevy bond of said defendants was withdrawn from the files and canceled, and, in lieu thereof, appellants, as plaintiffs in the suit, made and filed a replevy bond, with W. W. Blake and Roi Blake as their sureties, conditioned as specified in article 7110 of the Revised Statutes of 1911, and, it seems, possession of the land thereupon was delivered to them. Afterwards, but before the cause was tried, timber on the northwest and northeast quarters of the tract was cut and removed therefrom. Allying that appellants had wrongfully cut and removed same, appellees Conn and Ritchie, by a cross-action against appellants, sought a recovery against them for the value thereof. A trial resulted in a judgment as follows: In favor of appellants for the south one-half of the tract; in favor of defendant Rachel Burrell and others for the northwest quarter of the tract; in favor of the defendant Bilbo for the northeast quarter of the tract; and in favor of appellees Conn and Ritchie against appellants for the sum of \$2,770 as the value of timber removed by them from the northwest and northeast quarters. From the judgment appellants prosecuted an appeal to the Court of Civil Appeals at Galveston. That court affirmed the judgment in so far as it was in favor of appellants for the south one-half of the tract, and in favor of Bilbo for the northeast quarter thereof, but reversed it in so far as it was in favor of Rachel Burrell and others for the northwest quarter, and in favor of Conn and Ritchie for the value of timber thereon, and in so far as it was in favor of said Conn and Ritchie for the value of timber on the northeast quarter, and then rendered judgment in appellants' favor for said northwest quarter, and, having determined that appellees Conn and Ritchie owned the timber on the northeast quarter of the tract, and were entitled to recover the value thereof, remanded the cause for a trial between appellants and said Conn and Ritchie to determine such value. 127 S. W. 581. The Supreme Court, after granting a writ of error, affirmed the judgment rendered by the Court of Civil Appeals. 104 Tex. 183, 135 S. W. 1156. A trial between appellants and appellees Conn and Ritchie in accordance with the opinions of the Supreme Court and said Court of Civil Appeals resulted in a judgment in favor of said Conn and Ritchie against appellants and against W. W. Blake and Roi Blake, the sureties on appellants' said replevy bond, for the sum of \$1,938.50 as the value of timber cut and removed from said northeast quarter of said tract of land.

From this judgment appellants, said W. J. B. Adams, R. F. Adams, and Abel Adams, alone appeal.

Holland & Holland, of Orange, and Roi Blake, of Jasper, for appellants. Smith & Blackshear, of Jasper, and Goodrich & Lewis, of Hemphill, for appellees.

WILLSON, C. J. (after stating the facts as above). [1] If for no other reason, appellants should be denied a reversal of the judgment on the grounds urged in their first and second assignments, because same were not distinctly set forth in their motion for a new trial as required by rule 24 for the government of Courts of Civil Appeals. 142 S. W. xii. If, however, those assignments were entitled to consideration, it is not at all clear they should be sustained; for they are predicated on the assumption that, because defendants in the suit replevied the land after it was levied on by virtue of the writ of sequestration, they were in possession of it at the time the timber was cut and removed. Such an assumption ignores the fact that after it was so replevied, and before any of the timber was cut and removed, by an agreement between all the parties concerned, appellants executed and filed a replevy bond in lieu of the one defendants had filed, and in that way obtained, and at the time the timber was cut had possession of, the land.

[2] The remaining assignment is that "the trial court erred in his first conclusion of law in finding that, under the judgment of the Court of Civil Appeals in this cause heretofore delivered, plaintiffs are liable to the defendants for the value of the timber cut and removed." The reason given in the proposition under the assignment why appellants think the court erred as claimed is that (as they assert) the bond they executed, by virtue of which they obtained possession of the land, was a common-law and not a statutory bond, wherefore, they say, it was necessary, before a judgment could be rendered against them and their sureties, that appellees Conn and Ritchie should allege and prove a breach of the bond. It may be conceded that as to the sureties, if they were in the attitude of complaining of it, the judgment should be set aside, if it appeared that it was rendered in the absence of such pleading and proof; for liability on their part was purely contractual. But it does not follow that for the reason given it should be set aside as to appellants. For, without reference to the character of the bond, or whether they had made a bond or not, appellants would be liable if they, as appellees alleged they did, unlawfully cut and removed from the land timber belonging to appellees. Whether appellants did so cut and remove such timber was a question of fact, to be determined from testimony heard. The sufficiency of the testimony to support a finding that they did unlawfully cut and remove the timber is not questioned by any



assignment we can consider. In this attitude of the case we must assume, in support of the judgment, that the testimony was sufficient to show that they, or those acting for them, did cut and remove the timber.

The judgment is affirmed.

# DYE et al. v. LIVINGSTON LUMBER CO.

(Court of Civil Appeals of Texas. Texarkana.

Dec. 1, 1913. Rehearing Denied

Dec. 11, 1913.)

## 1. PARTNERSHIP (§ 141\*)—PROPERTY CONVEYED.

A deed signed by partners who composed the Livingston Lumber & Manufacturing Company, which recited that it conveyed all of the property and assets of that company to a corporation, includes only the partnership property and does not pass title to the partners' individual estate.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 214-221; Dec. Dig. § 141.\*]

## 2. PLEADING (§ 214\*)—DEMURRER—EFFECT.

On demurrer the averments of the petition must be taken as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

## 3. TRESPASS TO TRY TITLE (§ 32\*)—ACTIONS—PETITIONS—SUFFICIENCY.

A petition in trespass to try title, which averred that defendants based their sole claim of title on a deed executed by plaintiffs as members of a firm, which included only the firm property, and that the land was the individual property of plaintiffs, states a cause of action.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 39-41; Dec. Dig. § 32.\*]

## 4. TRESPASS TO TRY TITLE (§ 32\*)—PETITION—SUFFICIENCY.

In trespass to try title, where the petition alleged that defendants based their whole claim of title on a deed conveying the partnership property of a firm formerly composed of plaintiffs, and that the land in suit was plaintiffs' individual property, subsequent counts based on other agreements in relation to the property, to which defendants were parties, do not state a cause of action and are open to special exception.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 39-41; Dec. Dig. § 32.\*]

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Action by I. A. Dye and another against the Livingston Lumber Company. From a judgment sustaining a demurrer to the petition, plaintiffs appeal. Reversed and remanded.

Holshausen & German and T. F. Meece, all of Livingston, for appellants. Hill & Hill, of Livingston, for appellee.

LEVY, J. This is an action in trespass to try title to certain lands and for damages for timber taken therefrom. The petition has the formal statutory allegations of trespass to try title, and in addition thereto alleges and sets out deeds to a common source of title under which both the plaintiffs and defendant assert title to the lands in controversy,

and further alleges that the only claim defendant has or is asserting to the land is through and by virtue of a certain instrument in writing, which is set out in full. The defendant answered by general demurrer and special exceptions, besides other pleas. The court sustained the demurrer and certain special exceptions to the petition, and the appeal is to revise these rulings of the court.

[1-3] The demurrer is directed to the third and fourth and the sixth and seventh paragraphs of the petition, wherein was alleged and set out the particular claim of the defendant and the plaintiffs to the lands sued for. It appears from the petition that appellants Kelly and Dye formed a sawmill copartnership under the name of the Livingston Lumber & Manufacturing Company. Prior to the partnership Kelly and Dye separately acquired by deeds the lands in suit, which deeds are set forth. On September 10, 1902, this copartnership, through the partners, executed an instrument in writing by the terms of which there was passed, for the consideration therein specified, to the Livingston Lumber Company, a corporation, the following: "All of the property and assets of every kind and nature of said Livingston Lumber & Manufacturing Company." Appellants sue as individuals, alleging, as to the land in suit, "that the Livingston Lumber & Manufacturing Company had no title or interest in said lands, but the same were the property of the said I. A. Dye and C. B. Kelly." The instrument of September 10, 1902, purported on its face, and in legal effect operated, we think, to pass and vest in the Livingston Lumber Company, a corporation, the title to all the real and personal property of the Livingston Lumber & Manufacturing Company, a copartnership, but did not purport or operate to pass the distinct and separate property, which was not copartnership property, of the members of the partnership. And in legal requirement a further conveyance was not necessary in order to pass to the Livingston Lumber Company, a corporation, the copartnership property of the Livingston Lumber & Manufacturing Company. And in view of the allegation that the property in suit was not copartnership property of the Livingston Lumber & Manufacturing Company, which on demurrer must be taken as true, the petition on its face sufficiently presented, as against a demurrer, an actionable controversy. If, under the allegations, the lands sued for were not partnership lands of the Livingston Lumber & Manufacturing Company, but the distinct and private lands of the individual members of that partnership, then, assuming as true the allegation that defendant claims only under the instrument of 1902, the appellants were legally entitled to recover against appellee.

[4] But if the lands in suit were, on a trial, shown to be the copartnership lands of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Livingston Lumber & Manufacturing Company, then it would follow as a matter of law that appellee would be entitled, in view of the instrument of 1902, to a judgment. And in view of the construction given the instrument of 1902, which is pleaded as the only claim of appellee to the lands sued for, the allegations shown in paragraphs 6 and 7 of the petition would not legally avail appellants, as placing any title in them, even if proven as alleged. For if by legal force and effect of the instrument of 1902 only partnership property of the Livingston Lumber & Manufacturing Company was undertaken to be passed and did pass to the Livingston Lumber Company, a corporation, then the rights of appellants and the corporation would be limited to the controversy of fact of whether or not the property sued for was the partnership property of the Livingston Lumber & Manufacturing Company or the distinct and private property of the individual members of the partnership. And, if it were established that the lands sued for were the distinct and private property of the individual members of the partnership, then appellee would conclusively have no such claim or title to the premises as it could legally make subsequent or any agreement of disposition about, as pleaded in such paragraphs above referred to. Likewise, if it were established that the lands sued for were partnership property of the Livingston Lumber & Manufacturing Company and not the distinct and private property of the individual members of the partnership, then appellants would conclusively, in view of the instrument of 1902, have no title or claim in the property as they could legally make subsequent agreement or any contract about, as pleaded in said sixth and seventh paragraphs. Therefore the entire petition was not subject to a general demurrer. And the elimination of the sixth and seventh paragraphs of the petition by special exception, which we think was correctly ruled by the court, nevertheless left remaining, under the other paragraphs, a cause of action sufficiently stated.

As the general demurrer and special exception No. 1 were improperly sustained, the assignments presenting the errors are sustained, and the judgment is reversed, and the cause remanded.

#### SUPREME RULING OF FRATERNAL MYSTIC CIRCLE v. HANSEN.

(Court of Civil Appeals of Texas. Galveston. Oct. 30, 1913. Rehearing Denied Nov. 13, 1913.)

#### 1. INSURANCE (§ 761\*)—MUTUAL BENEFIT ASSOCIATION—REINSTATEMENT OF MEMBER—APPLICATION—WARRANTIES.

An application for reinstatement in a fraternal mutual benefit association having provided that the original application, under which the benefit certificate was issued, should be binding "as of the date of the application for

reinstatement," and the original application having warranted that the member had not had certain diseases, the reinstatement was on a warranty that he had had none of those diseases after the certificate was issued and before the reinstatement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1924; Dec. Dig. § 761.\*]

#### 2. INSURANCE (§ 761\*)—WARRANTIES—BREACH.

In the absence of a statute limiting the effect of a breach of warranty, on which one is reinstated to membership in a fraternal mutual benefit association which has issued a benefit certificate on his life, that he has not had certain diseases, the breach works a forfeiture of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 761.\*]

#### 3. INSURANCE (§ 745\*)—FRATERNAL ASSOCIATIONS—MISREPRESENTATIONS IN APPLICATION—STATUTES.

Acts 31st Leg. (1st Extra Sess.) c. 36, declaring untrue statements in an application for membership in a fraternal beneficiary association shall not prevent recovery on the benefit certificate unless shown to be material to risk, does not govern a certificate on a member reinstated before the act took effect.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1890; Dec. Dig. § 745.\*]

#### 4. INSURANCE (§ 723\*)—FRATERNAL ASSOCIATIONS—APPLICATION—STATEMENTS MATERIAL TO THE RISK.

False statements that one had never had dysentery or any disease of the genital organs or undergone a surgical operation are material to the risk, within Acts 31st Leg. (1st Extra Sess.) c. 36, declaring untrue statements in an application for membership in a fraternal beneficiary association shall not prevent recovery on the benefit certificate unless shown to be material to the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.\*]

Appeal from Fayette County Court; George Willrich, Judge.

Action by Ella Hansen against the Supreme Ruling of the Fraternal Mystic Circle. Judgment for plaintiff. Defendant appeals. Reversed and rendered.

Meador & Davis, of Dallas, for appellant. John T. Duncan, of La Grange, for appellee.

PLEASANTS, C. J. This suit was brought by appellee to recover upon a benefit certificate for \$1,000 issued by the appellant, a fraternal mutual benefit association, on the life of Julius Hansen, her deceased husband. In answer to plaintiff's suit the defendant pleaded that the contract of insurance was void because of false statements, representations, and warranties made by the insured in his application for insurance and his application for reinstatement after the lapse of the certificate for nonpayment of dues. The cause was tried in the court below without a jury, and judgment was rendered in favor of plaintiff for \$1,000.

The following facts are established by the evidence: In the original application for insurance, which was made on October 19, 1896, and upon which the certificate herein sued on was issued, the deceased, Julius

Hansen, made the following warranties: "I do hereby warrant the truthfulness of the statements in this petition, and consent and agree that any untrue or fraudulent statement made therein, or to the worthy medical examiner, or any concealment of facts by me in this petition, or any suspension or expulsion from, or voluntarily severing my connection with, this order, shall forfeit the rights of myself, my beneficiaries, and my family, or dependents, to all benefits and privileges therein."

The certificate of insurance, sued on herein, contains the following provisions: "This certificate of membership is issued to Julius Hansen \* \* \* in consideration of the application for this membership, and of the statements and agreements herein contained, and of the warranty of the said member that all answers to the medical examiner in original petition for membership are full, correct, and true, and upon the further conditions that said member complies with the constitution, laws, rules, and requirements of the Supreme Ruling of the Fraternal Mystic Circle now in force, or as the same may be hereafter altered or amended, and that the said application for membership, the medical examination, the constitution and laws, and the benefit certificate are made a part of the contract, as fully as if herein set forth at length. Upon these conditions the Supreme Ruling of the Fraternal Mystic Circle hereby promises and binds itself to pay out of the mortuary fund of said order to his wife, Ella Hansen, upon satisfactory proof of death of said member, while in good standing upon the books of the said the Supreme Ruling of the Fraternal Mystic Circle, the sum of two thousand dollars. \* \* \* I hereby accept this certificate on the terms and conditions named therein, this 18th day of November, 1908. [Signed] Julius Hansen."

In the "Statement of the Medical Examiner" made by Julius Hansen, appears the following:

"(7) Have you ever been subject to or had any of the following disorders or diseases? (Answer 'Yes' or 'No' to each.) \* \* \* Bilious, renal, or hepatic colic? No. Cancer or any tumor? No. Catarrh? No. Chronic diarrhea? No. Disease of the liver? No. Disease of the stomach? No. Dysentery? No. Dyspepsia? No. Ulcers or open sores? No. Any disease of the genital or urinary organs? No."

"(16) Have you undergone any surgical operation? No."

The laws of the defendant order provide that, in the event any member shall obtain admission or reinstatement into the order by false or untrue answers in application of medical examination, regarding personal or family history or present condition of health, the certificate shall be void, and no right of recovery against the defendant order shall exist.

Deceased remained a member in good standing of appellant association until December 31, 1908, when he was suspended for nonpayment of dues, and remained suspended until June 24, 1909, when he was reinstated upon his application for reinstatement, which was made on May 31, 1909. This application contains the following warranties and agreements: "I hereby warrant and declare that I am now [May 31, 1909] in sound health; that there is no cause in connection with my physical condition that would be a bar to my securing life insurance or in any way shorten my life; that I am not afflicted with any physical or mental defect or infirmity; that I have never suffered, nor am I now suffering, from tuberculosis, consumption, spitting of blood, habitual cough, \* \* \* diseases of the liver or kidneys, or cancer. \* \* \* I expressly agree that the original application for membership under which said certificate was issued shall be effective and binding, the same as if made to said Fraternal Mystic Circle at this date. Now, in consideration of the foregoing statements and warranties \* \* \* I hereby request that I may be reinstated, and I agree that \* \* \* my reinstatement shall be valid and binding only in consideration that such statements and warranties herein and in said petition are full, complete, and true, and the only statements and warranties in consideration of which I am reinstated, and, if any of them are untrue, my said membership shall be null and void, and I further agree that the receipt of future payments by said Fraternal Mystic Circle shall not estop the order from defense on account of any false statement herein or in said petition."

At the time this application was made the deceased also presented to appellant a petition for reinstatement signed by him. This petition contains the following statements and agreements: "I, Julius Hansen, \* \* \* do hereby certify that I am, on the day and year above written [May 31, 1909] of \* \* \* sound constitution, in good health, and free from all diseases and infirmities, and I hereby repeat all statements and warranties contained in my petition for membership, and warrant the same and statement herein or to the worthy medical examiner, and each of them, to be full, complete, and true. I further certify that there has been no change in my family history, and that I have had no severe illness, local disease, or personal injury since the date of my original petition and examination for membership in this order. \* \* \* Now, in consideration of the foregoing statements and warranties, \* \* \* I hereby request that I may be reinstated in said ruling under said benefit fund certificate, and I agree that \* \* \* my reinstatement shall be valid and binding only in consideration that such statements and warranties herein and in said petition are full, com-

plete, and true, and the only statements and warranties in consideration of which I am reinstated, and, if any of them are untrue, said membership shall be null and void, and I further agree that the receipt of further payments by said ruling shall not estop this order from defense on account of any false statements herein or in said petition."

The undisputed evidence shows that the deceased was operated on for hydrocele in November, 1908, and again in April, 1909. He had an attack of dysentery in April, 1909, and at that time was sick for several days. The physician who operated on him for hydrocele testified that at the last operation he advised deceased to consult another physician, because he had reached the conclusion that deceased had cancer of the testicle, or that such disease was developing, as he was then annoyed with pains in the testicle. In March, 1910, the year after his reinstatement, his testicle was removed. He died in August, 1910, from cancer of the intestines.

There is evidence sufficient to sustain the finding of the trial court that at the time the deceased made his application for reinstatement in May, 1909, he was in good health, and was not then suffering from, and had never had, any of the diseases mentioned in said application. The only disease mentioned in this application which the evidence tends to show he had before the application was made is cancer, and, while it seems to us that the preponderance of the evidence shows that he had this disease before his application for reinstatement was made, there is evidence to sustain the finding of the court that said disease did not develop until several months after the deceased was reinstated.

[1] We do not, however, agree with the learned trial judge and counsel for appellee in the proposition that appellee's right to recover in this case depends upon the condition of deceased's health at the time his application for reinstatement was made, and the truth or falsity of his warranty in said application that he had never had any of the diseases therein mentioned. In addition to the warranty that he had never had any of the diseases named in the application, he agreed that the original application, under which the certificate was made, should be binding as of the date of the application for reinstatement, and in his petition for reinstatement, which accompanies his application, he says: "I hereby repeat all statements and warranties contained in my petition for membership, and warrant the same and statements herein as to the worthy medical examiner, and each of them, to be full, complete, and true." In his application for reinstatement he makes the following agreement: "I agree that my reinstatement shall be valid and binding only in consideration that such statements and warranties herein and in said petition are full, complete, and true, and the only statements and warranties

in consideration of which I am reinstated, and, if any of them are untrue, my membership shall be null and void, and I further agree that the receipt of future payments by the Fraternal Mystic Circle shall not estop the order from defense on account of any false statements herein or in said petition."

By the explicit terms of the instruments before set out which, together, evidence the contract between the parties, the validity of the certificate depends upon the truth of the statements made to the medical examiner. It is shown by the undisputed evidence that at least three of these statements were false, namely, that the deceased had never had dysentery, had never had any disease of the genital organs, and had never undergone a surgical operation. As before stated, the undisputed evidence shows that he suffered from hydrocele, a disease of the testicle, in 1908 and 1909, before his application for reinstatement was made, that he had been operated on twice to obtain relief from said disease, and that he had dysentery in April, 1909.

[2] In the absence of any statute limiting the effect of a breach of warranties in contracts of this kind, it is well settled that such breach works a forfeiture of the contract. *Insurance Co. v. Pinson*, 94 Tex. 553, 63 S. W. 531; *Supreme Lodge v. Payne*, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277.

[3] In the case of *Modern Order of Prætorians v. Hollmig*, 100 Tex. 623, 103 S. W. 476, it was decided that the act of 1903 (article 4947, Revised Statutes 1911), which declares "that any provision in any contract or policy of insurance issued or contracted for in this state which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false shall render the contract or policy void or voidable shall be of no effect and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which the policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case," does not apply to fraternal beneficiary associations. To meet the defect in the statute pointed out in this decision, the Legislature in 1909 passed an act relating to certificates issued by fraternal beneficiary associations similar to the act above quoted. Acts 31st Legislature, 1st Extra Sess., p. 359. This act did not take effect until July 31, 1909, which was two months after the application of Hansen for reinstatement was made and more than a month after said application had been granted. The contract sued on in this case, having been made before the act referred to was passed, is not governed thereby.

[4] If, however, the act could be held to apply, we think the false statements were clearly material to the risk. In a case between the parties to this appeal involving a certificate issued at the time the certificate herein sued on was issued, and which was forfeited and reinstated upon application made by the deceased at the same time, and identical in all respects with the application in this case, the Court of Civil Appeals for the Fourth District held that the warranties breached in that case, which were the same shown to be breached in this, were as a matter of law material to the risk. Supreme Ruling v. Hansen, 153 S. W. 351. A writ of error was refused in this case. While we do not think it necessary to decide the question in determining this appeal, we agree with the conclusion expressed in the case cited.

It follows from what we have said that the judgment of the court below should be reversed, and judgment here rendered for appellant, and it has been so ordered.

Reversed and rendered.

#### WESTERN UNION TELEGRAPH CO. v. McFARLANE.

(Court of Civil Appeals of Texas. Galveston. Nov. 15, 1913. Rehearing Denied Dec. 11, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 39\*)—MESSAGES—NEGLIGENCE IN TRANSMISSION. The substitution of "Dallas" for "Galveston," Tex., as the sender's address in a telegram, was negligence entitling the sender to damages if no answer was received because of such mistake.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 30, 34; Dec. Dig. § 39.\*]

2. TELEGRAPHS AND TELEPHONES (§ 68\*)—MESSAGES—DAMAGES—PROXIMATE CAUSE.

A mistake in substituting "Dallas" for "Galveston" as the sender's address, by reason of which no answer was received to a telegram wiring for money, and stating that the sender's wife had just died, was the proximate cause of mental anguish to the sender, resulting from inability to properly bury his wife because of lack of money.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

3. TELEGRAPHS AND TELEPHONES (§ 74\*)—MESSAGES—ACTION FOR DAMAGES—INSTRUCTIONS.

In an action for damages for mental anguish, etc., caused by inability to properly bury plaintiff's wife through failure to receive an answer to a telegram wiring for money and stating that plaintiff's wife had just died, the court instructed that if plaintiff, when the message was handed in at the sending point, notified defendant that the addressee was indebted to plaintiff, and that plaintiff was without money and his wife had just died, and it was necessary for him to secure immediate funds for embalming his wife and funeral expenses, and further charged that if the sendee failed to send the money, and if the message had been transmitted correctly, the sendee would have sent sufficient money to enable "defendant" to embalm his wife and give her a

more elaborate burial than he did, and that plaintiff would have embalmed his wife and buried her differently but for the mistake in the message and failure to receive money, and if the sendee would have sent the money in time to enable plaintiff to do so, and as a direct and natural result of the mistake plaintiff was prevented from having the body embalmed, etc., and was compelled to have her buried without embalming, and as a proximate result thereof plaintiff suffered mental anguish, the jury should find for plaintiff such sum over the actual damages as it might believe from the evidence would reasonably compensate him for such mental anguish. *Held*, that the instruction was not affirmatively erroneous or misleading.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 77; Dec. Dig. § 74.\*]

4. TELEGRAPHS AND TELEPHONES (§ 68\*)—MESSAGES—DAMAGES—ANTICIPATION BY COMPANY.

Though a telegraph company was not told when a message was sent, requesting that money be wired immediately and stating that plaintiff's wife had just died, that plaintiff desired the money for embalming his wife, if it was informed that he was without funds and that the money was wanted for burial expenses, the company could have reasonably anticipated that its failure to properly transmit would probably cause plaintiff mental anguish from inability to properly embalm his wife on the nonreceipt of the money.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

5. TELEGRAPHS AND TELEPHONES (§ 71\*)—MESSAGES—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for damages for mental anguish, etc., through failure to deliver a telegram requesting money, *held* not to show that a verdict for plaintiff for \$1,500 was excessive.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 74; Dec. Dig. § 71.\*]

Appeal from District Court, Galveston County; Clay S. Briggs, Judge.

Action by J. E. McFarlane against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hume & Hume, of Houston, and Geo. H. Fearons, of New York City, for appellant. Marsene Johnson, Elmo Johnson, and Roy Johnson, all of Galveston, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellant to recover damages alleged to have been caused by the negligence of appellant in transmitting a telegraphic message sent by appellee from Galveston to Walter Scott at Ft. Worth, Tex. The telegram was as follows: "Galveston, Texas, March 20, 1912. Walter Scott, Fort Worth, Texas. Please wire me money immediately. My wife has just died. Answer. J. E. McFarlane." The telegram was transmitted by appellant from Galveston to its Dallas office and repeated there to Ft. Worth. When it was repeated from Dallas, the word "Dallas" was inserted in lieu of

the word "Galveston," and the addressee, supposing that it had been originally sent from Dallas, and that appellee was at that place, tried to communicate with him there, and because of this error in the transmission of the message received no answer thereto.

The petition upon which the case was tried contains the following allegations:

"And plaintiff further alleges that the negligence of the defendant in failing in all said particulars to correctly transmit, telegraph, and deliver to said Walter Scott in said city of Ft. Worth the telegram delivered to defendant in the said city of Galveston, as aforesaid, was the proximate cause of the injuries and damages sustained by plaintiff as hereinafter fully pleaded, set out, and described. And plaintiff further alleges that, at the time of the delivery of said telegram to the defendant in said city of Galveston, the defendant was informed that the person to whom the said telegram was addressed was indebted to this plaintiff, that this plaintiff was without money, and that his wife had just died, and that it was necessary for this plaintiff to have and to secure immediately funds for the embalming and care of the body of his said wife and for the necessary funeral and burial expenses of said body; and that this was the reason why this plaintiff was sending this telegram. And plaintiff further alleges that the defendant then and there promised and agreed to safely and correctly and immediately transmit said telegram and cause the same to be delivered within one hour, all of which agreements and contracts were breached by this defendant as aforesaid. And plaintiff further alleges that he was, as the defendant well knew and was at said time informed by plaintiff, wholly without funds, and that his wife had suddenly died, and that he was unable to secure money necessary to have her body embalmed and cared for and to secure burial grounds and other necessities for her funeral, all of which facts plaintiff informed defendant at the time of sending said telegram; that in the afternoon of said day he called at defendant's office and was by defendant's agents informed that said telegram had been traced, and that said telegram had been safely delivered to the person to whom it was addressed in said city of Ft. Worth, and that by reason of the failure of the defendant to correctly transmit and deliver said telegram the plaintiff was unable to secure funds with which to pay necessary embalmer's fees, to pay for burial fees, and to pay the other funeral expenses necessary for the burial of his wife until late in the morning of the second day after her death, when, and at which time, the plaintiff discovered that his wife's body was mortifying and decaying, and, not receiving any reply to his said telegram, the plaintiff borrowed a small sum of money wholly inadequate to properly and re-

spectfully care for and bury his said wife and cause her body to be interred in an appropriate manner in his family burying ground in a distant county where plaintiff intended to have his wife's body shipped, of all of which last-named facts the defendant was informed at the time of the reception of plaintiff's telegram as aforesaid.

"And plaintiff further alleges that on the date of the death of his wife, as aforesaid, he was destitute and without money, as defendant was by said telegram and by plaintiff informed; that by reason of defendant's negligence in failing to correctly transmit and deliver said telegram to said Walter Scott, plaintiff suffered such mental agony and distress and such mental pain and anguish, for this, that plaintiff was unable on said day to secure funds to properly care for the body of his said dead wife and to prepare same for burial; that late in the afternoon of said day plaintiff suffered much mental agony, humiliation, and distress of mind, for this, he was forced by reason of defendant's negligence, as aforesaid, to solicit money from his friends and to borrow such sums as he could to protect and save his wife's body from being buried in charity, and to save same from burial in the pauper burying ground in said city. And plaintiff further alleges that while he made every possible effort to secure sufficient funds by loan from his friends and otherwise to give his wife a decent and respectable burial and funeral, as he would have been able to do if his said telegram to said Walter Scott had been properly transmitted and delivered by defendant, as said Walter Scott was indebted to plaintiff in the sum of \$300 at said time and could and would have telegraphed all of said money to this plaintiff, and that, by reason of all of said negligence of the defendant, plaintiff was unable to have the body of his said wife embalmed, and was unable to secure a proper burial casket for her body, and was unable to obtain proper conveyances for his relatives and friends to and from the funeral of his said wife, and was unable to secure and obtain a decent burial place for the body of his said wife, all of which caused this plaintiff to suffer much shame, humiliation, and mental pain and anguish. And plaintiff further alleges that defendant's negligence in failing to carry out its contract with plaintiff and in failing to correctly transmit and deliver said telegram was the proximate cause of the injuries, damages, humiliation, and mental pain and anguish suffered and sustained by plaintiff at said time. And plaintiff further alleges that he has sustained actual damages by reason of the shame, humiliation, and mental pain and anguish suffered by plaintiff at said time in the sum of \$2,999, and that he has lost the value of the said 45 cents paid to defendant for correctly transmitting said telegram, and that on account

of all of said matters, and by reason of the negligence of the defendant, as hereinbefore pleaded, he is entitled to recover of and from the defendant his said total damages in the total sum of \$2,999.45."

The defendant answered by general demurrer to the petition as a whole, and by general exceptions to the allegations of damages caused by mental anguish, on the ground that said allegations were insufficient to entitle plaintiff to recover such damages, and that the only cause of action shown by the petition was for recovery of the 45 cents charges paid by plaintiff, which was a cause of action of which the court had no jurisdiction. The answer further denied generally all of the allegations of the petition.

The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiff in the sum of \$1,500.45.

The evidence shows that plaintiff's wife died in Galveston on the morning of March 20, 1912. Plaintiff was without funds with which to pay expenses necessary to prepare the body for burial and procure a coffin and lot in the cemetery, and, for the purpose of obtaining the money to bury his wife, sent the telegram before set out. At the time the message was sent the defendant was informed that plaintiff was without funds and was asked to hurry the message. The charges for transmission, 45 cents, were paid by plaintiff. The message was changed in the Dallas office, as before stated, and because of this change the addressee, Walter Scott, failed to respond to plaintiff's request. If the message had been properly transmitted, Mr. Scott would have at once wired plaintiff \$140 which he owed him, and if plaintiff had so requested would have sent as much as \$150. When plaintiff failed to receive any reply from his telegram, he made every effort to borrow money with which to provide for his wife's burial, and finally succeeded in obtaining \$120. With this amount he bought a cheap coffin and a cheap lot in a cemetery and procured the services of an undertaker. His wife was buried on the evening of the 21st of March. Shortly after death the body began to decompose and before the burial could be had it became very offensive and was buried in a very decayed condition. This condition of his wife's body caused plaintiff to suffer much mental anguish and distress of mind. If he had received the \$150 from Mr. Scott, he could and would have had the body embalmed shortly after death and would not have suffered the anguish and distress of mind caused by its condition. It is not shown that if plaintiff had received the money from Mr. Scott he would or could have borrowed the \$120. The body could have been embalmed at a cost less than \$30, the difference between the amount plaintiff was able to borrow and the amount he would have had if the telegram had been properly transmitted.

[1, 2] The failure of the defendant to properly transmit the telegram was negligence, and such negligence was the proximate cause of the anguish and distress of mind suffered by plaintiff.

[3] The first assignment of error complains of the following paragraph of the charge: "And that such negligence, if any, proximately caused plaintiff to suffer mental anguish in the respects alleged by plaintiff. And if you further believe from the evidence that the plaintiff or his agent, at the time such message was delivered to the defendant company at Galveston, Tex., notified such defendant that the person to whom said telegram was addressed was indebted to the plaintiff, and that plaintiff was without money, and that his wife had just died and it was necessary for plaintiff to have and secure immediate funds for the embalming and care of the body of his said wife, and for the necessary funeral and burial expenses of said body, and to secure necessary burial grounds, as more fully alleged by plaintiff, and if you further believe from the evidence that the sendee of such telegram failed to send money, and that had such message been transmitted correctly as sent the sendee of such message would have sent in response thereto sufficient money to have enabled defendant to have embalmed his wife and to have given his wife a more elaborate and different character of burial than that actually given her, and if you further believe from the evidence that plaintiff intended to and would have had the body of his wife embalmed and given his wife a more elaborate and different burial, but for such mistake in the message and failure to receive such money, and if you further believe that the sendee of such message would have sent such money, if any, in time to have admitted of plaintiff having his wife's body embalmed and giving his wife a more elaborate and different burial, and if you further believe from the evidence as a direct and natural result of the mistake in sending such telegram plaintiff was prevented from and it became impossible for him to have the said body embalmed, and giving his wife a more elaborate and different burial, and that he was compelled to have her buried without such embalming and a less elaborate and different burial than what he would otherwise have given her, and that as a proximate result thereof plaintiff suffered mental anguish, then you are instructed to further find for plaintiff such additional sum over and above 55 cents as you may believe from the evidence would reasonably compensate plaintiff for such mental anguish, if any; unless you so believe, you must find in favor of the defendant upon the issue of mental anguish."

We shall not undertake to discuss in detail the various objections to this charge presented in the 25 propositions submitted under this assignment. The charge is probably objectionable on some of the grounds

upon which it is assailed, but it contains no affirmative misstatements of the law applicable to the facts shown by the evidence and did not probably mislead or confuse the jury. The assignment is overruled.

Under appropriate assignments complaining of the refusal of the court to instruct the jury to return a verdict for the defendant on plaintiff's claim for damages for mental anguish and the action of the court in overruling defendant's motion for a new trial, the verdict for such damages is assailed on the ground that under the pleading and evidence in this case the negligence of the defendant in transmitting the telegram was not the proximate cause of such damages, and they are too remote to entitle plaintiff to recover therefor. The main contention under these assignments is made in the following proposition: "Mental anguish is not to be presumed as a matter of law to be a necessary consequence of mere failure to embalm remains, and failure to embalm is not to be presumed to be necessary to a decent and respectable burial as such, and where the allegation and proof shows that the embalming was contemplated and intended for specific purpose of burial elsewhere than at Galveston, and where the proof shows no notice of such purpose, and where the proof shows that plaintiff could have embalmed the body had he so chosen, and where the proof showed that failure to embalm in itself did not cause plaintiff mental anguish, and the embalming constituting a mere elaboration of funeral and burial at Galveston, and plaintiff not having been able with \$140 to have had the remains embalmed and in addition thereto have held a more decent and respectable burial at Galveston than he did provide, and defendant having had no notice of mental anguish as a probable result of failure to embalm for burial at Galveston, the charge should have been given."

[4] We do not think the proposition should be sustained. It is true that appellant was not told when the telegram was sent that plaintiff desired the money for the express purpose of embalming his wife's body, but was informed that plaintiff was without funds and the money was wanted for the purpose of providing for the burial expenses of his wife who had just died. Proper preparation of the body was a necessary part of its decent burial, and the evidence shows that embalming was necessary to prevent the rapid decay of the body. That this is generally true in this climate is a matter of such common knowledge that we hardly think proof of the fact was necessary. The evidence shows that plaintiff could not procure the necessary funds to embalm the body, and that if the telegram had been properly transmitted he could and would have had it embalmed. We think under the pleadings and evidence the appellant at the time it

undertook to transmit the message could have reasonably anticipated that a failure on its part to properly transmit it would probably cause plaintiff to suffer the mental anguish for which he seeks recovery in this case, and, this being so, appellant's negligence in transmitting the telegram was the proximate cause of the damages to plaintiff by reason of his mental anguish and appellant should be held liable therefor. *Telegraph Co. v. Carter*, 2 Tex. Civ. App. 624, 21 S. W. 688; *Cumberland Tel. & Tel. Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575.

[5] We cannot say under the evidence in this case that the verdict is excessive. The evidence as to the condition of the body is revolting, and the mental anguish of a husband who was compelled to keep and bury his wife's body in this condition must have been acute.

We are of opinion that the judgment should be affirmed, and it is so ordered.

Affirmed.

#### LE BLANC et al. v. JACKSON.

(Court of Civil Appeals of Texas. Galveston. Oct. 23, 1913. Rehearing Denied Nov. 13, 1913.)

#### 1. APPEAL AND ERROR (§ 719\*)—TRIAL BY COURT—VOLUNTARY FINDINGS—EFFECT.

When conclusions of fact are voluntarily filed by the trial court, neither party is required to take notice, and no exception to the conclusions and no assignments of error therein are required of parties against whom such findings are made, to entitle them to attack the judgment on the ground that it is unsupported by the evidence; but, where the facts are complicated, it is not improper for the court to look to them in making its own conclusions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

#### 2. ADVERSE POSSESSION (§ 104\*)—PRESUMPTION—EXECUTION AND EXISTENCE.

The execution of a deed may be established by circumstances, or by the presumption arising from circumstances of the existence of such muniments of title as are necessary to give lawful origin to a title long openly asserted on one side, with acquiescence in such claim on the other.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 595-602; Dec. Dig. § 104.\*]

#### 3. ADVERSE POSSESSION (§ 114\*)—PRESUMPTION—EXECUTION AND EXISTENCE.

Where it appears from the facts and circumstances to be more probable that a deed or other muniment of title in question had been executed than that it had not been, the jury would be authorized to presume that it had been so executed.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. § 114.\*]

#### 4. ADVERSE POSSESSION (§ 14\*)—PRESUMPTION—EXECUTION AND EXISTENCE—ACTUAL POSSESSION.

Actual possession is not essential to the presumption of the existence of a deed, that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



being only evidence of a claim of title tending to fix notice upon the holder of the adversary title and tending also to show acquiescence. It is essential that there be a claim of ownership openly, and notoriously asserted, and which can only be reasonably explained by the existence of the muniments of title necessary to support such claim. It is also essential that such assertion of ownership be acquiesced in by the owner of the adversary title, although such acquiescence is of greater weight than the assertion of ownership, and, to constitute such acquiescence, knowledge, which may be shown by circumstances, is essential.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77-81; Dec. Dig. § 14.\*]

**5. ADVERSE POSSESSION (§ 104\*)—PRESUMPTION OF EXISTENCE—ACQUIESCENCE.**

The execution of a deed or the existence of other muniment of title may be presumed from mere silence or failure to object to another's known assertion of title without any corroborating act evidencing such acquiescence.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.\*]

**6. ADVERSE POSSESSION (§ 104\*)—NATURE OF PRESUMPTION OF EXECUTION.**

The presumption of the execution or existence of a deed from the facts and circumstances shown is a presumption of fact.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.\*]

**7. TRESPASS TO TRY TITLE (§ 41\*)—SUFFICIENCY OF EVIDENCE—EXISTENCE AND EXECUTION.**

In trespass to try title, evidence held sufficient to support a conclusion that defendant's grantor by deed or settlement had acquired the title of two of his brothers to their interest in the land.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

**8. TRESPASS TO TRY TITLE (§ 41\*)—ADMISSIBILITY OF EVIDENCE—CLAIM OF TITLE.**

In trespass to try title, evidence that the talk in the family was that a brother of defendant's grantor had sold his interest to such grantor, contemporary with and explanatory of the grantor's claim of title, was admissible as bearing on the knowledge of such claim by the heirs of the grantor's brother.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

**9. ADVERSE POSSESSION (§ 104\*)—PAROL EVIDENCE—APPLICATION OF RULE.**

The rule that parol testimony cannot be offered over objection to prove a sale of land in this state has no application to a case where circumstances are relied on to support a presumption of a deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.\*]

**10. GUARDIAN AND WARD (§ 111\*)—CONVEYANCE OF WARD'S PROPERTY—EFFECT.**

In trespass to try title, a deed to defendant's grantor signed C. B. per S. Le B., "curator," in the absence of any authority shown for his execution of the deed, was not binding upon C. B. and was insufficient to pass her title.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 180-185; Dec. Dig. § 111.\*]

**11. APPEAL AND ERROR (§ 173\*)—NECESSITY OF OBJECTION—ADMISSION OF EVIDENCE.**

In trespass to try title, the contention, that failure to object to the introduction of a deed by the heirs of the grantor claiming her title barred them from objecting to its validity on appeal, was not sound, where the latter objection was as to the legal effect of the deed as conveying the grantor's interest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

**12. HUSBAND AND WIFE (§ 273\*)—PRESUMPTION—SEPARATE PROPERTY OF HUSBAND.**

Where a wife died before the execution of a deed by which the surviving husband acquired title, the presumption was that the property was his separate estate, to overcome which it was necessary to show that title had in effect been acquired by purchase prior to the death of the wife and had been paid for with community funds.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024; Dec. Dig. § 273.\*]

**13. VENDOR AND PURCHASER (§ 242\*)—PURCHASER FOR VALUE—BURDEN OF PROOF.**

Parties asserting an equitable title as against a purchaser for value have the burden of showing that he had notice of all the facts constituting their title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.\*]

**14. VENDOR AND PURCHASER (§ 239\*)—PURCHASER FOR VALUE—TITLE.**

The legal title of the purchaser for value, not shown to have notice of an outstanding equitable title, was superior to the equity.

[Ed. Note.—For other case, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. § 239.\*]

**15. APPEAL AND ERROR (§ 395\*)—DISMISSAL—FAILURE TO FILE APPEAL BOND.**

Where an appeal bond was not filed within the time required by law, the appeal is properly dismissed on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2058, 2064-2070, 2085, 2086, 3127; Dec. Dig. § 395.\*]

**16. DEEDS (§ 31\*)—SIGNATURE—EFFECT.**

A deed is not binding upon one who signs it but who is not named in the body of the deed as one of the grantors.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 60-63; Dec. Dig. § 31.\*]

**17. VENDOR AND PURCHASER (§ 229\*)—BONA FIDE PURCHASER—PRESUMPTION.**

Where a purchaser was affected with notice that his grantor acquired title during the life of his wife, he was charged with notice that the property was community property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

**18. VENDOR AND PURCHASER (§ 229\*)—BONA FIDE PURCHASER—NOTICE.**

Where a purchaser knew that his grantor had been married, as several of his children joined in the deed, he was bound to take notice of other children of the grantor's wife entitled to an interest in their mother's half of community land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

Appeal from District Court, Jefferson County; John M. Conley, Judge.

Trespass to try title by Ellen Craigen and others against R. S. Jackson, in which Elodie Le Blanc and others intervened, claiming the entire tract, with amended petition, making defendant Jackson and the interveners defendants, and with cross-action by interveners against Jackson. From the judgment, plaintiffs and part of the interveners appeal. Reformed and affirmed.

Thos. J. Baten and E. E. Easterling, both of Beaumont, for Le Blanc and others. Blain & Howth, of Beaumont, for Craigen and others. Lipscomb & Lipscomb, of Beaumont, for appellee.

REESE, J. As originally instituted, this was an action in trespass to try title by Ellen Craigen and Odella Carouthers, joined by her husband, against R. S. Jackson to recover an undivided one-eighth interest in a certain 666 acres of land out of the W. H. Smith league in Jefferson county. After the institution of the suit, Elodie Le Blanc and several others intervened, setting up claim, according to the face of their plea, to the entire tract. The original plaintiffs filed an amended petition in which interveners and the defendant Jackson were made defendants, setting up title in the usual form of an action of trespass to try title against all of these to the said undivided one-eighth interest in the tract. Interveners answered this amended petition by a plea of not guilty and a cross-action against plaintiffs and defendant Jackson for the entire tract. Defendant Jackson by amended answer pleaded, as against all the parties, not guilty and the statute of limitation of three, five, and ten years. This constituted the pleadings in the case. The case was tried without a jury and resulted in a judgment for the plaintiffs for one-eighth of the two-eighths interest inherited by Theophile and Emile Broussard from their father, P. O. Broussard, also one-fourth of the one-eighth interest inherited from her father, P. O. Broussard, by Victoire Hebert, and conveyed by her to Phillip Gallier. Some of the interveners recovered small interests in the land and some failed of recovery. The defendant Jackson recovered the one-eighth interest inherited by Derneville Broussard from P. O. Broussard, also the two-eighths of Theophile and Emile Broussard inherited from P. O. Broussard, their father, less a small interest therein awarded to plaintiffs, also three-fourths of the one-eighth interest of Victoire Hebert sold by her to Phillip Gallier, also the interests of some of the other children of P. O. Broussard and their descendants not necessary to particularize here. From this judgment the plaintiffs and interveners (except the heirs of Emerante Broussard, who recovered the one-eighth interest inherited by their mother from P. O. Broussard) have appealed. The defendant Jackson also filed an appeal bond and, as

appellant, seeks separately a reversal of the judgment in favor of the heirs of Emerante Broussard, which appeal they seek by motion to have dismissed for reasons hereafter stated in passing on this motion.

[1] The trial court filed and had incorporated in the record conclusions of fact and law, but there was no request by any party therefor, so far as is shown by the record. The exact status of such findings has not been, so far as we have been able to find, fixed by the courts. It was held by this court in *City of Houston v. Kapner*, 43 Tex. Civ. App. 507, 95 S. W. 1103, in considering an objection to the consideration of such conclusions, on the ground that, "when such conclusions are voluntarily filed by the judge, neither party is required to take notice of them, and no exception to the conclusions nor assignments predicated error on the findings of fact therein contained are required of the parties against whom such findings are made to entitle him to attack the judgment on the ground that it is unsupported by the evidence. \* \* \* The question of whether such conclusions can be considered by the appellate court is not presented, and we do not feel called upon to decide." The conclusions are ignored by the briefs; but, as the facts are quite complicated in some particulars, we have deemed it not improper to look to them in making our own conclusions.

So far as is material and necessary to a decision of the questions involved in this appeal, the facts are as follows: P. O. Broussard is the common source of title. He died in 1877 in the state of Louisiana where he resided. He owned at the time of his death a considerable estate in lands and cattle, etc., in that state, which seems to have been located about Johnson's bayou in the southwestern corner of the state. No mention is made of a will, so we assume that he died intestate. He left surviving him seven children—three sons, Derneville, Emile, and Theophile, and four daughters, Delzinde, Ezilda, Victoire, and Emerante—and the descendants of another daughter Azema (her children and grandchildren). At his death P. O. Broussard was possessed of two tracts of land in the Smith league in Jefferson county, containing approximately 1,000 acres. One of these tracts, containing 667 acres, is involved in this action.

Derneville Broussard married a widow with two children, Ellen Craigen and Odella Carouthers, the plaintiffs herein. By her he had six children. Mrs. Broussard died in April, 1893, as testified positively by Edgar Carouthers, husband of Odella Carouthers, and one of the plaintiffs, although her daughter testified that she died in 1893 or 1894. On the 7th of October, 1907, Derneville Broussard and his daughters aforesaid conveyed to the defendant, R. S. Jackson, under general warranty deed, for a recited con-

sideration of \$1,332, all their interest in the tract of land here involved.

On September 3, 1894, Ezilda Broussard and Delzinde Broussard and a number of others, including the children of Emerante Broussard, and some if not all the children or descendants of the other daughter, Azema, executed to Derneville Broussard a deed to what purports to be an undivided five-ninths, amounting to about 354 acres of the land involved herein, and being the interest inherited from P. O. Broussard. With regard to this deed there are certain facts which will be set out in discussing certain of the questions presented by the appeal, but the foregoing general statement is sufficient here. Victoire, one of the daughters, married Sarazine Hebert. Her interest in the land was conveyed by her to Phillip Gallier, who died, and part of his estate was inherited by his sister, Mrs. Derneville Broussard, and through her by her two daughters, the plaintiffs Craigen and Carouthers, and her children by Derneville Broussard. The interest of the latter passed to Jackson by the deed of Derneville and his daughters aforesaid, and the interest of plaintiffs in this portion was awarded to them by the judgment. Derneville Broussard did not himself claim any interest in that part inherited by Victoire and conveyed by her to Gallier.

Emile Broussard died in 1904, and Theophile in 1881. There was no deed or other written evidence of title in Derneville Broussard of their respective interests from Theophile or Emile. To support his title to their interest defendant Jackson relied upon certain circumstances, as affording a presumption that Derneville had acquired these interests from them prior to the death of Theophile. The court found these circumstances sufficient to authorize such presumption and that Derneville had lawfully acquired title to the interest of Emile and Theophile. By appropriate assignments of error appellants interveners have attacked this finding on the ground that there is no evidence to support this presumption. This presents the most troublesome question in the case, and one about which we have had much difficulty.

The facts and circumstances found by the trial court, and upon which it bases the conclusion of fact that Emile and Theophile had conveyed their interest to Derneville, are stated in his findings of fact as follows:

"That in addition to the land in Texas, the said P. O. Broussard was the owner of stock running on the range in Jefferson county, Tex. The son Derneville Broussard, at the time of his father's death, lived in Texas, and resided on the 667-acre tract, and up to and including the year 1907 had fenced and under cultivation about 20 acres of said tract of land. After the death of P. O. Broussard, the son Emile Broussard principally looked after the business of the estate in Jefferson

county, Tex. Under the direction and at the solicitation of Emile Broussard, Mr. J. Burrell, an old citizen of this county, for a number of years and up to and including the year 1881, rendered the land for taxation in the name of P. O. Broussard, and paid the taxes on said land out of the sale of stock belonging to the estate of P. O. Broussard, rendering an account of the balance of such sales to the said Emile Broussard. That about the year 1881, Emile Broussard and Theophile Broussard were both in Jefferson county, Tex., and in the Hamshire settlement, where Derneville Broussard, J. Burrell, and L. Hamshire lived. Some time about this period, Theo. Broussard tried to sell his interest in his father's estate to L. Hamshire, who refused to buy. That also, about this period, there was some adjustment or settlement between the brothers Theo. Broussard, Emile Broussard, and Derneville Broussard as to their interest in their father's estate in Texas. That thereafter Emile Broussard ceased to act as the head of and to look after the estate, and that Derneville Broussard thereafter instructed Mr. J. Burrell to render the lands for taxes in his name, that is, D. Broussard instead of P. O. Broussard, which was done from the year 1883 to the year 1907. That Mr. J. Burrell, upon the solicitation and instruction of Derneville Broussard, continued to pay the taxes on said lands out of the proceeds from the sale of cattle on the range, which said land and cattle D. Broussard was claiming as his own, and accounted to him for the balance of the proceeds of the sale of the cattle. That this continued for a great number of years. That after the settlement between the brothers it was common talk, or rumor, in the neighborhood, that Derneville Broussard had bought the interest of Theo. Broussard in the land, and that he had also in some manner acquired the interest of Emile Broussard. Emile Broussard died about the year 1903, and after such settlement and up to the time of his death had made no assertion of title or ownership to any interest in the lands in Texas. Theo. Broussard died December 15, 1881, and after the settlement and up to the time of his death made no assertion of title or ownership to any interest in said lands, and in no manner interfered with nor denied the claim of ownership and possession of Derneville Broussard to the entire tract of land, although they were in and out of the neighborhood at frequent intervals.

Shortly after the death of the wife of Derneville Broussard in 1892-1893, he (Derneville Broussard) undertook to qualify as survivor in community over the estate of himself and deceased spouse, and in an affidavit filed in the probate court of Jefferson county, set out that the wife's community interest consisted of 125 acres of land in the Smith league. Derneville Broussard was married some time prior to 1880, but the exact date

is not shown. In the filing of the above affidavit in his effort to qualify as survivor in community, it is apparent that he undertook to and did treat as community interest the two-eighths of 1,000 acres, or 250 acres, which he had acquired from his two brothers, Emile and Theo. Broussard. The community interest of the wife in the same would equal 125 acres, the amount specified in the affidavit. About this time Derneville Broussard employed Albert Broussard, an attorney of this bar, to make a search of the records of this county to ascertain if he could find of record any instrument from any of his brothers and sisters covering a transfer of their shares in his father's estate to him, saying he had purchased some such interests. The search was made and no such instruments were found registered in this county. It was also family history that Derneville Broussard had acquired some of the interests of his brothers or sisters in the early 80's."

To which we add that, after the death of Theophile in 1881 and of Emile in 1903, none of their heirs ever asserted any claim or disputed the claim set up by Derneville aforesaid. Mrs. Hayes, a daughter of Derneville, testified that her father had bought the interests of some of his brothers and sisters prior to the death of her mother.

[2] The doctrine of the proof of the execution of a deed by circumstances, or the presumption arising from certain circumstances of the existence of such muniments of title as are necessary to give lawful origin to a title long openly asserted on one side, with acquiescence in such claim on the other, is not new, but has been long established. So far as the general principle is concerned, it is established by a uniform course of decision in this state. Difficulty only arises in the application of the general principle to the facts of the particular case. The doctrine is nowhere more strongly asserted than by Justice Field, speaking for the Supreme Court of the United States in the case of *Fletcher v. Fuller*, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759. In *Dailey v. Starr*, 26 Tex. 567, the court says that "it would be difficult to lay down, so as to answer any beneficial purposes, the circumstances under which deeds will be presumed to have existed," and in *Beincourt v. Parker*, 27 Tex. 564, "although to some extent every case must stand upon its own peculiar facts, the principles upon which the courts are to be guided in the presumption of grants may be said to be now well established," citing *Taylor v. Watkins*, 26 Tex. 688, and *Yancey v. Norris*, 27 Tex. 40. The facts of various cases vary, from those which lead so irresistibly to the conclusion that the claimed deed or muniment of title existed, that a verdict of a jury against such conclusion would hardly be allowed to stand, to those where they are held sufficient for that purpose only in deference to the conclusion of the jury, or the court

trying the facts as a jury, upon the issue of fact thus presented.

[3] A charge to the jury has been many times approved by this court (and by the Supreme Court by refusal of writs of error) wherein the jury was instructed, in substance, that, if from the facts and circumstances in evidence it appeared to be more probable that the deed or other muniment of title in question had been executed than that it had not been, the jury would be authorized to presume that it had been so executed. In some cases it has been held that the facts were insufficient to support such finding by the jury, as in *Beincourt v. Parker*, supra, *Walker v. Caradine*, 78 Tex. 489, 15 S. W. 31, and probably other cases which might be cited, which only signify that each must stand upon its own facts; regard being had to the general principle stated.

[4] Actual possession, in this state, is not essential. *Brewer v. Cochran*, 45 Tex. Civ. App. 179, 99 S. W. 1033. This is only evidence of a claim of title tending to fix notice upon the holder of the adversary title of such claim and tending also to show acquiescence. But it is essential that there should be claim of ownership openly and notoriously asserted, and which can only be reasonably explained by the existence of the muniments of title necessary to support such claim, and it is essential that such assertion of ownership be acquiesced in by the holder of the adversary title. By the courts it is held that acquiescence on the one side is of more importance than assertion of ownership on the other, and logically so, for it is not unusual for men to claim what does not belong to them, but it is contrary to human experience that such adversary claim, if known, should be allowed to go undisputed if it has no basis in fact. Knowledge is essential to such acquiescence, for one cannot be supposed to acquiesce in a claim hostile to his own interest unless he has knowledge of it. *Walker v. Caradine*, supra. But this knowledge may also be shown by circumstances.

[5] It is earnestly contended by appellant that mere silence or failure in any way to make any objection to this assertion of title, even when known, is never sufficient evidence of acquiescence, but that some corroborating act must be shown evidencing such acquiescence before the execution of a deed, or the existence of other muniment of title will be presumed. We can find no support for this doctrine except in the opinion of the Court of Civil Appeals of the Fourth District in *Kimball v. Houston Oil Co.*, 114 S. W. 662. The doctrine as there stated is not supported by the authorities cited. For instance, it is stated in the opinion that "it is stated in *Herndon v. Vick*, 89 Tex. 475 [35 S. W. 141] that nonclaim alone is not enough, but that to entitle such a matter to be submitted to a jury for determination requires that there be corroborating circumstances." We do not so understand the opinion in that

case. What was really said is: "The ground of this contention is that the proof of the long and continued possession, use, and an enjoyment of the land in controversy, under a claim of title by defendant in error and those under whom he claims, together with the evidence that no claim had ever been asserted on behalf of the plaintiff in error until the bringing of this suit, is so conclusive in its nature and tendency as to impel the court to presume a sale or conveyance from Cole back to the original grantee, should it be found that Cole ever possessed the title. It has doubtless been held in other jurisdictions that the inference arising from long possession and enjoyment of real estate, together with corroborating circumstances, may be so cogent as to make it the duty of the court to instruct the jury to presume a grant. Such is not the rule in this state. With us the presumption is one of fact, and it is for the jury to determine the effect of the evidence in support of that presumption. *Taylor v. Watkins*, 26 Tex. 688; *Walker v. Caradine*, 78 Tex. 489 [15 S. W. 31]; *Dailey v. Starr*, 26 Tex. 562." The court also cites *Boone v. Miller*, 73 Tex. 557, 11 S. W. 551, and *Walker v. Caradine*, 78 Tex. 492, 15 S. W. 31, as cases which practically settle the question in this state. Neither of these cases afford any support to the doctrine stated in the opinion referred to.

[6] The court seems to have not been mindful of the distinction between a presumption of law declared by the court, and a presumption of fact to be found by the jury. The presumption here, as relating to deeds from Emile and Theophile Broussard to Derneville Broussard, is one of fact found by the court sitting as a jury.

[7] Applying these general principles to the evidence in the present case, we are of the opinion that the evidence on the whole is sufficient to support the conclusion of the trial court, sitting as a jury, that about the year 1881, either in a general settlement of the estate of P. O. Broussard or by direct purchase, Derneville Broussard acquired the title of Emile and Theophile Broussard to their respective interests in this land. All the parties to the transaction are dead. So far as concerns the mere possession of Derneville, that can well be attributed to the fact that he unquestionably owned, as one of the heirs, a one-eighth interest, amounting to about 80 acres, and his actual possession never at any time embraced more than 20 acres. But the evidence strongly supports the conclusion that he claimed, about 1881, to have acquired the interest of his two brothers, and that this must have been known to them. After the death of P. O. Broussard, and indeed before that, Emile actually looked after the Texas property, and the land was rendered for taxes in the name of P. O. Broussard up to 1883, and taxes were paid by the estate. Beginning with 1883, by direction of Derneville,

it was rendered in his name, and so continued up to his sale to Jackson in 1907, and he paid what taxes were paid. It is true that Theophile died in 1881, but he left a widow who is still living and eleven children, all of whom are still living. Some of them are sons and the others married daughters. Theophile lived a part of the time at least in Jefferson county, and it is beyond belief that none of these children had any knowledge of this Texas land, and of Theophile's ownership of an interest in it (unless he had parted with his title), and of Derneville's claim that he had acquired Theophile's interest, which, as one witness testified, was "generally talked in the family." Emile lived until 1904, returning to Louisiana, where he died, and from the position of general manager of the property, about 1881, he ceased to have anything to do with it. He must have known of Derneville's claim. The absolute silence of Emile, of his five children, still living, and of all of Theophile's children during all of these years, in the face of Derneville's assertion of title, consistent with his acquisition of the interests of Emile and Theophile, and inconsistent with any other hypothesis, strongly supports the presumption of a deed from them or the lawful acquisition of their title. Other facts and circumstances are shown in the court's findings herein quoted, all of which are consistent with Derneville's claim and difficult of explanation on any other hypotheses. We are of the opinion that the evidence sufficiently supports the court's conclusion, and the first, second, sixth, and eighth assignments of error of appellants presenting this question, with the several propositions thereunder, should be overruled.

[8] The case was tried without a jury. There was no reversible error in the admission in evidence, over the objection of appellants, of the testimony of the witness Hampshire that the "talk in the family," meaning the Broussard family, was that Theophile had sold his interest to Derneville Broussard. This evidence was contemporary with, and explanatory of, Derneville's claim of title, and served also as a circumstance to show knowledge of such claim on the part of Theophile's heirs. The point is presented by the third assignment, which is overruled.

[9] The proposition under the fourth assignment of error that parol testimony, when objected to, cannot be offered to prove a sale of land in this state, has no application to a case of this kind, where circumstances are relied on to support a presumption of a deed. The question referred to in the fifth assignment was not leading, nor does it call for conclusions of the witness. The testimony objected to is of the same character as that referred to in the third assignment, and there was no error in admitting it.

[10] Azema Broussard was one of the daughters of P. O. Broussard. She was dead

at the time of the execution of the deed by the other children and grandchildren, to Derneville Broussard in 1897. She left four children, one of whom died without issue, and one of whom died leaving issue, two children living, all parties interveners. One of such children was Celema Broussard, who was deaf, dumb, and blind but of sound mind, and about 45 years of age at the time of the execution of the deed to Derneville in 1897. She died unmarried in 1899, and the other descendants of Azema Broussard are her heirs. This deed is signed "Celema Broussard per Savenne Le Blanc, curator." It was not shown that Celema Broussard was present at the execution of this deed or had any knowledge of it. No explanation was offered as to why Savenne Le Blanc signed the deed as her curator. By proper assignment of error the heirs of Azema Broussard complain of the action of the court in holding that this deed passed the title to Celema's interest in this land. The parties all lived in Louisiana, where the deed was executed. Under the civil law which largely prevails in that state, the office of curator is largely the same as guardian in this state. It is defined as "a guardian, one appointed to take charge of the estate of a minor, a lunatic, a spendthrift, or other person not regarded by law as competent to administer it himself." Black's Law Dictionary. No authority was shown for the execution of the deed by Savenne Le Blanc as curator or guardian of Celema. No evidence was offered at all on this point except the production of the deed so signed. The deed was not binding upon her and was insufficient to pass her title. *Terrell v. Martin*, 64 Tex. 121; *Tucker v. Murphy*, 66 Tex. 355, 1 S. W. 76. The fact that it was signed by her curator contradicts any presumption that he merely acted as her amanuensis in signing her name, at her request, even if such presumption could be indulged in the absence of any evidence that she was present and knew of the execution of the deed. The case does not come within the rule announced in the cases cited by appellee in answering this assignment. *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *Lewis v. Watson*, 98 Ala. 479, 13 South. 570, 22 L. R. A. 297, 39 Am. St. Rep. 82; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506.

[11] Appellee's contention that the failure to object to the introduction of this deed by the heirs of Celema Broussard claiming her title bars them from making the objection here made is not sound. The objection is as to the legal effect of the deed, as conveying Celema's interest. Without other evidence than the mere naked deed, it was insufficient to convey her title, and the court erred in holding otherwise. Her interest appears to be  $\frac{1}{3}$  of  $\frac{1}{4}$ , or  $\frac{1}{12}$ , of which the intervenors, Elodie Le Blanc, the sister of Celema, is en-

titled to recover one-half, and Aurella and Adam Thibaudeau, children of Celeste Broussard, another sister, deceased, would be entitled, between them, to one-half. The judgment will be reformed accordingly.

[12] By separate brief the plaintiffs Ellen Craigen and Odella Carouthers, who claim only part of the interest of their mother in the community estate of herself and Derneville Broussard, complained of the conclusion of the court that the interests acquired by Derneville by the deed of 1894 from Delzinde Broussard and others was his separate property. The court held that the interests of Theophile and Emile acquired by Derneville was community property of Derneville and the mother of plaintiffs and gave them judgment for their share, but the other interests acquired by Derneville from his sisters and their descendants by the deed of September 3, 1894, did not belong to such community estate. Mrs. Broussard died in April, 1893. There is direct evidence to support this as the date of her death, though one of her daughters testified that it was in 1893 or 1894, she did not know which. In either case she died before the execution of this deed by which Derneville acquired title. The presumption would be that the property was his separate estate. In order to overcome this presumption, appellants were required to show that the title had, in effect, been acquired by purchase prior to the death of their mother, and had been paid for with community funds. There was some testimony that it had been acquired by some sort of an agreement or understanding before the death of Mrs. Broussard; but it was not conclusive nor clear, and the court's conclusion is supported by the evidence.

[13] If this was not so, appellants under their own contention had only an equitable title resting upon the fact that the land was paid for with community funds. The deed conveyed the legal title to Derneville and was executed some time after the death of the mother of appellants. Jackson was a purchaser for value, and the burden rested upon appellants to show that he had notice of all the facts constituting their equitable title.

[14] This was not attempted to be shown, and, if their contention be true, Jackson's legal title would be superior to their equity. *Biggerstaff v. Murphy*, 3 Tex. Civ. App. 363, 22 S. W. 769; *Johnson v. Newman*, 43 Tex. 628.

The assignment of error of plaintiffs appellants as to the taxation of costs is without merit and is overruled.

[15, 16] The deed of 1897 in the body of the deed names Emerante Broussard as one of the grantors. She was dead at the time of its execution. It is signed by certain of her heirs who are not named in the body of the deed. The court held that the deed was not binding on the heirs of Emerante and gave them judgment for their mother's one-eighth

interest. They do not appeal. Defendant Jackson attempted to prosecute an appeal against them by excepting to the judgment and giving notice of appeal; but his appeal bond, which was necessary to bring the heirs of Emerante Broussard into this court, they not having appealed from the judgment, was not filed within the time required by law, and the said heirs have filed a motion to dismiss said appeal as to them, on this ground. This motion must be sustained. If, however, the question had been properly presented, the contention of defendant Jackson could not be sustained. The fact that Emerante Broussard is named as one of the grantors in the body of the deed and that her interest is to be conveyed, she being dead, would not distinguish this case from the general doctrine, which is well settled in this state, that a deed is not binding upon one who signs it but who is not named in the body of the deed as one of the grantors. *Stone v. Sledge*, 87 Tex. 49, 26 S. W. 1068, 47 Am. St. Rep. 65; *Thompson v. Johnson*, 24 Tex. Civ. App. 250, 58 S. W. 1030. The rule is different in some of the states. *Sterling v. Park*, 129 Ga. 309, 58 S. E. 828, reported also in 13 L. R. A. (N. S.) 298, 121 Am. St. Rep. 224, 12 Ann. Cas. 201. An extensive note to this report collates the authorities showing that the weight of authority is in favor of the rule stated in the Texas cases cited. However, the appeal having been dismissed, the question is not before us for decision.

[17, 18] It remains only to dispose of the contention of defendant Jackson that he was an innocent purchaser for value and without notice that the interests of Emile and Theophile Broussard, conveyed to him by Derneville, were community property of Derneville and his then deceased wife, and that the court erred in rendering judgment in favor of the plaintiffs Craigen and Carouthers for their mother's interest therein. We think this contention cannot be sustained. Derneville had no deed to these interests. Jackson was affected with notice that he acquired them during the life of his wife, who did not die until 1897. The presumption would then be that the property was community. Jackson knew that Derneville had been married, as several of his children joined in the deed to him. He was then bound to take notice of the fact that the plaintiffs were children of Mrs. Broussard and entitled to an interest in their mother's half of the land. *Hill v. Moore*, 85 Tex. 335, 19 S. W. 162. The court did not err in the matter complained of.

It follows that the judgment should be reformed as indicated as to the interest of Celema Broussard, and as so reformed it should be affirmed, and it is so ordered. The costs of the appeal will be taxed against appellants, the interveners, except the heirs of Celema Broussard as herein named.

Reformed and affirmed.

# COCHRAN et al. v. KENNON et al.

(Court of Civil Appeals of Texas. Galveston. Nov. 13, 1913.)

## 1. SCHOOLS AND SCHOOL DISTRICTS (§ 107\*)—SCHOOL TAXES—ENJOINING COLLECTION.

Under Acts 31st Leg. c. 12, § 1, amending Acts 29th Leg. c. 124, § 58, providing that when 20 or more, or a majority of the property tax-paying voters of a district, wish to tax themselves for the purpose of supplementing the state school fund, they shall make application to the county judge, who shall issue an order for an election to determine whether such tax shall be levied, and that he shall order the sheriff to give notice of such election by posting three notices in the district, and that the sheriff shall obey such order, the validity of such an election can be attacked on the ground that notice was not given, as required by the statute, in a suit to enjoin collection of the tax, as the taxpayers have no other remedy, by quo warranto or otherwise.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 253-256; Dec. Dig. § 107.\*]

## 2. TAXATION (§ 301\*)—LEVY AND ASSESSMENT—COMPLIANCE WITH STATUTE.

Where the burden of taxation is authorized to be laid upon the property of citizens under certain conditions, a compliance with all such conditions is essential to the validity of the tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 483-495, 499-508; Dec. Dig. § 301.\*]

## 3. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—SCHOOL TAXES—SUBMISSION OF QUESTION TO VOTERS—STATUTORY PROVISIONS.

Acts 31st Leg. c. 12, amending Acts 29th Leg. c. 124, § 58, requiring notice of an election to determine whether a tax shall be levied to supplement the state school fund, to be given by the sheriff by posting three notices in the district, was neither strictly nor substantially complied with by posting two notices within the district and a third notice outside the district.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.\*]

## 4. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—SCHOOL TAXES—SUBMISSION OF QUESTION TO VOTERS—STATUTORY PROVISIONS.

Under such section, where one of the three notices required was posted outside the district, the notice was not rendered sufficient by the act of the commissioner's court in thereafter and before the election annexing to such district certain territory, including the place where such notice was posted.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 115, 117, 240-245, 252; Dec. Dig. § 103.\*]

## 5. SCHOOLS AND SCHOOL DISTRICTS (§ 107\*)—SCHOOL TAXES—SUBMISSION OF QUESTION TO VOTERS—STATUTORY PROVISIONS.

In a suit to enjoin the collection of a tax on the ground that the notices were not posted as required by such section, the burden was on defendants to show that all or a substantial majority of the qualified voters had actual knowledge of the election, and that the failure to give the statutory notice did not affect the result.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 253-256; Dec. Dig. § 107.\*]

Appeal from District Court, Ft. Bend County; S. J. Stiles, Judge.

Action by W. B. Cochran and others against

**J. D. Kennon and others.** From an order dissolving in part a temporary injunction, plaintiffs appeal. Reversed and injunction reinstated.

**W. J. Howard, of Houston, for appellants.**  
**D. R. Pearson, of Richmond, for appellees.**

**REESE, J.** This is an appeal from an order of the district judge, in vacation, dissolving, in part, a temporary injunction theretofore ordered by him. On the hearing of the motion to dissolve the judge found that all of the allegations of the plaintiff's petition were true. The petition was sworn to, and in defendants' answer, on which is based their motion to dissolve, and which is not sworn to, there is only a general denial of these allegations. So the only question presented is whether on the allegations of the petition it was error to dissolve the injunction as was done.

The plaintiffs sued to enjoin the collection of a special tax for the support of the public school in school district No. 19, ordered to be levied and collected for the year 1912, and succeeding years, by the commissioners' court, by order made in pursuance of an election which had been held on September 3, 1912. In addition to injunction against the levy and collection of such taxes generally, plaintiffs sought specially to have the tax collector restrained from collecting the taxes for the year 1912, on the ground that at the time the tax was ordered the tax rolls had been made up by the assessor and delivered to the collector, and that the assessor had no lawful right to afterwards enter upon such tax rolls the additional school tax so ordered. This part of the temporary injunction was not disturbed by the judge, but was continued on the motion to dissolve, and no question as to this part of the order is presented on this appeal.

The material allegations of the petition accepted as true, as a basis of this appeal, are as follows: Plaintiffs are all property taxpayers in school district No. 19 of Ft. Bend county, as now constituted, and some of them are residents of said school district. Some of them own property subject to taxation, and also reside, in that portion of district 20 which was added to district 19 on August 22, 1912. On August 10, 1912, upon proper petition, the commissioners' court of Ft. Bend county ordered an election to be held on September 3, 1912, in said school district 19, then, and for some time prior thereto, a duly created and organized school district of said county, to enable the qualified voters therein to determine whether an annual tax of 15 cents on the \$100 of taxable property in the district should be levied and collected for the support of public schools in the district. Notices of such election were ordered to be posted by the sheriff at three public places in the county, as required by subdivision 3, § 58, Acts 29th Leg., c. 124, as amended by chapter 12, Acts 31st Leg. Such

notices were so posted by the sheriff, two of them at two public places in said district 19, as it then existed, and one at a public place outside of said district, but at a public place then in district 20, and in the territory which was afterwards (as will be hereinafter shown) taken from district 20 and added to district 19. All of the notices were posted for three weeks before the election. After these notices had been posted the commissioners' court, on August 22, 1912, undertook to change the boundaries of district 19, and by order duly made did so change said boundaries by adding to district 19 certain territory theretofore lying in district 20, and also by such changed boundaries took certain territory from district 19. The territory taken from district 20 and added to district 19 included Sibley's store, where the third notice referred to had been posted. In pursuance of the order aforesaid and the notices referred to, an election was held at Dow Bros.' store in the district on September 3, 1912, at which 22 votes were cast, all of which were in favor of the tax. In due time return was made, the votes canvassed by the commissioners' court, result declared, and in pursuance of this authority, a tax of 15 cents on the \$100 valuation was ordered to be levied and collected each year, on all taxable property in the district. It is alleged in the petition, and must be taken as true, that the 22 voters voting at said election were less than a majority of the tax-paying voters of the district, and that none of the plaintiffs, 12 in number, had any notice or knowledge that such election was to be held. None of the plaintiffs who resided, or owned taxable property, in that part of district 20 which was, on August 22, 1912, added to district 19 had any knowledge or notice that this change had been made, whereby their property was placed in district 19. The petition further charges that there were many resident citizens of said district who were taxpayers and property owners, and qualified to vote at said election, who did not participate therein, and who had no notice that said election was to be held, and that if another and different election is held upon the question, a majority of the qualified voters in such district will vote against said tax.

[1] After finding that the allegations of the petition were true, the judge found as a conclusion of law "that the manner of giving notice of such election was irregular, but the manner of holding and giving notice of such election cannot be inquired into in this suit, which is a collateral attack on same," and upon this conclusion of law the court dissolved the temporary injunction, except as stated as to the tax for the year 1912. Appellees in their brief do not attempt to sustain the order of the judge upon any other ground than that upon which it is based in the law conclusion above stated (citing in support of such conclusion El



Paso v. Ruckman, 92 Tex. 86, 46 S. W. 25; Parker v. Drainage District, 148 S. W. 351; Drainage District v. Higbee, 149 S. W. 388; Boesch v. Byrom, 37 Tex. Civ. App. 35, 83 S. W. 18; Coffman v. Goree, 141 S. W. 132; Troutman v. McClesky, 7 Tex. Civ. App. 561, 27 S. W. 173; Wilbern v. Cone, 148 S. W. 818; Crabb v. Celeste School District, 132 S. W. 890; City of Carthage v. Burton, 51 Tex. Civ. App. 195, 111 S. W. 440). The learned district judge seems to have misapprehended the effect of these decisions, and learned counsel for appellees seems to have fallen into like error. El Paso v. Ruckman, supra, affords a fair example of the question presented and decided in each of the cases cited above. In that case the question involved was the validity of the independent school district of the city of El Paso. The power to levy and collect taxes by the municipality was involved, but the right to levy such taxes was denied on the ground that the independent school district had no legal existence. The city of El Paso had been acting since 1882 as such school district, but it was contended by the plaintiff Ruckman that the provisions of the law in the creation of the same had not been complied with. The question was certified to the Supreme Court. In answering certified questions the court said: "The rule is well established that when the creation of a public corporation, municipal or quasi municipal, is authorized by statute and a corporation has been organized under color of such authority, its corporate existence cannot be inquired into by the courts in a collateral proceeding. The validity of the incorporation can only be determined in a suit brought for that purpose in the name of the state, or by some individual under the authority of the state, who has a special interest which is affected by the existence of the corporation." The question involved and decided in the cited cases was of precisely similar import, the validity of some character of municipal or quasi municipal corporation being presented. In the present case no question is made of the validity of school district 19, as originally organized, nor is any question made of the validity of the action of the commissioners' court in adding new territory to said district. The sole attack upon the tax levy is based upon the illegality of the election on account of the failure to comply with the provisions of the statute with regard to notice. It is a matter which could not be reached or remedied by a proceeding in quo warranto. The law only authorizes such taxes as are here complained of after an election ordered and held under certain conditions. One of these conditions is that notices of the election be posted by the sheriff at three public places in the district. This was not done, and for this reason plaintiffs say the levy and collection of the tax is unauthorized, and they seek relief therefrom. They have

no other remedy than the one they are here seeking. The judge was in error in holding that the only remedy was by quo warranto, and in dissolving the injunction on this ground.

[2-5] The judge concluded that the manner of holding and giving notice of the election was irregular. Where the burden of taxation is authorized to be laid upon the property of a body of citizens, under certain conditions, a compliance with all of such conditions is essential to the validity of the tax. This is the general rule. 37 Cyc. 971; Swenson v. McLaren, 2 Tex. Civ. App. 331, 21 S. W. 302 (citing authorities). In the case cited the tax was declared invalid on the ground that the notices posted were signed by the county judge instead of the sheriff. Whether a strict or a substantial compliance be required, in the present case there was neither. The statute required in positive terms that notice to the voters be given by posting notices at three public places in the district by the sheriff. Such notices were posted only in two such places in the district. The third notice, posted at Sibley's store, outside of the district, may have just as well not have been posted at all, and the subsequent addition of territory to district 19, which included the place where it was posted, did not validate it. If it be sought to apply the rule that such failure to comply with the provisions of the statute will not invalidate such election, if in fact all, or a substantial majority, of such qualified voters had actual knowledge of such election, and the failure to give the notices prescribed did not affect the result (Norman v. Thompson, 30 Tex. Civ. App. 537, 72 S. W. 64; Buchanan v. Graham, 36 Tex. Civ. App. 468, 81 S. W. 1237; Wallis v. Williams, 50 Tex. Civ. App. 623, 110 S. W. 785), the burden was upon defendants to show by pleadings and proof that such was the case, as to this election (Norman v. Thompson, 30 Tex. Civ. App. 537, 72 S. W. 64-68). But not only was there no pleading or proof on the part of defendant that all or a substantial number of the voters, outside of those who actually voted, had any notice of such election, but the allegations of the petition, found to be true, expressly negated this fact. So the action of the judge in dissolving the injunction cannot be sanctioned on this ground. It is fairly to be presumed that the learned judge would have so found but for the mistaken view of the law upon which his action was based.

Other questions presented by the assignments of error need not be considered. It would seem, however, that under the decision of the Supreme Court in Hill v. Howth, 101 Tex. 620, 111 S. W. 649, after the election was ordered in district 19, the commissioners had no right to change the boundaries of the district so as to affect the election previously ordered, and that such subsequent

change could not do so. *Hill v. Howth*, 101 Tex. 620, 111 S. W. 649. This question is not presented, however, and what we have said is merely by way of suggestion.

Our conclusion is that the order of the district judge, in so far as it dissolves the temporary injunction, should be set aside, and the temporary injunction reinstated and continued, as though no such order of dissolution had been made; and it has been so ordered.

### WATERMAN LUMBER & SUPPLY CO. v. HOLMES.

(Court of Civil Appeals of Texas. Galveston. Oct. 23, 1913. On the Merits, Nov. 18, 1913.)

#### On Proceeding to Strike Briefs.

#### 1. APPEAL AND ERROR (§ 767\*)—BRIEFS—FORM—NECESSITY OF "PRINTED BRIEF"—"WRITTEN BRIEF."

Under Rev. Civ. St. 1911, art. 1614, providing that when a cause or suit is taken to the Court of Civil Appeals by appeal, writ of error, or otherwise, the attorney for either party may file written or printed briefs, or argument, if written, not to exceed 15 pages, and rule 37 as amended (149 S. W. x), providing that the copies of the briefs filed in the appellate court shall be plainly written or printed, and if it covers more than 15 pages of foolscap, shall be printed, a typewritten brief is a written and not a printed brief, and a typewritten brief containing 40 pages will be stricken out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3102; Dec. Dig. § 767.\*]

#### On the Merits.

#### 2. CONTRACTS (§ 323\*)—ACTIONS FOR BREACH—QUESTIONS FOR JURY.

In an action for refusing to permit plaintiff to perform a contract for the hauling and distributing of railroad ties along a railroad, evidence held to make a question for the jury as to whether plaintiff abandoned the contract before the cancellation thereof by defendant; and hence the court improperly charged that the evidence showed no breach by plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1311, 1349, 1466, 1543-1548, 1827, 1827½; Dec. Dig. § 323.\*]

#### 3. TRIAL (§ 191\*)—INSTRUCTIONS ON WEIGHT OF EVIDENCE.

In a contractor's action for damages from defendant's refusal to permit him to perform a contract for hauling and distributing railroad ties along a railroad, an instruction that the contractor could recover only such profits as he would have made by hauling the ties as defendant made them and demanded them; that, in arriving at his damage, the irregularity of the job, if any, its distance from the contractor's home, the expense he would have gone to in feeding his team, keeping up his harness and wagons, for drivers for teams, and all other expenses, should be considered, figuring only his net profits, if any, that he could have made under the contract—was properly refused, as it was on the weight of the evidence, and assumed that the irregularity of the job, etc., were parts of the expense of performance.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

#### 4. DAMAGES (§ 62\*)—DUTY TO MINIMIZE—BREACH OF CONTRACT.

Under a contract for hauling and distributing ties along a railroad, the contractor, upon

the refusal of the other party to permit him to perform, could not sit idly by and wait until the completion of the hauling, and then recover the net profits which he would have made had the contract not been breached, but was bound to use his wagons and teams in other employment, if there was any he could get, and the amount that he could have so made should be deducted from the amount to which he would be entitled had he carried out the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. § 62.\*]

#### 5. DAMAGES (§ 124\*)—MEASURE OF DAMAGES—BREACH OF CONTRACT.

A contractor was entitled as damages, for the failure of the other party to permit him to perform the contract for hauling and distributing railroad ties, only to the net profits of the enterprise, which would be the difference between the contract price and the expenses necessarily incident to the performance of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.\*]

Appeal from District Court, San Augustine County; A. E. Davis, Judge.

Action by W. H. Holmes against the Waterman Lumber & Supply Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Davis, Davis & Davis, of Center, for appellant. Blount & Strong, of Nacogdoches, for appellee.

McMEANS, J. [1] Article 1614, Revised Statutes 1911, provides: "When any cause or suit may be taken up from any inferior court to the Court of Civil Appeals, whether by appeal, writ of error, or otherwise, it shall be lawful for the attorney for both plaintiff and defendant to file in the papers of said suit or cause written or printed briefs, or argument, if written not to exceed fifteen pages," etc. Rule 37 (149 S. W. x), as amended by our Supreme Court on October 30, 1912, and which amendment became effective November 15, 1912, provides: "The briefs of the parties, framed in accordance with these rules must be signed by the party or his counsel \* \* \* and the copies thereof filed in the appellate court shall be plainly written or printed, and if it covers more than fifteen pages of foolscap, they shall be printed." In *National Bank v. Lovenberg*, 63 Tex. 512, our Supreme Court held, in effect, that a typewritten brief should be regarded as a written, and not a printed, brief. See, also, *Heath v. Hall*, 27 S. W. 160. Appellant's brief is violative of the statute and rule above quoted, in that it consists of more than 40 typewritten pages. As said in *Heath v. Hall*, supra, "We must insist on a compliance with this rule, as it is intended to aid in the dispatch of business."

The briefs are ordered stricken out and returned to appellant's counsel, and appellant will be allowed to file copies of its brief, either properly written or printed, within 15 days from this date, and in case of failure so to do, the appeal will be dismissed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## On the Merits.

This suit was brought by W. H. Holmes, appellee, against appellant, Waterman Lumber & Supply Company, to recover damages for an alleged breach of a contract by appellant, which appellee claimed he had with it, for the hauling and distribution of railroad ties along appellant's railroad. Appellee alleged that he contracted with appellant to haul and distribute 180,000 ordinary ties, for which he was to be paid five cents each, four cents to be paid at the time the work was done, and the remaining one cent to be paid on the completion of the contract, and 330 sets of switch ties, of 48 ties to each set, for which he was to be paid ten cents for each tie, eight cents to be paid when the ties were hauled, and the remaining two cents when the hauling was completed; that after he had hauled a part only of the ties the appellant breached the contract by refusing to allow him to perform it further, whereby he sustained the damages for which he sues.

[2] The court charged the jury that: "The first disputed issue for your decision is whether or not there was made and entered into by the plaintiff and defendant a contract, as alleged, for hauling and distribution of the ties along its railroad track and spur tracks. If you find there was a contract so made between plaintiff and defendant that Holmes should haul and distribute certain ties and receive certain compensations for the ties, then you are instructed that the evidence failed to show the breach of the contract by Holmes," etc. This charge is assailed by appellant by its first assignment of error, its contention, in effect, being that there was sufficient evidence to raise the issue of abandonment by Holmes of the contract, and that therefore the court was not authorized to take the question from the jury by charging that the evidence failed to show such breach by Holmes. By finding in favor of Holmes the jury necessarily found that a contract substantially as alleged had been made between him and the appellant. There was positive evidence that on January 17, 1912, the appellant by a letter written to Holmes on that date notified him that it had canceled the contract, and that it had made other arrangements for the hauling. It was shown by the testimony of the witness Weaver, appellant's agent, that the reason of appellant for canceling the contract was that theretofore, on December 24, 1911, Holmes had killed its foreman, Boatman. Holmes testified that he had not abandoned the contract, but was carrying it out in good faith at the time of the breach by appellant. But appellant contends that the evidence is sufficient to raise the issue of abandonment of the contract by Holmes prior to the 17th day of January, 1912, when appellant wrote the letter canceling the contract. If this contention is sustained by the evidence in the record, the charge complained of should

not have been given, but the issue as to which party breached the contract should have been submitted. The evidence relied upon by appellant as being sufficient to require the submission of this question is as follows: It was shown that Holmes had his hauling camp about eight miles from his home, and that on or about the middle of December, 1911, he took down his tent and moved his camping outfit, his teams, wagons, etc., to his home. The witness John Fountain testified that about the 14th or 15th of December, 1911, he had a conversation with Holmes before he took up his tent and moved his camp in which Holmes stated he had gotten the cream out of the haul, that it had gotten bad and boggy, and that he was going to quit. Continuing, the witness said: "He wanted me to cash some checks for him, and he wanted to get the checks cashed before the company found out that he had broken the contract; that if they found out that he had broken the contract before he got the checks cashed, he was afraid the company would not pay the checks. On the same day, in the evening, Holmes came to the store and wanted me to cash the checks for him; I told him I couldn't cash them, and he said he reckoned he would have to go to Nacogdoches; that he wanted to get them cashed before the Waterman Company found out he had broken the contract; that if he didn't, he would have to sue them to get a settlement." Further on the witness said, on cross-examination: "I don't think he broke it, unless he just pulled up and quit. The weather was very bad when he quit. It was nearly impossible to haul in the woods. He was a right smart ahead of the steel. It was some time after he quit before the steel got to the point where he was. I don't know whether he said he had broken the contract. He told me that he wanted to check up on this tie haul, the weather had gotten so bad he could not possibly haul there, and he quit on account of the weather; that was the reason he quit."

J. L. Francis testified that he knew Holmes intimately; "was making ties in the vicinity where Holmes was hauling; that on or about the 14th or 15th day of December, the day that Holmes was pulling up and moving his camp and things, I asked Holmes at the camp, 'What does this mean, Hill?' and he said: 'I have got about all of this that is good, and I am going home; I ought to have been in Waterman yesterday in place of being here taking up these ties; if I could have been in Waterman I could have made a deal for a better job than this. I believe I can make the same deal to-morrow.' Most of the time that Holmes hauled he was hauling the ties nearest the track. He left the ties farthest back from the track, and they were still there when I left. I know I had the conversation with Holmes; Holmes said that he ought to have been at Water-

man yesterday. He said he could have made a deal for a job that would suit him, if he went. He had not said what the job was. The woods was full of hackers at the time Holmes was hauling; they were making them while he was there hauling. They did not haul all of the ties."

Henry Courtney testified that he did not know when Holmes began hauling, but that he quit about the 15th day of December. He further testified: "About 10 days before he quit, Holmes told me that he was going to quit hauling, as he had got about all that was good out of it. That was two or three days before he quit. He took his camp home where he lived. I don't know what he did after he quit. I know how many teams he had of his own. He had his camp near his work, close to Ironosa, Tex. Holmes stayed at his camp and at home, about eight miles from the camp. He pulled up his camp and went home, and took his camp and his teams with him. That was two or three days after he told me he was going to quit the job. He told me he had got all of the good out of the job, and was going to quit." He further said: "Holmes quit hauling ties about 10 days before Boatman was killed. I never knew or heard of Holmes hauling any more for the company after he quit."

We think that this evidence was sufficient to raise the issue of abandonment of the contract by Holmes prior to the time the appellant sought to cancel the contract by its letter of January 17, 1912, and required the submission of the question to the jury. If the testimony is to be believed, and its credibility was for the jury, Holmes quit the work and abandoned the contract about December 15, 1911. The cases of *Hardeman-King Lumber Co. v. Hampton Bros.*, 104 Tex. 585, 142 S. W. 867, and *Kilgore v. Baptist Educational Ass'n*, 90 Tex. 143, 37 S. W. 598, relied upon by appellant, are cases in which it was shown that, while the contractors had threatened and intended to abandon their contracts, at the time of the breach by the other parties they were engaged in performing the work under the contract. It was held that the intention or threat of the contractors to quit did not constitute a breach of the contract, and, the other parties having refused to proceed with their part of the contract, had no right of action against the contractors. In the case before us, if the testimony we have quoted be true, and that was for the jury to say, the issue was raised that Holmes not only threatened, but had actually abandoned, the contract before appellant refused to perform its part of it. We think, therefore, that the court erred in withdrawing this question from the jury in the charge complained of, and that this error requires a reversal of the judgment.

[3-5] On the measure of damages the court

instructed the jury as follows: "And, in this connection, you are charged that in such case the legal measure of damages for breach of contract of the nature of this alleged contract is the profits, if any, the plaintiff would realize from the performance of the contract if the same had not been breached, and this you will arrive at from a consideration of all of the testimony in the case, and so assess, if any, in your verdict." The defendant requested the court to charge the jury, on the measure of damages, as follows: "You are instructed, as a part of the law in this case, that if the plaintiff is entitled to recover at all, he is only entitled to recover such profits as he would have made by hauling ties as the defendant made them, and when demanded by the defendant; and, in arriving at the damage, if any, you will take into consideration the irregularity of the job, if any, the distance it was from the plaintiff's home, the expense he would have gone to in feeding his team, the expense in keeping up his harness and wagons, his expense, drivers for teams, and all other expenses, figuring only his net profits, if any, he could have made under the contract, if you find there was a contract, and from such amount thus obtained, deducting such amounts as the evidence shows he would have earned at other and similar work, and let the amount thus obtained represent the damages you find for the plaintiff." The giving of the charge and the refusal of the court to give the special charge are the bases of appellant's third and tenth assignments. We think that the court's charge was wrong because the amount of money that Holmes could have made by the use of his teams in other work while not using them in the performance of his contract after the contract had been breached by appellant, if it did breach it, was disregarded. We understand the law to be that if the appellant did breach the contract, Holmes could not sit idly by and wait until the completion of the hauling and then recover from appellant the net profits he would have made had the contract not been breached, but that it was his duty to make use of his wagons and teams in other employment, if there was any he could get, and the amount that he could have so made, or ought reasonably to have made in this, should be deducted from the amount he would be entitled to recover had he carried out the contract. Again, he would not be entitled to the profits, but only the net profits, of the enterprise, which would be the difference between the contract price and the expenses necessarily incident to the performance of the contract. Appellant had this idea in view when it asked the special charge be given, but we think the special charge was upon the weight of the evidence, and should not have been given, because it assumes that the "irregularity of the job, the distance it was from plaintiff's home," and

other matters mentioned in the charge were parts of the expense of performance.

For the errors indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

# CONN v. ROSAMOND et al.

(Court of Civil Appeals of Texas. Galveston.  
Oct. 29, 1913. Rehearing Denied  
Nov. 27, 1913.)

## 1. APPEAL AND ERROR (§ 724\*)—ASSIGNMENTS OF ERROR—STATUTES AND RULES OF COURT.

Courts of Civil Appeals Rule 24 (142 S. W. xii), requiring assignments of error to distinctly specify the grounds of error relied upon and set forth in the motion for new trial, and rule 25, requiring them to refer to that portion of the motion for new trial in which the error is complained of, are in conflict with Rev. Civ. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136, providing that an assignment of error which directs the attention of the court to the error complained of shall be sufficient; since an assignment may clearly direct the attention of the court thereto without reference to the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.\*]

## 2. COURTS (§ 78\*)—RULE OF COURT—EFFECT.

When a rule prescribed by the Supreme Court conflicts with the statute, the rule must yield.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 274, 276-281; Dec. Dig. § 78.\*]

## 3. APPEAL AND ERROR (§ 742\*)—ASSIGNMENT OF ERROR—STATUTES.

The rules requiring each assignment of error in a brief to be followed by a proposition and a sufficient statement from the record are not in conflict with Rev. Civ. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136, declaring an assignment directing the attention of the court to the error complained of to be sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## 4. LANDLORD AND TENANT (§ 55\*)—TURPENTINE LEASE—CONSTRUCTION—SECURITY FOR BREACH—LIABILITY.

Under a turpentine lease whereby defendant agreed to pay the owner a specified sum for each tree destroyed, burned, etc., during the work, and under which \$1,000 was deposited to secure the obligation, the amount of the security could not be regarded as a measure of the extent of the defendants' liability, when that was expressly fixed by the contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 136-150; Dec. Dig. § 55.\*]

## 5. EVIDENCE (§ 448\*)—PAROL EVIDENCE TO VARY WRITING.

Where there is no ambiguity in a written contract, parol evidence to explain its meaning is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 448.\*]

## 6. TRIAL (§ 136\*)—CONSTRUCTION—QUESTION FOR JURY.

Where there is no ambiguity in a written contract, it is the duty of the court to construe it and to instruct the jury what its legal effect is.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. § 136.\*]

## 7. CONTRACTS (§ 346\*)—PAROL EVIDENCE—MISTAKE.

Under allegations of fraud or mutual mistake in the execution of a contract, evidence is admissible to show that it did not express the real agreement of the parties, and to show what the agreement in fact was.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. § 346.\*]

## 8. CONTRACTS (§ 342\*)—PAROL EVIDENCE—ALLEGATION OF FRAUD.

In an action for the breach of a contract, defendant's allegation that he intended that a deposit for security should be the extent of his liability thereunder, and that, if the contract did not show that, it was a mistake or inadvertence of the parties, was not sufficient as an allegation of mutual mistake.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1196, 1716; Dec. Dig. § 342.\*]

## 9. COMPROMISE AND SETTLEMENT (§ 23\*)—ACTION FOR BREACH—SUFFICIENCY OF EVIDENCE—SETTLEMENT.

Evidence, in an action upon a turpentine contract, held not to sustain a finding that plaintiff accepted defendant's order for money in full settlement of damages for the breach.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 91-94; Dec. Dig. § 23.\*]

## 10. CONTRACTS (§ 328\*)—ACTION FOR BREACH—DEFENSE.

In an action upon a turpentine lease, alleging that defendant had extracted turpentine from timber on 118 acres of division No. 3, and that defendant failed to make plaintiff whole by deducting 118 acres out of division No. 2, it was a good defense that plaintiff represented that division No. 2 contained 258 acres and leased that amount to defendants, and that it was because the tract did not contain that amount that when defendants deducted 140 acres for themselves there was not 118 left for plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819-1823; Dec. Dig. § 328.\*]

Appeal from District Court, Jasper County; W. B. Powell, Judge.

Action by R. C. Conn against S. M. Rosamond and others. Judgment for plaintiff, and he appeals. Reversed and rendered for plaintiff.

Smith & Blackshear, of Jasper, and John B. Warren, of Houston, for appellant. E. A. McDowell, of Beaumont, and H. C. Howell, of Jasper, for appellees.

PLEASANTS, C. J. This suit was brought by appellant against appellees S. M. Rosamond and S. S. Day, composing the firm of Rosamond & Day. The purpose of the suit was to recover damages for the loss of timber upon lands leased the defendants by plaintiff under a contract by the terms of which defendants, upon the payment of the consideration named in said contract, were granted the right to extract the turpentine and resin in the pine trees growing upon said land and agreed to pay plaintiff for all trees that were killed or died as a result of defendants' operations in extracting the turpentine therefrom within three years after such operations, and also to recover the sum

of \$795 alleged to be due because of the operations by defendants upon 53 acres of said timber land for which they failed to pay plaintiff.

By the contract declared on plaintiff leased to defendants for "turpentine and resin purposes" all of the standing and growing pine timber on various tracts of land, which are fully described in the contract, and contained in the aggregate 1,863½ acres. By the terms of the contract the whole body of land was divided into four parts; each of said divisions being specifically designated and described. The portions of the contract upon the proper construction of which the issues between the parties must be determined are as follows:

"Art. II. Parties of the second part are hereby authorized to and they hereby agree to go upon division No. 1, above mentioned, on the first day of November, A. D. 1907, for the purpose of producing and manufacturing spirits of turpentine and resin from the pine trees of the dimensions hereinbefore set forth, upon payment to the party of the first part by parties of the second part the sum of \$2,000.00, at Kirbyville, Texas, October 1, 1907, full payment of the said rights to division No. 1, and the further deposit of \$1,000.00 by parties of the second part in the Kirbyville State Bank at Kirbyville, Texas, October 1, 1907, to protect the party of the first part from all loss or losses incurred by trees burning down, that might break off at boxes by force of winds, and trees that die within a period of three years from date of boxing and which are destroyed or damaged by fire.

"Art. III. Parties of the second part hereby covenant and agree to pay party of the first part fifty cents for every tree that is boxed for turpentine, measuring from 12 to 16 inches in diameter 18 inches from the ground, and \$1.00 for all trees measuring 16 inches to 20 inches in diameter 18 inches from the ground, and \$1.50 for all trees measuring 20 inches and upwards in diameter 18 inches from the ground, which blow down, die and is burned by reason of being boxed as aforesaid. But the title to the said timber, which dies or is blown down, shall remain in the party of the first part.

"Art. IV. Party of the first part hereby reserves the rights to rescind this lease with respect to divisions two, three, and four at the expiration of twelve months from November 1, 1907, in case as many as 3 per cent. of the cupping timber on Division No. 1 dies during said twelve months.

"Art. V. In case party of the first part rescinds the lease under the above article, then he is to pay to parties of the second part the remainder of the \$1,000.00 deposited in said Kirbyville State Bank, less the damage by reason of the loss of timber on said land, together with 8 per cent. interest on the balance due them.

"Art. VI. Parties of the second part shall

have the right at the expiration of twelve months from November 1, 1907, to rescind this contract of lease as to division 2, 3, and 4 hereinbefore mentioned. And in case of rescission of the contract by them party of the first part shall return to parties of the second part the sum of \$1,000.00, less amount required to pay damages on timber aforesaid.

"Art. VII. In case this contract is not rescinded by either party, at the expiration of said twelve months, as above mentioned, then parties of the second part shall pay party of the first part the sum of \$2,000.00 on the 1st day of November, A. D. 1908, and enter upon the said second division.

"Art. VIII. On October 1, A. D. 1909, parties of the second part shall pay party of the first part the sum of \$2,000.00, and enter upon the third division, as above mentioned.

"Art. IX. On the first day of October, 1910, parties of the second part shall pay party of the first part the sum of \$2,000.00 and enter upon the fourth division as aforesaid, for the purpose hereinbefore set forth.

"Art. X. Party of the first part on October 1, 1912, covenants and agrees to pay to parties of the second part the sum of \$1,000.00, less damages to timber which has been cupped on divisions 1, 2, 3, and 4. Said damages to be estimated according to stipulations set out in article 3, above mentioned.

"Art. XI. Parties of the second part covenants and agrees that they will pay to party of the first part damages as set forth in article 3, as long as they may operate under this contract."

This contract was executed on August 26, 1907.

In a supplemental contract executed by the parties on December 19, 1908, it is recited, in substance, that defendants had under their contract for extracting the turpentine from the timber on division No. 1 of said lands entered upon and extracted the turpentine from the timber upon 118 acres of division No. 3 in addition to the land contained in division No. 1, and it was agreed that in order to make the plaintiff whole the defendants would deduct from division No. 2, upon which they were then operating, 118 acres of land, and that same should become a part of division No. 3. This supplemental contract also contains the following provisions:

"Art. III. Party of the first part does hereby agree to pay party of the second part 8 per cent. interest on the \$1,000.00 from date until this contract is canceled or closed. This \$1,000.00 is placed in the Kirbyville State Bank of Kirbyville, Texas, to secure the party of the first part for dead timber, which is set forth in article 2 of the first contract.

"Art. IV. Party of the first part hereby reserves the right to rescind this lease with respect to divisions Nos. 3 and 4 on the 1st day of November, A. D. 1909, and party of the second part is to have the same right to

rescind or cancel their part of this contract."

Plaintiff alleges that as a result of the operations of defendants in extracting the turpentine from the timber so leased them by plaintiff 2,902 of the trees had died, that said trees would average from 18 to 20 inches in diameter, and that by the terms of said contract defendants were obligated and bound to pay plaintiff the sum of \$1 for each of said trees, aggregating the sum of \$2,902. It is further alleged that the defendants have paid and are entitled to a credit of \$1,000, with interest from December 19, 1908, until the date of the filing of this suit. It is further alleged, in substance, that defendants had extracted the turpentine from the timber on 118 acres of division No. 3 described in said contract and for which they had paid plaintiff no consideration, and had failed to comply with the terms of said supplemental contract and make plaintiff whole by surveying 118 acres out of division No. 2 and leaving same as a part of division No. 3, but had extracted the turpentine from all of division No. 2 except 65 acres, having thus taken and operated upon 53 acres of land which they were not entitled to enter upon under the terms of their contract, to plaintiff's damage in the sum of \$795. The petition prays for judgment for said sum of \$795, with interest from October 1, 1909, and the further sum of \$1,822, with interest from January 1, 1909, which last amount is the value of the 2,902 trees lost by plaintiff as fixed by said contract, less the credit of \$1,000, and interest set out in the petition.

The answer of the defendants, in addition to a general demurrer, numerous special exceptions the nature of which it is unnecessary to state, and a general denial, also contains special pleas in which it is averred, in substance, that from the terms of the contract sued on it appears that plaintiff is not entitled to recover any amount as damages for timber killed or lost as a result of defendants' operations under said contract in excess of the \$1,000 deposited in the Kirbyville State Bank. They further pleaded: "That at the time of making these contracts they undertook by agreement to fix same within such limits as would protect the plaintiff from all losses that he sustained about the same time, and it was agreed then and there between all parties that said sum of \$1,000 would be ample to protect and save harmless the said plaintiff from damage, and they then and there agreed that the said \$1,000 should be the full measure of damages for which the defendants should be liable, in any event, the same if not included in the said article 2 as here pleaded, was, by mistake or inadvertence of the parties drawing the same, left out of and omitted from the terms of said contract, and these defendants say that they believed and understood said contract to so mean, and that the same was embodied therein as there pleaded, and, if they are

mistaken in this, then they allege that they executed said contract under a mistake of fact, and that the same does not contain all of the agreements then and there entered into by these defendants, and, if they had known that it did not contain the said matters herein pleaded (if in fact it does not contain same), then they would not have signed same. \* \* \* Defendants show unto the court that, after the expiration of three years from the date of the original contract sued on in this case, in accordance with the terms, considerations, and stipulations of said contract, all damages were settled by and between the parties hereto, in this: On or about the 1st day of October, 1910, or 1st day of November, 1910, defendant Rosamond gave to plaintiff an order in writing, directing him to take and apply to his own use and benefit the said \$1,000 so deposited in the Kirbyville State Bank under article 2 of the contract and specified in said order that the same was in settlement of all losses by reason of damage to the timber, that plaintiff accepted and retained said order and applied said money to his own use, and made no objection thereto, and in no way ever stated any objection to same. That by accepting said order, and applying said money to said own use, plaintiff became bound by its terms, and all losses and damages arising under said contract were thereby settled."

In answer to plaintiff's claim for the \$795 damages for extracting the turpentine from 53 acres of plaintiff's land upon which they had no right to enter under the terms of the original and supplemental contracts, they pleaded: "Defendants say: That their going out of division No. 1 and entering on division No. 3, and cupping 118 acres on division No. 3, was a mistake of fact by them, and, as soon as the same was discovered, the same was settled by agreement with the plaintiff, whereby these defendants were to set aside and survey for plaintiff 118 acres out of the southwest corner of the Elizabeth Davis survey of 1,280 acres. That said southwest corner is the sixth tract mentioned in said contract, and said to contain 259½ acres, and defendants say that plaintiff leased to them the said tract as containing 258½ acres, and which they believed to be in the same. That in pursuance of their agreement they proceeded to cut off from said 258½ acres what they believed to be 140 acres of land for themselves, but which in fact proved to be 130 acres, leaving the balance, 118 acres of land, in said tract for the plaintiff, and defendants say that, if said 118 acres were not left to plaintiff, it was his own fault in leasing to defendants said tract as containing 258½ acres when it did not contain that number of acres, and these defendants say that the said tract leased to them for 258½ acres by plaintiff contained only 218 acres, and plaintiff knew such fact at the time he leased same to defendants, but defendants did not so

know. That said shortage and failure to set aside to him 118 acres as agreed was caused by his own fault and wrong in the first place in leasing to defendants more land than he had in said tract, by which these defendants were misled, and now to allow him to recover thereon would be to allow him to take advantage of his own wrong."

The cause was submitted to a jury in the court below upon special issues, and the jury found that "the \$1,000 placed in the Kirbyville State Bank under article No. 2 of the contract was intended by the parties to be all that the defendants should be liable for by reason of timber dying on said land from turpentine the same." They also found that plaintiff accepted an order given by the defendants on the Kirbyville State Bank for said \$1,000 deposit in "full pay for all timber that died upon the land by reason of turpentine the same." They further found "that 2,902 trees had died upon the land by reason of having been turpentine prior to the filing of this suit, and that the average size of said trees was 18 inches in diameter." On the issue of the amount of deficiency in acreage in division No. 2, they found same to be 36½ acres, and that defendants operated upon all of said division except 64 acres. They made other findings which are not material. Upon the findings of the jury the court, after overruling a motion by plaintiff for judgment in his favor notwithstanding the verdict of the jury, and a motion by the defendants for judgment in their favor upon the verdict, rendered judgment in favor of plaintiff for the sum of \$175.

[1] Appellees object to all of the assignments of error presented in appellant's brief and ask us to refuse to consider them because they violate the rules, in that they make no reference to the pages of the record and fail to refer to appellant's motion for a new trial.

Rule 24 for the Courts of Civil Appeals (142 S. W. xii) provides: "The assignment of error must distinctly specify the grounds of error relied on and distinctly set forth in the motion for a new trial \* \* \* and a ground of error not distinctly set forth in a motion for a new trial \* \* \* and not distinctly specified in reference to that which is shown in the record, or not specified at all, shall be considered as waived," etc. Rule 25 expressly provides that assignments of error "must refer to that portion of the motion for a new trial in which the error is complained of."

Only one of the assignments in appellant's brief refers to the motion for a new trial, and under the rules above quoted the remaining assignments would not require our consideration. We think, however, this requirement of the rules is in conflict with article 1612 of the Revised Statutes of 1911, as amended by the Thirty-Third Legislature (chapter 136, p. 276, Acts of the 33d Legisla-

ture), and for this reason cannot be enforced. As amended, the article cited provides that an assignment of error "shall be sufficient which directs the attention of the court to the error complained of." An assignment may clearly and unmistakably direct the attention of the court to the error complained of without referring to a motion for a new trial, and therefore the requirement of the rule that to be sufficient the assignment must refer to the motion for a new trial conflicts with the provision of the statute that "an assignment shall be sufficient which directs the attention of the court to the error complained of."

[2] It is clear that when a rule prescribed by the Supreme Court conflicts with the statute the former must yield. This has been expressly decided by our Supreme Court in the case of Ry. Co. v. Beasley, 155 S. W. 183.

The assignments in appellant's brief are sufficient, under the statute above cited, to require us to consider them, and appellees' objection to their consideration cannot be sustained.

[3] We do not intend to hold that the rules governing briefs which require that each assignment presented in a brief must be followed by a proposition and sufficient statement from the record conflict with the statute cited. The objection to the assignments in this case presents no such question. Neither the propositions nor the statements from the record submitted under the assignments are objected to, and only the sufficiency of the assignment itself is questioned. The statute cited deals only with the sufficiency of assignments and has no reference nor application to the manner in which assignments should be presented in briefs. The decisions cited by appellees in support of their contention were rendered before the statute before mentioned became a law, and our holding is not in conflict with those decisions.

Under appropriate assignments of error, the appellant complains of the ruling of the court in permitting defendants to introduce evidence to explain the contract sued on and in submitting to the jury the question of whether it was the intention of the parties to the contract that the \$1,000 deposit should be all that plaintiff could recover for the loss of timber as a result of defendants' operations under said contract, on the ground that the contract is unambiguous and therefore evidence to explain it was not admissible, but the court should have construed it and have instructed the jury that defendants were bound thereby to pay plaintiff the amount specified in the contract for each tree lost by plaintiff as a result of defendants' operations upon said land.

[4] We think these assignments should be sustained. The contract, in so far as the measure of appellees' liability for the value of trees destroyed as a result of their operations under the contract, seems to us to be free from ambiguity. In article 3 they ex-



pressly agree to pay plaintiff a specified sum for each tree so destroyed, and in article 11 they reaffirm their obligation to pay plaintiff the damages contemplated and specified in article 3. When article 2 is considered with the other provisions of the contract, especially with the recital in article 3 of the supplemental contract, it is clear that the \$1,000 deposited in the Kirbyville State Bank was placed there to secure the obligations of appellees evidenced by articles 3 and 11 of the contract above set out. From the face of the contract it is evident that the \$1,000 deposit was made for the purpose of securing the obligations of appellees, and the written agreement considered as a whole clearly negatives the idea that the \$1,000 was intended by the parties to be the measure of the extent of the damages for which appellees should become liable.

[5, 6] The amount or value of the security required by a contract to insure the performance of its obligations cannot be regarded as a measure of the extent of liability of the obligor in the contract when the extent of such liability is fixed by the express terms of the contract. There being no ambiguity in the contract, no evidence as to its meaning was admissible; but it was the duty of the court to construe it and instruct the jury what its legal effect was. *San Antonio v. Lewis*, 9 Tex. 69; *Tinsley v. Penniman*, 12 Tex. Civ. App. 591, 34 S. W. 365; *Soell v. Hadden*, 85 Tex. 182, 19 S. W. 1087.

[7, 8] Of course, under allegations of fraud or mutual mistake it would have been permissible for appellees to have shown that the written contract did not express the real agreement between the parties and to have shown what the agreement in fact was; but no such allegations or proof were made. There is no allegation of fraud, and the only allegation of mistake is that the appellees intended that the \$1,000 deposit should be the extent of their liability, and that if the contract does not show this it was a mistake or inadvertence "of the parties drawing the same." This is not an allegation of mutual mistake of the parties to the contract, but, if it could be so construed, there is no evidence to sustain such an allegation. The evidence only shows that appellees did not intend to obligate themselves to become liable for damages in excess of the \$1,000. There is no evidence that plaintiff at any time agreed that appellees' obligations should be so restricted. All that the evidence shows upon this issue is that both parties considered that the damages would not likely exceed \$1,000, and therefore that a deposit of that sum would be sufficient to secure the performance of the contract by the appellees, and there is not a particle of evidence tending to show that plaintiff ever agreed that appellees should not be liable under their contract for any damages in excess of the amount of the security required by him for its performance. If appellees' contention that the pleading and

evidence in this case authorized the introduction of evidence explanatory of the contract and the submission to the jury of the question of whether appellees were liable under the contract for any sum in excess of \$1,000 should be sustained, the sanctity of written contracts would be destroyed, and the rule which forbids such contracts to be varied by parol evidence repudiated or ignored.

[9] Appellant complained in the trial court of the finding of the jury that he accepted "an order for the \$1,000 drawn by the defendants on the Kirbyville State Bank in full pay for all timber that died upon the land by reason of turpentine the same," and by assignment presented in the brief assails said finding on the ground that it is without any support in the evidence. This assignment must be sustained. The order on the bank for the payment of the \$1,000 as it appears in the statement of facts is as follows: "October 1, 1910. Kirbyville State Bank pay to R. C. Conn \$1,000.00 one thousand dollars deposited by Day & Rosamond complying with articles 2 and 3 timber contract between Conn, Rosamond & Day. Sam Rosamond." Before this order was produced and offered in evidence, the defendant Rosamond testified that his recollection was that it contained a recital that the \$1,000 was paid as settlement in full of appellant's claim for damages under the articles of the contract before mentioned. When, however, the order was produced and he was asked if that was the order given by him, he admitted that it was, but testified that he did not think the figures "2 and 3" shown in said order were written therein by him. He did not question the genuineness of the order in any other respect. This evidence does not raise an issue as to whether the order contained a recital that it was given as payment in full of plaintiff's claim, and there is no evidence that plaintiff at any time agreed to accept the \$1,000 as payment in full of the damages claimed by him by reason of timber lost as a result of defendants' operations on his land.

[10] Appellant further complains of the judgment of the court below in not awarding him the damages claimed by him for the 53 acres of land upon which defendants entered and extracted turpentine from the pine trees thereon without paying plaintiff any consideration therefor. We think the answer of defendants to this portion of plaintiff's petition showed a good defense, and said answer was sustained by the evidence, except as to 17½ acres of said land. It is admitted by the parties that the \$175 awarded plaintiff by the judgment was for damages to this 17½ acres, which the evidence shows amounted to \$10 per acre, and appellees made no complaint of the judgment in favor of appellant for this amount.

From what we have said it follows that appellant, in addition to the said sum of

\$175, was entitled to judgment for the 2,902 trees that died as a result of the operations of defendants, which damage by the terms of the contract is fixed at \$1 per tree; the jury having found that said trees were of the average diameter of 18 inches. From this sum it is admitted that the \$1,000 with 8 per cent. interest for one year, aggregating the sum of \$1,080, should be deducted, leaving the balance of such damages \$1,822. Adding this sum to the \$175, we have the sum of \$1,997 for which judgment should have been rendered for appellant with interest from January 1, 1912, the date of the accrual of such damages at 6 per cent. per annum.

There being no ambiguity in the contract sued on, and the findings of the jury by which the amount of appellant's damages is fixed being unassailed, it follows that the judgment of the court below should be reversed, and judgment here rendered for appellant for the sum last stated, and it has been so ordered.

Reversed and rendered.

#### CHILDRESS v. ROBINSON et al.

(Court of Civil Appeals of Texas. Galveston.  
Nov. 11, 1913. Rehearing Denied  
Dec. 4, 1913.)

#### 1. COURTS (§ 85\*)—ASSIGNMENTS OF ERROR—STATUTE.

Rev. Civ. St. 1911, art. 1612, providing that an assignment of error shall be sufficient which directs the attention of the court to the error complained of, while abrogating Court Rule 25 (142 S. W. xii), requiring the assignment of error to refer to that portion of the motion for new trial in which the error is complained of, does not affect Rules 30 and 31 (142 S. W. xiii), requiring each point in the assignment to be stated as a proposition, unless the assignment itself sufficiently discloses the point, with a brief statement of the substance of the proceedings complained of under each proposition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 294, 296-301; Dec. Dig. § 85.\*]

#### 2. APPEAL AND ERROR (§ 742\*)—COURT RULES—EFFECT.

Under Sayles' Ann. Civ. St. 1897, art. 947, authorizing the Supreme Court to make and enforce rules, court rules adopted by that tribunal have the force and effect of statutes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 3. APPEAL AND ERROR (§ 748\*)—ASSIGNMENTS OF ERROR—CONSIDERATION.

Where an appellant's assignments of error are not prepared in compliance with the court rules, the court may, either on the motion of the appellee or on its own motion, refuse to consider them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3058-3064; Dec. Dig. § 748.\*]

#### 4. APPEAL AND ERROR (§ 766\*)—BRIEFS—PRINTED ARGUMENT.

The printed argument cannot be looked to to supply vital defects in the brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3101, 3126; Dec. Dig. § 766.\*]

#### 5. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—STATEMENTS—SUFFICIENCY.

An assignment of error, which merely refers to the bill of exceptions, wherein the proceedings complained of were set out, cannot be considered, not being followed by a sufficient statement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 6. PLEADING (§ 403\*)—SUFFICIENCY—CURE OF PLEADINGS.

The defects in the pleadings of one party may be cured by averments in the pleadings of the other.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.\*]

#### 7. PLEADING (§ 403\*)—ANSWER—SUFFICIENCY.

The failure of defendant's answer to show that plaintiff, the wife of the possessor of land, against whom a judgment had been recovered, was a party to that action, so as to be bound thereby, is cured where plaintiff's petition showed that the property was the community estate of herself and her husband.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.\*]

#### 8. JUDGMENT (§ 693\*)—CONCLUSIVENESS—MATTERS CONCLUDED.

Where defendants in a previous action of trespass to try title recovered a judgment against plaintiff's husband, the then owner of the land, that judgment is conclusive as to the question whether the land constituted plaintiff's homestead.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1216; Dec. Dig. § 693.\*]

#### 9. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR.

An assignment of error, reciting that the court erred in overruling the general demurrer of the plaintiffs, contained in their first supplemental petition, to the answer of defendants as appears by the bill of exceptions, cannot be considered as a proposition, and so need not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 10. APPEAL AND ERROR (§ 724\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error, which do not show the objection made below, but leave it to the appellate court to go to the record and dig it out of the bill of exceptions, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.\*]

#### 11. TRESPASS TO TRY TITLE (§ 6\*)—ADMISSIBILITY—RELEVANCY.

In an action to enjoin the enforcement of a judgment upon land which plaintiff claimed was her individual estate, a deed in favor of plaintiff not executed until after the institution of the injunction suit, and not referred to in the pleadings, is inadmissible.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 5-9, 15, 16; Dec. Dig. § 6.\*]

#### 12. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error, complaining of the exclusion of evidence, which do not show the objection made below and are followed by no proposition or statement except to see the bill of exceptions, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 13. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error complaining of the exclusion of evidence, followed by a proposition

which merely stated the purpose for which it was offered, cannot be considered; the proposition not being sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**14. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

Assignments of error followed by neither propositions nor statements cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**15. TRESPASS TO TRY TITLE (§ 38\*)—ACTIONS—BURDEN OF PROOF.**

In trespass to try title, plaintiff must establish prima facie his title and right to recover, before the defendant is required to make any defense.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 53; Dec. Dig. § 38.\*]

**16. HUSBAND AND WIFE (§ 270\*)—COMMUNITY PROPERTY—JUDGMENTS.**

In trespass to try title to community property, it is not necessary to make the defendant's wife a party, even though the land be used as their homestead, and, if the wife denies the binding effect of the judgment, she must plead and prove a defense to the suit in which it was rendered, growing out of the homestead character of the property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 968-971, 973-984, 988; Dec. Dig. § 270.\*]

**17. FRAUDS, STATUTE OF (§ 63\*)—CONVEYANCES—VERBAL GIFTS.**

A verbal gift of land by a husband to his wife is wholly void, being within the statute of frauds, where it appeared that the land was not purchased with the wife's separate means.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 97-104; Dec. Dig. § 63.\*]

**18. DEEDS (§ 8\*)—ESSENTIALS—TITLE OF GRANTOR.**

Where plaintiff by an action of trespass to try title sought to prevent the enforcement of a judgment which defendants had recovered quieting their title to land formerly claimed by her husband, a deed executed by the husband after the adverse judgment is of no force, even though he called it a confirmatory deed of a prior verbal gift; the verbal gift itself being wholly void, and the deed being void because made at a time when the husband had no title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 13-18, 408-412; Dec. Dig. § 8.\*]

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Action by Callie Childress against J. F. Robinson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Dowell & Dowell, of Houston, for appellant. Sam, Bradley & Fogle, of Houston, for appellees.

REESE, J. Callie Childress and her husband, G. D. Childress, instituted this action in the district court, against J. F. Robinson, joining in the action A. R. Anderson, sheriff of Harris county. Plaintiffs seek, under the ordinary allegations of an action of trespass to try title, to recover of defendant Robinson the title and possession of an undivided three-fourths of a certain tract of land, de-

scribed in the petition, alleging that the plaintiff Callie Childress is the owner in fee simple thereof in her separate right as her separate estate, and was such owner on January 1, 1905. Petitioners further allege that the said Callie Childress has ever since the date aforesaid been the owner of said property as her separate estate; that on and ever since said date petitioners have been actually residing upon and occupying said property and claiming the same as their family homestead, with the dwelling house, fields, garden, and other improvements thereon; and that the said land is of the value of \$2,000, and the rental value thereof is \$8 per month. It is further alleged, in substance, that there has been placed in the hands of the defendant A. R. Anderson, as sheriff of Harris county, a certain writ of possession issued out of the district court of Harris county in and for the Eleventh district, in cause No. 43,570, wherein the said J. F. Robinson is plaintiff and the said G. D. Childress and others are defendants, of date July 1, 1911, commanding the said sheriff to place the said plaintiff Robinson in possession of the property above described; that the land embraced in said writ embraces the homestead of the said Callie Childress and her separate property as above described, and, unless said Anderson is restrained therefrom, he will at once dispossess plaintiff G. D. Childress and his family therefrom, to their great damage, wrong, and injury. It is further alleged that the said Callie Childress was not a party to said suit No. 43,570, and is in no way bound by said judgment, and was actually residing on said property as her separate property and homestead; that she is not named in said writ; and that there was no issue made in said suit of her homestead and separate property rights as herein set forth. Plaintiffs pray for the issuance of a writ of injunction restraining defendants from seeking to enforce said writ of possession.

Defendants answered by general demurrer and general denial and plea of not guilty, and by numerous special exceptions. They also pleaded that the matters and things in controversy had been adjudicated in cause No. 43,570 referred to in plaintiff's petition and pleaded the said judgment in bar of this action. Defendant Robinson also set up his title by cross-action and prayed for judgment, alleging that on, to wit, February 17, 1910, he recovered a judgment against G. D. Childress and others for the title and possession of said land; that plaintiff Callie Childress was, at the time of the rendition of said judgment, and is now, the wife of G. D. Childress; that upon appeal said judgment was affirmed and is now final and is an adjudication against plaintiffs of all matters set up in the petition; but that the plaintiffs are still in possession of said property and asserting claim thereto, which is a

cloud upon defendant's title. By supplemental petition plaintiffs set up various exceptions, general and special, to the foregoing answer, and, by way of answer, repeated the allegations as to the homestead and separate property rights of the plaintiff, Callie Childress. The judgment does not state that any action was had upon the exceptions, general or special, of either party. The case was tried with the assistance of a jury, which, upon instruction of the court to return a verdict for defendant, so found. Upon the verdict judgment was rendered for defendant that plaintiffs take nothing and that defendant Robinson recover the land. From the judgment, their motion for a new trial having been overruled, plaintiffs prosecute this appeal.

The undisputed evidence presents the following state of facts: G. D. Childress and his wife, Callie, were married in 1890. In 1905 they bought, by verbal sale of D. A. Reynolds, the tract of land in controversy. They at once began to improve it for a home, and as soon as it was ready for occupancy they moved on it, and have continued to so occupy it as their homestead (except when it was temporarily occupied by tenants, but still claimed as their homestead) to the present time. Reynolds had been in possession of the land for several years before he sold to Childress. Plaintiffs introduced in evidence original grant of the John Austin two leagues, of which the land in controversy is a part, dated 1828; also, special warranty deed from D. A. Reynolds to G. D. Childress of the land in controversy, dated November 9, 1909. Reynolds testified that he had been occupying the land adversely about three years before plaintiffs came to live on it, which was in 1904 or 1905. Mrs. Childress testified that at the date of the institution of the suit No. 43,570 of Robinson v. Childress et al., which date she fixes at August 27, 1907, Reynolds had lived on the land two or three years. Reynolds, testifying for plaintiffs, stated that when he sold the land to G. D. Childress it was his understanding that it was community property of him and his wife. There was introduced in evidence by plaintiffs copy of the judgment in cause No. 43,570 in the Eleventh district court of Harris county, entitled J. F. Robinson v. T. B. Mitchell et al. This judgment was rendered on the 7th day of January, 1910, and by the terms of the judgment J. F. Robinson, the plaintiff in that suit, who is the defendant in the present suit, recovered judgment against T. B. Mitchell, D. A. Reynolds, and G. D. Childress, L. J. O'Connor, J. E. Parker, and J. A. Parker for a tract of 53.7 acres of land, an undivided three-fourths of which is the subject-matter of this suit. The judgment recites that the defendants Mitchell, Reynolds, and Childress appeared in person and by their attorneys. Callie Childress was not a party to said suit. See 136 S. W. 501, showing affirmance

of this judgment. These are all the facts shown by the statement of facts.

Appellants undertook to prove by their testimony, in substance, that at the time the verbal purchase of the land from Reynolds in 1905, G. D. Childress, the husband, made a verbal gift of it to his wife as her separate property, and that she owned and claimed it as such. All of this testimony seems to have been excluded by the court. Nevertheless appellants in their brief state as uncontroverted facts "that on the date of the purchase of the property from Reynolds in 1905, by verbal deed of gift, G. D. Childress gave his wife all his interest in the land as her separate estate, and she was from that date up to the present time owning, occupying, and claiming it as her separate property homestead." It is also stated as one of the "uncontroverted facts" that on October 29, 1912, G. D. Childress made a written confirmation deed to his wife, Callie Childress, of the former verbal gift, which was duly recorded." No such fact appears in the evidence, but it appears that this deed was executed after this suit was filed, and was excluded on objection of appellee.

[1-4] Objection is made by appellee to the consideration of each of the 23 assignments of error; the objections being substantially the same to each of them, that the assignments are not followed by any proposition or sufficient statement from the record as required by rules 30 and 31. Appellants seem to be of the opinion that the act of the Thirty-Third Legislature (chapter 136, p. 276, art. 1612, R. S. of 1911), which provides that an assignment of error "shall be sufficient which directs the attention of the court to the error complained of," abrogates the rules referred to. It was held by this court, in the case of Conn v. Rosamond, 161 S. W. 73 (opinion filed the 29th day of October, 1913) that this statute was in conflict with rule 25, which requires that assignments of error "must refer to that portion of the motion for a new trial in which the error is complained of," and that an assignment shall be sufficient which directs the attention of the court to the error complained of, but which did not refer to the motion for a new trial as required by rule 25 (142 S. W. xii). In this connection, however, it is said: "We do not intend to hold that the rules governing briefs which require that each assignment must be followed by a proposition and sufficient statement from the record conflict with the statute." The act in question was not intended to do away with the requirements of rules 30 and 31 (142 S. W. xiii), which require that "each point under each assignment shall be stated as a proposition unless the assignment itself may sufficiently disclose the point, in which event it shall be sufficient to copy the assignment." Rule 31: "To each \* \* \* proposition there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the

record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record. This statement must be made faithfully, in reference to the whole of that which is in the record having a bearing upon said proposition, upon the professional responsibility of the counsel who makes it, and without intermixing with it arguments, reasons, conclusions, or inferences." This language seems plain enough and seems impossible of being misunderstood, and it has been expounded and re-expounded by decisions without number of the Supreme Court and the Courts of Civil Appeals. In the light of the provisions of these rules, which have the force and effect of statutes, not being in conflict with any legislative act (article 947, Sayles' Civil Statutes), none of the assignments of error presented in appellants' brief can properly be considered. Appellee has a right to have the brief prepared with some regard to the rules, and has by timely objections invoked such right; but the court might very well, on its own motion, refuse to consider assignments of error prepared without regard to the rules referred to. We cannot look to the printed argument to supply vital defects in the brief.

[5] The second assignment (the first presented in the brief), with its statement, is as follows: "Second Assignment of Error. The court erred in overruling the special demurrer of plaintiffs, contained in their first supplemental petition, to the said answer of the defendants, which said demurrer is as follows: 'The said answer does not aver that said Callie Childress was a party to said writ of possession or said judgment, but avers she was not.' Statement. See bill of exceptions No. 2, Record, p. 19. Here is set out in full special demurrer and answer excepted to. It is in no way stated how she is bound by said judgment, neither does it controvert or deny the facts in the petition, pleaded to avoid this judgment."

The third assignment (second in the brief) is as follows: "Third Assignment of Error. (A Proposition.) The court erred in overruling the second special demurrer of the plaintiffs as averred in their first supplemental petition to the said answer and in not striking of it out as a defense in said cause, which said special demurrer No. 2 is as follows: 'The said answer does not set up any facts or conditions that show that plaintiff Callie Childress is bound by the said judgment plead in bar'—as appears by bill of exceptions No. 3. Statement. See bill of exceptions No. 3, Record, p. 20. Here is set out in full the special demurrer and answer. The said answer does not plead any affirmative matter that negatives the allegations in appellant's petition, and avoids their effect. It is a plea of confession in so far as it goes."

By a liberal interpretation of rule 30, it might be considered that these assignments

sufficiently disclose the proposition of law relied upon to show error, and that it was not necessary to follow them with propositions, but we doubt this. Kirby Lumber Company v. Chambers, 41 Tex. Civ. App. 632, 95 S. W. 607. But, giving the appellant the benefit of the doubt on this point, the statement is insufficient. The mere reference to the bill of exceptions, no matter how full such bill may be, cannot take the place of such statement from the record as is required by rule 31. T. & N. O. R. R. Co. v. Powell, 51 Tex. Civ. App. 409, 112 S. W. 697; Colorado Canal Co. v. McFarland & Southwell, 50 Tex. Civ. App. 92, 109 S. W. 435.

[6-8] If it be considered that the allegations of the special demurrer are stated in full in the assignment, and that the statement sufficiently shows the vice in the pleading attacked by the special exception, "that it does not deny or controvert the facts in the petition pleaded to avoid this judgment," and that the assignment is sufficient to require its consideration, we would hold that the special demurrer, as stated in the assignment, was properly overruled. It is not the contention of appellee that Callie Childress was a party to the suit referred to. It is upon other grounds that it is contended that she is bound by the judgment. If by the same liberal interpretation of the rules the third assignment should be considered, we would hold that the special exception was properly overruled, upon the well-settled principle that defects in the pleading of one party may be cured by averments in the pleadings of the other. Gaston v. Wright, 83 Tex. 285, 18 S. W. 576. Appellants set out fully in their petition all of the facts necessary to show that the property was in fact, at the date of the suit and judgment referred to, the community property of Childress and his wife. It is true that it is stated that it was her separate estate, but the facts stated as the basis of this claim, to wit, the verbal gift of the husband to the wife, show to the contrary. This attempted gift was clearly void, and did not change the community character of the property. This point will be discussed later. Construing then the portion of the answer excepted to, in connection with the averments of the petition, it was sufficient, and the special exception was properly overruled. At any rate, the plea of res adjudicata by itself was an answer to this action in so far as plaintiffs' case rested upon the homestead character of the property, and on that ground also the special exception was properly overruled.

[9] The first assignment, with its statement, is as follows: "First Assignment of Error. (A Proposition.) The court erred in overruling the general demurrer of the plaintiffs, contained in their first supplemental petition herein, to the answer of the defendants herein, as appears by bill of exceptions No. 1. Statement. See bill of exceptions No.

1, Record, p. 17. Same as under assignments of error Nos. 2 and 3, considered as a proposition, ante."

The assignment cannot in any view be considered as a proposition. It is not followed by a proposition, and what is called "statement" is not sufficient, even in connection with the so-called statements under assignments 2 and 3. It may be added that the record does not contain any order or judgment of the court overruling any of the demurrers or exceptions. *Bonner v. Glenn*, 79 Tex. 533, 15 S. W. 572.

[10, 11] By the fourth assignment of error appellant complains that the court erred in excluding from the jury as evidence, on objection of defendant, the confirmatory deed of G. D. Childress to his wife, herein referred to. The assignment is stated as a proposition and is not followed by any further proposition. It is not stated in the assignment or statement what objection was made to the deed. We are expected to go to the record and dig this out of the bill of exceptions which is referred to. We are utterly unable to guess even from the assignment or statement, or both, what question of law is presented by the ruling. The assignment cannot be considered. If considered, it would have to be overruled. It appears from appellants' brief that this deed was executed long after the judgment referred to and after the institution of this suit, and there was no reference to it in the pleadings, so it was properly excluded. *Collins v. Barlow*, 72 Tex. 332, 10 S. W. 248.

[12] The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth assignments each complain of the exclusion of evidence of plaintiff G. D. Childress that Callie Childress owned the land, that he intended giving it to her and to make her a deed, and of Callie Childress that she owned the land, that at the time her husband bought it he gave it to her. Each assignment is stated as a proposition, and there is no other proposition stated. It does not appear what was the objection made by appellee, and the only statements made at all are, "See bill of exceptions," referring to the number of the bill and the page of the record. In the entire absence of any statement as to what objection was made, we are unable to determine whether or not there was error in the ruling complained of. Certainly the assignments are such as to require them to be followed by propositions. None of them can be considered. The evidence, however, appears inadmissible on the ground of its immateriality. It only tended, if true, to show that by verbal gift G. D. Childress gave the land to his wife and that she claimed to own it as her separate estate.

[13] The fourteenth assignment complains of the action of the court in excluding certain interrogatories to Callie Childress and her answers thereto "as appears by bill of exceptions No. 14." The assignment is fol-

lowed by a proposition, or what is called a proposition, which only states the purpose for which the evidence is offered. The only statement is, "See bill of exceptions No. 14." As to what the evidence was, or what the objection was, neither the assignment, proposition, nor statement gives the slightest intimation. The assignment cannot be considered.

Assignments of error 15 and 16 relate to the exclusion of testimony of Callie Childress. Each is stated as a proposition. Neither is a proposition within the meaning of that term in rule 30. The only statement is "See bill of exceptions," giving the number and page of the record. The assignments are not entitled to be considered. The evidence appears to be immaterial, and, if objected to on that ground, was properly excluded. The objection is not stated.

The seventeenth assignment is followed by a proposition, but no statement except the usual reference to bill of exceptions. It does not appear what objection was made to the testimony, nor can we gather what the evidence was. The assignment cannot be considered.

[14] The remaining assignments of error complain of the action of the court in directing a verdict for defendants, on the ground, generally, that the undisputed evidence showed no title in defendant, and that Callie Childress was not bound by the judgment, on the ground that she was not a party thereto, and that the property was her homestead and also her separate estate. In the statement of the undisputed facts in the assignments appellants have gotten the evidence which was admitted mixed up with that which was excluded. There are no propositions stated under the assignments, each of which is stated as a proposition, and neither assignment is followed by anything which can be considered as a statement from the record, as required by rule 31. Neither of the assignments is entitled to consideration under the rules.

[15, 16] But we are loath to dispose of this appeal in this way. There does not, however, appear to be any merit in appellants' case in any view that can be taken of it. The evidence in the record, all of which was introduced by appellants, shows that the property in controversy was first acquired by G. D. Childress in 1904 or 1905 by verbal sale, that at that time he and Callie Childress were husband and wife, and that they went into possession of the property, made some improvements and established their homestead on it, and that it has continuously since been so used and occupied, that the verbal sale to G. D. Childress was followed in 1909 by a deed to him, that in 1911 the appellee Robinson, in an action of trespass to try title, recovered judgment against G. D. Childress for the title and possession of the property, that G. D. Childress was a party to that suit and appeared and made defense, but that

Childress, his wife, was not a party. The appellants were plaintiffs and were required to establish prima facie their title and right to recover before appellee was required to say anything in his defense. If the judgment had not been pleaded, nor proven, as *res adjudicata*, plaintiffs would not have been entitled to recover the land on the evidence in the record. They showed neither title from the sovereignty, nor from a common source. But if they had showed such title, the plea of *res adjudicata* was a good defense on the facts shown on the trial, as shown by the statement of facts. Appellants' contention is that the property being the homestead at the date of the institution of the suit in *Robinson v. G. D. Childress*, and of the judgment, and Mrs. Childress not being a party to that suit, the judgment is not binding upon her, nor in fact upon the husband. The evidence in the record shows that the property was community. It is settled law in this state that in such case it is not necessary to make the wife a party in an action of trespass to try title for such community homestead, but that the judgment against the husband in a suit in which the wife is not a party is binding upon her. In such case the fact that the property was the homestead would not afford any defense to the action, and, if the wife's interest rests upon that fact alone, the husband represents her, and she need not be sued. The following cases are believed to settle this question in this state; *Jergens v. Schiele*, 61 Tex. 255; *City of San Antonio v. Berry*, 92 Tex. 327, 48 S. W. 496; *Collins v. Ferguson*, 22 Tex. Civ. App. 552, 56 S. W. 225; *Brown v. Humphrey*, 43 Tex. Civ. App. 23, 95 S. W. 23; *Breath v. Flowers*, 95 S. W. 26, 43 Tex. Civ. App. 516; *Central Coal & Coke Co. v. Henry*, 47 S. W. 281; *Speer on Law of Married Women*, § 295. And if the wife denies the binding effect of such judgment upon her, on this ground, she must both by pleadings and proof show she has a defense to the suit in which the judgment was rendered, growing out of the homestead character of the property.

[17, 18] If the property was the separate estate of the wife, she would not be bound by a judgment against the husband alone, and in the present case it was contended that the property was the separate estate of Mrs. Childress and certain testimony was offered to prove this. All of this testimony was excluded by the court, and, as none of the assignments of error based upon such exclusion can be considered, the case must stand upon the evidence in the statement of facts, which conclusively establish that the property was community of the husband and wife, and makes no reference to any fact tending to show otherwise. Nevertheless, if this excluded evidence had been admitted, it would have tended to show that at the time G. D.

Childress acquired the property by verbal sale he verbally gave it to his wife. This was in 1905. And that after the rendition of the judgment in *Robinson v. Childress*, and after the institution of this suit, he made a deed of it to his wife. With reference to this deed, it conveyed nothing, as at that time Childress had nothing to convey. That it is called a confirmatory deed gives it no force. If the verbal gift in 1905 was void, Childress could not breathe the breath of life into it by a deed executed after he had lost all title to the land by the judgment. The verbal gift, or attempted gift, of 1905, if ever made, was void under the statute of frauds. *Allen v. Allen*, 101 Tex. 362, 107 S. W. 528; *Sanders v. Thompson Lumber Co.*, 139 S. W. 1005. There is no pretense that the land was paid for with the separate means of Mrs. Childress, or that she was placed in possession, or made improvements on the land out of her separate estate. None of the elements necessary to take a parol gift of land out of the operation of the statute of frauds existed. So we conclude that under the undisputed facts in evidence, supplemented by those excluded, appellants have no case, and that if each of the assignments of error had been considered none of them would have presented any ground for reversal of the judgment. *Arnold v. Attaway*, 89 Tex. 506, 35 S. W. 646. The court did not err in directing a verdict for defendant. The judgment is affirmed.

Affirmed.

SWANSON v. CITY OF NACOGDOCHES.  
(Court of Civil Appeals of Texas. Texarkana.  
Nov. 13, 1913.)

1. APPEAL AND ERROR (§ 837\*)—REVIEW—DEMURRER.

In considering the propriety of the action of the lower court in sustaining a demurrer to the petition, the appellate court cannot consider the allegations of a supplemental petition.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.\*]

2. MUNICIPAL CORPORATIONS (§ 745\*)—TORTS.

A municipal corporation is not liable for the wrongful assault and imprisonment of the plaintiff by its officers without a showing of some wrongful act by the corporation itself.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1566; Dec. Dig. § 745.\*]

Appeal from District Court, Nacogdoches County; Jas. I. Perkins, Judge.

Action by James L. Swanson against the City of Nacogdoches. From a judgment for defendant, plaintiff appeals. Affirmed.

Jas. W. Williams, of Fowlerton, for appellant. Ingraham & Hodges, of Nacogdoches, for appellee.

WILLSON, O. J. Appellant, plaintiff in the court below, after alleging in his petition

that on March 19, 1912, he was lawfully engaged in the retail grocery business at No. 208 East Main street in the city of Nacogdoches, further alleged as follows: "That on or about said 19th day of March, 1912, while he [appellant] was quietly and peaceably pursuing his lawful occupation, defendant [said city of Nacogdoches], acting by and through its city marshal, E. M. Weaver, with the assistance of one H. C. Rich and W. H. Johnson, against the will and consent of plaintiff, with force and arms entered plaintiff's premises, and violently laid hold of plaintiff's person, and forcibly, and against the will and without the consent of the plaintiff, conducted plaintiff before the mayor of the said city of Nacogdoches, and by order of said mayor acting for and in the name of the defendant, the city of Nacogdoches, then and there with force and arms, against the will and contrary to the wish of plaintiff, incarcerated and falsely imprisoned plaintiff by placing him within a dirty and filthy cell in defendant's city jail, and then and there falsely and illegally held and imprisoned plaintiff against his will and consent in said city jail for more than four hours, and at the expiration of four hours defendant, acting by and through its said agents and representatives, removed plaintiff from said jail, and publicly, openly, and notoriously, against his will and without his consent, paraded plaintiff about the streets and the public square of said city of Nacogdoches, and then and there, against plaintiff's will and consent, compelled plaintiff to engage at hard labor upon the public streets of the city of Nacogdoches for a period of eight hours, and then and there falsely imprisoned plaintiff and deprived him of his liberty for a period of eight hours." After alleging that as a consequence of the acts of said city marshal and mayor he suffered damages in various sums, aggregating \$5,715, the amount for which he sought judgment, appellant further alleged as follows: "Plaintiff further charges and alleges that the acts of defendant's agents and representatives, to wit, Geo. H. Matthews, E. M. Weaver, H. C. Rich, and W. H. Johnson, were willfully and maliciously done for the purpose of injuring plaintiff, humiliating him, and disgracing him before his fellowmen, and that said acts of said E. M. Weaver, George H. Matthews, H. C. Rich, and W. H. Johnson have all and every one been willfully and completely ratified by the defendant, by reason of which plaintiff should have and recover of the defendant exemplary damages in the sum of \$5,000."

The court sustained a general demurrer to the petition, and, appellant refusing to amend same, dismissed the suit.

[1] While appellant assigns as error the action of the trial court in sustaining the demurrer and dismissing the suit, the propositions under the assignment are not framed to show that he stated a cause of action in

his said petition, but to show that he stated one in a supplemental petition he filed in reply to appellee's answer. In determining whether the demurrer, addressed to the original petition alone, should have been sustained or not, we do not think we can look to allegations in the supplemental petition in aid of those in the original petition.

[2] The case made by the allegations in the original petition is that appellee by its marshal and mayor unlawfully and maliciously assaulted and imprisoned appellant, whereby he was injured. The allegations doubtless were sufficient to show a liability on the part of said marshal and mayor; but appellant did not seek a recovery against them. They were not sufficient to show a liability on the part of appellee. A municipal corporation is liable for torts committed by its officers only in exceptional cases. Allegations showing merely a wrongful assault on and imprisonment of a plaintiff by officers of such a corporation do not present such a case. 2 Dillon, Mun. Corp. §§ 972, 975; 20 A. & E. Enc. Law, pp. 1199, 1201, 1202, 1204; City of Corsicana v. White, 57 Tex. 382; McFadin v. City of San Antonio, 22 Tex. Civ. App. 140, 54 S. W. 48; Rusher v. City of Dallas, 83 Tex. 151, 18 S. W. 333; Harrison v. City of Columbus, 44 Tex. 418; Edson v. Olathe, 81 Kan. 328, 105 Pac. 521, 36 L. R. A. (N. S.) 861; Hershberg v. City of Barboursville, 142 Ky. 60, 133 S. W. 985, 34 L. R. A. (N. S.) 141, Ann. Cas. 1912D, 189; City of Greenville v. Branch, 152 S. W. 478.

The judgment is affirmed.

#### ST. LOUIS, B. & M. RY. CO. v. VERNON.

(Court of Civil Appeals of Texas. Galveston. Oct. 30, 1913. Rehearing Denied Nov. 20, 1913.)

#### 1. MASTER AND SERVANT (§ 278\*)—INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence in a railroad engineer's action for injuries in a collision of his train with another standing on the main track at a station *held* to sustain a finding of negligence in failing to have the other train on the side track, or, if not, of negligence in failing to warn plaintiff that the main track was obstructed, and in not turning the switch for the side track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

#### 2. MASTER AND SERVANT (§ 276\*)—INJURIES—EVIDENCE—PROXIMATE CAUSE.

Evidence in an action for injuries to a railroad engineer in a collision of his train with another standing on the main track *held* to sustain a finding that negligence in not having the other train on siding, or in not warning plaintiff that the main track was obstructed, and turning the switch for the siding, was the proximate cause of plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

#### 3. STATUTES (§ 221\*)—LEGISLATIVE KNOWLEDGE OF LAW—PRESUMPTIONS.

It will be presumed that the Legislature knew, when it enacted the Employers' Liability

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Act (Acts 31st Leg. [1st Extra Sess.] c. 10; Rev. Civ. St. 1911, § 6649), that contributory negligence would bar a recovery by an employe.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 293, 299; Dec. Dig. § 221.\*]

**4. NEGLIGENCE (§ 101\*)—CONTRIBUTORY NEGLIGENCE—DIMINUTION OF RECOVERY—EMPLOYERS' LIABILITY ACT.**

Acts 31st Leg. (1st Extra Sess.) c. 10 (Rev. Civ. St. 1911, art. 6649), providing that an employe's contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of his negligence, only denies recovery because of contributory negligence to the extent that the jury determines is attributable to his negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.\*]

**5. NEGLIGENCE (§ 141\*)—COMPARATIVE NEGLIGENCE—INSTRUCTIONS.**

An instruction, in a railroad employe's action for personal injuries, that, if any negligence of plaintiff and any negligence by defendant were concurrent proximate causes of the injuries, the jury should diminish plaintiff's damages in proportion to the amount of negligence attributable to him was not misleading as permitting a recovery, if the jury found that plaintiff's negligence did not contribute to his injuries, though he was guilty of negligence which necessarily caused them, and was not affirmatively erroneous.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-399; Dec. Dig. § 141.\*]

**6. MASTER AND SERVANT (§ 289\*)—INJURIES—SUFFICIENCY OF EVIDENCE—NEGLECT.**

Plaintiff's evidence, in an action by a railroad engineer for injuries in a collision of his train with one on the main track at a station, held not to show plaintiff's contributory negligence as a matter of law in assuming that the track was clear because the switch target was white.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

**7. MASTER AND SERVANT (§ 265\*)—INJURIES—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.**

Acts 31st Leg. (1st Extra Sess.) c. 10 (Rev. Civ. St. 1911, art. 6649), providing that a railroad employe's contributory negligence shall not bar recovery for personal injuries, but the damages shall be diminished in proportion to the negligence attributable to him, did not abrogate the rule placing the burden of proving contributory negligence upon defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

**8. NEGLIGENCE (§ 101\*)—CONTRIBUTORY NEGLIGENCE—DIMINUTION OF RECOVERY.**

Even where plaintiff's proof shows that he is guilty of contributory negligence as a matter of law, under Acts 31st Leg. (1st Extra Sess.) c. 10 (Rev. St. 1911, art. 6649), providing that the effect of contributory negligence shall merely diminish recovery in proportion, the court could only direct the jury to diminish the damages in proportion to plaintiff's negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.\*]

**9. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS.**

Requested charges were properly refused where those which were correct were sufficiently covered by charges given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**10. DAMAGES (§ 221\*)—CONTRIBUTORY NEGLIGENCE—DIMINUTION OF RECOVERY—FINDINGS.**

In a railroad employe's action for personal injuries under Employers' Liability Act (Acts 31st Leg. [1st Extra Sess.] c. 10; Rev. Civ. St. 1911, art. 6649), it is the better practice to have the jury find whether plaintiff was negligent, and, if so, to find the damages sustained by him and the extent his damages are diminished because of his own negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 563-566; Dec. Dig. § 221.\*]

Appeal from District Court, Harris County.

Action by T. H. Vernon against the St. Louis, Brownsville & Mexico Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrews, Ball & Streetman, of Houston, and Claude Pollard, of Kingsville (Coke K. Burns and W. L. Cook, both of Houston, of counsel), for appellant. John Lovejoy and Presley K. Ewing, both of Houston, for appellee.

McMEANS, J. T. H. Vernon brought this suit against the St. Louis, Brownsville & Mexico Railway Company, a corporation operating a railroad, to recover damages for personal injuries sustained by him while in the employment of defendant as locomotive engineer on account of a collision of the freight train he was engaged in operating with another freight train standing on defendant's main track at or near its station of Brazoria. Plaintiff alleged that his injuries were a proximate result of negligence of the defendant's agents or servants in charge of the standing train (1) in having that train on the main track, instead of on the siding, at its south end, and (2) in failing to give a reasonable or adequate warning in any manner of the standing train being on the main track, and (3) in failing to have the switchboard turned red, and the switch lined up for the approaching train plaintiff was operating. The defendant, after a general denial, specifically denied the particulars of negligence alleged against it, and pleaded for contributory negligence, that plaintiff approached the station and switch without having his train under control, and without maintaining a reasonable lookout, and at an excessive rate of speed, and in excess of the limit prescribed by its rule of 25 miles per hour. It was also alleged that these several negligent acts were the sole proximate cause of plaintiff's alleged injuries. It was further alleged that plaintiff, after he actually discovered the danger of collision, negligently failed to make all reasonable use of the means at hand to stop and avoid the collision, and that thereby he brought about his own injuries, and should not recover. It was further alleged in the alternative that, if plaintiff did not in fact see and appreciate that the extra freight train was on the main track in time to avoid injury, his failure to see and appreciate such fact was due to his negligent failure to keep a proper lookout,

and that such failure was the proximate cause of his injuries.

The plaintiff, in reply to defendant's answer, among other things, alleged: "That the train he had in charge, being a regular freight train, was superior and had the right of way over the blocking train, which was an extra freight train, and inferior and subordinate to said train in his charge; that, coming into said station late, as he did, he had a right to expect, and to rely on the expectation, that the defendant's employes in charge of said inferior train would exercise ordinary care, for his safety, in respect thereof, and under the rules and custom of the business, as practiced by defendant, have said inferior train on the siding at or near said station or at least not on the main track in the location it was, and that, if said train was so located, they would give him the signals required by the rules in such case, or at least reasonable and adequate warning of such location of the same, and in addition would line up the switch or siding for his train, and flag the same accordingly; that the defendant had established no rule requiring a superior train, such as that in plaintiff's charge at the time, to approach the station under control, as that term is used by the defendant, in circumstances similar to that on the occasion in question, but only that the train should not be run exceeding 25 miles an hour, and the same was being run by plaintiff well within that limit at the time, and he did in fact keep a proper lookout, as he approached and came into the station, and had the train under control, all that was required of him, and after his actual discovery of the blocking train on the main track he used all reasonable means at his command to avoid collision or injury, and he was throughout in the exercise of that ordinary care usual in such case, and which would have been ample to avoid a collision and injury had the employes of the blocking train, as he had the right to expect, and relied on their doing, exercised due care in the particulars aforesaid, but, instead of that, they were guilty of negligence in having said inferior freight train on the main track in the position and manner as done, and in failing to place such inferior train on the siding at or near said station, if not entirely, then as far as they could, and at the south end thereof, and also in failing to give said regular freight train in charge of plaintiff the signals required in such case, both by the defendant's rules and the custom of its business, or any reasonable or adequate warning of the location of said freight train on said main track, and also in failing to line up the said switch or siding for said regular freight train in charge of plaintiff, and flagging the same accordingly."

A trial before a jury resulted in a verdict and judgment in favor of the plaintiff for \$17,500, from which the defendant has appealed.

The facts material to a proper disposition of this appeal are as follows: Plaintiff, Vernon, was in the service of defendant as a locomotive engineer, and on the morning of September 4, 1911, was engaged as such in the operation of a regular freight train going south on defendant's railroad. Under the rules and custom in force on defendant's road, the train being operated by plaintiff, being a regular train, was superior to irregular and extra freight trains also being operated over the road at the same time. Under the rule of the defendant, it was the duty of those operating the extra train, when meeting a train of the superior class, to place their train on the side track at least five minutes before the time of arrival of the train of the superior class, so that the latter would have a clear main line track. It was also a rule that, if a train of the inferior class does not arrive within the time the train of the superior class is ordered to wait for it, the latter may, without waiting longer, proceed on its way. It was also a rule that, whenever it became necessary to protect the front of the train, the head brakeman should go forward with danger signals to stop any train from that direction. This rule requires that the brakeman must, at the distance of 15 telegraph poles from his train, place one torpedo on the engineer's side; he must then continue to go at least the distance of 20 telegraph poles from the front of his train, and place two torpedoes on the rail on the engineer's side, 90 feet apart, when he may return to a point 15 telegraph poles distant from the front of his train, where he must remain until an approaching train has been stopped, or until he has been recalled by a whistle of his engine. In case the head brakeman is unable to go forward, the rules require that the fireman be sent in his place. There was also a printed or time card rule requiring all trains to approach "the end of double tracks, junctions, railroad crossings at grade and drawbridges prepared to stop, unless the switches and signals are right and the track clear." There was a rule and custom on that road to approach all yards and yard limits under control; but there was testimony sufficient to justify the jury in finding that this rule and custom had been disregarded and abandoned. Yard limits are defined by yard limit boards or by the outer switches where there are no yard limit boards. At Brazoria there were no yard limit boards, and the yard limits there were defined by the outer switches. A railroad owned and operated by the state formed a junction there with defendant's road.

The defendant's regular train in charge of plaintiff as engineer was No. 547, and was a superior train under the rules, with the right of way to the main line over the train with which it collided, which was No. 545, and which, under the rules, was an extra, and not

of the same class as the regular train. A telegraphic order was advised to both trains, directing the regular south-bound, in charge of plaintiff, to wait at Brazoria until 9:20 in the morning for extra No. 545, north-bound. Plaintiff's train reached Brazoria that morning a little late, about 9:27. The evidence warrants the conclusion that plaintiff, coming into Brazoria after 9:20, had a right to assume that the extra, if at that time it had arrived, had been placed on the side track, and that the main line was clear for him to pass on through without stopping. Plaintiff's train reached Brazoria around a curve, and, after coming around the curve, when he crossed the bridge, plaintiff, being able to see only a short distance ahead, then saw the extra train, which afterwards proved to be on the main track, but which he then thought was on the side track, and could not then tell differently, and was confirmed in this view, because, under the rules, it should have been on the side track, or he should have been warned if it was not, and, besides, the switch target was turned white, which indicated that the switch was lined up for the main track, and not for the side track, when, under the evidence, it should have been lined up for the side track, if, for any reason, the standing train was left on the main track. If the switch had been lined up for the side track, the switchboard would have shown red, and not white. When plaintiff discovered that the extra train was on the main line, he was distant about  $2\frac{1}{2}$  to 3 telegraph poles from same; but he remained on his engine, using the means at his command to avert a collision, and only at the last moment jumped from the engine just before a collision took place, and was thereby injured.

The evidence warrants the conclusion and we find that the extra north-bound freight reached Brazoria in ample time to be placed on the side track before plaintiff's train reached there, but that this was not done, and the extra was left standing on the main line; that, notwithstanding the employees in charge thereof were apprised and knew that plaintiff's train was coming, they sent out no flagman, or otherwise gave warning to plaintiff that the main line was obstructed by their train, as the rules required them to do in such case, nor did they turn the switch for the side track, which would have caused the switch board to show red instead of white, although one of the crew had been sent back to do so, but with ample time neglected to do it. The excuses offered for not placing the extra on the side track were that the locomotive drawing it was in bad order, and did not have enough steam to have started again had it gone into the siding, and not enough steam to pump the brakes off, and, besides, there were cars on the side track in sufficient number to prevent the entire train to go in, and would have left a part of

it on the main line. No excuse was offered, at least none has been called to our attention, for the failure of the crew of the extra to give the warnings to the on-coming regular that the main line was obstructed, as required by the rules. The speed limit on defendant's road was 25 miles an hour. Plaintiff came into Brazoria at a speed of 18 to 20 miles an hour, and his train was not under control as that phrase in the rules is understood. As before stated, however, there was evidence from which the jury might have found that the rule requiring trains to run into stations such as Brazoria under control and at a less rate of speed than 25 miles an hour had been habitually violated, disregarded, and abandoned.

On this point, the plaintiff testified: "I had my train under perfect control at that time with respect to the usage and custom of the business, as conducted by the defendant at that time. There was no rule that required me to have my train under control in the sense of being able to stop within the range of my vision; they had no such rule; I never received any instructions or orders to do that. The custom and course of the business as to superior trains coming into a station like that under the circumstances of this occasion—the inferior train was supposed to be in the siding; the superior train was not even supposed to know that they were on earth at that time, when I went into Brazoria after 9:20. There was no restraint on my speed in running through there at that time beyond this rule of 25 miles an hour. I did not receive any orders or instructions not to exceed or run at any less speed than that." He further testified: "As I came there, approaching the station, the switches appeared to be all right and clear. My belief was, until I discovered this extra on the main line, that it was that way; if it hadn't been, I wouldn't have went around there like I did. I would have went around there prepared to stop."

Another witness, Henry Teague, testified: "The target of the switch being white would indicate a clear track. \* \* \* I said that a white target indicated that the main line was a clear track, clear for the main line. The switch indicated that you have got a clear track at the switch; you have got a clear main line."

[1, 2] The witness Rebeck's testimony on this point was substantially the same. However, there was other testimony that controverted theirs. Under all the evidence we conclude that the jury were authorized to find that the defendant's agents and servants in charge of the extra were guilty of negligence towards plaintiff in failing to have their train on the side track and the main line clear by the time of the arrival of the regular train, of which plaintiff was the engineer, or, if not, they were guilty of negligence toward him in failing to warn plain-

tiff that the main line track was obstructed by their train, and in failing to turn the switch for the side track, and that such negligence was a proximate cause of the plaintiff's injuries.

The court's charge to the jury was full, and fair, and an admirable presentation of the law as applied to the facts, and it is here given in full:

"(1) In passing on the issues submitted to you by the court, you must be governed by the law given in the court's instructions, which you will consider in their entirety, and not in separate and detached parts alone; but you are the exclusive judges of the facts submitted to your determination, and of the weight of the evidence, and of the credibility of the witnesses.

"(2) Under statutes now in force, known as the Employers' Liability Act, it is provided that a corporation operating a railroad in this state shall be liable in damages to any of its employes suffering injury proximately caused by negligence of its agents or employes, and that the fact, if a fact, that the injured employe may have been guilty of contributory negligence shall not bar a recovery, but that in such event the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. Under these statutes, an employer, such as defendant, is not an insurer of the safety of its employes, but negligence of its employes, if committed within the scope of their employment towards another employe, is chargeable to such employer, and deemed in law its own.

"(3) 'Negligence' as used herein means a want of ordinary care to another to whom care is due, and by 'ordinary care' is meant such care as an ordinarily prudent person would have exercised under the same or similar circumstances. 'Contributory negligence' means such act or omission on the part of a plaintiff as an ordinarily prudent person would not do or suffer under similar circumstances, which, concurring with a negligent act or omission of a defendant, becomes a proximate cause of an injury. By 'proximate cause' of an injury is not necessarily meant the nearest time or physical sequence, but is meant a cause without which the injury would not have happened, and from which the injury in question, or some like injury, might reasonably have been anticipated as a natural and probable consequence.

"(4) If you believe from the evidence that the defendant's employes in charge of the extra train, or any of them, had that train on the main track in the position you may find it was, or that such employes or employe failed to flag the regular freight train in charge of plaintiff, or to give any signal or warning of the location of said extra train on the main track, or that such employes or employe failed to line up the switch or siding for said regular freight train, then, if you

further believe from the evidence that such conduct on the part of such employes, or any of them, in any or all of the particulars above submitted, was negligence towards plaintiff, that is, a failure to exercise towards him such care as ordinarily prudent persons would have exercised under the same or similar circumstances, and that such negligence, if any, was a proximate cause, as before defined, of alleged injuries to plaintiff, then he is entitled to recover, and, if you so find, return your verdict in his favor.

"(5) The burden is upon the plaintiff to prove the facts necessary to entitle him to recover, as above submitted to you by the court, and, unless such facts are proved by a preponderance of the evidence, to be considered by you in its entirety, then return your verdict in favor of the defendant. If you do not believe from the evidence that the employes, or any of them, in charge of the extra train, under and in view of the attendant circumstances, failed to exercise such care as an ordinarily prudent person or persons would have exercised under the same or similar circumstances, in having the extra on the main track in the position you may find it was, or in failing to flag or signal or warn the regular freight train in charge of plaintiff of the location of the extra on the main track, if they did so fail, or in failing to line up the switch or siding for said regular freight train, if they did so fail, or if you do not believe that the employes in charge of said extra train, or any of them, could, in the exercise of ordinary care, as before defined, reasonably have foreseen a collision and injury to plaintiff, or a like injury, as a natural and probable result of having the extra on the main track in the position you may find it was, or as a natural and probable result of failing to flag or signal or warn the regular freight train of the location of the extra on the main track, if they did so fail, or as a natural and probable result of failing to line up said switch or siding for the regular freight train, if they did so fail, then, in either or both of these alternative events, return your verdict for the defendant.

"(6) If you believe from the evidence that, under and in view of the rules relied on by the defendant, or the custom and usage of the business as you may find it, or independent of such rules and such custom or usage, the plaintiff approached or came into the yard, at the north opening of the switch in question, without having the train in his charge under control, such as the evidence may show you was proper, and that such act was a want of ordinary care, that is, a failure on his part to exercise such care as an ordinarily prudent person would have exercised under the same or similar circumstances, or if you believe that plaintiff so approached or came into such yard without keeping a proper lookout, and that such was a want of ordinary care on his part, or if

you believe that he so approached or came into such yard at a speed in excess of that at which a person of ordinary prudence would have operated the train under like circumstances, or in excess of 25 miles per hour, then he was guilty of negligence.

"(7) If you believe from the evidence that negligence on the part of plaintiff as just submitted to you, if any, was the sole proximate cause of alleged injuries to him, if any, or if you believe that, as he was approaching with the train in his charge, he saw and appreciated the fact that the extra freight train was on the main line in sufficient time for him, by the use of the means at hand, to avoid a collision or injury, and that he then failed to make all reasonable use of the means at hand to avoid a collision and injury, and thereby brought about his alleged injuries, if any, then return your verdict for the defendant. Under the second alternative just submitted, failure of plaintiff to use all reasonable means at hand to avoid collision or injury after he actually saw and appreciated the fact that the extra was on the main track, if he did so fail, would be the sole proximate cause of his injury, if any, and negligence, if any, of defendant's employees operating the extra train would in that event be a remote cause, and not actionable.

"(8) If you believe from the evidence that negligence on the part of plaintiff, if any, as submitted to you by the court, and negligence on the part of the defendant, if any, as submitted to you by the court, were concurrent proximate causes of alleged injuries to plaintiff, if any, then you will diminish the damages to plaintiff, if you find him entitled to recover, in proportion to the amount of negligence you find attributable to him.

"(9) If you do not believe from the evidence that plaintiff was guilty of any negligence on the occasion in question, as alleged by defendant, or submitted to you by the court, then you will not, if you find plaintiff entitled to recover, diminish his damages anything on account of contributory negligence.

"(10) If your verdict is in favor of the plaintiff, then you will, in view of and subject to the foregoing instructions, assess his damages at such sum as you believe from the evidence to be fair and just compensation for the injuries alleged and proved to have been suffered by plaintiff on the occasion in question, if any, taking into consideration as elements of damage, so far as shown by the evidence to be a natural and probable result of such injuries, if at all, mental and physical pain to him therefrom, if any, including such as he will in reasonable probability suffer therefrom in the future, if any, and also the reasonable value of time lost to him from such injuries down to the trial, if any, and also, such sum, if paid now, as will be fair and just compensation to him for his diminished capacity, from such in-

juries, to labor and earn money in the future, if any.

"(10a) If you believe from the evidence that the injuries complained of by plaintiff in his petition are in part the result of a former accident, then, to that extent, allow him nothing therefor, as you can take into consideration herein only such injuries as you find from the evidence proximately resulted from the accident in question, if any."

Appellant's first assignment of error complains of the eighth paragraph of the foregoing charge, which reads: "If you believe from the evidence that negligence on the part of the plaintiff, if any, as submitted to you by the court, and negligence on the part of defendant, if any, as submitted to you by the court, were concurrent proximate causes of alleged injuries to plaintiff, if any, then you will diminish the damages to plaintiff, if you find him entitled to recover, in proportion to the amount of negligence you find attributable to him."

The ground of complaint urged in the first, second, third, and fourth propositions under this assignment is that under the quoted paragraph of the charge the jury were permitted to find negligence on plaintiff's part in failing to come into the station of Brazoria with his train under control, and to combine as concurrent cause such negligence, if found, and negligence on the part of defendant, if found, in having the extra on the main track in the position it was, and in failing to flag the regular freight train in charge of plaintiff, and in failing to give any signal or warning of the location of the extra on the main line, and in failing to line up the switch or siding for the regular freight; whereas, it contends that it is the law that the negligence of the plaintiff so found would be the sole proximate cause, and the negligence of the defendant so found would be only a remote cause, and in this respect the paragraph was erroneous.

As we understand appellant's contention as presented in the very elaborate and able brief of its counsel, it is simply this: Conceding that appellant's servants were guilty of negligence towards plaintiff in some or all of the particulars above stated, and that without such negligence plaintiff would not have been hurt, yet the evidence showed that plaintiff was guilty of negligence in coming into the station of Brazoria without having his train under control (and we may concede that the evidence was sufficient to raise the issue of his negligence in that regard), and that without such negligence on his part he would not have been injured, and that therefore his negligence broke the causal connection between the negligence of the agents of appellant in charge of the extra in the particulars mentioned and the injury of plaintiff, leaving plaintiff's negligence the sole proximate cause of the injuries, and the defendant's negligence at most only a remote

cause, and that therefore he was not entitled to recover.

We will not undertake to follow at length appellant's argument in support of this contention. The contention here made would be applicable in determining liability of the defendant as it exists at common law and as applied by the courts of this state prior to the passage of the Employers' Liability Act. As we understand it, the rule urged by appellant is the same, in effect, as that formerly given by the courts of this state for the holding that contributory negligence of the plaintiff was an absolute bar to his right of recovery even where it was indisputably shown that the defendant's negligence was a contributing cause of the injury. Some of the authorities base the reason of the rule upon the view that, where plaintiff's negligence contributed to the injury, his contributory negligence breaks the causal connection between the injury and defendant's negligence; in other words, his negligence is the proximate cause, and not the negligence of defendant. Among the authorities that so hold are 2 Labatt on the Law of Master and Servant, p. 2234; 2 Cooley on Torts, pp. 1411, 1412, 1414; 1 Shearman & Red. on Negligence, p. 88; Wharton on Negligence, pars. 300, 303, 133. On the other hand, our Supreme Court has stated the reason of the rule as follows: "The reason why a person who, if guilty of contributory negligence contributing to his own injury, cannot recover is because the policy of the law will not ordinarily permit one to recover who is himself at fault." *Hays v. Railway*, 70 Tex. 607, 8 S. W. 493, 8 Am. St. Rep. 624. In *Railway v. Symphkins*, 54 Tex. 619, 38 Am. Rep. 632, it is said: "If a party be wrongfully on the track under such circumstances, or, being there, acts in such a way as to be himself the proximate cause of his own injury, he will be precluded from recovery on grounds of public policy, as being himself guilty of contributory negligence. Although the company's agents may have failed in proper watchfulness, the injured person is regarded as being himself too directly a cause of the injury to be allowed to complain. It is not that no wrong has been done by the company in the negligence of its agents, but that the injured party is precluded from complaining of that wrong." To the same effect, are *Railway v. Adams*, 44 Tex. Civ. App. 288, 98 S. W. 224, and *Railway v. Olds*, 112 S. W. 792. But the reason for the former rule that denied a recovery to a plaintiff whose own negligence contributed to his injury is beside the question now before us.

[3] That was the law before the adoption of the Employers' Liability Act, and it will be presumed that the Legislature knew the law at the time the act was adopted, and intended to take away from it some of its rigors. The act is as follows: "That in all actions hereafter brought against any such

common carrier by [or] railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé. \* \* \* The fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé." Acts (1st Extra Sess.) 1909, p. 280; Revised Statutes 1911, art. 6649.

[4] This act changes the rule of the common law which precludes the injured employé from recovering where his negligence contributed to his injury, and substitutes therefor a denial of recovery for only such an amount as the jury may determine from the evidence is attributable to his negligence. The question here presented is not a new one in this court, for substantially the same question was presented and overruled in *Houston Belt & Terminal Company v. Woods*, 149 S. W. 376; writ of error refused. We quote from the opinion: "By a second proposition under the second assignment it is contended that it was error for the court in the part of the charge complained of to submit to the jury whether the negligence of defendant, if shown, in providing lighting which was insufficient and not reasonably safe was the proximate cause of the injury and death of John Woods, for the reason, as it contends, the undisputed testimony shows that the alleged injury to John Woods was caused by his own voluntary act in taking the lighted lantern into a place of danger, in violation of orders and instructions, when it was not necessary for him to do so, and that such voluntary act on his own part intervened between the alleged negligence of defendant and the injury, and became itself the proximate and supervening cause, without which the injury would not have occurred, thus leaving the alleged negligence of defendant remote in its relation to the injury, and not actionable in law. The claim of broken causal connection because of contributory negligence on the part of the deceased, if it could be allowed, would have the effect of entirely abolishing the doctrine of contributory negligence in every case. The negligence of defendant was a continuing negligence, and, if it resulted in the injury and death of Woods, was the proximate cause thereof, and the only effect of Woods' contributory negligence would be to bar a recovery therefor under the law as it stood prior to the adoption of the act of April 13, 1909; but, since the adoption of that act, the only effect of contributory negligence of the injured party would be, not to bar a recovery, but to diminish the damages in proportion to the amount of negligence attributable to the injured employé."

The first four propositions under the assignment are overruled.

By its fifth proposition under the first as-

signment appellant asserts that under the eighth paragraph of the court's charge, above quoted, it was left for the jury to say whether or not, if plaintiff had been found negligent in not having his train properly under control, such negligence was a contributing or concurrent proximate cause with negligence of the defendant; whereas, it contends that the law is that such negligence of plaintiff, if shown, would necessarily be a concurrent and proximate cause, and refers to the cases of *Railway v. McCoy*, 90 Tex. 264, 38 S. W. 36; *Railway v. Rowland*, 90 Tex. 365, 38 S. W. 756; *Culpepper v. Railway*, 90 Tex. 631, 40 S. W. 386, and other cases in support of its contention.

In the cases referred to the court charged the jury on the question of plaintiff's contributory negligence, and submitted the question as to whether such contributory negligence was the proximate cause of plaintiff's injury in such a form as to mislead the jury, and to impress upon their minds that, although the plaintiff was guilty of negligence in doing an act which necessarily caused his injury, they might yet find for him, if they found it did not contribute to his injury, and it was held that such a charge was erroneous, and required a reversal of the judgment. No such vice is found in the portion of the charge here complained of. A similar complaint was made of a charge in *Railway v. Lester*, 99 Tex. 221, 89 S. W. 752, and our Supreme Court, in passing upon the point, uses the following language: "This question has been presented to this court so frequently of late that it suggests the propriety of calling the attention of the bar to the following cases upon which the objection is based [citing the *McCoy*, *Rowland*, and *Culpepper* Cases]. Chief Justice Gaines wrote the opinion in each of those cases, and carefully distinguished the charges being then examined from charges like this. The charges in those cases were held to be erroneous, because they submitted the question as to whether the negligent act contributed to the injury in such form as to mislead the jury, and to impress upon their minds that, although the plaintiff was guilty of negligence in doing an act which necessarily caused his injury, they might yet find for the plaintiff, if they found it did not contribute to his injury."

In *Parks v. San Antonio Traction Company*, 100 Tex. 222, 94 S. W. 331, 98 S. W. 1100, it is held, in effect, that a charge stating generally the law governing the defense of contributory negligence, which directs a verdict for defendant, if, from the evidence, such negligence is found to have existed, and to have proximately contributed to cause plaintiff's injury, is not affirmative error against defendant, though the evidence was conclusive that the act, if negligent, was also a proximate cause.

[5] We hold that the charge in the respect in which it is here complained of was not

affirmative error, nor was it misleading or confusing as complained in the sixth proposition. The first assignment and all the propositions thereunder are overruled.

Under the second and third assignments of error appellant presents the proposition that the court erred in the ninth paragraph of its charge in telling the jury that, if they did not believe from the evidence that plaintiff was guilty of any negligence on the occasion of the collision, as submitted by the court, they would not diminish plaintiff's damages in the event they found he was entitled to recover, and in the tenth paragraph of the charge, which states the elements of damage. The contention here made is that it was error to confine the jury to the contributory negligence of plaintiff in the particulars pleaded by defendant and submitted in the charge, but that, if on the trial acts of plaintiff were proved which raised the issue of plaintiff's contributory negligence, they should have been submitted, although not alleged. It is contended that plaintiff's own testimony showed his contributory negligence, where he says, in effect, that he assumed that the main line was clear because the switch target showed white, and that he acted partly on this assumption in coming into the switch at the rate of speed he did. Defendant did not plead that plaintiff was contributorily negligent in this regard; but it argues that under the *Employers' Liability Act* the common-law rule in vogue in Texas that the burden upon the issue of contributory negligence is upon the defendant has been abrogated, or at least the rule that contributory negligence must be specifically pleaded is of necessity abolished by the act.

There can be no question, we think, that plaintiff's testimony did not make him *prima facie* guilty of contributory negligence as a matter of law, but at most only raised the issue of such negligence on his part, and that it did raise such issue is doubtful. He did not testify that he relied entirely on the switch target being white instead of red; but all his testimony shows that he reasonably anticipated the extra freight was on the side track as it should have been, or, if not, that the switchboard would have been turned to show red instead of white, lining up the track for the siding, and that, in addition, he would have received due warning, as he ought, of the presence of the extra on the main track, that, until he had reason to apprehend the contrary, it was proper for him to run his train at any rate of speed within the limit prescribed by the rule of 25 miles per hour, and that as soon as he did discover that the extra was on the main line he used every means at hand to avoid the collision and injury.

[6-8] It will be thus seen that the testimony not only did not show negligence on plaintiff's part as a matter of law on account of his assumption of a clear track because

of the switch target being white, but, if believed by the jury, he was thereby exonerated from any negligence whatever. But we cannot agree with appellant's counsel that the act referred to has abrogated the common-law rule placing the burden of pleading and proving contributory negligence of the plaintiff upon the defendant. The act itself does not abolish the defense of contributory negligence, but recognizes it. True, the defense is a qualified one; but to the extent it is allowed and recognized it is perfect. It will not allow the defendant to escape all the consequences of its wrong merely because the plaintiff has contributed thereto by his wrong; but it requires a defendant to respond in damages for all the injuries its wrong inflicts, less the proportion thereof that the plaintiff contributes thereto by his negligence. When plaintiff alleges and proves facts which show that he has been hurt as a result of another's negligence, he has done all that the law requires of him in order to a recovery. If the defendant would escape so much of the consequences of its wrong as the plaintiff by his negligence has wrought to himself, then it should plead and prove it. *Rosenbaum Grain Co. v. Mitchell*, 145 S. W. 1188. It is only where the proof made by plaintiff shows that he is *prima facie* guilty of contributory negligence as a matter of law that the court is justified, without pleadings of defendant, to instruct a verdict for defendant, and under the act in question the court could, in such case, only instruct the jury to diminish in proportion to the amount of the negligence attributable to plaintiff. The assignments and propositions thereunder are overruled.

[9, 10] We will not discuss the remaining assignments of error presented by appellant in detail, because to do so would extend this opinion, already too long, beyond all reasonable bounds. It must suffice to say that we have carefully examined all the assignments and the several propositions submitted under them, and are of the opinion that no reversible error is pointed out in any of them. The special charges requested by defendant, the refusal to give which is the basis of several assignments of error, were properly refused, because such of them as were correct were sufficiently covered by the court's charge. Several of the special charges directed that in the event the jury found that plaintiff's injuries were contributed to by his negligence to find for defendant. These were incorrect, because they ignored the act providing that the effect of such contributory negligence is to diminish the damages only. The assignment which complains that the verdict of the jury is excessive must be overruled. There is nothing in the record to indicate that the jury found that the plaintiff was contributorily negligent, or that they diminished the damages suffered by him by reason of any such negligence on his part. The

evidence, which we will not pause to set out or restate, was ample, we think, to justify the amount of the award. We suggest that in cases of this kind it would be the better practice to have the jury make a finding as to whether they find the plaintiff guilty of contributory negligence, and, if they do so find, then to find the amount of the damages he sustained, and also the extent they diminish his damages on account thereof. There being no reversible error in the record, the judgment of the court below is affirmed.

Affirmed.

## HOUSTON OIL CO. OF TEXAS v. JONES, et al.

(Court of Civil Appeals of Texas. Texarkana. Nov. 27, 1913. Rehearing Denied Dec. 11, 1913.)

### 1. APPEAL AND ERROR (§ 499\*)—RECORD—RESERVATION OF GROUNDS OF REVIEW.

Assignments of error based on the refusal of the court to give a peremptory instruction for appellant must be overruled in the absence of anything in the record to show that such instruction was ever called to the court's attention or acted on by it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

### 2. APPEAL AND ERROR (§ 1070\*)—REVIEW—HARMLESS ERROR—VERDICT AND JUDGMENT.

Where the petition alleged that a described tract contained 160 acres, and sought recovery of an undivided one-half, or, if it contained more, an undivided one-half of 160 acres, that the verdict and judgment awarded an undivided one-half of the land as set forth in the petition, without more definite description, was not a fundamental error, since it cannot be said as a matter of law that the petition failed to describe the 160 acres claimed, and the verdict and judgment were in conformity therewith.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.\*]

### 3. ADVERSE POSSESSION (§ 95\*)—TRIAL—ADMISSIBILITY OF EVIDENCE.

Evidence of failure to pay taxes on land during the time it was alleged that adverse possession was being asserted was material and admissible as against the claimants by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 530-532; Dec. Dig. § 95.\*]

### 4. APPEAL AND ERROR (§ 1056\*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Refusal to admit evidence of failure to pay taxes on land during the time it was claimed that adverse possession was being asserted by appellees was reversible error where, in view of all the testimony, the exclusion of such evidence is deemed to have been injurious to appellant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Appeal from District Court, Newton County; W. B. Powell, Judge.

Action by H. C. Jones and another against the Houston Oil Company of Texas. From

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Hightower, Orgain & Butler and W. H. Davidson, all of Beaumont, and H. O. Head, of Sherman, for appellant. Jno. B. Warren, of Houston, for appellees.

LEVY, J. This was an action of trespass to try title brought by the appellees against appellant to recover an undivided one-half interest in a tract of land described by metes and bounds in the petition. Appellant answered by denial and plea of not guilty. In a trial to a jury there was a verdict and judgment for appellees for an undivided one-half of 160 acres out of the land described in the petition. There was a trial agreement that the title to the land in controversy was good in the Houston Oil Company of Texas, and that it has title thereto unless same has been divested out of the said company by the adverse possession of those under whom plaintiffs claim. The verdict of the jury was in favor of appellees.

[1] The first and second assignments are presented together, and must be overruled. The assignments are predicated on the refusal to give a peremptory instruction for appellant. The record does not show that the special charge of peremptory instruction was ever called to the court's attention or acted on by him.

[2] The third assignment is presented as a fundamental error. The contention is that the verdict of the jury awarded appellees an undivided one-half of 160 acres of the land described in plaintiffs' petition, and the judgment describes the land awarded to appellees merely as an undivided one-half interest of a 160 acres of land out of the land described in the plaintiffs' petition, setting out the metes and bounds of the entire land as in the petition. The point made is that there was no sufficient and definite description of 160 acres, one-half interest in which was awarded appellees, by which such 160 acres can be identified. It was alleged in the petition that the land so described had been surveyed for appellees on several occasions, beginning in 1872 as 160 acres of land, and that it contained 160 acres. Plaintiffs further alleged that they were the owners of a one-half undivided interest in the land described, and in the alternative that, if it should be determined that it contained more than 160 acres, they recover their interest in 160 acres of the tract so as to include their improvements, and that the excess be taken off the north side. Looking, therefore, to the pleading, we cannot say as a matter of law that appellees failed to describe the 160 acres to which they claim title. And the verdict and judgment being in conformity to the pleading, a fundamental error based on the pleadings and judgment in the record cannot properly be said, we think, to appear.

The fourth assignment is based on a bill of exception to certain evidence. We think there was no error. *Thornton v. Britton*, 144 Pa. 128, 22 Atl. 1048; *Boyd v. Railway Co.*, 101 Tex. 411, 108 S. W. 813.

[3, 4] The seventh assignment predicates error upon the refusal to permit evidence of the failure to pay taxes on the land in suit during the time it was claimed D. M. Jones was asserting adverse possession. It has been ruled that such evidence was proper and material. *Harris v. Wagnon*, 148 S. W. 606. Considering all the testimony in this case, it is deemed injurious to appellant to have been denied the evidence sought, and is reversible error.

The other assignments, except the one involving the sufficiency of the facts, should be overruled. It is not necessary to pass on the facts, and we do not undertake to do so.

The judgment is reversed, and the cause remanded for another trial.

#### MADRID et al. v. STATE.

(Court of Criminal Appeals of Texas. Oct. 15, 1913. Rehearing Denied Dec. 10, 1913.)

#### 1. CRIMINAL LAW (§ 678\*)—INDICTMENT—DIFFERENT OFFENSES.

Where the indictment and evidence would have sustained a conviction of either assault to murder, maiming, or robbery, but the offenses all arose out of one transaction, the state was required to elect the offense for which it would seek a conviction, since, while defendants could be convicted of any one, they could not be convicted of more than one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.\*]

#### 2. CRIMINAL LAW (§ 1167\*)—INDICTMENT—SEPARATE OFFENSES.

Where an indictment in separate counts charged assault to murder, maiming by cutting off prosecutor's ears, and robbery, defendants were not prejudiced by the fact that the court only submitted the charge of robbery, since the state was entitled to elect and ask a conviction for the most grave offense, included in the indictment, which the evidence would support.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103-3106; Dec. Dig. § 1167.\*]

#### 3. INDICTMENT AND INFORMATION (§ 171\*)—JOINT DEFENDANTS—SEPARATE CONVICTION.

Where an indictment charged that three persons named did unlawfully and willfully make an assault on prosecutor, etc., all were not entitled to an acquittal unless the evidence showed that they jointly committed the offense, but one or more could be convicted according to the proof of guilt.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 536, 537, 549; Dec. Dig. § 171.\*]

#### 4. CRIMINAL LAW (§ 111\*)—JURISDICTION—OFFENSE AT COUNTY BOUNDARY.

Where an offense was committed near a county line and evidences of the crime were discovered about 50 feet from the line, defendants could be properly prosecuted in either coun-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ty under Code Cr. Proc. 1911, § 238, providing that an offense committed on the boundary of any two counties may be prosecuted in either.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 229; Dec. Dig. § 111.\*]

**5. CRIMINAL LAW (§ 775\*)—INSTRUCTIONS—ALIBI.**

Where, in a prosecution for robbery, the court gave the ordinary charge of alibi and then gave a special charge at defendants' request that though the jury might believe beyond a reasonable doubt that defendants were present at or near the place where the alleged assault was committed, yet if they further found that there was any mistake as to the personal identity of defendants as being parties who committed the offense, or if they had reasonable doubt as to whether they were the parties, they should acquit, the defendants' identity as the persons guilty of the offense was sufficiently submitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1837; Dec. Dig. § 775.\*]

**6. CRIMINAL LAW (§ 800\*)—INSTRUCTIONS—WILLFUL.**

In a prosecution for robbery, it was proper for the court to define the word "willful" and require that the jury find that the robbery was unlawful and willfully committed, though the statute defining the offense does not in terms require that the robbery be willfully done.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. § 800.\*]

**7. CRIMINAL LAW (§ 1172\*)—INSTRUCTIONS—PREJUDICE.**

Accused, in a prosecution for robbery, was not prejudiced by an instruction that the robbery must have been willfully committed, since such requirement only imposed an additional burden of proof on the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

**8. CRIMINAL LAW (§ 1124\*)—MOTION FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

An order denying a motion for a new trial for newly discovered evidence cannot be reviewed on appeal where evidence submitted on the motion is not brought up by bill of exceptions or otherwise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946-2948; Dec. Dig. § 1124.\*]

**9. CRIMINAL LAW (§ 958\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

An application for a new trial for newly discovered evidence was properly denied where there was no showing of diligence to procure the evidence at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.\*]

**10. CRIMINAL LAW (§ 938\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—REQUISITES.**

Newly discovered evidence, in order to afford ground for a new trial, must in fact be newly discovered and such as could not by reasonable diligence have been discovered in time for the trial. It must also be probably true and of such a nature as would probably produce a different result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. § 938.\*]

**Appeal from District Court, Erath County; W. J. Oxford, Judge.**

Mose Madrid and others were convicted of robbery, and they appeal. **Affirmed.**

C. Nugent, of Matador, B. E. Cook, of Stephenville, and W. F. Ramsey and C. L. Black, both of Austin, for appellants. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** On the 4th day of February, 1913, the appellants were indicted by the grand jury of Erath county. The indictment contains three counts; the first charging them with assault to murder one J. D. Roasewell, the second charging them with maiming him by cutting off his ears, and the third charging them with robbing the said Roasewell. It may be said the evidence offered in behalf of the state would support either and all the above counts. However, the court only submitted the third count in the indictment, and appellants insist that, as the evidence, if it would support the third count, would also support the other two counts, the court should in his charge have submitted all three of the counts; that if the court had done so the jury might have found appellants guilty of either assault to murder or maiming, and, as the punishment for either of these two latter offenses is less than that affixed to the offense of robbery, appellants were materially injured by the court only submitting the graver offense for their consideration.

[1] While it is true that under the indictment in this case and the evidence adduced thereunder the appellants could have been convicted of either assault to murder, maiming, or robbery, yet as it was all one transaction they could not be convicted of all three offenses, nor any two or them, and it has always been held that, when the elements entering into a transaction would constitute two or more offenses, the state has the right to elect which one of the offenses for which it will seek a conviction.

[2] By the court only submitting robbery, appellants suffered no injury of which they will be heard to complain. Under the charge of the court, if the jury had not believed, beyond a reasonable doubt, that appellants were guilty of robbery as charged in the third count, they would have been compelled to acquit appellants, even though they had believed them guilty of either maiming or assault to murder. This is a matter of which the appellants cannot be heard to complain, as the state has the right to elect and ask a conviction for the most grave offense which the evidence will support. Branch, in his Criminal Law, correctly states the rule to be: "He (state's counsel) may carve as large an offense out of a single transaction as he can, but he must cut only once"—citing *Grisham v. State*, 19 Tex. App. 513; *Paschal v. State*, 49 Tex. Cr. R. 111, 90 S. W. 878;

Taylor v. State, 50 Tex. Cr. R. 288, 98 S. W. 839; De Leon v. State, 55 Tex. Cr. R. 41, 114 S. W. 828; Herera v. State, 35 Tex. Cr. R. 607, 34 S. W. 943.

[3] The indictment charges that "Mose Madrid, Tom Maker, and Frank Ostrowski did unlawfully and willfully make an assault." Under this indictment appellants contend that they must jointly have committed the offense, and, if either one was entitled to acquittal, then all should have been acquitted, and the court erred in not so instructing the jury. This is not the law, for under an indictment charging that all three persons committed the offense, in the language contained in this indictment, if the evidence should show the guilt of only one, the jury would be authorized to so find and acquit the other two, and the court did not err in so instructing the jury. Neither did the court err in instructing the jury that, if "Mose Madrid either alone, or acting under such circumstances with Tom Maker and Frank Ostrowski or any other person as to constitute him a principal, did then and there unlawfully," etc., commit the offense, he should be convicted, and in thus applying the law to each of the other two defendants. The case of Tooney v. State, 5 Tex. App. 163, and others cited by appellants correctly announce the law to be that it is error to submit to the jury an issue not presented in the indictment, but such rule of law has no application to this case. The court presented no issue not presented in the indictment. The issue submitted as to each of the appellants was: Did he, acting alone or acting in connection with some other person under such circumstances as to constitute him a principal, commit the offense of robbery as charged in the indictment? If an indictment should charge that A. alone committed the offense of robbery, and the evidence should conclusively show that B. in fact committed the offense, yet it also should show that A. was at the time keeping watch and otherwise aiding or abetting B. in the commission of the offense under such circumstances as in law would constitute him a principal, the court would be authorized, and it would be his duty to so instruct the jury. Appellants' able attorneys evidently had in mind the rule that if one is charged with having committed an offense, and the evidence should develop that instead of being a principal offender he was only an accomplice, he could not be convicted under the indictment. But such is not the rule when the evidence should show that the person on trial did not in fact strike the fatal blow in a murder case, or, in robbery, take the money off the person, if the evidence would make him a principal in the commission of an offense. The contention of appellants "that a charge is erroneous which warrants a jury to convict on proof of acts not alleged in the indictment" is sound, but the error fallen into is that, because the indictment charges

that "Mose Madrid, Tom Maker, and Frank Ostrowski did unlawfully and willfully make an assault," etc., it is necessary that the proof show that all three jointly committed the offense. The indictment charged each of them with the commission of the offense, and charged no joint action on their part, and either could be convicted if the evidence showed his guilt, even though it should have been developed that some person not named in the indictment in fact took the money from Roasewell, if it was also shown that the person or persons named in the indictment committed such acts as constituted them a principal under the provisions of our Code.

[4] The proof conclusively shows that the offense was committed in the town of Thurber near the line of Palo Pinto and Erath counties. Mr. Roasewell's ear was cut off, his clothing and money taken off him, and he was cut in several places. The point where the ear was found, parts of clothing and blood, was about 50 feet from the county line within Erath county. Mr. Roasewell did not know where the county line was situated, but he stated circumstances and facts which showed the occurrence to have taken place near the county line. Article 238 of the Code of Criminal Procedure provides that an offense committed on the boundary of any two counties, or within 400 yards thereof, may be prosecuted and punished in either county. This article was evidently passed to meet just such contingencies as is here presented. The testimony not definitely fixing the place where the offense was committed on either side of the county line, but fixing it so near as to be certainly within 400 yards of the line, it was not necessary, nor would it have been proper for the court, to have submitted that issue to the jury. The indictment was returned by the grand jury in Erath county; the offense was alleged to have been committed in that county; and the evidence showing that if it did not actually occur in that county, yet it did occur within a short distance of the county line, the court properly refused the special charge instructing the jury that if they did not find that the offense was committed in Erath county to acquit.

[5] Mr. Roasewell on the trial of this case positively identified appellants as the persons who assaulted, maimed, and robbed him. In addition to the plea of not guilty, appellants introduced evidence to show their whereabouts, and that they were not and could not have been the offenders. The court gave a charge on alibi, which has been frequently approved by this court. Branch's Crim. Law, § 3, and cases cited. In addition thereto the court gave the following special charge at the request of appellants: "Although you may believe beyond a reasonable doubt that defendants were present at the place or near the place where the alleged assault was committed, yet if you further find from the evidence, if any, that there is a mistake as to

the personal identity of the defendants as being the parties who committed the offense, or if you have a reasonable doubt as to they being the parties who committed the offense, taking into consideration all of the facts and circumstances offered in evidence before you both by state and defendants, you should acquit defendants, and this you should do although the offense was actually committed." Under such circumstances it was not necessary to give the other special charges requested on this issue.

[6] The indictment in this case charged the appellants with having willfully committed the robbery. The court in his charge defined the word "willful," stating: "The word 'willfully,' as used in this charge, means that the act must have been done with evil intent and legal malice and without reasonable grounds for believing it to have been lawful and without legal justification"—and then required the jury to find that the robbery was unlawful and "willfully" committed. Appellant assigns this as error, claiming that the Penal Code does not require the offense of robbery to be willfully done. While in defining robbery the Code does not use the word "willful," yet the offense itself is composed of such elements that the meaning of the word is necessarily included therein.

[7] However, if this were not true, the court in defining the word "willful" and requiring the jury to find that the act was willfully done, as legally defined, would have been adding a burden to the proof necessary to be made by the state, and it would not be an error of which appellant could complain.

The prosecuting witness positively identified appellants as the persons who robbed him. The jury evidently believed him, and we, at this distance, cannot say he is unworthy of belief. No evidence was admitted over the objection of appellants; none that they offered excluded; and under such circumstances we feel impelled to hold that there is no merit in that ground in the motion setting up the insufficiency of the testimony.

[8] This disposes of all the grounds in the motion for new trial, except the one setting up newly discovered testimony. The state's attorney filed a replication to this portion of the motion for new trial. Appellants then filed a supplemental plea in reply to the state's answer, to which the district attor-

ney also filed a replication. Numerous affidavits are attached to each of these pleadings. The motion was heard by the court, and the record discloses there was evidence adduced thereon; yet this evidence is not presented to us by bill of exceptions or otherwise, and under such circumstances we can but presume the district judge was correct in overruling the motion on this ground.

[9] But, was the testimony before us, we do not think the ground in the motion itself discloses that diligence to secure the testimony before the trial that the law requires to be used before a new trial will be granted on the ground of newly discovered testimony. No motion for a continuance was presented; no application for a postponement of the case on the ground that insufficient time had been granted in which to get ready for trial; yet after conviction this is assigned as the reason why the witnesses were not produced at the trial. The courts cannot thus be trifled with. If, in fact, new testimony is discovered after conviction which was unknown to the defendant, and which could not have been known by the use of reasonable diligence, and the testimony is of a material nature, a new trial should always be granted. But in this case a total lack of diligence is wanting, and the testimony is not of that nature for which we would feel authorized to disturb the verdict. In subdivisions 3, 4, 5, 6, and 7 of section 1149 of White's Annotated Code of Criminal Procedure, the rules governing the granting of new trials on account of alleged newly discovered evidence are set forth at length, and the authorities there cited.

[10] The evidence must in fact be newly discovered and such as could not, by a reasonable exercise of diligence, have been discovered in time for the trial; and although the testimony is in fact newly discovered evidence, yet if by the use of diligence it could have been discovered before the trial, a new trial will not be granted. It must be probably true and of such a nature that it would produce a different result. Considering the motion for new trial, together with the affidavits attached, and the contest filed by the district attorney, and the affidavits attached thereto by him, this ground of the motion for a new trial hardly comes up to the requirements announced by Judge White in his annotations to our Criminal Procedure.

The judgment is affirmed.

## Ex parte SIMPKINS.

(Court of Criminal Appeals of Texas. Nov. 19, 1913.)

## HABEAS CORPUS (§ 113\*) — APPEAL — DISMISSAL.

Where, on a hearing upon habeas corpus, accused was remanded to the custody of the sheriff who was directed to release him upon bond, and accused appealed, his appeal should be dismissed for want of jurisdiction if he afterwards submitted to the trial court's decision and entered into bond pursuant thereto.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.\*]

Appeal from District Court, Grayson County; W. J. Mathis, Judge.

Habeas corpus proceeding by E. S. Simpkins. From an order remanding relator to custody, he appeals. Appeal dismissed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant resorted to a writ of habeas corpus to relieve himself from an arrest based on a complaint and information charging him with keeping a disorderly house. Upon a hearing he was remanded to the custody of the sheriff, who was instructed to release him upon his giving bond. Appellant gave notice of appeal from the decision of the court, and the case was submitted. Since the submission appellant has concluded to accept the decision of the lower court and has entered into bond in pursuance of that conclusion. This fact has been made known to this court in a satisfactory way. This would dismiss the appeal for want of jurisdiction under the circumstances stated. This has been called to our attention by the attorneys on both sides and the sheriff and accompanying affidavit.

The appeal will be dismissed.

## REED v. STATE.

(Court of Criminal Appeals of Texas. Nov. 19, 1913.)

## 1. HOMICIDE (§ 63\*) — MANSLAUGHTER — ABSENCE OF INTENT TO KILL—MUTUAL COMBAT.

On a trial for homicide, it appeared that accused and deceased met accidentally; that there was some feeling by accused towards deceased on account of the killing of a dog; that defendant had threatened to whip deceased or the man who killed the dog; that he asked deceased if he killed it, to which deceased responded by asking him what he was going to do about it; that accused said he could whip whoever killed the dog, applying an insulting epithet to such unknown person; that deceased said he would not take that and told accused to get down from his horse, which accused did; that deceased struck accused with a whip handle on the head; that accused drew a knife, and in the ensuing fight, in which deceased obtained or attempted to obtain a railroad fishplate, accused stabbed deceased. Held, that if accused entered into the fight with no purpose of killing he could not be guilty, under the circumstances, of a higher grade of homicide than manslaughter, and hence the

court should have submitted manslaughter from the viewpoint of mutual combat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 86, 87; Dec. Dig. § 63.\*]

## 2. HOMICIDE (§ 36\*) — MANSLAUGHTER—PROVOKING DIFFICULTY.

Though accused used such insulting epithet to provoke a difficulty, if he intended to provoke only an ordinary fight, and was forced to kill under the circumstances, he was not guilty of a higher grade of homicide than manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 57; Dec. Dig. § 36.\*]

Appeal from District Court, Eastland County; Thomas L. Blanton, Judge.

John Reed was convicted of murder in the second degree, and he appeals. Reversed and remanded.

D. G. Hunt and J. R. Stubblefield, both of Eastland, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. A brief summary of the evidence will show the defendant, who is about 20 years of age, killed Oliver Brown on the 9th of March, 1912. Brown was also a young man about 25 or 26 years of age. Appellant was the owner of a dog which was killed in the pasture belonging to the father of deceased. In February, before the killing in March, defendant and the elder Brown were at a country schoolhouse one Sunday. Defendant made inquiry of the elder Brown as to who killed his dog, and made the statement, while talking with him, that he could whip whoever killed his dog, and mentioned the name of deceased during the conversation. The elder Brown denied killing the dog. Appellant said that he or deceased killed him, or must have killed him. On the 9th of March appellant, in company with the two Campbell boys, Fayette and David, were en route to the town of Carbon on horseback, when they met deceased driving a wagon. Appellant asked Brown if he had killed his dog. Brown said, "What have you got to say about it?" Appellant said he "could whip the son of a bitch who killed his dog." Brown, the deceased, dropped his lines and told appellant to get off his horse, which he did. As soon as appellant alighted from his horse, deceased struck him on the head with a whip handle, and the parties engaged in the fight in the wagon. During the fight deceased had three knife wounds inflicted on him by appellant, from which he subsequently died. The parties separated, appellant going to Carbon, and deceased drove away. Deceased was met by his brother directly, who took charge of the wagon and drove it home; deceased dying about 30 minutes after the difficulty and before he reached his father's home, where he lived. The conviction was for murder in the second degree, with a punishment of ten years allotted to him in the penitentiary. The knife used in the difficulty was a pocketknife; no further description is given of the knife. It

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—7

is also in evidence that, when deceased struck appellant on the head with the whip handle, appellant started towards the wagon, or attempted to get in the wagon, and deceased reached for and obtained a piece of iron, described as being a fishplate used in coupling railroad rails, and when he obtained this appellant says he stabbed or cut him with his knife. There was evidence pro and con that deceased had secured the piece of iron when cut. One of the Campbell boys testified practically as did appellant in regard to the difficulty. A brother of deceased was some 250 yards away, approaching the scene of the trouble, at the time it happened.

[1, 2] The court gave a charge on both degrees of murder, manslaughter, and self-defense. The charge on manslaughter is based upon the grounds: (1) An assault and battery causing pain or bloodshed; (2) a serious personal conflict in which great injury is inflicted by the person killed, by means of violence, etc.; (3) any condition or circumstance which is capable of creating and does create sudden passion, whether accompanied by bodily pain or not. The court says: "All of the above are deemed adequate causes. And where there are several causes to arouse passion, although no one of them alone might constitute adequate cause, it is for you to determine, from all the facts and circumstances in the case, whether or not all such causes combined might be sufficient to do so." Appellant requested an instruction submitting substantially manslaughter from the viewpoint of mutual combat. The testimony has been sufficiently stated in this connection; but, to restate, we find that the meeting was accidental. It is shown there was some feeling by appellant towards deceased on account of killing his dog, and it is shown he had threatened to whip him, or the man who did kill the dog. The father of the deceased, when asked by appellant, denied it. When appellant met the deceased, he asked him about it, and deceased said: "What are you going to do about it?" Appellant said he could whip the son of a bitch who killed his dog. Deceased said he would not take that and told appellant to get down from his horse. Appellant accepted, got off his horse, and the fight began by deceased striking appellant the first lick with a whip handle on the head. When deceased invited him into the difficulty, appellant accepted. This raised the question of imperfect self-defense viewed from the standpoint of an affray or mutual fighting. If he entered into the fight not for the purpose of killing, appellant could not be guilty, under the circumstances, of a higher grade of homicide than manslaughter. If it be viewed from the standpoint of appellant provoking the difficulty or provoking deceased to extend him an invitation by using the expression "son of a bitch," and if that was intended to provoke the difficulty and it was of no higher magnitude than an

ordinary fight, and he was forced to kill under the circumstances detailed, from his viewpoint of it he still would not be guilty of a higher grade of homicide than manslaughter. Deceased struck the first lick with his whip handle. Appellant then got out his knife. Under those circumstances, we are of opinion the court should have given the requested instructions. The issue presented by the charge requested was in the case. If the jury had been told what the law was under those peculiar circumstances, and viewed from that standpoint, they might have convicted him of no higher grade of homicide than manslaughter. As it is, they gave him ten years for murder in the second degree. There is no evidence in the record of any threats except a whipping. Harris did testify that defendant said that he and his knife could whip the deceased, but his testimony was withdrawn from the jury, and it does not even appear in the statement of facts. It was error on the part of the court to refuse this requested instruction. *Carter v. State*, 37 Tex. Cr. R. 403, 35 S. W. 378; *Delgado v. State*, 34 Tex. Cr. R. 159, 29 S. W. 1070; *Habel v. State*, 28 Tex. App. 588, 13 S. W. 1001; *Gray v. State*, 55 Tex. Cr. R. 98, 114 S. W. 639, 22 L. R. A. (N. S.) 513; *Branch, Crim. Law*, § 468; *Rose's Texas Notes*, vol. 5, p. 1157.

There are some other matters arising with reference to impaneling the petit jury, as well as the refusal of continuance, which will not likely occur upon another trial.

For the errors indicated, the judgment is reversed and the cause is remanded.

#### IOVANOVICH v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

#### CRIMINAL LAW (§ 1099\*)—APPEAL—STATEMENT OF FACTS—SIGNING.

It was not a sufficient excuse for appellant's failure to procure a statement of facts that the officers of the state failed to agree on or return the proposed statement in time; it being the duty of defendant's attorney under such circumstances to present his proposed statement to the judge and ask him to approve the same, or himself prepare and file a statement in the event he does not find the one presented correct.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

George Iovanovich was convicted of theft as bailee, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of the offense of theft by bailee, and his punishment assessed at four years' confinement in the state penitentiary.

There is no statement of facts nor any bills of exception in the record, consequently no question presented in the motion for a new trial can be reviewed by us. The indictment charges an offense under our laws, and in the absence of a statement of facts we must presume the court charged the law, and all the law, applicable to the evidence introduced.

Appellant's counsel has filed an affidavit stating that it was through no fault or negligence on the part of appellant or his counsel that he has been deprived of a statement of facts, and asks that the case be reversed, because he has been deprived of a statement of facts. Appellant's counsel in the affidavit states he prepared a statement of facts and presented it to the assistant county attorney for examination and approval, but that such official, although frequently promising so to do, never acted on and never returned to him the statement of facts. If this was all the law required him to do, then he would be entitled to a reversal. But the law provides that, before he will be entitled to have his case reversed because of failure to secure a statement of facts, he must, in addition to furnishing the county attorney a copy, when they fail to or do not agree upon the statement of facts, then present to the judge a copy of the statement of facts, and ask the trial judge to prepare and file a statement, in the event he does not find the one presented to him to be correct. Appellant at no time presented a statement of facts to the trial judge, and under such circumstances he is not entitled to have his case reversed on that ground.

The judgment is affirmed.

#### LARA v. STATE.

(Court of Criminal Appeals of Texas. Nov. 19, 1913.)

#### 1. CRIMINAL LAW (§ 363\*)—EVIDENCE—RES GESTÆ.

Where an officer claimed that he was called to a saloon and notified of pending trouble, and that some one had a knife; that he discovered the knife on accused's person and demanded it; that accused refused to surrender it, and a difficulty arose, in which he was cut on the hand before he obtained the knife; that he then arrested four persons and started off with them, when some one called to him to watch out, and he was then assaulted from the rear; and that a person who came to his rescue was killed—he was properly permitted to testify on accused's trial for assault to murder as to the details of both difficulties, the participants therein, the wounds inflicted on him, and that such person who came to his rescue was killed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 863.\*]

#### 2. CRIMINAL LAW (§ 338\*)—EVIDENCE—RES INTER ALIOS ACTA.

On a trial for assault to murder, evidence that another party had been convicted of murdering a person who came to the prosecuting witness's rescue in the difficulty in which the al-

leged assault occurred, was improperly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.\*]

#### 3. CRIMINAL LAW (§ 338\*)—EVIDENCE—RES INTER ALIOS ACTA.

On a trial for assault to murder, evidence that other parties had been indicted for their participation in the difficulty in which the alleged assault occurred, and such indictments themselves, were improperly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.\*]

#### 4. CRIMINAL LAW (§ 338\*)—EVIDENCE—RES INTER ALIOS ACTA.

On a trial for assault to murder, it was error to admit evidence that other parties indicted for their participation in the same difficulty had forfeited their bonds, fled, and were refugees from justice, where accused had not attempted to flee, and was not shown to be responsible for the acts of such other parties subsequent to the difficulty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.\*]

#### 5. HOMICIDE (§ 349\*)—REVERSAL—NEW TRIAL—SCOPE OF INQUIRY.

Where a conviction for aggravated assault under an indictment for assault to murder is reversed, assault to murder should not be submitted on the new trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 726; Dec. Dig. § 349.\*]

Appeal from District Court, Willson County; F. G. Chambliss, Judge.

Florencia Lara was convicted of aggravated assault, and he appeals. Reversed and remanded.

J. E. Canfield, of Floresville, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted for making an assault on J. L. Allen with intent to murder him, he was convicted of aggravated assault, and his punishment assessed at one year's confinement in jail and a fine of \$300.

[1] Mr. Allen was an officer, and he testified: That he was called to a saloon at Poth and notified of pending trouble, and that some one had a knife. He searched several and failed to find any weapon. He says that appellant then approached, and invited him to take a drink, leaning up against him. He declined the drink, but felt a knife on appellant's person, and demanded it. Appellant refused to surrender it, and a difficulty arose in which he was cut on the hand before he succeeded in getting the knife. He then arrested four Mexicans, and started off with them, and while at the back of the saloon, some one holloed to him to "Watch out," when he was assaulted from the rear. He pulled his pistol, but that in the mêlée it was taken from him, and he was struck over the head with it. Also some one struck his right arm and broke it. That one Ludwig came to his rescue and was killed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appellant testified he had no knife on his person, but that Allen came to him and some five of his friends, who were getting in the wagon to go home, and invited them to take a drink; that three of them did go in and take a glass of beer with Mr. Allen, and while they were drinking Chaverrea passed by and stuck a knife in the waistband of his pants; that Mr. Allen at once grabbed the knife, and some one struck him from behind, and that he knew no more. It was permissible for Mr. Allen to testify as to all the details of the difficulty, or two difficulties, and as to who were participants therein, as to the wounds inflicted on him, and that Joe Ludwig was killed in the difficulty—that is, detail the entire transaction as it occurred from his viewpoint—and the bills of exception as to this testimony present no error.

[2, 3] But it was not permissible for Mr. Allen to testify that Arrando had been indicted by the grand jury, tried, convicted of the murder of Mr. Ludwig, and sentenced to the penitentiary. Nor was it permissible for Mr. Allen to testify that the grand jury had investigated this difficulty and returned bills of indictment against Elberto Chaverrea, Reyes Flores, Gregoria Cortenas, and others, charging them with assault to murder on him for their participation in this difficulty, and the court should not have admitted this testimony.

The court was also in error in permitting the bills of indictment against these others to be introduced in evidence. This was but getting before the trial jury the fact that the grand jury had accepted the state's theory of the case, and indicted all those whom Mr. Allen said had been participants in the affray, and they could have been introduced for no purpose, except to support and bolster up the state's theory. This investigation of the grand jury and return of the indictments were certainly after the difficulty, would shed no light on the difficulty, and were getting before the jury the opinion of the grand jury as to the merits of the disputed issues. The grand jury may not have been informed as to the defendant's theory of the case; the evidence of the witnesses who tended to support his defense may not have been before the grand jury. Often this is the case, and it was highly improper to have permitted these indictments against others to be introduced in evidence. They were not witnesses, and as it appears by these indictments, they could not have been witnesses for the defendant, and the state tendered none of them as witnesses. We have treated these bills jointly, and this relates to all the indictments introduced, and on another trial the objection to their introduction in evidence should be sustained.

[4] By another bill it is shown that Mr. Wright was permitted to testify: "I am acquainted with Gregorio Cortenas, and know

that he was indicted by the grand jury of the December term of the district court, 1911, in connection with an assault to murder J. L. Allen. I had him under arrest, but he gave bond and has not been under process to this court, nor has he been since the indictment was returned. I have a capias for his arrest, and have made diligent search for him, and have sent circulars all over the southwest part of the state. I do not know where he is. I do not know Jilberto Chaverrea, but I have had a capias as an officer for him since the grand jury of December, 1911, but have no idea where he is. He has not been in court in Wilson county to my knowledge." These were two of the men shown to have been indicted as participating in the assault on Mr. Allen, and the fact that they fled, had forfeited their bonds—were refugees from justice—was not legitimate evidence against this defendant. It was not sought to be shown he had anything to do with their flight, and he could, in no sense, be held responsible for any of their acts after the difficulty was over. He, at least, had not fled, nor made any attempt to do so, but was in court contending he had made an assault of no character, but instead, that he had been assaulted and seriously wounded. While testimony as to what took place *during the difficulty*, the acts and conduct of each participant, was admissible in evidence, yet the subsequent acts of any of the others, in which he did not participate, were not admissible against him, and the court erred in not excluding all such testimony.

There are other bills in the record presenting similar matters, but what has been said should make it clear what testimony is admissible and what should be excluded, without taking up each bill and discussing it. As before stated, the fact that Mr. Allen was called to the saloon, that he searched for a knife, and the acts and conduct of each and every one of the alleged participants in the difficulty until it was over, under this record, were properly admitted in evidence. But nothing subsequent thereto should have been admitted. It was error to show that Arrando had been tried and convicted; it was error to show that others had been indicted for assault to murder; it was error to show that some of them had fled; it was error to show that others had forfeited their bonds—in fact all these matters that took place after the difficulty was over will be excluded on another trial.

[5] We need not discuss the alleged errors in the charge on assault to murder, as that grade of offense will not be presented on another trial; having been convicted of aggravated assault only, on another trial that issue should alone be presented. Besides, the entire charge is copied in one bill, and the assignments of errors in it are too general to bring anything before us for review.

Reversed and remanded.



## CHRISTIAN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 5, 1913. Rehearing Denied Dec. 3, 1913.)

## 1. CRIMINAL LAW (§ 306\*)—EVIDENCE—RES GESTÆ.

A witness who was half a mile from the place of the shooting, but who immediately ran there upon hearing it, when decedent, who was lying on the ground and suffering intensely, voluntarily told him the circumstances of the shooting and described the assailants, could testify as res gestæ as to what decedent told him about the shooting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. § 306.\*]

## 2. HOMICIDE (§ 203\*)—DYING DECLARATIONS.

Where, when decedent was helped into the ambulance after being shot, witness handed decedent his pistol, when decedent told him to take the gun because decedent would never have any more use for it, it sufficiently appeared that decedent was conscious of approaching death without hope of recovery, within Code Cr. Proc. 1911, art. 808, so as to make such declaration admissible as dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

## 3. WITNESSES (§ 268\*)—CROSS-EXAMINATION.

Great latitude is permitted in cross-examining witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

## 4. CRIMINAL LAW (§ 1170½\*)—APPEAL—HARMLESS ERROR—QUESTION.

There was no reversible error in the asking of questions, by the prosecuting attorney for impeachment purposes, as to whether a certain witness was not forgetful and as to whether she had not told stories, where such questions were not answered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.\*]

## 5. CRIMINAL LAW (§ 508\*)—TESTIMONY OF ACCOMPLICES.

Under the substantially direct provisions of Code Cr. Proc. 1911, art. 791, one who was also under separate indictment for killing decedent was properly excluded from testifying in a prosecution of accused for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. § 508.\*]

## 6. CRIMINAL LAW (§ 770\*)—INSTRUCTIONS.

Instructions in a criminal law case must submit every phase of the case suggested by the evidence and every legitimate inference therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.\*]

## 7. CRIMINAL LAW (§ 770\*)—TRIAL—ISSUES.

In submitting the issues to the jury, the court is not limited by the evidence of accused for himself, but should submit every question suggested by the evidence, whether offered by the state or accused, or both.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.\*]

## 8. CRIMINAL LAW (§ 770\*)—INSTRUCTIONS—CONFORMITY TO ISSUES.

The court should instruct on the law applicable to every theory of guilt or defense, within the scope of the indictment, which the evidence tends to establish.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.\*]

## 9. HOMICIDE (§§ 300, 301, 309\*)—INSTRUCTIONS—ISSUES.

If the trial court has a reasonable doubt as to the necessity of a charge on manslaughter, self-defense, or defense of another, he should resolve such doubt in favor of accused and charge thereon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630, 633, 649, 650, 652-655; Dec. Dig. §§ 300, 301, 309.\*]

## 10. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—CONSTRUCTION.

A charge in a criminal law case should be construed as a whole and not by separate paragraphs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

## 11. CRIMINAL LAW (§ 805\*)—INSTRUCTIONS.

The charge in a homicide case cannot and should not all be given in a single paragraph.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1958, 1989; Dec. Dig. § 805.\*]

## 12. CRIMINAL LAW (§§ 820, 1144\*)—INSTRUCTIONS—CONSTRUCTION.

The instructions must be given a reasonable construction, and the jury must be deemed to have placed such a construction upon it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1988, 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. §§ 820, 1144.\*]

## 13. CRIMINAL LAW (§ 1186\*)—APPEAL—HARMLESS ERROR—UNNECESSARY INSTRUCTION.

Under Acts 25th Leg. c. 21, amending Code Cr. Proc. 1895, art. 723, prohibiting reversal because of error of commission or omission in the charge, unless the whole record shows that it was calculated to prejudice accused's rights, a judgment of conviction should not ordinarily be reversed for unnecessary instructions in favor of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

## 14. HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR—IMPROPER SUBMISSION OF ISSUES.

Even if the evidence, which showed that decedent, who was a deputy, hid behind a gate post and stepped out and presented a gun at accused and others as they were carrying away stolen property, did not raise the issues of manslaughter, self-defense, or defense of another, any error in submitting such issues was not prejudicial to accused, though his only defense was alibi.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

## 15. CRIMINAL LAW (§ 792\*)—INSTRUCTIONS—PRINCIPALS.

Accused cannot claim, in a prosecution for homicide claimed to have been committed while accused and others were carrying away burglarized goods, that an instruction upon the law of principals was harmful to him, though abstractly correct, on the ground that his intention may have been only to burglarize the car and steal the goods without intent to kill any person, where the instructions required a finding that accused himself fired the fatal shot.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. § 792.\*]

## 16. HOMICIDE (§ 18\*)—FIRST DEGREE MURDER—PERPETRATION OF BURGLARY—COMPLETION OF OFFENSE—"IN THE PERPETRATION."

Where accused and others were engaged in hauling away the goods stolen from a burglar-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ized car, when accused shot an officer who was attempting to arrest them, accused was then "in the perpetration" of the burglary, within Pen. Code 1911, art. 1141, making all murder committed "in the perpetration" of burglary first degree murder; the offense of burglary not then having been completed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24-31; Dec. Dig. § 18.\*]

**17. CRIMINAL LAW (§§ 741, 742, 1159\*)—APPEAL—JURY FINDINGS—CONCLUSIVENESS.**

The credibility of the witnesses and the weight of their testimony is for the jury in the trial court and not for the Court of Criminal Appeals to determine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1221, 1705, 1713, 1716, 1717, 1719-1721, 1727, 1728, 3074-3083; Dec. Dig. §§ 741, 742, 1159.\*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Ed Christian was convicted of first degree murder, and appeals. Affirmed.

F. M. Ball and George, Hancock & Hardwicke, all of Dallas, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** The appellant was convicted of murder in the first degree and the death penalty assessed.

We think it unnecessary to give any detail statement of the evidence by the several witnesses but will give a summary of it as a whole. It clearly authorized the jury to believe and find that in daytime in the evening of September 9, 1910, four negroes, to wit, appellant, Ed Christian, Ed Long, George Williams, and Willie Wyatt, by mutual consent, met at the house of Ed Long, in the city of Dallas, Tex., and entered into a plot and conspiracy to that night rob or burglarize a Texas & Pacific box car while being pulled into the city of Dallas; that Wyatt lived about one mile, or some distance, from Ed Long's, and that they all sent said Wyatt to his (Wyatt's) house to get his six-shooter and to swap it with one Lee Jeffries for a Winchester; that appellant said he wanted to trade the pistol for a rifle for long-range shooting; that Wyatt went home, got his pistol, and went by to see Jeffries to make the said exchange but, not finding Jeffries, did not make the exchange but took the pistol back to Ed Long's where the others were awaiting his return; that, when he returned to Long's, two officers in plain clothes were there and, seeing he had something under his coat, inquired what it was, and he told them it was his six-shooter. They thereupon arrested him for carrying the pistol, and soon afterwards placed him in jail and kept him until some time the next day; that the said four persons and no others entered into said plot and conspiracy; that that night, about or after midnight, said conspirators, other than Wyatt, did board a Texas & Pacific freight train pulling into Dallas and at or near the Fair Grounds burglarized one of the box cars and

threw out therefrom, on the right of way, two boxes of goods; that Ed Long at once hired and procured a one-horse wagon and a small gray mule with small feet, returned to the place where they had thrown out said goods, the other two there awaiting his return, and as soon as he did so loaded the said goods into the wagon and started off therewith down the right of way; that Henry Bennett, the deceased, was a deputy sheriff whose duties were to look after offenses of burglarizing and stealing goods from railroad cars in said city; that immediately, or soon after this burglary, he was informed thereof and immediately went to investigate it and if possible apprehend the criminals and arrest them and prevent their getting away with said goods; that when he got near where the goods were thrown out he saw three persons loading said boxes in a wagon and then come down the right of way from where they had just loaded them, one of them in the wagon driving, the other two walking; that he secreted himself behind a gate post where, it seems, the parties were to come off of the right of way and leave the railroad, and that when they got very close to him he drew his pistol, presented it at them, and commanded them to halt or hold up; that then appellant, who was one of the two on the ground, immediately stepped from behind the mule and fatally shot the deceased, he dying the next day or the day following; that these three conspirators then made their escape with the goods and went to the residence that night of Lena Tenneson with said goods in said wagon drawn by said mule, and appellant awoke him from his bed and endeavored to get him to let them leave these goods secreted at his house, but he declined, and they then left, sold the goods, returned the mule and wagon to the place and person from whom they had hired them, paid for the hire, and the next day divided with said Wyatt (who that day had been released from jail) the proceeds of the sale, paying him \$50 as his portion thereof. The evidence tends to show that appellant then left Dallas and succeeded in keeping his whereabouts unknown to the officers and evaded arrest until some year or two later when he was found and arrested in Lime-stone county, Tex.

Appellant objected to the testimony of E. R. Meeks as to what the deceased said to him as to who shot him or the facts or circumstances surrounding the shooting, because his testimony did not show that at the time deceased made said declarations to the witness he was conscious of approaching death and believed there was no hope of recovery. The court admitted the testimony, holding that it was admissible as a dying declaration and also as res gestæ. It was not objected to because it was not res gestæ. If it was admissible as res gestæ, the court's ruling was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

correct, even though it might not have been admissible as a dying declaration.

[1] It is shown by the bill that the witness Meeks was about a half mile from where the shooting occurred and heard it; that he immediately ran there, found deceased shot and lying upon the ground at the place where the shooting occurred and at once voluntarily told the witness the circumstances of his being shot and described the person who shot him and one of the others, the wagon and the mule drawing it. Deceased was suffering intensely from the shot. We are well satisfied that the evidence was clearly admissible as *res gestæ*. *Rainer v. State*, 148 S. W. 736.

[2] The testimony of this witness further shows that, at the time when they helped the deceased in the ambulance, he took deceased's head in his lap and handed him his pistol; that the deceased replied to him: "Take the gun and take care of it. I will never have any more use for it." To take the testimony of this witness alone, shown by the bill, we think it shows satisfactorily that at the time of making said declaration he was conscious of approaching death and believed there was no hope of recovery, substantially in compliance with the statute on this subject. Article 808, C. C. P. This was the only ground upon which the testimony was objected to. All the other requisites of the statute are shown to have been complied with. *Miller v. State*, 27 Tex. App. 63, 10 S. W. 445. It is shown that his wound was necessarily a fatal one.

Lena (Eugene) Tennison was an important witness for the state and gave material testimony against appellant. The defendant, on cross-examination of him for the purpose of impeaching him by Ada Tennison, asked him if he did not make certain statements to her which would be contradictory if not the reverse of what he testified on the trial. He denied making any such statements to her. Appellant placed her on the stand, and she testified that Lena Tennison did make the statements to her which he had denied. The state subjected her to a severe cross-examination, whereby her reputation for truth and veracity was placed in issue before the jury. What this examination was is in no way disclosed by the bill. Thereupon, for the purpose of sustaining her general reputation for truth and veracity, appellant introduced Mrs. Tabler, who showed that she had lived in Longview many years where Ada Tennison lived and that Ada had worked for her many years, and that she knew Ada's general reputation for truth and veracity at Longview and it was good. On cross-examination of Mrs. Tabler by the state, it was shown by Mrs. Tabler that Ada had been operated on about a year before this trial and since then she had been in a feeble condition; and the state then asked her if Ada Tennison was not forgetful since said

operation. Upon objection by the appellant this question was excluded from the jury and was not answered. Upon the state then asking some other questions and establishing that Mrs. Tabler had seen Ada Tennison every day for the past year, except about one month, and that she had worked for her constantly, the state's attorney repeated the question, "You state she is forgetful?" The appellant again objected to this question; and, while the bill states the court overruled the objection, it also shows that no answer whatever was had from the witness. Then, the state proceeding with its cross-examination of Mrs. Tabler, she testified that Ada Tennison's reputation for truthfulness had changed within the last 12 months and that she was not as truthful as before then. Then asked, "She told you stories?" Appellant objected to this question, and the court sustained his objection, and no answer thereto was had.

[3, 4] Great latitude is always permitted in the cross-examination of a witness. It seems this bill merely complained of the said certain questions which were asked by the state's attorney but not answered. The bill in no way shows any reversible error. *Sweeney v. State*, 146 S. W. 885, 886, and cases cited.

[5] The only other bill appellant has is he complains that the court would not permit him to introduce Ed Long and have him testify. Said Long was then also under indictment in the lower court for the killing of deceased, as well as this appellant, though under a separate indictment. The court, of course, committed no error in refusing to permit Ed Long to testify. The statute itself makes him incompetent. Article 791, C. C. P. Appellant urges many objections to the court's charge. Before discussing these objections, we will state some of the well-established rules pertaining to the giving of charges and how the court's charge shall be construed. These are:

[6] (1) The charge must submit to the jury every phase of the case made by the evidence and every legitimate deduction to be drawn therefrom.

(2) The charge should be framed with reference to the whole evidence adduced on the trial.

[7] (3) The court is not limited or restricted by the testimony of appellant in his own behalf as to the issues to be submitted but, notwithstanding his testimony, should submit each and every phase of the case suggested by the evidence, whether the theory be presented by the evidence of the state or defense, or both.

[8] (4) The charge should instruct the jury as to the law applicable to every theory within the scope of the indictment which the evidence tends to establish, whether favorable to the state or defendant.

[9] (5) If the testimony creates a reasonable doubt in the mind of the trial judge as

to the necessity of a charge on manslaughter and self-defense, or defense of another, in a murder trial, the doubt should be resolved in favor of the accused and such charge given, in which event, if he gives such charge or charges, no reversible error is caused thereby.

[10, 11] (6) In determining the sufficiency of a charge, it must be construed as a whole and not by isolated extracts, excerpts, or paragraphs. It must be treated as an entirety, and regard must be had to the connection and interdependence of its several parts. A charge in a murder case should not and cannot properly all be given in one paragraph as a whole. It should necessarily be given in separate and distinct paragraphs.

[12] (7) The charge and the language thereof must have a reasonable and not a strained and unreasonable construction, and the jury must be considered to be reasonably intelligent and capable men, sufficiently so to put such reasonable construction on the charge, and not a strained and unreasonable construction thereon.

[13] (8) By the act of March 12, 1897, amending article 743 (723), C. C. P., the Legislature expressly prohibited this court from reversing a case because of an error of either commission or omission in the charge, unless such error, from the whole record, was calculated to prejudice the rights of the defendant. Even before then, but especially ever since that act, no conviction should necessarily and must not ordinarily be reversed for unnecessary instructions in favor of the accused. (We are not considering the amendment of article 743 under the Acts of 1913, p. 278.)

Bearing these rules in mind, we will now state the court's charge and appellant's objections thereto. The court gave a full, fair, and complete charge on murder in the first and second degrees, as in ordinary murder trials. As we understand, appellant has made no objection to either of these charges, as within themselves wrong. The court also charged on manslaughter, self-defense, and defense of another, and gave a complete and perfect charge on alibi. Also a charge on principals, reasonable doubt, and the reasonable doubt between the different degrees of murder and manslaughter.

One of appellant's objections is to the entire charge of the court, considered as a whole, claiming that it is on the weight of the evidence and misled and confused the jury in that, as his sole defense was alibi, it impressed the jury with the belief that the trial court did not believe his defense but believed that he was present and participated in the homicide. We have carefully, again and again, read and studied the court's charge, in view of this objection and of the rules above announced regulating what charges shall be given, how given and construed, and, in our opinion, this objection is wholly without foundation. Unquestiona-

bly the evidence imperatively required the court to submit murder in the first degree, even if it should be conceded that appellant's sole defense was alibi. By doing so the court, as it should, required the jury to believe every essential fact to establish first degree murder beyond a reasonable doubt, and in no way, as we see it, did the court express or intimate, and by no reasonable construction of the language of the charge can it, by implication, be construed, that the court expressed any opinion whatever on the weight of the testimony or in derogation of appellant's claimed alibi. The same may be said, and is true, of the submission of every other question submitted to the jury for a finding. As we see it, the court expressed, neither directly nor by implication, any opinion to the jury as to his belief or disbelief affecting appellant's claimed defense of alibi. We can hardly see, and appellant has not pointed out, how the court could or should have charged otherwise if it was necessary or proper to submit the several matters to the jury for a finding.

[14] Again, the appellant complains that the court erred in charging on manslaughter and self-defense and defense of another, claiming that because his only defense was alibi, by submitting charges on these subjects to the jury for a finding, the court improperly led the jury to believe that he was present and participated in the killing and not to believe his special defense, and also claiming that there was no evidence in the record raising or tending to raise these several issues, and that it put him in the position of relying on inconsistent, conflicting, and antagonistic defenses, and that the giving of these charges, therefore, must necessarily result in a reversal.

Appellant contends that the evidence in this case established that he was guilty of murder in the first degree or not guilty at all. He concedes in his brief that ordinarily a charge favorable to defendant would be no ground for a reversal, but claims that, because, as contended for by him, his sole defense was alibi, the submission of such charges when the evidence did not call therefor necessarily resulted in injury to him.

In *Jones v. State*, 63 Tex. Cr. R. 413, 141 S. W. 904, we correctly said: "Prior to the enactment of article 743 (723), Code Criminal Procedure, in construing that article, as it had theretofore been, in connection with article 735 (715), this court had reversed cases where mere technical errors of commission or omission had been in the charge of the court. The Legislature, in amending article 743 (723), as it was amended by the act of March 12, 1897, expressly enacted that the judgment shall not be reversed, unless the error appearing from the record was calculated to prejudice the rights of the defendant, whereas, before then, said article, as it stood, seemed and was construed to require a reversal whether such error was

calculated to injure or not. Even before this article was amended, the Supreme Court in *Wright v. State*, 41 Tex. 246, held that a judgment of conviction would not be reversed for improper instructions given in favor of the defendant; and cases prior to *Green v. State*, 32 Tex. Cr. R. 298 [22 S. W. 1094], which held that where erroneous charges were given, if excepted to, even though such injury inured to the benefit of the accused, required a reversal, were expressly overruled by this court. In *Briscoe v. State*, 37 Tex. Cr. R. 464 [36 S. W. 281], on a trial for murder, where the evidence established murder in the first degree, it was held that defendant could not be heard to complain that the court gave him a charge upon murder in the second degree. Also in *Gonzales v. State*, 35 Tex. Cr. R. 33 [29 S. W. 1091, 30 S. W. 224], this court held that a defendant who had been convicted of manslaughter could not claim any possible injury from a charge on mutual combat, even when such charge was not required by the evidence and that a charge upon imperfect self-defense, though not called for by the evidence, could do no possible harm to appellant where there was no self-defense in the case. It has also been held in many cases by this court that even though a specific portion of the charge of the court may be erroneous, when it is more favorable to the accused than he was entitled to upon the particular questions, he had no ground to complain. *Wilkins v. State*, 35 Tex. Cr. R. 525 [34 S. W. 627]; *Scruggs v. State*, 35 Tex. Cr. R. 622 [34 S. W. 951]; *Delgado v. State*, 34 Tex. Cr. R. 157 [29 S. W. 1070]; *English v. State*, 34 Tex. Cr. R. 190 [30 S. W. 233]; *Daud v. State*, 34 Tex. Cr. R. 460 [31 S. W. 376]; *Loggins v. State*, 32 Tex. Cr. R. 364 [24 S. W. 512]; *Lujano v. State*, 32 Tex. Cr. R. 414 [24 S. W. 97]; *Boren v. State*, 32 Tex. Cr. R. 637 [25 S. W. 775]; *Green v. State*, 32 Tex. Cr. R. 298 [22 S. W. 1094]; *Kelley v. State*, 31 Tex. Cr. R. 216 [20 S. W. 357]; *Sutton v. State*, 31 Tex. Cr. R. 297 [20 S. W. 564]; *Massey v. State*, 31 Tex. Cr. R. 371 [20 S. W. 758]; *Wolforth v. State*, 31 Tex. Cr. R. 387 [20 S. W. 741]; *Gonzales v. State*, 31 Tex. Cr. R. 508 [21 S. W. 253]; *Weathersby v. State*, 29 Tex. App. 278 [15 S. W. 823]; *Surrell v. State*, 29 Tex. App. 321 [15 S. W. 816]; *Hawthorne v. State*, 28 Tex. App. 212 [12 S. W. 603]; *Walker v. State*, 28 Tex. App. 503 [13 S. W. 860]; *McCleavland v. State*, 24 Tex. App. 202 [5 S. W. 664]; *Carlisle v. State*, 37 Tex. Cr. R. 108 [38 S. W. 991]."

Of course there might be a case, when appellant's defense was alibi, where the court's charge was so worded as objections like those of appellant in this case might be well founded. This case, however, and the charges of the court do not present the questions in such a way as to be subject to this objection, even if it should be conceded that the evidence did not raise the questions of

manslaughter, self-defense, and defense of another.

For the sake of discussing the question further, however, suppose that it be conceded that the evidence did not so raise manslaughter, self-defense, and defense of another as to call for a submission of them or any of them to the jury for a finding, yet how is it possible that the appellant was injured or could have been injured thereby? Without doubt, by submitting manslaughter the court gave the jury an opportunity to find him guilty of manslaughter only and not murder in the first degree, and so by submitting self-defense and defense of another the court clearly gave the jury the authority to find him not guilty at all; and as we see it, considered as a whole, the submission of these questions to the jury by the court were each and all favorable to appellant and in his behalf and could not and did not prejudice him in the least. Again, we cannot say that the evidence may not have been sufficient to raise each of these questions in appellant's favor. If so, under the above well-established rules there was no error in submitting them which could or should require a reversal of this case.

Take for instance the question of manslaughter. Under one theory and phase of the evidence it might well be contended that it tends to show that the attempted arrest of appellant and his confederates by the deceased at the time deceased was killed was not a legal arrest or attempt to arrest. The officer Bennett, it was shown, secreted himself from appellant and his confederates by getting behind a post as they were coming toward him, and when they got within a short distance of him he suddenly emerged from behind the post, presented his drawn pistol suddenly, and demanded that the parties halt or hold up; that he did not then disclose to appellant and his associates that he was an officer or was attempting to make a legal arrest of them. Mr. Branch, in his work on Criminal Law, in one paragraph of section 437, says: "If attempted arrest is illegal, defendant has the same right to resist as if the officer was merely a private citizen. *Lynch v. State*, 41 Tex. Cr. R. 510 [57 S. W. 1130]; *Miers v. State*, 34 Tex. Cr. R. 161 [29 S. W. 1074, 53 Am. St. Rep. 705]; *Earles v. State*, 94 S. W. 466." In another paragraph, under the same section, he says: "The law sets such a high value upon the liberty of a citizen that an attempt to arrest him unlawfully is esteemed a great provocation and, if it produces such passion as renders him incapable of cool reflection, may reduce the homicide to manslaughter. Ex parte *Sherwood*, 29 Tex. App. 335 [15 S. W. 812]; *Dyson v. State*, 14 Tex. App. 461; *Miller v. State*, 31 Tex. Cr. R. 639 [21 S. W. 925, 37 Am. St. Rep. 836]; *Meuly v. State*, 26 Tex. App. 274 [9 S. W. 563, 8 Am. St. Rep. 477]; *Mooney v. State*, 65 S. W. 927; *Earles v. State*, supra; *Ledbetter v. State*, 23 Tex.

App. 258 [5 S. W. 226]; *Peter v. State*, 23 Tex. App. 687 [5 S. W. 223]; *Goodman v. State*, 4 Tex. App. 352; *Johnson v. State*, 5 Tex. App. 47; *Ross v. State*, 10 Tex. App. 464 [38 Am. Rep. 643]; *Jones v. State*, 26 Tex. App. 12 [9 S. W. 53, 8 Am. St. Rep. 454]; *Mundine v. State*, 37 Tex. Cr. R. 15 [38 S. W. 619]; *Alford v. State*, 8 Tex. App. 566; *Hardin v. State*, 40 Tex. Cr. R. 220 [49 S. W. 607]; *Lynch v. State*, *supra*; *Cortez v. State*, 44 Tex. Cr. R. 182 [69 S. W. 536]; *Scott v. State*, 49 Tex. Cr. R. 389 [93 S. W. 112].” Again, in another subdivision under said section, he says: “Whether arrest was legal or not, the power to arrest may be exercised in such a wanton and menacing manner as to threaten the accused with loss of life or serious bodily injury. In such a case, though attempted arrest was lawful, the killing would be justifiable. *Jones v. State*, 26 Tex. App. 12 [9 S. W. 53, 8 Am. St. Rep. 454]; *Ex parte Sherwood*, 29 Tex. App. 336 [15 S. W. 812]; *Alford v. State*, 8 Tex. App. 568. Or, if attack was of a milder character, manslaughter would be presented from such character of arrest. *Vann v. State*, 45 Tex. Cr. R. 443 [77 S. W. 813, 108 Am. St. Rep. 961]; *James v. State*, 44 Tex. 314.”

The court in charging on manslaughter, after giving the proper and necessary definition thereof, strictly in accordance with the statute on the subject, and defining sudden passion as defined by the statute and adequate cause, as so defined, also charged: “You are further instructed that if an officer or other person attempts to seize or arrest an offender or supposed offender and uses more force than is necessary for such purpose, or uses unreasonable means to secure the arrest or detention of such offender, this would be deemed in law an adequate cause; and you are further instructed that any fact or circumstance, or set of facts or circumstances, such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render a man incapable of cool reflection, would be deemed in law adequate cause.” Then further told the jury that in order to reduce voluntary homicide to manslaughter it was necessary that adequate cause existed to produce the state of mind referred to sufficient to render it incapable of cool reflection, and also that such state of mind did actually exist at the time. Then further, properly following the statute, told them that it was their duty, in determining the adequacy of the provocation and the state of defendant's mind at the time, to consider all the facts and circumstances in evidence. Then correctly submitted to the jury whether or not appellant was guilty of manslaughter and required the jury to believe beyond a reasonable doubt everything that was necessary to do so and, if so, to find him guilty of manslaughter.

In charging on self-defense and defense of another, the court correctly laid down the

principles of law on that subject and, among other things, told the jury, in substance and effect, that a person had the right to seize personal property which had been stolen and take charge of the supposed offender when making off with such goods and take him before a magistrate for examination; and such person may use all reasonable means to so secure the seizure of the property and the detention of the supposed offender, but that no greater force was permitted than necessary for that purpose, and, if greater force than necessary was used by deceased in the attempted seizure of the property or arrest or detention of the parties, the same was illegal, and the defendant or any of said parties had the legal right to resist it and if necessary, or apparently necessary in their defense, to kill Bennett while engaged in such unlawful arrest, and that what he had a right to do for himself he had the right to do for his companions. Then submitted self-defense and defense of another on these lines and told the jury, if appellant shot the deceased under any such circumstances, to find him not guilty.

Doubtless the learned trial judge, in properly guarding appellant's rights, reasonably concluded that the whole evidence in the case raised and tended to raise the questions of manslaughter, self-defense, and defense of another in appellant's favor and, in order to guard all of his rights and that he might have the benefit thereof, submitted these questions to the jury for a finding. We think the court did right in submitting these questions, or at least that his doing so, under the circumstances and the law, presents no reversible error.

[15] The court also charged the law of principals. As we understand, appellant concedes that the charge abstractly is a correct one and does not contend that as an abstract question it is incorrect. But he does contend that to give the charge at all was inapplicable and hurtful in that it would make him liable for the act of one of his co-conspirators, which was not contemplated by him or intended by him. In other words, as an illustration, that it may have been his intention only to burglarize the car and steal the goods and not to kill any person or officer in the consummation thereof, and that one or the other of his associates went outside of and beyond that purpose and for some intent of their own, unknown and not participated in by him, intentionally killed the officer. It is unnecessary to enter into an extended discussion of this question. We think it altogether proper and pertinent that the court should have charged the general principles of the principals in this case. It was necessary to do so in order that the jury might thoroughly understand and comprehend the questions necessary for them to consider and decide. Appellant's contention cannot be maintained, because the court, in every instance where it submitted the kill-

ing of the deceased, expressly required the jury to find that appellant himself, and not any of his confederates, fired the shot and did the killing. The charge not only required this expressly as an affirmative fact but also distinctly and clearly told the jury that: "If you find and believe from the evidence that some party or parties shot and killed the deceased at the time and place charged in the indictment, but you have a reasonable doubt as to whether it was this defendant who did so, you will acquit him." Again: "Or if you believe from the evidence that Lena Tennison was present with parties other than this defendant and that the said Lena Tennison shot and killed the deceased, you will acquit the defendant; and, if you have a reasonable doubt as to whether or not this is true, you will give the benefit of such reasonable doubt to the defendant, and acquit him." And still again in submitting alibi he charged: "If the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time of the commission thereof, you will find him not guilty." So that in no contingency is the charge of the court on this subject erroneous as contended.

[16] The law, at the time this offense was committed and the case tried, by article 1141, P. C., was: "All murder committed by poison, starving, torture, or with express malice, or committed in the perpetration, or in the attempt at the perpetration, of arson, rape, robbery or burglary, is murder in the first degree." The court, in accordance with the evidence and this statute, in substance and effect defined to the jury burglary and theft in connection therewith and gave an appropriate charge that if appellant and his co-conspirators had the agreement or understanding that they would arm themselves with a pistol or other deadly weapon and shoot or kill any person or persons who opposed them in the execution of their said design to commit burglary and theft and carrying away of the property acquired thereby, and that these persons were present at the time the deceased attempted to arrest them and prevent their carrying away the stolen property, and appellant thereupon shot and killed the deceased unlawfully and with his express malice aforethought, his offense would be murder in the first degree. Appellant contends that this was inapplicable because the burglary and theft had been completed and that they were not engaged in the perpetration thereof at the time of the killing. In our opinion his contention is entirely too restrictive. The evidence in effect shows that the appellant and his co-conspirators entered into a conspiracy to do, and they were doing, everything that the

charge submitted on this subject, and that, while the car had been broken open and the goods thrown out, the appellant had not completed these offenses in contemplation of this statute, because they were still engaged in the same and were then and there, as a part of the acts themselves, attempting to take away the stolen goods. In other words, they were in such juxtaposition to the burglary and theft as that their acts at the time should and would be considered as in perpetration of the burglary and theft. We think no error is pointed out by appellant on this ground. No charge on circumstantial evidence was called for, and none should have been given.

The court gave a complete and admirable charge on the subject of an accomplice's testimony and in addition gave the only charge on the subject which was requested by appellant. Among other things he charged that said Wyatt was an accomplice, and correctly submitted to the jury for a finding whether or not Lena Tennison and John Hawkins were accomplices, and, if the jury found that these latter two were accomplices, gave a correct charge as to their corroboration and the corroboration of each of them, as well as of the said Wyatt. We are inclined to think that the evidence as a whole shows that Hawkins nor Tennison were not accomplices, but, if so, that not only they, but also said Wyatt, were amply and sufficiently corroborated under the law and the charge of the court. There were contradictions on some material points in the evidence. There was also impeaching testimony and supporting testimony as to some of the witnesses.

[17] The credibility of the witnesses and the weight to be given to their testimony was for the jury, not for this court. Most of the material facts were unquestionably established without much contradiction or, perhaps in some instances, none. If physical facts and human testimony are to be credited, then clearly the evidence in this case was sufficient to cause the jury to believe beyond a reasonable doubt that appellant not only entered into the conspiracy to rob the car, steal the goods and carry them off, and kill whoever attempted to prevent this, or arrest him, but that he only, and not either of his co-conspirators, with his malice aforethought shot and killed the deceased. The jury, who were wholly disinterested, impartial, and fair, have so found upon their solemn oaths. The learned trial judge, who heard all the testimony, by his action in overruling the motion for new trial has sanctioned the verdict of the jury and agrees with them in their finding.

There being no reversible error, this court has no other alternative than to affirm this judgment, which will be accordingly ordered.

## TREVINO v. STATE.

(Court of Criminal Appeals of Texas. Nov. 19, 1913.)

## 1. HOMICIDE (§ 309\*)—ADEQUATE CAUSE.

It was not error in a homicide case to refuse to submit in the charge on manslaughter the insulting language by decedent, which consisted in calling accused a son of a whore and disgraced.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

## 2. HOMICIDE (§ 301\*)—ISSUES—SELF-DEFENSE.

Where the only question of self-defense raised by the evidence in a homicide case was that accused was defending himself against apparent danger, in that he thought decedent had drawn a pistol, and also that he was defending another who was attacked by decedent, it was error to instruct that homicide was justifiable when committed in protecting another against other unlawful attacks besides one with intent to murder or inflict serious bodily injury, and in such case all other means must be first resorted to, to prevent injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 624, 633; Dec. Dig. § 301.\*]

## 3. HOMICIDE (§ 301\*)—SELF-DEFENSE—ISSUES.

Where there was evidence in a homicide case that accused did the cutting to defend another, who was then being attacked by decedent, the issue of the killing in defense of another should have been submitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 624, 633; Dec. Dig. § 301.\*]

## 4. HOMICIDE (§ 295\*)—MANSLAUGHTER—ADEQUATE CAUSE.

It was error to refuse a requested charge in a homicide case submitting the question of insulting conduct by decedent toward accused's mother; the evidence raising that issue.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.\*]

## 5. HOMICIDE (§ 286\*)—ISSUES—INTENT TO KILL.

Where the evidence showed that accused and decedent, who were strangers, met suddenly in the nighttime, and accused testified that he cut decedent only once with a pocket knife, which was not shown to have been a dangerous weapon, merely to defend himself and another against threatened attack, and without intent to kill, the court should have instructed that accused should be acquitted of homicide if he had no intent to kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.\*]

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

Alvino Trevino was convicted of killing by cutting with a knife, and he appeals. Reversed and remanded.

Chambers & Watson and Dwyer & Dwyer, all of San Antonio, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted for killing Brigido Gaudino by cutting him with a knife; his punishment being assessed at five years' confinement in the penitentiary.

The statement of facts, in substance, shows that appellant and Martinez lived near what is called the First Mission below the city of San Antonio. Martinez owned a buggy and

a mule. In the evening he hitched this mule to the buggy, and he and appellant drove into the city of San Antonio, to a wagon yard, took the mule from the buggy, leaving the harness on the mule, and hitched the animal. They went thence to a saloon and drank two or three schooners of beer. From that point they went to what they called a sporting house and danced with the girls. After dancing a while they concluded to return home, and went to the wagon yard to hitch their team. In the wagon yard somewhere this trouble occurred. The witnesses differ as to the place and circumstances. Some of the state's witnesses testified they heard a scuffling by some men behind a water tank and heard a lick. The parties scattered and went away. Martinez turned state's evidence, and his case was dismissed and his testimony used. After giving an account of where he lived, and the distance from the city, he narrates the fact that on the evening of October 12, 1912, he was with defendant, who went with him in his buggy to San Antonio. He was driving a mule. He went to the campyard of Fernandez on Matamoras and Santa Rosa streets, reaching there before dark. They unhitched the mule from the buggy, and tied it in the campyard, but did not take the harness off. They went to a sporting house and danced with the girls, staying there until about seven o'clock. There they met Vidal Aguilar who also danced with the girls; thence they went to a saloon directly in front of Fernandez's store. He says that the three, defendant, Aguilar and himself remained about 15 or 20 minutes in the saloon and had two or three rounds of beer, smoking cigarettes in the meantime. They left the saloon, went to the campyard, and hitched up the mule with a view of going home. The three left the saloon at the same time and in the following order: "I led the way; Vidal Aguilar was next, and Alvino Trevino, the defendant, was third. We entered Domingo Fernandez's campyard in this same order. It was dark at that time, and about 7:30 o'clock in the evening. I passed some one in the campyard, but do not know who it was, because I could not recognize him on account of the darkness. I went on to where the mule was, to hitch her up, and the defendant came up and said he had cut some one. Vidal Aguilar went on ahead of us out of the campyard, and the defendant and I hitching up the buggy, drove out of the campyard in a different direction to what we drove in, and went on towards home. After going a piece, we caught up with Vidal Aguilar, and he got in the buggy with us. We then drove slowly down South Flores street, until we reached the depot, where we were stopped by some police officers, who arrested us, and we were brought back to town, and placed in the city hall, all three of us. \* \* \* I saw the defendant strike the person I passed this way (illus-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



trating as one would thrust with a knife). It was after we had left the campyard and picked up Aguilar that the defendant said, 'I cut him.'" On cross-examination he says he made a trade with the state by which he was to be immuned from punishment on condition he testify. This witness contradicts the state's witness Dunbar about some matters that occurred, which we deem unnecessary to state. The defendant testified practically, as did the witness Martinez, as to their place of residence, going to the city, dancing with the girls, drinking beer and going to the wagon yard, and the order of their going. He then states: "On passing through the campyard I heard some one say, 'Are you Antonio Martinez?' and Antonio Martinez replied, 'No,' whereupon the party grabbed a hold of him and then began to scuffle, and I thought he was trying to rob Antonio Martinez, as he had his arms around him, and I rushed up to where he was, after having opened up my knife, to see what he was doing to my companion, Antonio Martinez. When I got there, which was in a few seconds, I put my hand on his shoulder and said, 'What do you mean?' and he turned and let go of Antonio Martinez and cursed me, in Spanish (which is omitted, but which, translated in English, he says, means), saying that 'I was the son of a whore and disgraced,' and at the same time he drew some dark object from his waist, which I took to be a pistol, and he then made towards me, when I cut him with my pocketknife to defend myself. The deceased then went one way and I went the other, and I went to the buggy and told Antonio Martinez I had cut this man. We then hitched up the mule and got in the buggy. Vidal Aguilar had gone on ahead. We drove out in another direction than which we came in, and went on towards home. This was about half past 7 o'clock at night. I did not know the deceased, and if I had it was too dark for me to recognize him. I do not remember ever having seen him before. I did not intend to kill him, but simply cut him in defense of myself, and to keep him, as I thought, from shooting or killing me, or doing me serious bodily harm. I could have cut him several times more if I had so desired, but when he retreated after having been cut by me, I went my way and he went his. I did not know that he had been badly cut, or how badly he was cut, until told afterwards when I was in jail." He describes the trip down South Flores street until arrested by the officers as did the witness Martinez. The evidence shows that deceased and defendant were both boys under 21 years of age, and but little difference in their ages.

The court gave a general charge on manslaughter, telling the jury they might look to all the facts and circumstances to determine the question of adequate cause and consequent passion in passing upon the case.

[1] Objection was urged that the court

should have submitted the insulting language used which applied to defendant as being the son of a whore and disgraced. Under case of Fitzpatrick v. State, 37 Tex. Cr. R. 20, 38 S. W. 806, the court was not in error.

[2, 3] In submitting the issue of self-defense, the court gave the usual charge in this respect. After giving this charge he further charged the jury as follows: "Homicide is justifiable in the protection of the person against any other unlawful and violent attack besides one with intent to murder, or to inflict serious bodily injury, and in such case all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." Exception was reserved to this phase of the charge, which exception is well taken. This issue was not in the case. Appellant's right of self-defense arose from his testimony under two views: First. That he was defending himself against apparent danger; that is, that the party whom he cut had drawn a weapon which he thought was a pistol. This presented the ordinary theory of self-defense, based upon apparent danger. The second view is under the defendant's testimony he was entitled to a charge which was not given, and for which exception was reserved, for the defense of Martinez, whom he swears he found attacked by the deceased, and whom he thought deceased was trying to rob. These two issues of self-defense were in the case, and the second phase of it should have been charged as contended by appellant. Therefore we hold, with respect to this phase of the case, that the court was in error in charging with reference to any other unlawful and violent attack besides the one with intent to murder or inflict serious bodily injury, requiring him to resort to all other means for the prevention of such injury, etc.; and, second, that the court should have charged the jury that he had a right to defend Martinez if he believed at the time Martinez's life was in danger or he was being robbed.

[4] In reference to the failure of the court to charge on insulting conduct towards the mother of defendant, appellant excepted to the failure of the court to so charge, and asked special requested instructions, which were refused by the court. This was not error.

[5] It will be remembered that defendant testified, in connection with the circumstances attending the difficulty, that he used his knife, not for the purpose of killing or with the intent to kill, but in defending himself against the threatened attack; that he only cut one time, and the parties separated. He further testified that he used a pocketknife. There is no evidence in the record as to the size of the pocketknife or its dangerous character, or that it was a deadly weapon. To meet this phase of the case appellant requested the court to submit to the jury a

charge which would instruct them to acquit him of homicide if they believed, under the circumstances, that he had no intent to kill. We believe under our statutes that, under the facts of this case, this charge should have been given. It is not shown to have been a deadly weapon, nor that the wound was inflicted in such manner as showed a cruel or evil disposition, and from any viewpoint of the testimony it was a sudden and unexpected meeting, a difficulty occurring between two boys who were strangers to each other and at night. If the defendant's testimony be true, he did not intend to kill deceased. This raised the issue in connection with the other facts. If some of the state's testimony is true—that is, that there was a difficulty or scuffle at the water tank not seen by them—then we have no facts otherwise than the mere fact of the struggle or scuffle, and the fact that a lick was struck. From that viewpoint we have no evidence as to the attendant circumstances. These witnesses did not see the difficulty, as it was behind a water tank, and knew nothing about it further than they heard a scuffle and lick struck. From any viewpoint of this case we are of opinion that a charge on intent to kill should have been given.

Application was made for a continuance, which was overruled. Without taking up the grounds of this phase of the record or discussing it, it will be disposed of with the statement that the witnesses may be obtained upon another trial.

There was a motion made to quash the special venire that is not discussed, as it may not occur upon another trial, and will hardly occur as it did upon this trial.

For the errors indicated the judgment is reversed, and the cause is remanded.

### STRICKLAND v. STATE.

(Court of Criminal Appeals of Texas. Nov. 5, 1913. Rehearing Denied Dec. 3, 1913.)

#### 1. CRIMINAL LAW (§ 448\*)—EVIDENCE—OPINION.

Testimony of one, after testifying in what direction, as shown by tracks, deceased's horse was traveling when near a tree, that this would put the left side of a man, riding, towards the tree was not objectionable as an opinion; it being a fact within his knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.\*]

#### 2. CRIMINAL LAW (§ 413\*)—EVIDENCE—SELF-SERVING DECLARATION.

Statement of defendant, a short time before the killing, to a third person that he had been told deceased had charged defendant and his sister-in-law with improper conduct is a self-serving declaration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.\*]

#### 3. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—REQUESTS—APPLICABILITY TO EVIDENCE.

Defendant's testimony showing that he had not armed himself and gone in search of deces-

ed for an explanation of his remarks about defendant and his sister-in-law, but that on his way to ask explanation from another he met deceased by accident, the giving of a requested charge that he had the right to seek deceased and demand an explanation of his remarks and, if he anticipated danger, to arm himself was not called for.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

#### 4. HOMICIDE (§ 300\*)—SELF-DEFENSE—INSTRUCTIONS—PROVOKING DIFFICULTY.

The court having given a full and unrestricted charge on the issue of self-defense, and not having limited the right of self-defense by instructing on the issue of provoking the difficulty, it was not necessary to give a requested charge that defendant had the right to seek deceased and demand an explanation of the remarks he had heard deceased had made in regard to him and his sister-in-law and, if he anticipated danger, to arm himself.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

#### 5. CRIMINAL LAW (§ 776\*)—INSTRUCTIONS—MATTERS IN ISSUE—REPUTATION.

Testimony of defendant that deceased had made some slighting remarks in regard to the virtue of D., and of T. that deceased had told him there were reports about the conduct of defendant and D. and had requested him to so inform defendant, with the denial by defendant that there was any ground for such reports, without any more by either side, does not put D.'s reputation in issue; it being necessary for this that there be some testimony that her reputation was either good or bad, so that there was no occasion for giving defendant's requested instructions that, as he put in issue, by his evidence, the reputation for virtue and chastity of D., the state had the right also to offer evidence on this issue in rebuttal of defendant's evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838-1845; Dec. Dig. § 776.\*]

#### 6. CRIMINAL LAW (§ 784\*)—CASE DEPENDING ON CIRCUMSTANTIAL EVIDENCE.

Though defendant was the only eyewitness and testified he shot deceased in self-defense, yet he by his testimony having admitted he did the killing, and others having testified that he admitted to them that he shot deceased, it was no longer a case depending solely on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

#### 7. CRIMINAL LAW (§ 1090\*)—APPEAL—REVIEW—NECESSITY OF BILL OF EXCEPTION.

Rulings on admissibility of evidence, complained of in motion for new trial, cannot be reviewed on appeal, in the absence of bills of exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

#### 8. CRIMINAL LAW (§ 1090\*)—APPEAL—REVIEW—NECESSITY OF BILLS OF EXCEPTION.

The matter of alleged remarks of the district attorney, complained of in the motion for new trial, cannot be reviewed on appeal; the fact of his making them not being verified by bills of exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

9. CRIMINAL LAW (§ 728\*)—AGREEMENT OF DISTRICT ATTORNEY—REQUESTING CHARGE.

That the district attorney argued to the jury that the letter of deceased to defendant's sister-in-law was not genuine but was fixed up by defendant, as to which letter defendant alone testified, though his sister-in-law was in court, was not reversible error; no special charge in regard thereto having been requested by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.\*]

Appeal from District Court, Houston County; John S. Prince, Judge.

Henry Strickland was convicted of manslaughter, and appeals. Affirmed.

J. V. Lea, of Houston, J. M. Hansbro, of Coldspring, and Adams & Young, of Crockett, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was indicted for murder, and, when tried, convicted of manslaughter, from which judgment he prosecutes this appeal.

[1] There are two bills of exceptions in the record in regard to the introduction of testimony, one to the action of the court in permitting the witness S. F. Fain to testify, after testifying in what direction the deceased's horse was traveling when near a certain pine tree, that this would put the left side of a man, riding, towards the pine tree. This, it is claimed, is an opinion of the witness, based on a hypothetical question. The witness saw the tracks on the ground and of course could tell as a fact the direction in which the horse was traveling, and it would also be a fact within his knowledge as to which side of a man would be towards a given object on the ground, if he was riding the horse. The body of deceased is shown to have fallen on the ground some 40 steps from where the horse turned near this tree, and, under the facts of this case, the court ruled correctly in admitting the testimony.

[2] The other bill relates to the exclusion of certain testimony. Appellant testified that Andrew Dawson had told him the day of the killing of certain derogatory remarks deceased made in regard to appellant and his sister-in-law, Miss Bertha Dawson, charging them with improper conduct. When his witness Berry Welch was on the stand, he desired to prove by Welch that he (appellant) had told Welch about the matter a short time before the killing. This would be but a self-serving declaration, made before the homicide, and the court correctly held that any testimony tending to show that appellant had been so informed would be admissible, but not what appellant said to some third person he had been told.

[3, 4] The appellant requested the court to instruct the jury that appellant had the right to seek deceased and demand an explanation of the remarks he had heard deceased had

made in regard to him and his sister-in-law, and, if he anticipated danger, he had the right to arm himself. In some cases, under the facts in those cases, it has been held that such a charge should be given. But not under evidence similar to that adduced on this trial. Appellant does not claim that he armed himself and went in search of deceased to ask for an explanation of the remarks deceased had made. His testimony is that he went to see Berry Welch about remarks he was informed Welch made, and, when Welch denied making such remarks, that, as he had been informed by his Uncle Charlie Williamson that Welch had made such remarks, he and Welch went to see his Uncle Charlie in regard to the matter. Welch and appellant both so testify, and appellant further testified: "I was not expecting to meet Pack (deceased) there at that time, and we were within a few steps of one another when I first seen him." In no syllable of appellant's testimony is there a suggestion that he was on his way to see Pack to demand an explanation of him, but his whole testimony is that he went to see Welch and demanded an explanation of him, and then was on his way to have Welch and his Uncle Charlie face each other about the remarks he had heard. So, under the testimony, this charge was not called for, and there was no error in refusing it. Appellant shows by his testimony, if true, that his meeting with deceased was purely accidental. However, if he had testified that he had gone to see deceased to demand an explanation, and the shooting occurred in consequence, the court did charge the jury: "The defendant had the right, under the evidence in this case, to arm himself with a pistol, if he thought himself in danger, when demanding an explanation of all persons that he believed had reflected on the character of his sister-in-law." In the case of Williford v. State, 36 Tex. Cr. R. 414, 37 S. W. 761, it was held by this court that it is only when the court limits the defendant's right of self-defense by instructing the jury on the issue of provoking the difficulty that it is necessary to give a charge of the character requested by appellant. In this case the court did not charge on provoking the difficulty but gave a full and unrestricted charge on the issue of self-defense, telling the jury: "Upon the law of self-defense you are instructed that if from the acts of the said Paschal Williamson, or from his words coupled with his acts, there was created in the mind of the defendant a reasonable apprehension that he (the defendant) was in danger of losing his life or of suffering serious bodily harm at the hands of said Paschal Williamson, then the defendant had the right to defend himself from such danger or apparent danger as it reasonably appeared to him at the time, viewed from his standpoint. And a party so unlawfully

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

attacked is not bound to retreat in order to avoid the necessity of killing his assailant. It is not necessary to the right of self-defense that the danger should in fact exist; if it reasonably appears from the circumstances of the case that danger exists, the person threatened with such apparent danger has the same right to defend against it and to the same extent that he would have were the danger real. And, to determine whether or not there was reason to believe that danger did exist, the appearances must be viewed from the standpoint of the person who acted upon them and from no other standpoint. Now, if you believe that the defendant shot and thereby killed Paschal Williamson as a means of defense, believing at the time he did so (if he did so) that he was in danger of losing his life or of serious bodily injury at the hands of said Paschal Williamson, then you will acquit the defendant." Having instructed the jury as he did in his main charge, there was no error in refusing this special charge.

[5] Again, as the reputation of Miss Bertha Dawson was not made an issue in the case, it was not necessary to give the special charge requested by appellant that, as "the defendant in this case put in issue by his evidence the reputation for virtue and chastity of Bertha Dawson, the state had the right also to offer evidence on this issue in rebuttal of defendant's evidence." The defendant offered no evidence that the reputation of Miss Bertha Dawson was good, and the state offered none that it was bad. The only way this came in the case was that appellant said deceased had made slighting remarks in regard to her virtue; that he heard that Welch had also made such remarks, which Welch denied; that his Uncle Charlie said Welch had so stated. Dr. Tinsley said that deceased had told him that there were reports out about the conduct of appellant and Miss Bertha and requested him to so inform appellant. Appellant denied that there were any grounds for such reports, and so far as this record discloses there no such grounds, but this was not putting her reputation in issue, until some testimony was offered that her reputation was either good or bad, and no such testimony was offered by either side; consequently there was no occasion to give the special charge requested.

[6] Appellant contends that as defendant testified he shot deceased in self-defense, and he being the only eyewitness, necessarily the state depended on circumstantial evidence to prove that the shooting was not done in defense of his person, such as that deceased was shot in the back, etc. This doubtless is true that the state depended wholly upon circumstantial evidence to prove that appellant was not justified in slaying the deceased, but when appellant took the stand and admitted he did the killing, and Mrs. Cornett

and others testified he admitted to them he had shot the deceased, it was no longer a case depending wholly upon circumstantial evidence, and such criticism of the charge is without merit. Branch's Crim. Law, § 203, and cases there cited.

[7] There are several grounds in the motion complaining of the admissibility of certain testimony; but as no bills of exception were reserved, at least none being in the record, these questions are not presented in a way we can review them.

[8, 9] There are several complaints in the motion for new trial in regard to the alleged remarks of the district attorney; but, as the fact that he made such remarks is not verified by a bill of exception, we are not authorized to review these matters. The only instance where a bill is reserved is the one that says, "The district attorney, in his closing argument, argued that the letter written by Paschal Williamson to Bertha Dawson was not genuine but was fixed up by defendant," to which argument defendant objected, because there was no testimony that the letter was not genuine. Perhaps this deduction was drawn by the district attorney from the fact that appellant alone testified in regard to the letter, and the person to whom it was addressed and who is alleged to have received it, although in attendance on court, was not placed on the stand to prove that she did receive such a letter. Anyway, as appellant requested no special charge in regard to this matter, it would not be such error as to call for a reversal of the case.

The judgment is affirmed.

#### Ex parte MARSHALL.

(Court of Criminal Appeals of Texas. Nov. 19, 1913.)

#### 1. JURY (§ 24\*)—TRIAL BY JURY—VERDICT—ASSESSMENT OF PUNISHMENT.

The constitutional provision entitling accused to trial by jury does not preclude the Legislature from providing that the jury shall only pass on the question of guilt or innocence and that the punishment shall be assessed by the court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 143; Dec. Dig. § 24.\*]

#### 2. CRIMINAL LAW (§ 1206\*)—INDETERMINATE SENTENCE LAW—VALIDITY—INDEFINITENESS.

Indeterminate sentence law (Acts 33d Leg. c. 132), providing that, instead of pronouncing a definite term of imprisonment after finding or verdict of guilty, the court trying the case shall pronounce an indeterminate sentence of imprisonment in the penitentiary for a term, stating in such sentence the minimum and maximum limits thereof, fixing as the minimum time for such imprisonment the time now or hereafter prescribed by law as the minimum time of imprisonment for the punishment of such offense, and as the maximum time the maximum time now or hereafter prescribed by law as a penalty for such offense. *Held*, that such act necessarily applied to offenses, the minimum punishment for which in many in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stances was a mere fine, and hence the act was void, within Pen. Code 1911, art. 6, providing that whenever it appears that a provision is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed or from some other written law of the state, it shall be regarded as wholly inoperative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206.\*]

Prendergast, P. J., dissenting in part.

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Habeas corpus on petition of Randell Marshall. Remanded.

Spearman Webb and Hamp P. Abney, both of Sherman, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. The statement of facts filed in this cause shows that relator was indicted by the grand jury of Grayson county on August 9, 1913, charged with a violation of article 597 of the Penal Code. A capias was issued by the clerk of the district court on the same day, and appellant was arrested and placed in jail. The validity of this indictment, or the law under which it is drawn, is not questioned in these proceedings. So it may be said that he was legally arrested and confined in jail under a valid indictment. Thereafter, on the 18th day of August, the case went to trial, and the jury returned the following verdict: "We, the jury, find the defendant guilty as charged in the indictment." No term of imprisonment or punishment being assessed or fixed by the jury. On the 13th day of September, 1913, the judge of the district court pronounced sentence on defendant and ordered him incarcerated in the penitentiary for a term not less than one nor more than three years. Relator contends that the verdict and sentence are null and void, and that the laws of this state require that the jury shall assess the punishment to be undergone as well as pass on his guilt or innocence. This brings in review chapter 132 of the acts of the Thirty-Third Legislature, known as the indeterminate sentence law. We will here say that we are passing on the act passed at the regular session of the Thirty-Third Legislature and not the one passed at the special session, and nothing we shall say shall be considered as passing or in any way affecting the validity of the act passed at the special session of the Legislature.

Article 770 of the Code of Criminal Procedure provides that the jury, in their verdict, must find that the defendant is either guilty or not guilty, and in addition thereto they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty. This is the law of this state, unless this provision of the Code, in so far as felony cases are concerned, was repealed by implication by the

provisions of chapter 132 of the regular session of the Thirty-Third Legislature. In this latter act, in section 1, it is provided that when a person is on trial for any felony, except such as are punishable by death, the jury trying said cause shall ascertain whether or not said person is guilty of the offense charged, and, if the death penalty is not assessed, they shall not assess the penalty, and the provisions relating to indeterminate sentences shall apply, and in pronouncing sentence on such person the trial judge shall sentence him to confinement in the penitentiary for a minimum and maximum period; the minimum period being the least number of years affixed by law as punishment for said offense, and the maximum period the maximum term fixed by law.

[1] It is manifest that relator was tried under the provisions of this law, and if the law is valid then the proceedings are regular; if the law, for any reason, is void, then relator has not had a legal trial and the proceedings had on the trial are void. The law is assailed on many grounds, but we do not deem it necessary to discuss all of them. One is that the Constitution of this state requires that the jury shall assess the punishment. In this view the writer does not concur and does not think the law void for this reason. The right of trial by jury was a right guaranteed to our English ancestors and brought with them to this country, and, when we were declared a free and independent people, the right was incorporated in our Constitution, and without a change in the Constitution this right cannot be taken away nor abridged by legislative act. But we do not think the fixing of the penalty by a jury is either implied or guaranteed by the Constitution. It was not so considered by our English ancestors, for, when the right to be tried by a jury was accorded to them, the jury was only called on and permitted to try only the guilt or innocence of the accused, and the judge assessed the penalty. This was so during our colonial days, and when this right to be tried by jury was placed in the federal Constitution in 1778, down to the present time, it has never been construed to embrace the right to have the jury assess the punishment. In our federal courts, operating under this Constitution, to this day, the jury passes simply on the guilt or innocence of the accused, and, if found guilty, the judge assesses the penalty, and this is the rule in many states of this Union, enjoying a Constitution worded, in this respect, the same as is our Constitution. Therefore we are of the opinion that our Constitution, in guaranteeing a trial by jury, does not embrace the right to have the jury assess the penalty as well as pass on the guilt or innocence of one accused of crime. But, if article 770 was not repealed by implication as to felony trials by the aforesaid indeterminate sentence law, the accused has a statutory right to have the penal-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—8

ty to be undergone fixed by the jury in their verdict, and this right courts cannot deny him.

[2] But there is a ground which we think renders the indeterminate sentence law (chapter 132) wholly void. Article 6 of the Penal Code provides: "Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the state, such penal law shall be regarded as wholly inoperative." This is an emphatic rule of construction provided by law for our government. As hereinbefore stated, section 1 of chapter 132 provides: "Instead of pronouncing upon said person a definite time of imprisonment for a fixed term, after such finding or verdict, the court trying said cause shall pronounce upon such person an indeterminate sentence of imprisonment in the penitentiary for a term, stating in such sentence the minimum and maximum limits thereof, fixing as the minimum time for such imprisonment the time now or hereafter prescribed by law as the minimum time of imprisonment for the punishment of such offense, and as the maximum time, the maximum time now or hereafter prescribed by law as a penalty for such offense."

When we turn to the Penal Code or written law of this state, we find that the punishment fixed for various felonies includes as the minimum penalty merely pecuniary fines and as the maximum penalty a term of years in the penitentiary. For instance: Article 1228 of the Penal Code provides that, if any person shall intentionally break and cut any telegraph and telephone line, he shall be punished by confinement in the penitentiary not less than two nor more than five years or by fine not less than \$100 nor more than \$2,000. Under the indeterminate sentence law, if a man should be found guilty of this offense by a jury, what punishment would the judge pronounce against him? The law says he shall affix as the minimum the minimum punishment fixed by law and as the maximum punishment the maximum fixed by law. So the sentence would be, if any pronounced, that the defendant be punished by a fine of not less than \$100 nor punished more than by confinement in the penitentiary for five years. Many laws of a similar nature might be cited, another being that, if any officer of a corporation shall consent to a contribution of money by the corporation for the purpose of aiding or defeating the election of any candidate for office, he shall be punished by a fine of not less than \$500 nor more than \$1,000, or by imprisonment in the penitentiary for not less than two years nor more than five years, or by both such fine and imprisonment.

After a jury had adjudged a person guilty of this offense, how could a trial judge apply the provisions of the indeterminate sentence

law; and, if he sentenced him to the minimum sum of a fine of \$500 and a maximum punishment of five years in the penitentiary, would the officers of the penitentiary know whether or not to convey such person to the penitentiary, and, if it should be held that he should be so consigned, when would he have served the minimum punishment fixed by law and be entitled to a parole under the provisions of section 2 of said act? If he paid the \$500 in cash without serving a day in jail or an hour in the penitentiary, could the Board of Pardons parole him? Taking all the provisions of our Penal Code, it certainly appears that the provisions of this indeterminate sentence law are so indefinite that no construction can be given to them that render an enforcement of that law possible. The language used in the indeterminate sentence law, when considered in connection with a large number of the penal laws of this state, is of such doubtful meaning that one cannot understand what punishment is to be meted out to persons found guilty of the offenses cited above and similar offenses. However, it is insisted that the indeterminate sentence law was not intended to apply to felonies of that class. We know of no rule of construction that would authorize us to so hold. The act by its terms applies to all felonies, and we cannot see how we would be authorized to hold that it is valid and applies to certain felonies but does not apply to the other felonies. If the indeterminate sentence law is valid, it certainly repeals the law requiring the jury to assess the penalty in felony cases; and if so there would be no law authorizing them to fix the punishment where the penalty might be imprisonment in the penitentiary or by fine only, and if imprisonment in the penitentiary is assessed, this shall be a fixed term of imprisonment, while in all other felonies an indeterminate sentence shall be assessed.

Other grounds are assigned why it is claimed the law is void, but we deem it unnecessary to discuss them, as we are of the opinion that it is so indefinitely framed, and of such doubtful construction, that it is impossible to ascertain its meaning, the law is inoperative, and chapter 132 of the acts of the Thirty-Third Legislature void; and, so holding it necessarily follows that article 770 of the Code of Criminal Procedure was not repealed in its application to felony convictions, and appellant was entitled to have the jury assess the punishment as well as pass on his guilt or innocence, and the judgment and sentence based on the verdict fixing no penalty are wholly void. Did we deem it necessary we would discuss the other grounds upon which it is claimed the law is void, but, as we have so held on this proposition, it would be a useless consumption of time.

However, appellant was arrested and incarcerated in jail on a valid indictment which is still pending against him, and he is re-

manded to the custody of the sheriff of Grayson county to be held by him to await legal trial under said indictment.

Relator remanded.

PRENDERGAST, P. J. I concur in that part of Judge HARPER'S opinion holding that the Legislature can by law provide that the jury can pass only on the guilt of an accused and not fix the punishment, and, when the jury by their verdict find an accused guilty, the judge alone can fix the punishment. I have found much difficulty in arriving at a conclusion on the other question; that is, whether the provisions of chapter 182, approved April 3, 1913, p. 262, are so indefinite as to render the whole act void. After giving the question much thought and investigation, I think the act is not void; that taking all its provisions and construing them together, which must be done, the Legislature did not intend to prohibit the jury from fixing the punishment of such felonies as provide for a fine only or, in the alternative, a fine or a term in the penitentiary, but that the intent of the Legislature was that, as to such offenses, the jury by their verdict should assess the punishment, and that the judge in that class of felonies should not alone fix the penalty. I do not care to discuss the question at all.

DAVIDSON, J. I concur in result reached by Judge HARPER that the law is void. It is unnecessary, as I view the matter decided, to express an opinion on other phases of the act.

#### COLLINS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 19, 1913. Rehearing Denied Dec. 10, 1913.)

CRIMINAL LAW (§ 1102\*)—APPEAL—STATEMENT OF FACTS—TIME OF FILING.

A statement of facts not filed in the county court until more than 20 days after adjournment will be stricken under the statute on motion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1102.\*]

Appeal from El Paso County Court; Albert S. Eylar, Judge.

Ira W. Collins was convicted of unlawfully practicing medicine without a license, and appeals. Affirmed.

Coldwell & Sweeney, of El Paso, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Upon proper complaint and information charging appellant with unlawfully practicing medicine without having and recording his license therefor, etc., appellant was convicted, and his punishment fixed at a fine of \$50 and one day in jail.

The Assistant Attorney General moves to strike out what purports to be a statement of facts in this case, because not filed in the court below until more than 20 days after the adjournment of court. Under the many and uniform decisions of this court and the statute, the motion is sustained, and said statement struck out. *Durham v. State*, 155 S. W. 222, and cases cited. In the absence of a statement of facts, no question is raised that we can consider.

The judgment is therefore affirmed.

#### Ex parte PRESTON.

(Court of Criminal Appeals of Texas. Nov. 19, 1913.)

1. OFFICERS (§ 110\*)—PEACE OFFICERS—DUTY.

It is the purpose of the law that peace officers especially shall do everything necessary to prevent, suppress, and punish crime.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 176-179, 182-184; Dec. Dig. § 110.\*]

2. STATES (§ 66\*)—"STATE OFFICER."

In a popular sense a "state officer" is one whose jurisdiction is co-extensive with the state, while in a more enlarged sense a "state officer" is one who receives his authority under the laws of the state.

[Ed. Note.—For other cases, see States, Cent. Dig. § 68; Dec. Dig. § 66.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6635-6638; vol. 8, p. 7804.]

3. MUNICIPAL CORPORATIONS (§ 180\*)—OFFICERS—POLICEMAN.

A policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of contract between himself and the city; the word applying equally to every member of the police force.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 449-457, 466, 482; Dec. Dig. § 180.\*]

4. FALSE PERSONATION (§ 2\*)—WHAT CONSTITUTES—EXECUTIVE OFFICER.

Code Cr. Proc. 1911, arts. 43, 44, respectively, declare that policemen of an incorporated municipality are peace officers, and that it shall be the duty of every peace officer to preserve peace, while Pen. Code 1911, arts. 506, 561, 611, require peace officers, including policemen, to aid in the enforcement of the law against disorderly houses, gambling, and the unlawful sale of intoxicants, and article 349, defining the term "officer," states that it includes any peace officer, marshal, or policeman of a city or town. *Held* that, while an executive officer is one whose duties are mainly to cause the laws to be executed, a policeman is an executive officer within the purview of Pen. Code 1911, art. 424, providing that any person who shall falsely assume or pretend to be a judicial or executive officer of the state shall be punished, for a policeman is a public officer of the state expressly charged by the statutes with enforcing a large body of the criminal law.

[Ed. Note.—For other cases, see False Personation, Cent. Dig. § 2; Dec. Dig. § 2.\*]

Appeal from Harris County Court at Law; C. C. Wren, Judge.

Application by Will Preston for a writ of habeas corpus. From a judgment remanding relator, he appeals. Affirmed.

R. H. Holland, of Houston, for appellant.  
C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** The sheriff of Harris county holds the relator in the county jail by virtue of a proper *capias*. He sued out an original habeas corpus before the county judge, contending that the complaint and information on which he was arrested and held charged no offense under the laws of Texas, and that he was entitled to his liberty. The county judge who granted the writ heard the case, and remanded the relator, from which he has appealed to this court.

The information against him alleges that on October 4, 1913, he did unlawfully, willfully, and fraudulently assume and pretend to be a police officer of the city of Houston, Harris county, Tex. Then gives the particulars thereof, and, further, that he was not such officer, as he then and there well knew.

This prosecution was had under article 424, P. C., which is: "Any person who shall falsely assume or pretend to be a judicial or executive officer of this state, or a justice of the peace, sheriff, deputy sheriff, constable or any other judicial or ministerial officer of any county in the state, and shall take upon himself to act as such, shall be punished by imprisonment in the county jail for a term not exceeding six months, or by fine not exceeding five hundred dollars."

Appellant contends that this statute does not include any city officer, but means only officers of the state and county, which are made so by our Constitution. This is the only question raised.

[1-4] Our statute (C. C. P. art. 43) expressly enacts that policemen of an incorporated town or city are peace officers.

Article 44 is: "It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall, in every case where he is authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime. He shall execute all lawful process issued to him by any magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or court and be brought to punishment."

Chapter 4, tit. 10, art. 496 et seq., P. C., makes the keeping of bawdyhouses, disorderly houses, and houses of assignation offenses, and prescribe punishment therefor.

Article 506 of that chapter requires all peace officers, naming them, including mayors, marshals, chiefs of police, and deputies and assistants, and policemen, of towns and cities to discover and report to the proper

legal authorities, and by all lawful means to aid in the enforcement of the law for violations of the articles of that chapter, and requires the district judges specially to charge grand juries thereabout, and makes it the duty of the grand juries at every term of the district court to call before them each and all of said officers, and examine them under oath touching their knowledge and information of violations thereof and as to their diligence in their enforcement. Articles 548 to 563 inclusive, P. C., denounce gaming and the keeping of premises therefor, etc.

Article 564 specially enacts: "Whenever it shall come to the knowledge of any \* \* \* police officer or other peace officer, by affidavit of a reputable citizen, or otherwise, that any of the provisions of this law are being violated, it shall be the duty of such officer to immediately avail himself of all lawful means to suppress such violation."

Article 611, P. C., makes it an offense to sell intoxicating liquors without license, and the succeeding articles make many other offenses regarding the unlawful sale, etc., of intoxicating liquors.

Then article 631 in the same chapter requires that any peace officer, having knowledge of the violation of this chapter, shall report the same to the county attorney, who shall forthwith prosecute any person or persons violating this law.

Chapter 4, tit. 8, art. 320 et seq., P. C., relating to offenses against public justice, and relating to the arrest and custody of prisoners, makes many acts in connection therewith offenses—some misdemeanors, others felonies.

Then article 349 defines an officer, and states that it means any peace officer, marshal, or policeman of a city or town.

Article 261, C. C. P., authorizes towns and cities to establish rules authorizing the arrest, without warrant, of persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten or are about to commit some offenses against the laws.

And, as said by this court in *Minter v. State*, 159 S. W. 292: "The whole theory and purpose of our laws are that the peace officers especially shall do everything and all things necessary or proper to prevent, suppress, and punish crime."

23 A. & E. Ency. of Law (2d Ed.) p. 327, says: "In a popular sense a state officer is one whose jurisdiction is coextensive with the state. In a more enlarged sense a state officer is one who receives his authority under the laws of the state, and performs some of the governmental functions of the state."

An executive officer is one whose duties are mainly to cause the laws to be executed. *Bouvier's Law Dictionary*; *Black's Law Dictionary*; 23 A. & E. Ency. of Law, p. 326. 28 Cyc. 497, says: "A policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of con-



tract between himself and the city." Again, 31 Cyc. 901, defining "policeman," says: "As a generic term, a word which may equally apply to any member of the police force, be his rank and station what it may." Throop on Public Officers, in section 10, says that a policeman and a police officer are public officers. Mechem on Public Officers holds that the police officers of a city are public officers, and says: "The power intrusted to the corporation in such cases is intrusted to it as one of the political divisions of the state, and it is conferred, not for the benefit of the municipality, but as a means of the exercise of the sovereign power for the benefit of all the citizens. The officers who exercise this power are not the agents or servants of the municipality, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions, nor for the acts or omissions of the subordinates appointed by them." 1 Dillon on Municipal Corporations (5th Ed.) § 390, discussing police officers and their power to make arrests, says: "The office of a police officer is not known to the common law; it is created by statute, and such an officer has and can exercise only such powers as he is authorized to do by the Legislature, expressly or derivatively. He is an officer of the state rather than of the municipality in which he exercises his office." In *Johnson v. Hanscom*, 90 Tex. 327, 38 S. W. 763, Chief Justice Gaines for our Supreme Court, in discussing the character of an officer of the city of Galveston, says: "While acting as justice of the peace, the recorder of the city is, to all intents and purposes, a justice of the peace, and, since the criminal jurisdiction of a justice's court extends only to prosecutions for violations of certain penal laws of the state, he is as to the functions of that office a state officer. Writs and processes issued by him are state writs and state processes, and hence they must run in the name of the state of Texas." In *City of Galveston v. Hemmis*, 72 Tex. 563, 11 S. W. 31, 13 Am. St. Rep. 828, our Supreme Court again says: "The statute of this state makes policemen of incorporated cities and towns public officers, that is, peace officers, and clothes them with the powers and duties of other peace officers." See, also, *Rusher v. City of Dallas*, 83 Tex. 153, 18 S. W. 333; *Harris County v. Stewart*, 91 Tex. 133, 41 S. W. 650. In *Sanner v. State*, 2 Tex. Cr. App. 458, this court held that the word "officer" in article 1022, P. C., making it an aggravated assault to commit an assault and battery upon an officer, included and meant a policeman of any city or town.

From these authorities we are clearly of the opinion that an "executive officer of this state," as used in said article 424, P. C., quoted above, includes any police officer or policeman in any city or town of this state, and

that by such description the Legislature did not intend to restrict such an executive officer to those specially enumerated as constituting the executive department of this state by section 1, article 4, of our Constitution, as contended by the relator. The language of this statute is significant. It is: "Any person who shall falsely assume or pretend to be a judicial or executive officer of this state"—not a judicial or executive state officer. We are further clearly of the opinion that the information in this case charged an offense against the laws of the state under said article 424, P. C., and that the county judge was correct in so holding, and remanding relator to the custody of the sheriff.

His judgment is therefore affirmed, and we again remand him to the custody of the sheriff.

#### McLAIN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

#### INTOXICATING LIQUORS (§ 146\*)—CRIMINAL OFFENSES—SALE—ACTS CONSTITUTING.

Where accused and two others contributed money to buy a bottle of whisky, and accused with the money so contributed purchased whisky, which he and the others then drank, there was no sale of whisky by accused.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.\*]

Appeal from Anderson County Court; W. I. Sims, Special Judge.

Marvin McLain was convicted of violating the local option law, and he appeals. Reversed and remanded.

Kay & Seagler, of Palestine, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant prosecutes this appeal from a conviction for violating the local option law. Two grounds are presented: First, the evidence is insufficient; second, the jury discussed appellant's failure to testify while considering the case. Taylor, the alleged purchaser, testified for the state that in November, 1912, he, defendant, and McDaniel were talking together in Franks-ton, Anderson county. McDaniel remarked that he wished he had some whisky, and asked the defendant if he knew where he could get it. Appellant answered he thought he could find some. Witness and McDaniel gave appellant \$1.25, the witness putting in 75 cents and McDaniel 50 cents, and he says: "I think the defendant gave 25 cents. I did not see him put up the money, but my best recollection is that he said he would throw in 25 cents, and that amount was all he had." He and McDaniel gave defendant the money. He went away, and in about 20 or 30 minutes returned with a quart of whisky, which they drank. On cross-examination he was asked the direct question: "Did you ever buy any

whisky from Marvin McLain? A. No; the only time I ever got any whisky from Marvin McLain was some time in November, 1912. We had been drinking whisky on that day, and we were all near Mr. McDaniel's picture gallery. Mr. McDaniel remarked that he wished he had some whisky and asked the defendant if he knew where he could get some. The defendant answered that he thought he did. Mr. McDaniel said he would go 50 cents, and I said I would go 75 cents; the defendant said he would go a quarter, and said he would try and find some. We handed him our part of the money, and he went off towards the depot and returned with a quart of whisky. Yes; I know the price of whisky in and around Frankston; it costs \$1.50 a quart. There had been a lot of negroes charged with bootlegging around there. I did not know whether they pleaded guilty or not." McDaniel testified the same as did Taylor, almost literally. John McLain testified he was appellant's brother, and was in Frankston the day appellant got whisky for Taylor and McDaniel. His brother came to him and asked him if he knew where he could get some whisky. He informed him, and they went to the depot, where witness had seen a negro some time before that hanging around the express office; when they reached the depot the negro was leaving, going north up the railroad track with a bundle or package. They followed, overtook, and bought from him a bottle of whisky; his brother paying \$1.50 for it. His brother then went back up town, etc.

This is the case, and we are of opinion appellant's contention is correct—that the state is not entitled to a conviction. These facts are uncontroverted, and in fact it is all the evidence there is in the record. They do not support a conviction. No witness testified appellant sold any whisky. All the evidence shows that he, Taylor, and McDaniel put up \$1.50, and appellant went and bought the whisky with it, and paid \$1.50 for it, and they drank it. It is unnecessary to cite authorities.

On the second proposition, discussion of appellant's failure to testify, we believe the judgment should be reversed; but it is unnecessary to discuss it.

The judgment is reversed, and the cause is remanded.

#### ARRISMAN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 19, 1913. Rehearing Denied Dec. 10, 1913.)

#### CRIMINAL LAW (§ 1102\*)—STATEMENT OF FACTS.

A purported statement of facts, not filed in the trial court until six months after adjournment, cannot be considered on a criminal appeal, and will be stricken.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1102.\*]

Appeal from District Court, Wichita County; P. A. Martin, Judge.

Will Arrisman was convicted of robbery, and appeals. Affirmed.

T. F. Hunter, of Wichita Falls, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of robbery, and his punishment fixed at the lowest prescribed by law. What purports to be a very short statement of facts in the case was not filed in the court below until six months after the adjournment of the court, and, of course, cannot be considered on this appeal, and is struck out on the motion of the Assistant Attorney General. There is nothing attempted to be raised by appellant which we can consider in the absence of a statement of facts.

The judgment will be affirmed.

#### HILL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 28, 1913.)

#### 1. HOMICIDE (§ 309\*)—ISSUES—NEGLIGENT HOMICIDE.

Where accused testified that he went to a house where his wife was, without intending to have a difficulty with her, but to induce her to go home with him, and as he was standing in the door some women got hold of his gun, and it was accidentally discharged in the scuffle, shooting his wife, the court should have instructed on negligent homicide in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

#### 2. CRIMINAL LAW (§ 518\*)—CONFESSIONS.

An alleged statement by accused, while he was under arrest and had not been warned, that he shot his wife because she would not go home with him was not admissible for the purpose of impeaching accused or otherwise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157-1162; Dec. Dig. § 518.\*]

#### 3. CRIMINAL LAW (§ 385\*)—ADMISSION OF EVIDENCE.

It is improper practice to permit incompetent and injurious evidence to go before the jury, and after it had been discussed to exclude or withdraw it on the court's own motion or at the suggestion of the prosecuting officer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 865-868, 870, 878; Dec. Dig. § 385.\*]

#### 4. HOMICIDE (§ 158\*)—ADMISSION OF EVIDENCE.

In a prosecution for killing accused's wife, claimed to have occurred while he was attempting to have her go home with him, evidence as to a quarrel between them earlier in the morning, other than that which was the basis of the homicide, was admissible to show the relation between the parties, and as throwing light on accused's visit to the house where the homicide occurred.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 5. HOMICIDE (§ 8\*)—WHAT LAW GOVERNS.

Pen. Code 1911, art. 15, provides that, when a penalty for an offense is prescribed by one law and altered by a subsequent law, the penalty of the second law shall not be inflicted for an offense committed before it took effect, and that the defendant shall be tried and punished under the law in force when the offense was committed, except that, when the second law ameliorates the punishment, defendant shall be punished thereunder, unless he elects to be punished under the former law, and article 18 provides that, if an offense be defined by one law, and its definition changed by a subsequent law, the modification shall not take effect as to an offense already committed. *Held*, that one who committed a homicide in April, before Acts 33d Leg. c. 116, abolishing the degrees of murder, became effective on July 1st, was entitled to be tried and sentenced under the former law, which recognized different degrees of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 13; Dec. Dig. § 8.\*]

Prendergast, P. J., dissenting in part.

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge.

Israel Hill was convicted of murder, and appeals. Reversed and remanded.

Scott & Caven, Hobart Key, and Geo. J. Ryan, all of Marshall, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of murder, and his punishment assessed at death.

He killed his wife. The witnesses differ widely as to the conditions and circumstances that environed the case and the homicide. The state's case is based upon the theory that appellant and his wife had a quarrel in the morning, in which he may have been the provoking cause; at least the state sought to place blame upon him. He went to work, and she went to a neighbor's. Without going into details, later during the morning, and before the noon hour, he appeared at the house of the family where his wife had gone. The state's theory of the immediate facts is, in substance, that he undertook to get his wife to go home; she agreed to go, but told him to go on, and she would come directly. He then told her if she did not go now she would not go. This was repeated a time or two. Appellant had his gun with him, and is shown to have bought cartridges that morning while at the store, to which place he went to secure bolts to fix a broken plow. It is shown also by the state that the women at the house where appellant went had closed the door against appellant, and he went to a window for the purpose of shooting his wife; that he left there, and went back to the door, and forced it open. One of the women pushed the gun to one side, and again closed the door. He again opened it, with his gun presented, and fired, striking his wife in the upper part of the hip, from which within about 60 hours she died. Appellant's theory is quite contrary to this. He states that he went by

the house where his wife was with no purpose of having any difficulty with her, and denies the language imputed to him by the state's witnesses. He said he was trying to induce his wife to go home, and had no purpose or intent of hurting her, and made no threats. In fact, his testimony excludes the idea that he intended to kill his wife. As he was standing in the door one or more of the women got hold of his gun, and in the scuffle it was in some way discharged, and the load of shot accidentally struck his wife. He denied being at the house for any sinister or mischievous purpose, while the women make it apparent he was there for that purpose, and intentionally killed his wife, or that such would be a fair deduction from the state's testimony.

[1] Appellant's contention is that he was entitled under this state of facts to a charge upon negligent homicide, first, that he had a right to visit the house at this point to see his wife, and, if he did no wrong, and was there for the purpose of asking or persuading her to go home with him, it would be negligent homicide of the first degree; second, that the issue of negligent homicide was raised in that, if he was doing things that were illegal and unlawful at the residence of these people, it would place him in the wrong legally, and therefore, if the gun went off accidentally, he would be guilty of no higher offense than negligent homicide of the second degree. He asked special charges submitting these issues to the jury, which were promptly refused by the court. We are of opinion that the evidence raised the issue of negligent homicide, and appellant's contentions are correct, especially with reference to negligent homicide in the second degree. If he was there disturbing the peace at a private residence, at which place he had no right to be for illegal purposes, and his gun was accidentally discharged in the scuffle, and he did not fire it for the purpose of killing his wife, there would be negligent homicide in the case, and this charge should have been given.

[2] The court permitted the state to prove, while appellant was under arrest and without being warned, he made this statement to the sheriff, that he shot his wife because she would not go home with him. Proper objections were urged, appellant was under arrest and unwarned, and therefore this statement was not admissible. The court admitted it upon the theory that a predicate had been laid for its introduction as impeachment, and therefore the state was entitled to thus impeach appellant. It will be stated further after it had been before the jury for some time the district attorney stated that after thinking the matter over the authorities held against him, and he asked the court to withdraw it from the jury, which the court did. That this testimony was inadmissible has been settled so long and so clearly by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the adjudicated cases it would seem at this late day unnecessary to even refer to them; but, as there seems to be a tendency to ignore the decisions of this court with reference to this matter, it is deemed advisable to again call attention to it, and cite the authorities, commencing with *Morales v. State*, 36 Tex. Cr. R. 234, 36 S. W. 435, 846; *Johnson v. State*, 43 Tex. Cr. R. 478, 66 S. W. 845; *Wright v. State*, 36 Tex. Cr. R. 433, 37 S. W. 732; *Rodriguez v. State*, 36 S. W. 439; *Bailey v. State*, 40 Tex. Cr. R. 153, 49 S. W. 102; *Walton v. State*, 41 Tex. Cr. R. 458, 55 S. W. 566; *Parker v. State*, 57 S. W. 668; *Johnson v. State*, 43 Tex. Cr. R. 476, 66 S. W. 846. These all refer to and reaffirm the rule laid down in *Morales v. State*, supra. In *Brown v. State*, 55 Tex. Cr. R. 583, 118 S. W. 139, it was held that in prosecutions for perjury it was reversible error to permit the state to introduce in evidence verbal confessions of the defendant made while under arrest to impeach him. See, also, *Hankins v. State*, 75 S. W. 787. These cases will be found collated in 5 *Rose's Notes*, p. 1108. There are other cases decided by the court since the collation of these cases; but these are all sufficient, it would seem, to show that this rule is settled, if the decisions of this court can settle anything. In *Clements v. State*, 153 S. W. 1137, this court held that it was erroneous for the state's attorney to ask a witness questions with reference to a conspiracy between the accused and other parties, when the officer asking the question knew that he could not prove the conspiracy. This opinion was by Judge Harper. If it was error under those circumstances, and the writer thinks Judge Harper's opinion is correct, then it ought to be unnecessary for prosecuting officers, in the face of this long line of decisions settling the law of Texas as they have settled it, to be informed of the fact, and it would be a presumption at least in his favor that he knew the law and decisions of the court upon which he must rely in the prosecution of criminal cases.

[3] We want to call attention again to another phase of this matter that has occurred with unnecessary frequency, that is, that injurious and illegal testimony will be permitted to go before the jury, and, after it has been investigated and discussed until the matter is thoroughly in the minds of the jury, the court will then either of its own volition or at the suggestion of prosecuting officers withdraw it. This practice has been condemned. If such testimony is inadmissible, it would take no reasoning to show that this would be a clear violation of the rules of right, justice, and law.

[4] There was a bill of exceptions reserved to the admission of testimony with reference to a quarrel that occurred between appellant and his wife earlier in the morning than that which is the basis of this homicide. It was seriously objected that this testimony

should not be admitted. The writer is inclined to believe it was admissible. It showed the relations between the parties, and may have tended to throw light on his visit to the house where the homicide occurred. We deem it unnecessary to go into that matter; but, as this record presents those questions, we are of opinion that it was admissible.

[5] This case was tried and the conviction resulted under the late act of the Thirty-Third Legislature, where the degrees of murder were abolished, and a general definition substituted. Acts 33d Leg. c. 116. Appellant generally objected to being tried under the new law; his case having arisen under the old law. The homicide occurred in the early part of April, before the late act went into operation on the 1st of July. The trial occurred after the 1st of July. The court gave a general definition of malice, also of express and implied malice, and then instructed the jury that, if appellant with malice aforethought killed the deceased, he would be guilty, and could be punished, but, if they found the killing was upon express malice, they could only convict him of murder in the first degree. Appellant excepted to all this, and asked a charge submitting murder in the second degree, which is unnecessary to repeat. The contention, without going into details, is that, appellant's case having arisen under the old law, he had the right to be tried under that law, and that the two degrees of murder should have been submitted to the jury, and also, incidentally to that, that the judgment should be reversed, because the jury failed to state the degree of murder for which they convicted appellant. If the first proposition is correct, the second would necessarily be correct. We are of opinion that appellant had the right to be tried under the old law by reason of the provisions of articles 15 and 18 of the Revised Penal Code.

Article 15 is as follows: "When the penalty for an offense is prescribed by one law, and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second shall have taken effect. In every such case the offender shall be tried under the law in force when the offense was committed, and if convicted, punished under that law; except that when by the provisions of the second law the punishment of the offense is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offense was committed."

Article 18 is as follows: "If an offense be defined by one law, and by a subsequent law the definition of the offense is changed, no such change or modification shall take effect as to offenses already committed; but all offenders against the first law shall be tried, and their guilt or innocence determined

in accordance with the provisions thereof."

It may be a question as to whether the punishment of the offense is ameliorated by the terms of the new law. Appellant insisted upon being tried under the old law, and under the terms of the statute he had a right to be tried under that law, and it might be, so far as this case is concerned, if murder in the second degree had been given as requested by appellant under the old law, the jury would have found him guilty of murder in the second degree, which would unquestionably have been a milder punishment than this, because they could not have inflicted the death penalty for murder in the second degree. Be that as it may, he demanded the right and submitted charges to the effect that he desired to be tried under the old law, under which the offense was committed. This he had a right to demand, and the court should have tried him under that law. This much is said so that upon another trial the court will try the case under the old and not the new law, if demanded by defendant.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

PRENDERGAST, P. J. I concur in the disposition of this case. I am inclined to believe no charge on negligent homicide should have been given; that submitting accidental killing was all that was required.

#### KEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 12, 1913. Rehearing Denied Dec. 10, 1913.)

##### 1. MAYHEM (§ 1\*)—OFFENSES—"MAIM."

Under the statute providing that to maim is to willfully and maliciously deprive of an ear, etc., the injury must be done willfully and maliciously, and, if it arises from a sudden attack without premeditated design, the offense is not maiming.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4275, 4276.]

##### 2. MAYHEM (§ 1\*)—MAIMING—EXTENT OF INJURY.

Where the statute prohibits an injury to a member, such as an ear, etc., which disfigures the person, the whole member need not be detached to constitute the offense, but a severance of only a small part, which does not disfigure the person and could only be discovered by close examination, is not an offense under the statute.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\*]

##### 3. MAYHEM (§ 1\*)—OFFENSES—"WILLFUL"—"MALICIOUS."

An act is "willful" within the statute providing that to "maim" is to willfully and maliciously deprive of a member, etc., if committed with an evil intent, with legal malice, and without reasonable ground for believing the act to be lawful or legal justification, and is "malicious" if committed in a state of mind showing a heart regardless of social duty and fatal-

ly bent on mischief; a wrongful act intentionally done without legal justification or excuse.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7468-7481, 7835, 7836; vol. 5, p. 4307; vol. 8, p. 7714.]

##### 4. MAYHEM (§ 1\*)—OFFENSES—MAIMING.

If a maiming occurred under the immediate influence of sudden passion aroused by adequate cause, such as an assault, the issue of simple assault by accused would not be in the case, though accused only intended to commit a simple assault; Pen. Code 1911, art. 50, providing that if one intending to commit a misdemeanor shall, through mistake, commit a felony he shall receive the lowest punishment for the offense committed.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\*]

Davidson, J., dissenting in part.

Appeal from District Court, Wichita County; P. A. Martin, Judge.

Jesse Key was convicted of maiming, and appeals. Affirmed.

T. F. Hunter, of Wichita Falls, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of maiming, and given two years in the penitentiary.

The evidence is indisputable that appellant bit off a small part of the outer edge or rim of the ear during a fight with the assaulted party, Ashley. Ashley did not testify. The state's witnesses show that a fight occurred between Ashley and appellant on the sidewalk or street in front of a pool room or billiard hall. The parties had played pool, and Ashley had raised a disturbance in the pool hall because he had lost the game. Being rather profane, Ashley was ordered out by the keeper of the hall. There is some conflict as to how the parties got out of the pool hall onto the sidewalk. It seems, however from the evidence that Ashley pulled defendant out. Anyway, after they got upon the street they engaged in a personal altercation. There is evidence that Ashley struck the defendant with a beer bottle and also cut his finger with a knife. These matters are not very important, however, except to show they were engaged in rather an animated personal encounter. When they "clinched," they fell upon the sidewalk, some of the evidence tending to show they had what they call a "dog fall"; but, in any event, appellant obtained the better of the fall and finally got on top of Ashley and was holding him to prevent being cut with a knife. This is his view of the case, and his testimony is to that effect. He says Ashley was biting his neck, and he concluded he would bite him in the same way Ashley was biting him, so he reached down and thought he was biting upon the neck. Ashley screamed rather vociferously. Some of the parties approached the contestants

and touched appellant upon the shoulder and told him to get off, which he did. This is shown by the state's witnesses, and also by the defendant's testimony. So it may be stated to be uncontroverted, when appellant got up, or at least when he turned Ashley loose, he spit out of his mouth what he says he discovered to be a part of Ashley's ear, and what the witnesses show to be a small portion of Ashley's ear. This is described as being the small portion of the outer rim of it, and all the witnesses say less than one-third in amount or size of the ear.

[1] Under our statutes, in order to constitute maiming, disfiguring, or the biting of the ear or the member mentioned in the indictment, it must be done willfully and maliciously. If it is not so shown by the evidence, then the offense of maiming is not made out. The statute thus reads: "To maim is to willfully and maliciously cut off or otherwise deprive a person of a hand, finger, toe, foot, leg, nose or ear, put out an eye, or in any way deprive a person of any other member of his body." Construing this statute, this court in *Bowers v. State*, 24 Tex. App. 542, 7 S. W. 247, 5 Am. St. Rep. 901, held that the two elements of willfulness and malice must combine. We are of opinion that, if appellant maliciously and willfully bit the assaulted party's ear so as to disfigure him, he would come within the definition of the statute. If he did not willfully and maliciously do so, although he may have bit the ear, then the offense is not complete, and the evidence would not sustain the conviction. It is also laid down in 26 Cyc. 1598, that under the statutory rule there must be a premeditated design, and, if the injury arises out of a sudden attack unconnected with any premeditated design against the person, the offense is not complete. Quite a number of authorities are cited in support of this in footnote 26 found in the above authority. This rule is in conformity with our statute and seems to lay down the correct rule.

[2] It also seems to be a correct rule that, where the inhibition is directed against an injury which disfigures, it is not necessary that the whole member should be mutilated or detached if the injury only impairs comeliness. The authorities also lay down the proposition that the cutting or biting off a small portion of the member which does not disfigure the person, and could only be discovered by close inspection or examination, when attention is directed to it, will not constitute maiming under the statute. This is the rule laid down in the case of *State v. Abram*, 10 Ala. 928.

This much is said to meet the questions suggested in the motion for a new trial and urged as error here, to wit, the failure of the court to charge upon simple assault. The court charged upon maiming and self-defense. The trouble between the parties

come up in sort of an accidental way growing out of the alleged injured party's conduct and becoming angry and provoking the difficulty because he had lost a game or two of pool. The fight was an ordinary sudden one, and the testimony indicates it was brought about by Ashley and not the defendant. His testimony clearly raised the issue that it was not willfully and maliciously done for the purpose of disfiguring or maiming, but it grew out of the fact that Ashley was biting him and was an incident and sudden impulse occurring during the fight while they were on the ground. The court fully charged all the issues favorable to the state, and the jury, believing the state's side of it, gave the minimum punishment in the penitentiary. If the court had charged upon simple assault, the jury may have been more lenient in their verdict and may have agreed with defendant's view of it. Unless the testimony of willfulness and maliciousness incident to the alleged maiming or disfiguring excludes other theories and is so convincing that no other conclusion could have been reached, then appellant would be in error, and the court would not be required to charge on simple assault or on any minor grade of the offense. We think this rule is laid down by Chief Justice Roberts in *Slattery v. State*, 41 Tex. 619, but in order to show no error in this respect the evidence must be sufficiently cogent to overcome any idea except willfulness and malice. The issue was raised that it was not maliciously and willfully done (that is, that it was not done by premeditation and deliberation, etc.), and we are of opinion, therefore, the court should have charged on the issue of simple assault. The statute (article 772, Revised Code of Criminal Procedure), in stating offenses consisting of degrees, under the third heading, uses this language: "Maiming, which includes disfiguring, wounding, aggravated assault and battery, and simple assault and battery." Under this clause of the statute we are of opinion that the court should have submitted the issue of simple assault and battery. All the evidence shows the disfiguring was slight, and if it was done without malice and willfulness, and there being no serious bodily injury or circumstance to make it aggravated assault, then the issue of simple assault would be in the case. We are therefore of the opinion that appellant's attack upon the court's charge in this respect should be sustained.

The judgment ought to be reversed, and the cause is remanded.

After I wrote the above my Brethren wrote the affirmance. I have seen no reason to change my views but do not care to write further.

HARPER, J. I agree to all the above opinion, except that portion wherein it is held that the case should be reversed be-

cause the court failed to submit the issue of simple assault. I do not think the evidence would raise that issue, taking it as stated by Judge DAVIDSON. He says, "Appellant's testimony clearly raised the issue that the act of maiming was not willfully and maliciously done, but it grew out of a sudden impulse occurring during the fight;" and because of this state of facts the court should have charged on simple assault. The fact that appellant bit off a portion of Ashley's ear is not questioned; that appellant is the person who thus maimed Ashley is not denied, nor is the fact that Ashley was maimed questioned; then, if the act was willfully and maliciously done, appellant would be guilty of maiming, as defined in our statute, is conceded in the above opinion. The question is: If the act was not done willfully and maliciously, of what offense would appellant be guilty?

[3] The words "willful" and "malicious" are thus defined under our decisions: "A 'willful' act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. A 'malicious' act is one committed in a state of mind which shows a heart regardless of social duty and fatally bent on mischief; a wrongful act intentionally done without legal justification or excuse." *Bowers v. State*, 24 Tex. App. 549, 7 S. W. 247, 5 Am. St. Rep. 901. It is thus seen that the words "willful" and "malicious" have the same legal meaning in this character of case as do the words "malice aforethought" in a murder case. *White's Ann. P. C.* § 1225, and cases cited.

[4] Following these cases, if the maiming took place under the immediate influence of sudden passion aroused by an adequate cause, the issue of aggravated assault might be presented by the evidence, and the court submitted that issue in a way not complained of by appellant; but in such case the issue of simple assault could not arise. Our Penal Code provides: "If one intending to commit a misdemeanor and, in the act of preparation for or executing the same, shall, through mistake, commit an offense which in law is a felony, he shall receive the lowest punishment affixed by law to the offense actually committed." *Pen. Code* 1911, art. 50.

So in this case, if appellant, by the testimony introduced by him, raised the issue that he intended only to commit a simple assault, yet the facts showing conclusively and beyond dispute that he committed the act of maiming in attempting to execute the assault, the law says, as recited in article 50 of the Penal Code, he shall be guilty of the offense actually committed, to wit, maiming, providing that he shall receive the lowest punishment for that offense. That is the only amelioration given under our laws,

and, as appellant received the lowest penalty affixed by law for maiming, we therefore do not agree that the court erred in refusing to submit the issue of simple assault, but think he ruled correctly in the premises; and, as this is the only ground upon which Judge DAVIDSON thinks the case should be reversed, we think the case should be affirmed, and it is so ordered.

PRENDERGAST, P. J., concurs in Judge HARPER'S opinion.

#### Ex parte SINGLETON.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

HABEAS CORPUS (§ 20\*)—NATURE OF PROCEEDING—INCARCERATION—LUNATIC.

A lunacy proceeding is civil, and not quasi criminal, and hence a person found to be insane is not entitled to a writ of habeas corpus to determine the constitutionality of the statute under which the proceedings were instituted.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 18; Dec. Dig. § 20.\*]

Application by James Singleton for writ of habeas corpus. Denied.

Heldingsfelders and A. R. Railey, all of Houston, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. This is an original application to this court to grant a writ of habeas corpus, alleging that the applicant is restrained of his liberty by the sheriff of Harris county on his being found a lunatic under chapter 163, p. 341, of the Acts of the Regular Session of the Thirty-Third Legislature, relating to judicial proceedings in cases of lunacy. This act of the Legislature amends articles 150 to 165, inclusive, of the Revised Civil Statutes of the state in probate matters, pertaining to lunacy cases. The object of this writ is to have this court pass upon whether or not the said act is constitutional, wherein it provides that, instead of an alleged lunatic being tried by a jury, he shall be tried by a commission of physicians.

Our Supreme Court, in *Legate v. Legate*, 87 Tex. 251, 28 S. W. 282, in discussing what is a criminal and what a civil case, so far as the writ of habeas corpus is concerned, said: "If in this proceeding it appears that such person is restrained by reason of his supposed violation of some criminal law or quasi criminal law, as an offense against the person or contempt of court, then the proceeding must be classed as a criminal case, although upon the whole case the court should be of opinion that the act for which such person is detained does not constitute a violation of such law, or that the evidence is totally insufficient to establish the act, or that the supposed law does not exist or is void; but, if such person is not restrained by rea-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

son of some supposed violation of law, then the proceeding must be classed as a civil case. It is the *cause* of restraint which determines whether the proceeding to *remove* the restraint be a criminal or civil case."

In our opinion the applicant in this case is in no way restrained of his liberty by reason of any supposed violation of any criminal or quasi criminal law, but wholly and solely in a probate civil proceeding. Hence this court has no jurisdiction to issue the writ of habeas corpus. His remedy is solely, as we see it, in the civil courts. *Ex parte Calvin*, 40 Tex. Cr. R. 84, 48 S. W. 518; *Ex parte Reed*, 34 Tex. Cr. R. 9, 28 S. W. 689; *Ex parte Berry*, 34 Tex. Cr. R. 36, 28 S. W. 800; *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281.

We deem it unnecessary to discuss the question.

Entertaining this view of the question, any opinion by us as to the constitutionality of the said act of the Legislature would be obiter dictum; still it may not be amiss to say that, in view of the following authorities, which are in point, to wit: *Black Hawk v. Springer*, 58 Iowa, 417, 10 N. W. 791; *Chavannes v. Priestly*, 80 Iowa, 316, 45 N. W. 766, 9 L. R. A. 193; *State v. Linderholm*, 84 Kan. 603, 114 Pac. 857; *In re Bresee*, 82 Iowa, 573, 48 N. W. 991; *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; and *In re Walker*, 57 App. Div. 1, 67 N. Y. Supp. 647—if we could properly decide the question, we might hold the act constitutional.

The writ is denied, and the application, therefore, is dismissed.

DAVIDSON, J. I do not express any opinion on the constitutionality of the act. I have not examined the question sufficiently to have formed a definite conclusion. Inasmuch as it is held this court is without jurisdiction, I have not examined that phase of the law.

#### BRACHER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1913. On Motion for Rehearing, Dec. 10, 1913.)

1. CRIMINAL LAW (§ 1099\*)—STATEMENT OF FACTS—SUBMISSION TO TRIAL JUDGE—TIME. Acts 32d Leg. c. 119, § 7, provides that a statement of facts in a felony case may be filed, at any time before the time for filing the transcript in the appellate court expires, which, in counties where the term of court exceeds eight weeks, is 90 days after sentence. *Held*, that where, in such a county, accused was sentenced on February 24th and a statement of facts was not presented to the trial judge until August 30th following, it was too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.\*]

2. CRIMINAL LAW (§ 949\*)—NEW TRIAL—AMENDED MOTION.

An amended motion for a new trial could not be filed without leave of court after the

denial of the original motion; defendant's remedy being by an application to the court to set aside the order overruling the original motion and to grant the motion as amended.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2337, 2339-2344; Dec. Dig. § 949.\*]

#### On Motion for Rehearing.

3. CRIMINAL LAW (§ 1099\*)—STATEMENT OF FACTS—FAILURE TO OBTAIN—NEGLIGENCE OF ATTORNEY.

Where accused employed his own attorney to defend him, the negligence of such attorney in failing to present a statement of facts to the judge for approval in time will be imputed to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.\*]

4. ROBBERY (§ 24\*)—ALIBI—EVIDENCE.

In a prosecution for robbery, evidence held to justify a conviction, notwithstanding defendant's evidence of alibi.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. § 24.\*]

5. CRIMINAL LAW (§ 958\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MOTION—REQUISITES—AFFIDAVIT.

An application for a new trial for newly discovered evidence must be supported by affidavit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2396-2403; Dec. Dig. § 958.\*]

6. ROBBERY (§ 20\*)—INDICTMENT—VARIANCE.

Where an indictment for robbery alleged that C. was robbed of \$10, a fact that the proof showed that he was robbed of \$14 was not a variance.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 27; Dec. Dig. § 20.\*]

7. ROBBERY (§ 17\*)—INDICTMENT—MONEY STOLEN—CHARACTER.

In a prosecution for robbery, it is not necessary that the indictment allege the denomination and kind of money stolen from prosecutor.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 16-23, 26; Dec. Dig. § 17.\*]

8. CRIMINAL LAW (§ 1053\*)—APPEAL—JURY—NECESSITY OF EXCEPTION.

In the absence of an exception reserved to the formation and organization of the jury, an objection that it was composed wholly of "talesmen" is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2661, 2665; Dec. Dig. § 1053.\*]

Appeal from District Court, Wichita County; P. A. Martin, Judge.

J. E. Bracher was convicted of robbery, and he appeals. Affirmed.

T. F. Hunter, of Wichita Falls, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of robbery, and his punishment assessed at five years' confinement in the state penitentiary.

[1] There are no bills of exceptions contained in the record. There is a purported statement of facts, but the judge trying the cause certifies that same was not presented to him



until August 30, 1913. This case was tried January 25, 1913, and sentence pronounced on February 24, 1913. The official stenographer's act provides that time may be extended in which to file statements of facts and bills of exceptions, and further provides that a statement of facts in a felony case may be filed, whether time is granted by the trial judge or not, at any time before the time of filing of the transcript in the appellate court expires. We have frequently had occasion to call attention to the fact that the time for filing transcripts in the appellate court expires in 90 days from the adjournment of the term of court, or, if the term extends more than 8 weeks, within 90 days from date of sentence. Section 7 of chapter 119, Acts of 32d Legislature; articles 929, 930, 931, and 934 of Code of Criminal Procedure; rule 2 of the Court of Civil Appeals, 142 S. W. x, and rule 1, p. xvii; Constitution, § 25, art. 5.

[2] There is another matter disclosed by this record we would call attention to. The motion for a new trial was filed on January 27 and overruled on February 22, 1913. After said motion for new trial was overruled, appellant, without leave of the court, undertakes to file, two days after the motion for new trial had been overruled, an amended motion for a new trial, which the record does not disclose was ever called to the attention of this court. Under such circumstances, this court would not be authorized to consider the amended motion for new trial. If, after the motion for new trial has been overruled by the trial court, an appellant desires to file an amended motion for new trial, he should file a motion asking the trial court to set aside the order overruling the motion for new trial and grant him a new trial, and the record should disclose by an order duly entered that such action was taken, and that the trial court then ruled on the amended motion.

There being no statement of facts we can consider, no matter is presented we can review.

The judgment is affirmed.

#### On Motion for Rehearing.

[3] The motion for rehearing in this case undertakes to lay the blame for failure to secure a statement of facts on appellant's counsel. Appellant employed his own attorney, and if this attorney was negligent this will be attributed to him. The term of court at which appellant was tried lasted more than eight weeks. The appellant was sentenced February 24, 1913. The statement of facts was not presented to the judge until August 30, 1913. It was through no fault of the prosecuting officers nor the district judge that this delay occurred; consequently, nothing stated in the affidavit of appellant filed would entitle him to have the statement of facts considered.

[4] But if we did consider it, the witnesses for the state positively identify appellant as one of those who robbed A. B. Clayton. Mr. Clayton positively swears he is one of the two men. While appellant undertakes to prove an alibi by J. B. Ivie and his daughter, yet everything they say could be true and yet he be the person who robbed Clayton. She says that she left home about 7:15 to go to town, and as she looked back she saw appellant and Arisman (the man who is said to have aided in the robbery) coming along after her. Clayton says he is not positive about the time he met appellant, but it was about 7:15, and that he was robbed at about 7:30. There is no such discrepancy in the time and place of the robbery fixed as to render the testimony irreconcilable, and the court submitted the issue of alibi in the language frequently approved by this court. *Hines v. State*, 40 Tex. Cr. R. 26, 48 S. W. 171; *Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122; *Harris v. State*, 31 Tex. Cr. R. 416, 20 S. W. 916; *Stevens v. State*, 42 Tex. Cr. R. 175, 59 S. W. 545.

[5] The alleged newly discovered evidence is supported by the affidavit of no person, and no reason stated why such affidavit is not attached, and this under such circumstances, presents no error. *Love v. State*, 3 Tex. App. 501; *Cotton v. State*, 4 Tex. 260; *Evans v. State*, 6 Tex. App. 513.

[6] If there was any variance in the "proof and the allegations contained in the indictment," no exception was reserved to the introduction of the testimony. But no such variance occurs. The indictment alleges that Mr. Clayton was robbed of \$10. Proof that he was robbed of more than \$10—\$14—would be no variance.

[7] Neither was it necessary for the indictment to allege denomination and kind of money.

[8] If the jury was composed wholly of "talesmen" as alleged in the motion for a new trial, in the absence of any exception being reserved to the formation and organization of the jury, such fact would present no ground for reversal of the case. So, if we considered the statement of facts and every ground stated in appellant's amended motion for a new trial, no error would be presented.

Motion for rehearing overruled.

#### HARRIS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

#### 1. CRIMINAL LAW (§ 444\*)—EVIDENCE—RECORDS AND CERTIFIED COPIES—PRODUCTION AND AUTHENTICATION.

In a prosecution for bigamy, a license to defendant to marry the alleged former wife was not admissible unless proven to be the original license issued by the proper officer, or unless a certified copy of it was filed with the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

papers at least three days before the trial and notice of such filing was given to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 444.\*]

## 2. CRIMINAL LAW (§ 400\*)—DOCUMENTARY EVIDENCE—PAROL EVIDENCE OF CONTENTS.

Where a marriage license offered by the state was not admissible in a prosecution for bigamy, the state could not prove its contents by oral testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.\*]

## 3. CRIMINAL LAW (§ 1171\*)—TRIAL—REMARKS OF PROSECUTING ATTORNEY.

In a prosecution for bigamy, where the court excluded letters claimed to have been written by defendant to the alleged former wife, who had delivered them to the district attorney, a statement by the district attorney to the jury that if he had been allowed to introduce them in evidence he would have shown defendant's guilt was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8126, 8127; Dec. Dig. § 1171.\*]

## 4. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for bigamy, where there was no positive identification of defendant as the one who had married the first alleged wife, but the state's evidence thereon was only circumstantial, it was error to refuse a charge on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

## 5. WITNESSES (§ 193\*)—COMPETENCY—WIFE'S LETTERS—ADMISSIBILITY AGAINST HUSBAND.

In a prosecution for bigamy, where the mother of the first alleged wife can identify the handwriting of defendant and, without the connivance of such wife, saw letters to her from him, she might identify them as his, but she could not so testify as to letters which the wife had received and had sent to the district attorney, who was in possession of them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 740, 741; Dec. Dig. § 193.\*]

## 6. CRIMINAL LAW (§ 400\*)—BEST AND SECONDARY EVIDENCE—LOST WRITINGS.

In such case she could not testify as to the contents of the letters unless it was further shown that they had been lost or destroyed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. § 400.\*]

## 7. BIGAMY (§ 8\*)—EVIDENCE—BIRTH OF CHILD.

In a prosecution for bigamy, the fact that a child was born to the first alleged wife was inadmissible, as it would have no tendency to show that defendant was the person who, under another name, had married her at a certain place.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 41-49; Dec. Dig. § 8.\*]

## 8. WITNESSES (§ 268\*)—CROSS-EXAMINATION—SCOPE.

In a prosecution for bigamy, where letters from defendant to the first alleged wife were not introduced, but where her mother was permitted to testify that she had received them, defendant had the right to cross-examine her as to how she knew the letters were written by him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

## 9. JURY (§ 99\*)—COMPETENCY—BIAS.

A juror in a trial for bigamy, who, before the trial, had said that in such case he would convict the defendant, was incompetent by reason of his fixed and expressed opinion of defendant's guilt.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 438-443, 445-448; Dec. Dig. § 99.\*]

Appeal from District Court, Cherokee County; Lee D. Guinn, Judge.

Harry M. Harris, alias John M. Harris, was convicted of bigamy, and he appeals. Reversed and remanded.

J. E. Rose, of Palestine, for appellant.  
C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of bigamy, and his punishment assessed at four years' confinement in the state penitentiary.

The testimony of A. M. Duke, a justice of the peace in Cherokee county, shows that appellant, under the name of Harry M. Harris, was married to Miss Venia Chaney at Jacksonville on the 16th day of July, 1912, and this fact is clearly established by the record and is not questioned by the testimony offered in behalf of appellant. To prove that appellant was guilty of the crime of bigamy, the state undertook to prove that appellant had married Miss Alice Ellison, under the name of John M. Harris in San Antonio, prior to his marriage to Miss Chaney in December, 1911.

Anton Adams was called, and he testified he was clerk in the justice court in San Antonio and that Mr. Fisk, was justice of the peace; that the paper shown him by state's counsel was a marriage license issued by Frank R. Newton, county clerk of Bexar county, dated December 15, 1911, and that it authorized the marriage of John M. Harris to Alice Ellison, and that the marriage ceremony was performed by the justice of the peace, and he (Adams) signed the license as a witness to the marriage. He then testified: "I don't know this defendant, and if he is the man down there with these license will say that I don't remember the gentleman. I don't remember of ever knowing this gentleman. I don't know whether he is the man to whom those license was issued. I don't know whether he was in San Antonio that day or not."

No other testimony was offered to prove that appellant was the man to whom the marriage license was issued and the person who was married to Miss Ellison by Justice Fisk on that day other than some remote circumstances. The court in approving the bill, states that the marriage license was not permitted to be introduced in evidence, but this statement, we think, only aggravates the error here complained of. Certainly if the marriage license was not proven up in a way to render it admissible in evidence, then a witness would not be permitted to

take it and state that it was a marriage license and read or state its contents to the jury, as Mr. Adams was permitted to do in this case. If he had sworn that he knew the signature of the county clerk, who issued the license, and that the signature of the clerk to the license was the genuine signature of the clerk, and that it was the original license issued, a different question would be presented, for then the license would have been admissible in evidence. But there is no evidence that the signature of Frank R. Newton, county clerk, was the genuine signature of Mr. Newton, nor that this was the original license. Mr. Adams was not questioned in regard to these matters, and he positively refuses to identify appellant as the man he saw in possession of the license. County Clerk Newton was not called as a witness.

[1] If the issuance and execution of the license had been proven up properly, then the license would have been admissible in evidence, without filing with the papers or giving any notice; but, if the state expected to use this license and the return thereon to show a legal marriage to Miss Ellison, it ought either have proven it was the original license issued, and its issuance by the proper officer, or, if it could not do that, then a certified copy of the license ought to have been filed with the papers at least three days before the trial and notice given to appellant of its filing.

[2] One of the other of the two things should have been done to render the license admissible in evidence; and neither of these having been done, the state could not prove its contents by a witness sitting before a jury and testifying as to its contents. If the license was not admissible in evidence, then oral proof of its contents was not admissible. *Burton v. State*, 51 Tex. Cr. R. 196, 101 S. W. 226, and cases there cited.

[3] Another matter that presents material error is that, while Mrs. Ellen Ellison, the stepmother of Miss Alice, was testifying, she identified two letters as letters written by appellant to his alleged wife, Miss Alice. The court excluded them on the ground that they were written by appellant to the person whom the state contended was his bona fide wife, and the establishing of which fact it was necessary for the state to do to secure a conviction, and letters written by a man to his wife are not admissible. The record further discloses that the alleged wife had delivered these letters to the district attorney. After the court had properly excluded these letters, the district attorney in his address to the jury said: "We offered two letters from Mr. Harris to his wife, Alice Ellison, in evidence, but the court sustained defendant's objection to their admission, and if we had been allowed to introduce these letters in evidence we would have shown his guilt." We do not

understand upon what rule of law the district attorney thought he had the right to comment on evidence excluded by the court and especially to tell them that such evidence excluded showed appellant's guilt. This was prejudicial error of the highest character, and such error, if the court had instructed the jury not to consider it (which he did not do), would still present error. Other remarks of the district attorney are complained of, but this ruling is enough to show that he must keep himself within the record. It is further shown by the record that a portion of the jury, at least, after their retirement, discussed the fact that appellant had objected to the introduction of these letters and commented thereon. Jurymen, nor any one else during the trial, have any right to consider any evidence excluded by the court nor discuss such excluded evidence. It may be that appellant is guilty of the crime charged, but he has a right to a fair trial upon what the law recognizes as legitimate testimony.

[4] The state relied on the fact that Mrs. Ellison testified that she received information which caused her and Miss Alice to go to Mineola where appellant met them; that appellant told her he had business calling him to San Antonio, and if she would allow Miss Alice to go with him that he would telegraph ahead and have license issued at Palestine and have an officer meet them at Palestine and marry them; that under such promise Miss Alice did get on the train with appellant. The state further proved that subsequent to this appellant and Miss Alice registered at the hotel of Mrs. Ford at Mineola as husband and wife, remaining there several days, conducting themselves as husband and wife, and some other circumstances tending to show that appellant and Miss Alice conducted themselves as husband and wife, and that he treated her as such and so recognized her. These circumstances, together with the testimony of Anton Adams, hereinbefore discussed, was the testimony relied on to show a marriage between appellant and Alice Ellison. When we take into consideration that appellant at the time of his arrest was going under the name of Harry M. Harris, and had married Miss Chaney under that name, and the state relied on the above testimony to show that he was the John M. Harris who married Alice Ellison at San Antonio, and the further fact that Adams could not and would not identify appellant as the person who married Alice Ellison under the name of John M. Harris, it is manifest that the state relied on circumstances to show that the John M. Harris who, in San Antonio, married Alice Ellison was one and the same person as Harry M. Harris who married Miss Chaney. No positive testimony of that fact was offered or introduced in evidence. The circumstances are doubtless strong and

cogent, tending to show that fact, but there is no positive testimony in the record that appellant, Harry M. Harris, was ever in San Antonio in his life, and no positive testimony that if in San Antonio he was going under the name of John M. Harris, and under such circumstances the court erred in refusing to give the special charge requested by appellant on circumstantial evidence. There are a number of complaints and exceptions to the testimony of Mrs. Ellen Ellison, and we will treat all of them together.

[5,6] If Mrs. Ellison is able, on another trial, to identify the handwriting of appellant, and she saw letters from appellant to his alleged wife, Alice Harris, if she saw them without the connivance of his wife, she should be permitted to so testify. Letters stand in the same category as third persons overhearing conversations between the husband and wife. The husband nor wife could not testify as to the conversation, but the third person who heard would be permitted to do so. And so if she got possession of the letters without the knowledge, connivance, or acquiescence of either the husband or wife, and she knows the handwriting and can so state, then she could so testify, but as to the contents of the letters she would not be permitted to testify, unless it was further shown that such letters had been lost or destroyed. But under no circumstances should she be permitted to testify that the wife had received letters which the wife had sent to the district attorney, and that that officer was in possession of such letters. What became of the letters would be immaterial unless they were lost or destroyed. Nor, if Mrs. Ellison obtained the letters from her daughter, with the knowledge and consent of the daughter, to enable her to testify in regard to them, should she be permitted to testify in regard to the letters.

[7] Nor can we see how the fact that a baby was born to Mrs. Harris, née Ellison, would be admissible. Such fact would have no tendency to show that appellant was the John M. Harris who married Miss Ellison in San Antonio.

[8] The court was in error again in refusing to permit appellant's counsel to interrogate the witness as to whether or not she knew that the letters were in the handwriting of appellant. It is true that the letters themselves were not introduced in evidence, but the witness was permitted to testify that her daughter had received letters from appellant, and it was permissible to cross-examine her as to how she knew the letters were written by appellant. Neither should she have been permitted to testify: "She sent some of those letters down here to the county attorney and brought some of them here with her this time. I don't know how many she sent down here, only what

she told me." And this error was further aggravated, as hereinbefore shown, by the district attorney offering these letters in evidence and, when the court excluded them, have him tell the jury that if he had been permitted to introduce those letters they would have shown appellant's guilt.

[9] W. P. Brittain was one of the jurymen who tried appellant. On the hearing of the motion for a new trial, W. O. Neely testified: "I remember some time during this court, and about the 2d of June, of this case against Harry M. Harris being tried wherein he was charged with bigamy. I remember hearing Mr. Brittain before the trial of that case making some remarks about the case. We were right over here at Mr. Tucker's store here in town, and Mr. Tucker just made the remarks that if he was on the jury where a man did like that he would stick him; and Mr. Brittain just said, 'Yes, I would convict him, too, if I was on that jury myself.'" Mr. Tucker testified in substance to the same facts. Mr. Brittain was also called as a witness and testified that he was at Tucker's store, but stated "he had no recollection of what he did say at that time." He would not positively deny making the remark. He was not a competent juror, having a fixed and expressed opinion as to appellant's guilt. Many other matters are complained of in the record, and some of which present error, but the rulings herein made apply to the rules of law to such matters in a way they will not occur on another trial, and we deem it unnecessary to reiterate the law in regard to such matters.

Reversed and remanded.

#### MILLER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

#### 1. INTOXICATING LIQUORS (§ 36\*)—VIOLATION OF LOCAL OPTION—PROSECUTION—ATTACKING ELECTION.

Objection that there was not proper notice of a local option election cannot be made on a prosecution for pursuing the occupation of selling intoxicating liquors in prohibition territory; Rev. Civ. St. 1911, art. 5728, providing that if the election is not contested, as there provided, it shall be conclusively presumed to be valid and binding on all courts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 43, 44; Dec. Dig. § 36.\*]

#### 2. INTOXICATING LIQUORS (§ 230\*)—PURSUING BUSINESS IN PROHIBITION TERRITORY—EVIDENCE.

The prosecution being for pursuing the occupation of selling intoxicating liquors in prohibition territory, testimony that defendant at various other times, after selling to witness, solicited him to make purchases is admissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 230; Dec. Dig. § 230.\*]

#### 3. INTOXICATING LIQUORS (§ 230\*)—PURSUING BUSINESS IN PROHIBITION TERRITORY—EVIDENCE.

Evidence of whisky and alcohol being frequently shipped and delivered to defendant is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

admissible, on a prosecution for pursuing the business of selling intoxicating liquors in prohibition territory.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 290; Dec. Dig. § 230.\*]

**4. CRIMINAL LAW (§ 741\*)—TRIAL—PEREMPTORY CONSTRUCTION.**

Where the evidence would sustain a conviction, error cannot be predicated on refusal to peremptorily instruct a verdict of not guilty.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1138, 1221, 1706, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.\*]

**5. CRIMINAL LAW (§ 1134\*)—APPEAL—REVIEW—OVERRULING MOTION FOR NEW TRIAL.**

The overruling of a motion for new trial, being unnecessary, presents no question for review further than would be presented by the motion itself.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.\*]

**6. CRIMINAL LAW (§ 1038\*)—TRIAL—STATEMENT OF DISTRICT ATTORNEY TO JURY.**

In the absence of any request for a special charge, error cannot be predicated on a statement of the district attorney to the jury, the court, in approving the bill of exceptions, stating that, when objection was made, the district attorney corrected the statement, and the court instructed the jury not to consider it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2646; Dec. Dig. § 1038.\*]

**7. CRIMINAL LAW (§ 598\*)—TRIAL—WITHDRAWING ANNOUNCEMENT OF READY.**

Refusal to allow defendant, after the state had introduced its evidence, to withdraw his announcement of ready for trial, he merely stating he could prove by certain persons certain facts which would tend to impeach a witness for the state, and which would be admissible only for the purpose of impeachment, and showing no diligence to ascertain the facts before making the announcement, is not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.\*]

**8. INTOXICATING LIQUORS (§ 239\*)—PURSUING OCCUPATION IN PROHIBITION TERRITORY—PROSECUTION—CHARGE.**

The charge, on a prosecution for pursuing the occupation of selling intoxicating liquors in prohibition territory, does not authorize a conviction for making two sales; it instructing that the jury must believe beyond a reasonable doubt that defendant was pursuing the occupation and made two sales to the person named in the indictment, or they would acquit, and then defining occupation in an unobjectionable way.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.\*]

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

Ed. Miller was convicted, and appeals. Affirmed.

Birmingham & Calvin, of Paris, for appellant. R. T. Lipscomb, Dist. Atty., of Bonham, and C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of pursuing the business and occupation of selling intoxicating liquors in prohibition territory, from which judgment he prosecutes this appeal.

[1] In introducing the orders of the commissioners' court, the state introduced the one ordering the election which on its face shows that the clerk of the court was ordered to "post or cause to be posted at least 5 notices of this order at different places within Lamar county for at least 12 days prior to the said 26th of June, 1909 (the day of election), as the law directs." Appellant objected to the order on the ground that "it does not give such notice as the law demands." This order complies strictly with articles 5717 and 5718 of the Revised Statutes. The objection to the other orders are equally untenable, as the proceedings were in strict compliance with the provisions of chapter 1, tit. 88, of the Revised Statutes. In addition to this, the objection would come too late, as article 5728 provides for a contest of the election within a given period of time, and, if not contested, it shall be conclusively presumed that said election is valid and binding upon all courts.

[2] A. Ware testified that he purchased whisky twice from appellant, giving the date, time, and place. He also testified: "There were several nights I was at the depot after the second transaction, and he generally would ask me if I wanted any more whisky. I could not positively say how many times he asked me, several times though. In fact, every time I saw him he solicited me to make a purchase." Appellant objected to this latter testimony, but, as appellant was being prosecuted for pursuing the occupation, it was clearly admissible.

[3] The state introduced Mr. J. E. Vaughn, agent of the Wells Fargo Express Company, at Paris, and he testified: "The book shown me is the record of the depot delivery of whisky from March 22, 1912, to April 1, 1913, of the Wells Fargo Express Company." That the book was correctly kept, and that appellant had been to the express office and had business transactions with him as agent of the express company, and he saw him sign the express record. That the books show shipments and delivery of whisky and alcohol to appellant on January 8, 1913, January 11, 1913, January 16, 1913, January 17, 1913, January 25, 1913, January 31, 1913, and other dates up to the time of the return of the indictment in this cause. As appellant was being prosecuted for pursuing the business of selling intoxicating liquor, the court ruled correctly in admitting this testimony.

[4-6] There are four other bills of exception, one of them relates to the refusal of the court to peremptorily instruct a verdict of not guilty on appellant's motion. As the evidence above recited would sustain a conviction, the court did not err in overruling the motion. Another relates to the action of the court in overruling his motion for a new trial. This was unnecessary and presents

no question for review further than would be presented by the motion itself. In the third bill of exception it is stated that "the district attorney stated to the jury that on February 4, 1913, the appellant had shipped to him 48 pints of whisky." The court, in approving the bill, states that, when objection was made, the district attorney corrected the statement, and the court instructed the jury not to consider the statement. In the absence of any request for a special charge in regard to the matter, this action of the court presents no error.

[7] The only other bill relates to the action of the court in refusing to allow appellant to withdraw his announcement after the state had introduced its evidence. Appellant states he could prove by Tom Smith and Mr. Gossett certain facts which would have a tendency to impeach state's witness Ware. Appellant shows no diligence to ascertain the facts before announcing ready for trial, and, as the testimony would only be admissible for the purpose of the impeachment of the state's witness, the bill presents no error.

[8] The criticisms of the court's charge are without merit. He did not authorize a conviction for making two sales, but instructed the jury that they must believe beyond a reasonable doubt that appellant was pursuing the occupation and made two sales to the person named in the indictment, or they would acquit, and then defined occupation in an unobjectionable way.

**Affirmed.**

#### KUYKENDALL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

##### 1. INDICTMENT AND INFORMATION (§ 119\*)—SURPLUSAGE.

The indictment clearly charging an offense under the statute both in getting drunk and being found intoxicated in a public place, unnecessary allegations do not invalidate it but are to be treated as surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 311-314; Dec. Dig. § 119.\*]

##### 2. CRIMINAL LAW (§ 1090\*)—APPEAL—BILL OF EXCEPTIONS.

Questions as to introduction of evidence, attempted to be raised by motion for new trial, cannot be reviewed on appeal in the absence of bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2826-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

Appeal from Montague County Court; Levi Walker, Judge.

Theo. Kuykendall was convicted, and appeals. **Affirmed.**

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, J. Under a complaint and information appellant was tried before the court, without a jury, and fined \$5.

[1] The statute under which this conviction was had is: "Any person who shall get drunk or be found in a state of intoxication, in any public place shall be deemed guilty of a misdemeanor and on conviction before a court of competent jurisdiction shall be fined in a sum of not more than \$100 for each and every such offense."

The complaint and information charge that he, on or about January 12, 1913, in Montague county, "did then and there unlawfully get drunk [by the immoderate use of spirituous, vinous, and malt liquors] in a certain public place, to wit, the Methodist Church house at Gladys, in Montague county, Tex., a place where people were then and there assembled for business, pleasure, and recreation, and was found in said public place in a state of intoxication." While this complaint and information contain some unnecessary matter, yet it clearly charges an offense under said statute on both grounds, which are made offenses thereby, to wit, that he got drunk in a public place and that he was found in a state of intoxication in a public place. The unnecessary matter can and should be treated as surplusage. *Goodwin v. State*, 158 S. W. 275, in which a large number of cases are collated and cited. The words in brackets above are surplusage; but, if not, they in no way invalidate the complaint and information.

[2] Appellant has no bill of exception in the record. He attempts to raise some question as to the introduction of some testimony by his motion for new trial, which we cannot review in the absence of a bill of exception.

By other grounds of a motion for new trial he attacks the judgment of the court because he claims the evidence was insufficient to support the conviction. While the evidence was conflicting to some extent, the testimony as a whole clearly was sufficient to establish both charges in the complaint and information.

**The judgment is affirmed.**

#### KEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

##### 1. WORDS AND PHRASES—"MEMORY."

Standard dictionaries define "memory" as the mental capacity of retaining unconscious traces of conscious impressions and of recalling such traces to consciousness with the attendant perception that they have a certain relation to the past, and, in a narrow sense, the term means the power of such retention alone, or reviving in the mind ideas which, after being imprinted thereon, have disappeared or lain dormant.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4474.]

##### 2. PERJURY (§ 32\*)—ADMISSION OF EVIDENCE—EVIDENCE IN CIVIL SUIT.

In a prosecution for perjury in falsely testifying in a personal injury action that accused had never been injured while working for an-

other railroad, parts of the transcript in the civil action, which showed that accused's counsel therein withdrew from the case upon it appearing that accused had testified falsely, were not admissible in evidence; only accused's questions and answers in the civil action being admissible.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108–116; Dec. Dig. § 32.\*]

### 3. CRIMINAL LAW (§ 456\*)—EVIDENCE—OPINION EVIDENCE.

Nonexperts may testify as to a mental condition if they show an intimate acquaintance and knowledge of the person's habits and conduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1045; Dec. Dig. § 456.\*]

### 4. CRIMINAL LAW (§ 772\*)—INSTRUCTIONS—DEFENSES.

The court should present accused's defenses in an affirmative way.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1812–1814, 1816, 1817; Dec. Dig. § 772.\*]

Appeal from District Court, Hunt County; Wm. Pierson, Judge.

Andrew F. Key was convicted of perjury, and appeals. Reversed and remanded.

E. S. McAlester, of Bonham, and Sam D. Stinson, of Greenville, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of perjury; his punishment being assessed at two years' confinement in the state penitentiary.

Appellant had brought suit in the district court of Hunt county, Tex., against the Missouri, Kansas & Texas Railway Company for damages, alleging that he was injured while in the employ of said company. He was duly sworn and testified in said cause in substance as follows: "That he had never been injured in any way from the time he worked for the Katy Railroad at Greenville in 1907, under Jack Corder, up to April 6, 1912; that he had never collected any money from the Gulf, Colorado & Santa Fé, or the Missouri, Kansas & Texas Railroad Company of Texas, or any other railroad for any hurt or injury; that he never had a hernia or rupture before the 6th day of April, 1912; that he had never had any hurting in his left groin or side or been bothered with a knot in his left groin or scrotum prior to April 6, 1912." This testimony so given by him in the civil suit is the basis for the charge of perjury in this case; in the indictment it being alleged that said testimony was false and was negatived as follows: "Whereas in truth and in fact he (Andrew F. Key) had been injured between the time he worked for the Katy Railroad at Greenville, Tex., in 1907, under Jack Corder, and April 6, 1912; and he (the said Andrew F. Key) had collected money from the San Antonio & Aransas Pass Railway Company for an injury in February, 1911; and he (the said Andrew F. Key) had a hernia or rupture before April 6, 1912; and he (the said Andrew F. Key)

had had a hurting in his left groin or side and had been bothered with a knot in his left groin or scrotum prior to April 6, 1912, and which said statements so made by said Andrew F. Key, as a witness in said case in the manner and form as aforesaid, were deliberately and willfully made and were deliberately and willfully false, as he (the said Andrew F. Key) then and there well knew."

The testimony on this trial would support a finding that appellant did testify as alleged on the trial of the civil suit, and that said statements were false; in fact, the negative allegations being specifically proven by at least two witnesses. However, on this trial, a certified copy of appellant's testimony in the civil suit was used in the examination of appellant, and what he testified on that trial was proven by appellant and other witnesses, and the questions and answers given by appellant on that trial being thus gotten in the record in this case. However, the transcript of the testimony as a whole was never offered nor introduced in evidence on this trial, and, if it had been offered, it contained matter that was not properly admissible in evidence.

Appellant offered no evidence that he did not testify as stated and offered no evidence tending to show that such testimony was not false, but all witnesses introduced by him were intended to show that he was mentally defective; that he had no memory as to past transactions. His mother testified as to severe injuries received by him in the head in infancy, and other facts having a tendency to show him a man with almost without the faculty of memory. A teacher testified that in his youth appellant came to school in the school where he was teaching for two years; that when he entered school he was in the third grade, and at the end of the two sessions he was still in the third grade, and was in a sense defective in memory.

[1] By standard dictionaries "memory" is thus defined: "The mental capacity of retaining unconscious traces of conscious impressions or states, and of recalling these traces to consciousness with the attendant perception that they have a certain relation to the past; in a narrower sense, the power of such retention alone, the power or act of recalling being termed recollection. \* \* \* The power to revive again in our own minds those ideas which after imprinting have disappeared, or have been as it were laid aside out of sight, is memory."

As before stated, the defensive theory, and the sole one relied on, was that appellant, on account of accidents received in childhood, was defective in memory to the extent that he could not retain and recall past transactions unless his mind and attention was directed specifically to the act or occasion, and they contend that the evidence on the civil trial was such as to support this theory. That, while appellant in answer to general ques-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions had denied he had ever received any prior injury or collected damages therefor, yet when by direct questions his mind and attention was directed to the specific injury, railroad, etc., he then admitted he had received the injury and collected the money as damages for the injury received, and the record discloses that appellant was the only witness introduced on the trial in the civil case, and after his cross-examination, and his attention being thus specifically directed to the matter, on his admissions, the defendant was permitted to and did obtain a judgment against the plaintiff. This being the issue, did the transcript which was delivered to the jury while they were considering the case contain matter not introduced in evidence, which would have a bearing on that issue? We think so.

Mr. Carpenter was attorney for plaintiff in the civil suit. He was not a witness on this trial; yet in the transcript which was delivered to the jury it showed that Mr. Carpenter withdrew from the case, and that the following proceedings had taken place on the trial in the civil case: "Plaintiff's Counsel: If the court please, this is putting us in a very embarrassing situation. After these questions were propounded to this witness yesterday evening before court adjourned. After court adjourned last night we taken him over to our office (we have two clients a man by the name), and they called and told us this yesterday that they understood he had been ruptured before. And we taken over to the office and asked him, I said, 'Now, Key, if you have been ruptured, if you had a suit with any company or made any settlement, now is the time for you to say so in this office;' and I says, 'Now, if you go back there and recall your statement they will put you in the pen;' and he said nothing of the kind had ever occurred. I says, 'Now, you know whether you did, and I judge from the way that Mr. McMahan (defendant's counsel) has questioned you that he has something from the Santa Fé or some other railroad that you got this injury or hernia before, and we want you to tell us the truth about it.' And yesterday was the first time I ever talked to him as far as that was concerned; and he has just put up a job on us, that's all there is to it. Defendant's Counsel: Now, in justice to opposing counsel, I think that I ought to state that when this suit was instituted, and when this man was making a claim, the claim department got information that he had been injured, or at least claimed to have been injured, down on the San Antonio & Aransas Pass Railroad, and that he settled with them for it some time in the early part of last year. He asked us for a settlement and come to my office and seen me and talked to me about it; and I knew this at the time he was there and said nothing to him about it. The suit was instituted, and of course we at once taken the matter up

through the claim department with the San Antonio & Aransas Pass Railroad, and we got the information that he claimed to have been injured on the 20th or 21st of January, 1911, when he had been at work about 4 or 5 days for the San Antonio & Aransas Pass Railroad. He then went to the hospital at San Antonio. He stayed there a short time and came back home to Leonard. He showed who his father was and give his initials and give his name as Frank A. Key. We got information from the San Antonio & Aransas Pass Railroad and got the voucher and draft that was given with it. The draft is indorsed by him and receipted by him and signed Frank A. Key. He wrote one letter to the San Antonio & Aransas Pass Railroad about that claim, and he wrote a letter to Mr. Akers (defendant's claim agent at Greenville), and they show to be exactly the same handwriting. Now, I came in possession of all these facts, but I am sure that counsel for the plaintiff had no notice and had no thought of such a thing, and that it was 'news' to them when I began to ask the questions I did yesterday, and as a matter of fact, when I asked him the questions again this morning, I had studied about it last night and expected he would swear positively that he never collected a dollar from the San Antonio & Aransas Pass Railroad, and that he was not hurt there, but I thought I would put it to him again and give him every chance to correct his statement, if he would do it. If I had really expected that he would correct it this morning I don't know whether I would have put the questions to him again like I have. Court: Well, what shall we do about it? Plaintiff's Counsel: We desire to withdraw from the case right now. Defendant's Counsel: I don't want the case to go over without any judgment being entered; but I thought it was justice to opposing counsel to tell them just what I had this morning. Hal Horton (an attorney in the office of Evans & Carpenter, plaintiff's counsel): When this matter was called to my attention yesterday I went to Leonard and interviewed two doctors, his mother, and his father, and why they each and all told me that so far as they knew, and his wife too, this plaintiff had never been ruptured; and Dr. John Pendergrast told me the same thing; and I came back here this morning with that information myself and cross-questioned the plaintiff at the time. Court (addressing plaintiff who is still on witness stand): Mr. Key, your attorneys have withdrawn from the case. Now, I will give you an opportunity to employ any attorney that you want to. I have to just let you take your own course, but you have a right to employ other attorneys to go on with your case. I can't stop the case. They have a right to have it submitted to the jury in some way." Defendant's counsel then examined the witness further as follows: "Q. (Hands witness paper.) That is your signature? A. Yes, sir. Q. That



draft is dated February 15, 1911, for \$1,000, ain't it? A. Yes, sir. Q. Now, that is your signature right there on this voucher (shows the witness voucher for \$1,000)? A. Yes, sir. Q. And you signed that (Frank A. Key)? A. Yes, sir. (At this juncture of the case the defendant's counsel calls Evans & Carpenter, or rather steps aside with them to the back of the courtroom, and exhibits the voucher and draft for \$1,000 and other investigation papers. In the meantime Hal Horton, an attorney in the office of Evans & Carpenter, steps over to the witness and has a conference with him, then asks in the presence and hearing of defendant's counsel that the witness be permitted to take a nonsuit.) Defendant's Counsel: I don't think it is proper for him to take a nonsuit in this case and run us to the expense, and we don't think it would be right. \* \* \* Witness (still on witness stand): I am going to take a nonsuit on it. Defendant's Counsel: Now, in the condition this matter has gotten in, matters have developed that we cannot anticipate what the witness would say about it, then we will ask your honor to give us 20 minutes to prepare a pleading in this case before you rule on the question of nonsuit. Now, I will ask that the plaintiff be instructed to stay in the courthouse and when I prepare the pleadings I will want to ask him some other questions. The Court: Mr. Key, you will just remain in the courtroom. The Plaintiff's Counsel: I don't think there is anything your— Defendant's Counsel (after being out about 30 minutes): We ask leave to file first trial amendment. Court: Is your trial amendment affirmative pleading asking for any relief? Defendant's Counsel: Yes. The Court (after looking at defendant's pleading just filed): All right, the plaintiff asks for a nonsuit. Do you desire to use him as a witness? Defendant's Counsel: Yes, I desire to use him on the nonsuit. The Court: Well, the plaintiff takes a nonsuit. There is no case in court. (Defendant's counsel here reads his trial amendment to the jury.) The Court (addressing the witness who is still on witness stand): Now, you understand the plaintiff has taken a nonsuit. He has no suit against the railroad in court. Now you desire to use him as a witness. I feel it my duty, as the man is ignorant in regard to the rules of law, that the witness is not compelled to answer anything that will incriminate him, and so far as— Witness (here interrupts the court): Well, I want a nonsuit and I have to go home. Court: Go ahead with the examination of the witness." Other similar excerpts might be cited.

[2] Outside of the questions propounded to appellant and his answers thereto, none of this matter would have been admissible in evidence had that part of the transcript been offered as evidence, and yet the jury was permitted to take it with them in the privacy of their room, read and consider it, and that it was read and considered is shown by the tes-

timony of Messrs. Green, Murphy, and Davis, heard on the motion for a new trial. These men swear that they were on the jury who tried appellant; that the jury had arrived at no verdict until this transcript was called for and delivered to them; that they had two copies of the transcript, and one of the jurymen asked the questions and another read the answers; and that the entire transcript was perused by them, and then it was that a verdict was reached. It is manifest that the jury received and considered other evidence, than that adduced on the trial, bearing on a material issue in the case, and this will necessitate a reversal.

There are a number of bills of exception in the record, some of which show that witnesses, after testifying to facts showing an intimate acquaintance and knowledge of appellant, were asked their opinion as to his ability to remember matters unless his attention was specifically called to the matter. As illustrative of these bills we will copy the one relating to the testimony of Dr. J. H. Thompson. The doctor had testified that he knew defendant, had known him for 20 years, and had been the family physician of his father during all the time defendant was growing to manhood, and had practiced in defendant's family since he had left home, and other facts, when the following question was propounded to him: "Now, in the condition that you have stated he (defendant) is, what, in your judgment, would be the condition of his memory, speaking as a physician?" Objection was made, when defendant's counsel restated the question: "I will ask the doctor from what he had observed, and what he knew of defendant's mental condition, what effect it would have on his memory?" The objection was that he was not an expert on mental diseases, and an answer would be but an opinion, which objection was sustained. The bill shows the witness would have answered that under defendant's peculiar condition and under his physical and mental make-up, and from his acts, conduct, and general deportment, and from what he knew of the defendant, and from what he, as a physician, had observed of the defendant in his acts, his conduct and his conversation, that the defendant's memory necessarily was bad, and defendant would be slow to recall past incidents, unless his mind had been specially directed to the particular circumstances, time, and occasion.

[3] This was error, as in a number of cases we have held that, when one's mental state is an issue, those not experts may be permitted to testify where they show intimate acquaintance and dealings with and knowledge of one's habits and conduct. This question is discussed at length in *Jordan v. State*, 141 S. W. 786, citing authorities, and the correct rule there stated, and under this case the testimony of Dr. Thompson was admissible as well as that of the witnesses Dooly and Mrs. Key.

[4] There are several complaints of the charge of the court, and especially that the charge as given did not properly submit the defense of defendant in an affirmative way. We feel sure this will not occur on another trial, for when this additional testimony is admitted, which we have herein ruled should have been admitted, the court will appreciate the necessity of presenting in an affirmative way the defense relied on, if the testimony on another trial tends to prove the same defensive theory as relied on in this case.

The judgment is reversed, and the cause is remanded.

**BANK OF DES ARC et al. v. MOODY et al.**  
(Supreme Court of Arkansas. Nov. 3, 1913.  
On Rehearing, Dec. 1, 1913.)

**1. APPEAL AND ERROR (§ 334\*)—DEATH OF PARTY—TIME FOR REVIVING.**

Under Kirby's Dig. § 6313, providing that an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor unless in one year from the time it could have been first made, where, on an appeal from a decree in favor of plaintiffs, defendants suggested the death of one of the plaintiffs but did not give notice of a motion to revive or prosecute such motion within one year after the death, it was too late to revive except by consent, and the appeal as to him would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1848, 1851-1863; Dec. Dig. § 334.\*]

**2. BANKS AND BANKING (§ 54\*)—OFFICERS—LIABILITY TO STOCKHOLDERS.**

Directors of a bank, who negligently failed to manage its affairs or control the action of its cashier, thereby permitting him to make bad loans by which the bank was made insolvent and the stock rendered worthless, were liable to the stockholders for their negligence.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105-107; Dec. Dig. § 54.\*]

**3. BANKS AND BANKING (§ 54\*)—OFFICERS—LIABILITY TO STOCKHOLDERS.**

A person who was elected director of a bank, but who never received notice or information thereof, attended meetings, acted as such, or had anything to do with the management of the bank until after the making of bad loans by the cashier, was not liable to the stockholders for his failure to prevent the making of such loans.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92-98, 105-107; Dec. Dig. § 54.\*]

**4. BANKS AND BANKING (§ 47\*)—STOCK SUBSCRIPTIONS—LIABILITY.**

Stockholders in a bank, who had made payments on their subscriptions, were entitled to have the liability of other stockholders on their subscriptions enforced for the percentage of the subscription which they had paid, and the directors had no right to cancel the notes of such other stockholders for their stock subscriptions.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 62, 64-68, 341; Dec. Dig. § 47.\*]

**5. CORPORATIONS (§ 279\*)—STOCK SUBSCRIPTIONS—ACTIONS—FORM.**

A court of equity is the appropriate forum to enforce the right of a stockholder who has paid his subscription against one who has not paid, where the corporation has ceased to perform its functions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1177-1185; Dec. Dig. § 279.\*]

**6. APPEAL AND ERROR (§ 1178\*)—DISPOSITION OF CAUSE—REMANDING FOR FURTHER PROOF.**

Where a suit in equity was not tried on the proper theory, it could be sent back for further proof and for reference to a master, if that course was found necessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.\*]

On Rehearing.

**7. JUDGMENT (§ 251\*)—CONFORMITY TO ISSUES.**

In an action by stockholders of a defunct bank against the directors for negligent management where recovery against a new bank which had purchased the assets of the defunct bank of the amount which plaintiffs had paid respectively on their stock subscriptions was sought, they were not entitled to a decree against such bank for the amount of their distributive shares of the assets of the defunct bank which had been deposited to their credit in the new bank and their right to which had never been disputed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\*]

**8. BANKS AND BANKING (§ 154\*)—DEPOSITS—RIGHT OF ACTION TO RECOVER.**

A depositor has a right of action to recover the amount of a deposit in a bank if payment thereof is refused.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. § 154.\*]

**9. APPEAL AND ERROR (§ 907\*)—PRESUMPTIONS TO SUPPORT JUDGMENT.**

Ordinarily where the record of the evidence is incomplete, a presumption will be indulged on appeal that the omitted matters support the chancellor's finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

**10. APPEAL AND ERROR (§ 907\*)—PRESUMPTIONS TO SUPPORT JUDGMENT.**

Where exhibits to a complaint related only to matters as to which there was no dispute and had no bearing on the issues involved, their omission from the record of the evidence did not justify a presumption that they supported the finding below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

**11. APPEAL AND ERROR (§ 907\*)—PRESUMPTIONS TO SUPPORT JUDGMENT.**

In an action by stockholders in a bank against the directors for negligent management and against a new bank to which the defunct bank's assets had been sold, the omission from the transcript on appeal of an exhibit to the answer showing a list of the assets so purchased, did not justify a presumption that such exhibit supported the finding below where there was no attempt to show that the new bank had received assets in excess of the amounts accounted for.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.\*]

Appeal from Prairie Chancery Court;  
John M. Elliott, Chancellor.

Action by A. L. Moody and others against

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Bank of Des Arc and others. From a decree for plaintiffs, defendants appeal. Appeal dismissed as to the plaintiff named, and decree affirmed in part, reversed and remanded in part, and reversed and rendered in part as to the other parties.

W. A. Leach, of Des Arc, for appellants. S. Brundidge, of Searcy, and J. W. & J. W. House, Jr., of Little Rock, for appellees.

MCCULLOCH, C. J. This is an action instituted in the chancery court of Prairie county by A. L. Moody, Ed McElwee, and E. C. Blakemore against the Bank of Des Arc and G. W. Edmondson and others, directors thereof, and the Des Arc Bank & Trust Company. The plaintiffs were stockholders in the Bank of Des Arc and paid in 40 per cent. of the amount of stock subscribed. The bank suspended business and went into liquidation, and, after its affairs were wound up and the creditors paid, only a small part of assets were left to be distributed among the stockholders. Some of the assets were sold to the Des Arc Bank & Trust Company, a new banking corporation organized by some of the stockholders of the old bank. The charge is made that the directors were guilty of negligence in failing to direct the cashier in the management of the affairs of the bank, thereby causing losses which brought about its insolvency. The chancellor sustained the allegations of the complaint and rendered decree in favor of each of the plaintiffs for the amount claimed by each. The defendants appeal to this court.

[1] Since the appeal was lodged here, the defendants have suggested the death of A. L. Moody, one of the plaintiffs, but failed to give notice of the motion to revive or to prosecute such motion. A year has been allowed to elapse since the death of Moody, and under the statute it is too late to revive as to him except by consent. Kirby's Digest, § 6313. The appeal as against defendant Moody is therefore dismissed. The decree in favor of the plaintiffs is against the Bank of Des Arc, G. W. Edmondson, Emmett Vaughan, J. T. Bogard, J. R. B. Moore, as directors, and against the Des Arc Bank & Trust Company. There is nothing in the record justifying the decree against the Des Arc Bank & Trust Company, for that concern is not shown to have had any connection with the defunct Bank of Des Arc except to purchase some of the assets. The decree as to that defendant is therefore reversed, and the cause dismissed.

[2] One of the allegations of the complaint is, as before stated, that the directors of the bank "negligently and purposely failed and neglected to give attention to or take any control in the management of the said bank and its affairs" and allowed the cashier to recklessly dissipate the assets in making bad loans. This charge is sustained by the

evidence, for it is undisputed that a lot of bad loans were made by the cashier and that the directors were guilty of negligence in not managing the affairs of the bank and controlling the action of the cashier. Under the doctrine laid down by this court in the case of Bailey v. O'Neal, 92 Ark. 327, 122 S. W. 503, 135 Am. St. Rep. 185, this rendered the directors liable, not only to the creditors who were defeated in the enforcement of their rights against the bank, but also as to the stockholders whose stock was rendered worthless on account of the losses sustained by the bank. The proof shows that only two of the persons against whom the chancery court rendered decree were directors in the Bank of Des Arc. These two are defendants G. W. Edmondson and J. R. B. Moore, who, according to the undisputed evidence, were directors, and as to them the decree is affirmed. There is no attempt to show that defendant Bogard was a director or in any way responsible for the losses sustained by the bank. The decree as to defendant Bogard is therefore reversed, and the complaint as to him is dismissed for want of equity.

[3,4] The record shows that defendant Vaughan was elected one of the directors, but he testified that he was not present at the meeting and never received any notice or information that he was elected a director and never acted as such and had nothing to do with the management of the bank until he was called in to assist the cashier after the loans were made. His testimony on this point is undisputed, and there is nothing upon which the decree against him, establishing liability on account of any alleged mismanagement of the bank, can be sustained. It appears, however, that defendant Vaughan and several other stockholders never paid any part of their subscriptions to the capital stock, but gave notes therefor, which were afterwards canceled by the directors. The corporation, acting through its directors, had no right to cancel the notes for the stock subscriptions as against creditors nor as against other stockholders who had paid their subscriptions. Those who had paid were, to the extent of their payments on stock, creditors of the corporation and are entitled to have the liability against other stockholders enforced. Such liability is for the percentage paid in by stockholders, so that the amount can be treated as a part of the assets of the corporation for distribution.

"A subscription to the capital stock of a corporation," says Mr. Helliwell in his work on Stock and Stockholders (section 292), "constitutes an agreement on the part of the subscriber that, in consideration of the benefits to be derived from membership, he will pay to the corporation the subscription price of his shares at such time as the articles of incorporation or the contract of subscription may provide, or, if no specific provision is there made, at such time as the

amount stated shall be called for by the directors."

[5] A court of equity is the appropriate forum to enforce the right of the stockholder who has paid against one who is in default in the payment of his subscription where the corporation has ceased to perform its functions. *Fletcher v. Bank of Lonoke*, 71 Ark. 1, 69 S. W. 580; 1 Cook on Corporations (7th Ed.) § 204.

[6] It was not developed in the case what would be the distributive share of the plaintiffs and the additional amount to be paid in by defendant Vaughan and other defaulting stockholders. These are equities that should be adjusted; and, as the case was not developed on that theory, it can be sent back for further proof and for reference to a master, if that course be found necessary. *Long v. Abeles*, 77 Ark. 156, 93 S. W. 67.

The decree as against defendant Vaughan is therefore reversed, and the cause remanded for further proceedings against him not inconsistent with this opinion.

#### On Rehearing.

[7, 8] It is shown by the pleadings and undisputed testimony that the distributive shares of appellees in the assets of the defunct bank were deposited to their credit with appellant Des Arc Bank & Trust Company. Appellees declined to accept the amounts so deposited, but sought by this action to recover the amount they had paid, respectively, on subscriptions to stock. There has never been any dispute about their right to the money deposited to their credit with the Des Arc Bank & Trust Company. Those amounts have been subject to their check as depositors. It is now insisted that appellees should at least have a decree against the Des Arc Bank & Trust Company for the amount of the deposits. That is not an issue in this case, and we cannot render any such decree. If payment should be refused, they would have a right of action as depositors to recover the amount of the deposits; but that matter cannot now be brought into this case as an element of liability.

[9-11] Again, it is insisted that the record is incomplete, in that the exhibits to the complaint and one of the answers which were considered by the chancellor are not in the transcript, and that we must indulge the presumption that those things omitted afforded sufficient grounds for the chancellor's finding. That presumption is ordinarily indulged when the record of the evidence is incomplete. But the exhibits could not have had any probative force in determining the issue in the case. The three exhibits to the complaint covered, according to the recitals of the complaint, only the records of the defunct corporation, showing the articles of incorporation, the names of directors, and the subscribers to the capital stock. There is no

dispute as to what the records show about those matters, and the exhibits had no bearing on the issues involved. It is true that Vaughan denied that he had knowledge of having been elected as a director, or that he acted as such; but he admitted that the record showed that he was duly elected. The only other exhibit omitted from the transcript is the exhibit to the answer of the Des Arc Bank & Trust Company, which the answer shows contained a list of the notes and other evidences of debt purchased from the defunct bank at face value. There is no attempt to show that the Des Arc Bank & Trust Company received assets in excess of the amounts accounted for, or the exhibit showing the list of notes, etc., purchased at face value could not have had any bearing on the case.

We therefore adhere to our former decision, and the petition for rehearing is overruled.

#### ARKANSAS LIFE INS. CO. v. AMERICAN NAT. LIFE INS. CO. et al.

(Supreme Court of Arkansas. Nov. 10, 1913.)

##### 1. ABATEMENT AND REVIVAL (§ 39\*)—CAUSES WHICH ABATE—ASSIGNMENT.

Since, under Kirby's Dig. § 6285, relating to abatement and revival, only causes of action for injuries to the person or property of another survive and are assignable, causes of action in favor of an industrial insurance company in the nature of slander, libel, malicious prosecution, fraudulent conspiracy to injure and destroy its business, etc., did not survive, and could not be prosecuted by a transferee of its assets after the company had passed out of existence.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 194-204; Dec. Dig. § 39.\*]

##### 2. LIBEL AND SLANDER (§ 80\*)—MASTER AND SERVANT (§ 340\*)—STATEMENT OF CAUSES OF ACTION—SUFFICIENCY.

In an action by one insurance company against another, one paragraph of the complaint alleged that defendants, through malice and by false and fraudulent promises of compensation and promotion, had interfered with plaintiff's employes, and had succeeded in securing them to leave plaintiff in breach of their employment contracts and enter defendants' employ. No specific contract between plaintiff and the employes was set up nor were the employes' names pleaded, nor the means and methods used specified. Another paragraph charged that "through defendants' wrongs" one N. joined the conspiracy and brought suit against plaintiff for \$50,000. The "wrong" were not set forth, and another paragraph charged that N. and other agents began another canvass of plaintiff's policy holders, telling them that plaintiff had "another big suit against it." *Held*, that none of such paragraphs stated a cause of action, though construed pursuant to the rule that every reasonable intendment must be indulged to support it.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 184-186; Dec. Dig. § 80.\* Master and Servant, Cent. Dig. §§ 1284, 1285; Dec. Dig. § 340.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. PLEADING (§ 243\*)—COMPLAINT—AMENDMENT.**

Where no cause of action was stated in a complaint as distinguished from a cause of action defectively stated, it could not be amended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 643-651, 820-822; Dec. Dig. § 243.\*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by the Arkansas Life Insurance Company against the American National Insurance Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The appellant brought suit against the appellees to recover damages alleged to have accrued to appellant from the conduct of the appellees in planning and executing a conspiracy to destroy appellant's business and the business of the Industrial Mutual Indemnity Company, a corporation to whose assets and business appellant became successor. The first paragraph of the complaint set up the organization of appellant and appellee American National Insurance Company, stated the business they were engaged in, and that Smith was in the employ of appellee American National Insurance Company as general agent for Arkansas. The second paragraph alleged the organization of the Industrial Mutual Indemnity Company, and set forth that it was engaged in the industrial insurance business until the 28th of February, 1911, when the appellant, by contract with it, reinsured its policy holders and took over all of its assets. The third and fourth paragraphs set forth at length the manner in which the Mutual Company carried on its business of insurance, and alleged that the defendant Smith, while he was the general superintendent of the Mutual Company, in September, 1910, clandestinely entered into a contract with his codefendant to enter at some future time the employment of the American National Insurance Company, and in the meantime to "organize and execute a conspiracy to destroy the appellant and the Mutual Company." The fifth and sixth paragraphs alleged that defendants had conspired together to destroy appellant as a competitor, against the statutes of the state prohibiting the formation of pools, trusts, etc. The seventh paragraph sets out specifically that the purpose of the alleged conspiracy was to procure all of the employes of the appellant and their contracts of insurance, and all of their business, property, and good will in order to force appellant out of business; that this was to be done by false and fraudulent representations made concerning the appellant; that they endeavored by this means, through Smith, to persuade the employes of the Mutual Company to breach their contracts of employment, and to leave the employment of the appellant and enter the employment of the National Insurance Company; that the conspiracy should

be continued as long as necessary to accomplish the purpose intended, and that resort should be had "to intimidation, threats, false and slanderous statements, bribery, false and malicious prosecution, vexatious litigation, confiscation of property, or any other unlawful means necessary to accomplish the destruction of their competitors." The eighth paragraph alleged that by the "unlawful means aforesaid" the appellant succeeded in procuring the employes of the Mutual Company, on the morning of January 9, 1911, to enter the employ of appellee. The ninth paragraph sets forth that the agents of the appellee company, in pursuance of the false and fraudulent representations, induced the policy holders of the Mutual Company to abandon their policies with that company and to insure in the National Company, which was done by false and fraudulent statements, setting them out; that this was done "falsely, designedly and maliciously, for the purpose of executing the unlawful conspiracy." The tenth and eleventh paragraphs detailed the further efforts of the defendants to destroy the business of the Mutual Company by interference with its agents and policy holders, causing the policies to lapse in the Mutual Company and the appellant company. The twelfth paragraph specifies the amount of damages alleged to have resulted to appellant by reason of the acts of the alleged conspiracy. The fourteenth and fifteenth paragraphs allege that suits were brought against the Mutual Company for the dissolution of the same in pursuance of the conspiracy, and that the purpose of the suits was to destroy the Mutual Company's business by causing the policy holders therein to drop their policies by false and fraudulent statements concerning the solvency of the Mutual Company, which are set forth; that the false and fraudulent statements made throughout the various districts in which the Mutual Company was doing business caused a loss to plaintiff of an income from policy holders in the Mutual Company to the amount of \$20,000. The sixteenth paragraph sets forth the following: "That the defendants during the years 1911 and 1912, have continued, through malice and by means of false and fraudulent promises of compensation and promotion, interfered with the employes of plaintiff, whereby the business of plaintiff was kept deranged; that they have succeeded in securing said employes to leave plaintiff in breach of contract, and enter the employment of defendants; that they carried to defendants the skill and knowledge of plaintiff's business that they had acquired at plaintiff's expense; that defendants required them to spend their time in harassing, annoying, and worrying plaintiff's policy holders, for whom they had formerly collected, and in trying to cause said policy holders to lapse their insurance,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

all of which was in furtherance of said conspiracy; that because thereof plaintiff has been compelled to employ agents to overcome said wrongs and maintain said insurance, and in defense of its said business has been compelled to spend to its damage the sum of \$5,000; that in numerous instances plaintiff has been unable to satisfy its said policy holders from the aforesaid attacks of defendants whereby the premiums of plaintiff have been greatly reduced, to its damage in the sum of \$5,000; that because of said wrong it has been deprived of new business to its damage in the sum of \$15,000." The seventeenth paragraph sets forth that one Nelson, plaintiff's former superintendent, joined the conspiracy through appellee's wrong, and brought suit against the appellant in the sum of \$50,000; that said suit was brought for the purpose of "annoying and vexing plaintiff's policy holders and employes, and as a basis for further false and fraudulent representations against plaintiff, to its damage in the sum of \$5,000." The eighteenth paragraph sets forth certain false and fraudulent representations of Nelson in pursuance of the conspiracy, by which appellant alleges that it was brought into disrepute with its policy holders, and, as a result, caused them to lapse their insurance, to plaintiff's damage in the sum of \$7,000. The nineteenth paragraph sets forth that the good name and reputation of plaintiff had been damaged in the sum of \$80,000. The twentieth paragraph alleges exemplary damages in the sum of \$50,000; and the prayer was for judgment for \$200,000.

The appellees, defendants below, demurred to the complaint, alleging that the same "does not state a cause of action." The court sustained the demurrer. Appellant refused to plead further, whereupon the court dismissed the complaint, and the cause is here on appeal.

Miles & Wade, of Little Rock, for appellant. Mehaffy, Reid & Mehaffy, Horace Chamberlin, and Wallace Townsend, all of Little Rock, for appellees.

WOOD, J. (after stating the facts as above). [1] The injuries and resultant damage to appellant, by reason of the various wrongful acts of conspiracy set forth in its complaint, down to the sixteenth paragraph thereof, were all wrongs and injuries done to the Mutual Indemnity Company. Appellant contends that it was entitled to recover damages for these alleged injuries by reason of its contract with the Mutual Indemnity Company, whereby in consideration of the reinsurance by appellant of the Mutual Company's policies, and the assumption by appellant of all its risks and obligations, together with all debts and liabilities of the Mutual Company, the latter was to transfer

contracts of insurance, together with all assets."

The appellant is mistaken in assuming that this court held that this contract was valid as a merger agreement, whereby the assets of the Mutual Company should pass to the appellant company in the case of *Freemeyer v. Industrial Mutual Indemnity*, 101 Ark. 61, 141 S. W. 508. We expressly refrained from deciding that question in the above case, saying: "We do not think the general subject of the power of a corporation of this kind to merge itself into or consolidate with another or organize itself into a new corporation is involved." It was not necessary in that case to determine as to whether a mutual industrial insurance company, under our statute, could, by contract, merge itself and pass all of its assets into another company; nor do we think it necessary to decide that question in this case, for, conceding that the assets of the mutual Industrial Insurance Company passed or were assigned by it to the appellant under a valid contract, the alleged injuries set up in appellant's complaint as suffered by the Mutual Industrial Insurance Company, down to paragraph 16, were not such assets as could be assigned under our statute.

The injuries as alleged to the Mutual Industrial Insurance Company were all torts in the nature of slander, libel, malicious prosecution, fraudulent conspiracy to injure and destroy business, etc., etc. Actions growing out of wrongs of this nature would not survive, but were peculiar to the Mutual Industrial Insurance Company, and died when it went out of existence. The causes of action that survive are assignable; those that do not survive are not assignable. 4 Cyc. 23. Now the causes of action that survive are those "for wrongs done to the person or property of another." Section 6285, Kirby's Digest. The statute means injuries of a physical character to actual, visible, and tangible property, and not to property rights or interests which in their nature are invisible and intangible. For example, if one injures another in his reputation or business by libel and slander, these, by the express terms of the statute (section 6286, Kirby's Digest), do not survive. And the statute (section 6285, supra) by analogy has generally been construed not to include injuries or wrongs of a kindred nature, such as malicious prosecution, conspiracies to injure another's business and interests in property, to cheat, defraud, etc., where no visible personal property as such is affected. To illustrate further, where there is an injury by trespass to tangible personal property, same being damaged or destroyed, or where same is converted, or where, through negligence, the visible personal property of another is injured or destroyed, in all such cases the causes of action for damages resulting from such wrongs or injuries survive, and are assignable. But injuries that are not of a physical nature,

and that do not operate upon or affect tangible personal property, as distinguished from property rights or interests, do not survive, and are not assignable. *Davis v. Nichols*, 54 Ark. 358, 15 S. W. 880; *John W. Farwell & Co. v. Wolf et al.*, 96 Wis. 10, 70 N. W. 289, 71 N. W. 100, 37 L. R. A. 138, 65 Am. St. Rep. 22, and cases therein cited. It follows that whatever causes of action the Mutual Industrial Insurance Company had against appellee, these causes of action (conceding that same were well pleaded) grew out of torts that were not of a physical character, and which did not injure the Mutual Industrial Insurance Company's tangible property. But, on the contrary, the torts, as set forth, were in the nature of conspiracies to injure and destroy the Mutual Industrial Insurance Company's property rights and interests in business by libel, slander, malicious prosecution, fraudulent representations, and kindred wrongs. Causes of action for these wrongs did not survive, and were not assignable.

[2] The allegations contained in the 16th, 17th, and 18th paragraphs of the complaint do not state any cause of action against the appellees. In the 16th paragraph there is a general allegation that "defendants, through malice and by means of false and fraudulent promises of compensation and promotion, had interfered with the employes of plaintiff"; that "defendants had succeeded in securing said employes to leave plaintiff in breach of contract, and enter the employment of defendants." These allegations are not sufficient to state a cause of action against appellees for causing the employes of appellant to violate their contract of employment with it. No specific contract is set up. The names of no employes are mentioned; the means and methods used are not specified. No facts are stated that discover a cause of action. The same may be said as to the allegations concerning policy holders. The 17th paragraph alleges that "through defendant's wrongs" Nelson "joined said conspiracy, and brought suit against plaintiff in the sum of \$50,000." But the "wrongs" alleged are not set forth. The 18th paragraph does not state a cause of action against appellees. It charges that "Nelson and other agents began another canvass of plaintiff's policy holders telling that plaintiff had another big suit against it," etc. If this allegation was intended to state a cause of action for slander of appellant's business, or malicious prosecution of appellant in furtherance of a conspiracy, it falls far short of stating them. Such general allegations as contained in the above paragraphs could only be met by general denials, and no issue could be joined by such pleadings.

In testing the sufficiency of a pleading by general demurrer, every reasonable intentment should be indulged to support it. "If

the facts stated, together with every reasonable inference therefrom, constituted a cause of action, then the demurrer should be overruled." *Cazort & McGehee v. Dunbar*, 91 Ark. 400, 121 S. W. 270, and cases cited. But the complaint here does not state any facts to show cause of action.

[3] Therefore, the complaint cannot be amended on motion to make more specific. It is not a statement of a cause of action defectively, but a failure to state a cause of action at all. *Goodwin v. Robinson*, 30 Ark. 536.

The judgment sustaining the demurrer and dismissing the complaint is correct, and is therefore affirmed.

### THREET v. STATE.

(Supreme Court of Arkansas. Nov. 10, 1913.)

#### 1. INDICTMENT AND INFORMATION (§ 125\*)—DUPLICITY.

An indictment charging that accused forcibly, etc., raped and assaulted H., a female under the age of 16 years, and ravished and carnally knew her, was not defective as charging both rape and carnal abuse, as carnal abuse is included in the charge of rape when the female is under the age of 16 years.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

#### 2. CRIMINAL LAW (§ 1166\*)—APPEAL—HARMLESS ERROR—CHALLENGE OF GRAND JURORS.

Under Kirby's Digest, § 2220, giving every person, held to answer a criminal charge, the right to object to the competency of any one summoned as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person, and providing that, if the objection be established, the person challenged shall be set aside, where, though accused moved to quash the indictment because certain grand jurors were specially interested in his prosecution, he made no attempt to prove this fact, the mere fact that he was afforded no opportunity to challenge such jurors was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. § 1166.\*]

#### 3. CRIMINAL LAW (§ 137\*)—VENUE—PETITION FOR CHANGE—WITHDRAWAL.

Where, though one of accused's counsel, in withdrawing a petition for a change of venue before the court acted thereon, did so without the consent of accused or his other attorney and in their absence, because of information that accused would be lynched if he was removed from the county jail, the court did not know of this want of authority, or of the attorney's motive, and the trial was thereafter had without accused or his other attorney requesting a ruling on the petition, their failure to request a ruling was equivalent to a withdrawal of the petition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 253; Dec. Dig. § 137.\*]

#### 4. CRIMINAL LAW (§ 1166\*)—TRIAL—SETTING TIME FOR TRIAL.

While a criminal case should not have been set for trial in accused's absence, no prejudice resulted therefrom where the trial was had at the time set without any request for additional

time to prepare for trial, especially as a trial might be had without any setting of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. § 1166.\*]

**5. RAPE (§ 14\*)—FORCE—RESISTANCE OVERCOME BY FEAR.**

If a girl, claimed to have been raped, failed to resist or to make outcry because she feared for her safety, the crime was against her will, and was rape, and hence, the court properly modified an instruction so as to charge that it was her duty to use all means within her power, "consistent with her safety," to prevent accused from accomplishing his designs.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 13; Dec. Dig. § 14.\*]

**6. RAPE (§ 59\*)—INSTRUCTIONS—CONDUCT OF FEMALE.**

On a trial for rape, where it appeared that following the act charged, the prosecutrix went to school where she remained during the day without any one knowing that anything had happened to her, that she subsequently voluntarily met accused and others at the same place, and had sexual intercourse with them, and that she made no disclosure of what had happened until it was discovered that she was meeting men at such place about 60 days after the alleged rape, it was error to refuse instructions that, in considering whether the intercourse was against her will or with her consent, the jury might consider her failure to make known to her parents and others the wrong done her, and also her subsequent conduct.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.\*]

**7. CRIMINAL LAW (§ 787\*)—INSTRUCTIONS—FAILURE OF ACCUSED TO TESTIFY.**

Under Kirby's Digest, § 3088, making any person charged with crime a competent witness at his own request, and not otherwise, and providing that his failure to make such request shall not create any presumption against him, it was error to refuse an instruction that it was accused's privilege to testify or to decline to do so, and that his failure to testify was neither evidence nor a presumption of his guilt, and must not be considered in determining his guilt or innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902, 1903; Dec. Dig. § 787.\*]

**8. CRIMINAL LAW (§ 1186\*)—APPEAL—DISPOSITION OF CAUSE—NEW TRIAL.**

On reversal of a conviction for rape because of errors in the instructions, where the jury found by their verdict that accused had sexual intercourse with a girl who, it was undisputed, was under 16, the state would be permitted to elect to have accused sentenced for carnal abuse, if it saw fit to do so, without a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

Appeal from Circuit Court, Faulkner County; Eugene Lankford, Judge.

Robert Threet was convicted of rape, and he appeals. Reversed, and remanded conditionally.

Robert Threet, pro se. Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for the State.

SMITH, J. The appellant was indicted for the crime of rape, convicted and sen-

tenced to death, and has appealed from that judgment. The allegations of the indictment are as follows: "State of Arkansas vs. Robert Threet. \* \* \* Faulkner County Circuit Court. The grand jury of Faulkner county, in the name and by authority of the state of Arkansas, accuse Robert Threet of the crime of rape, committed as follows: The said Robert Threet, in the county and state aforesaid, on the first day of March, A. D. 1913, in and upon one Gertie Hollingshead, a female under the age of 16 years, forcibly, violently, and feloniously, did rape and assault her, the said Gertie Hollingshead, then and there violently, forcibly and against her will, feloniously did ravish and carnally know. Against the peace and dignity of the state of Arkansas. J. B. Read, Prosecuting Attorney."

[1] Appellant moved to quash the indictment because under its allegations he was charged with both the crime of rape and carnal abuse. The indictment sufficiently charges the crime of rape, and, where it is alleged the female is under the age of 16 years, the crime of carnal abuse is included in the charge. A similar indictment was approved in the case of Henson v. State, 76 Ark. 287, 88 S. W. 965, where it was said: "Carnal knowledge of a female is necessary to constitute rape; and when the female is under 16 years of age, carnal abuse is included in that offense."

[2] Appellant also moved to quash the indictment because certain members of the grand jury were specially interested in the prosecution against him, and at the time of his indictment he was confined in the common jail of Faulkner county, and afforded no opportunity to challenge such persons from serving on the grand jury in the investigation of his case. No attempt was made to prove this allegation, and the mere fact that appellant was not afforded the opportunity to challenge grand jurors is not ground for reversal, when it does not appear that he was denied the benefit of some right secured by section 2220, Kirby's Digest, which gives every person held to answer a criminal charge the right to object to the competency of any one summoned to serve as a grand juror, on the ground that "he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been summoned or bound in a recognizance as such; and, if such objection be established, the person so challenged shall be set aside." Sullins v. State, 79 Ark. 127, 95 S. W. 159, 9 Ann. Cas. 275; Eastling v. State, 69 Ark. 189, 62 S. W. 584.

[3, 4] A reversal of the case is also sought because of the failure of the court to grant appellant a change of venue, and because, also, of the fact that the court set the cause for trial in the defendant's absence. An ex-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



amination of the record discloses the following facts: Appellant filed a petition for a change of venue in proper form, alleging that he could not obtain a fair trial in Faulkner county because of the prejudice of the inhabitants of that county against him. This petition was supported by the affidavits of Geo. Shaw and George W. Clark, appellant's attorneys, and two other citizens of that county. These affiants all testified in court, and, after setting out their evidence, the record contains the following recital: "About 30 minutes after the above testimony was heard, George Shaw, one of the attorneys for the defendant, appeared before the court and stated that he had talked with the mother of the defendant, who had talked with some of her white friends, and she was now of the opinion that the defendant would get better treatment in Faulkner county than anywhere else, and he (Shaw) stated they wished to withdraw the petition for a change of venue, which was granted." The trial judge thereupon made a notation on his docket showing the withdrawal of this motion, and at the same time ordered the case set down for trial on a certain day. After the trial, which resulted in appellant's conviction, he filed an affidavit in which he stated that his petition for a change of venue was withdrawn by one of his attorneys in his absence and in the absence of the other attorney, and that he was not aware of this action until after the trial. The attorney who had withdrawn the petition also filed an affidavit in which he stated that he had acted without the consent of defendant or the other attorney, and in their absence, and this action was taken because of information he had received that appellant would be lynched if he was removed from the Faulkner county jail. It is not contended that the court was advised of this want of authority, nor of the motive which prompted counsel's action; but upon the day set for trial all parties announced ready and the trial proceeded. The court was not asked to make a ruling upon the petition for a change of venue, and no request was made for additional time to prepare for trial. Under the circumstances the failure of appellant or his counsel, who was not a party to the withdrawal of this petition, to ask a ruling on the petition for a change of venue must be held equivalent to a withdrawal of the petition in appellant's presence. And, notwithstanding the cause should not have been set for trial in appellant's absence, no prejudice resulted from that fact as additional time was not asked, and a trial might be had without any setting of a case. We conclude, therefore, that no error was committed in the court's failure to act upon the petition for a change of venue, nor in setting the case for trial in defendant's absence.

[5, 6] Appellant was a negro man, and Gertie Hollingshead, the girl alleged to have been assaulted, was only 15 years old, and there appears to have been no question as to the

fact that appellant had had sexual intercourse with her. But, while the girl testified that she did not consent, but that she was put in fear and offered all the resistance which she dared to offer, she also testified to facts which tended to discredit that statement. The story told by the girl is that the assault occurred at the home of a negress named Louvidia Sims, in the town of Conway, and that there were a number of houses near this house, and that among others who lived near was the city marshal and the constable. That the negress took her by one arm and the appellant by the other and led her to a bed where she was assaulted, and that the negress was in the house laughing during its commission. That this occurred about 8 o'clock in the morning, and after washing the blood from her clothes she went to school, where she remained during the day and no one knew that anything had happened to her. She also admitted that she had subsequently voluntarily met appellant at the same place and had sexual intercourse with him, and further admitted that she had had intercourse with a number of men, both white and black, at Louvidia's house, and that Louvidia had kept the money which these men had paid her, but had promised to buy her some fine dresses, but had failed to do so. She admitted that the intercourse in each instance was had with her permission except on the occasion when the appellant first had intercourse with her, and on another occasion when a negro who had no hands had intercourse with her forcibly and against her will. It appears that the girl made no disclosure of what had happened until it was discovered that she was meeting men at Louvidia's place about 60 days after the commission of the alleged assault.

At the trial appellant asked the following instruction: "You are instructed that it was the duty of Gertie Hollingshead to use all means within her power to prevent the defendant from accomplishing his designs, when said alleged assault was made upon her, and you are further instructed that it was also her duty to give alarm and make an outcry, when she first learned of the defendant's designs to have sexual intercourse with her, and it is your sworn duty in this case to consider her failure to make such outcry at the time said alleged assault was made upon her by the defendant in this case, together with all the other facts and circumstances proven in this case."

The court gave this instruction, but added, after the words "to use all the means within her power," the words "consistent with her safety." Appellant complains of this modification, but we think it was proper. If she failed to resist or to make outcry because she feared for her safety the crime was against her will and was rape. But this instruction related to the question of outcry at the time of the commission of the offense,

and appellant asked a number of instructions on the question of subsequent silence. These instructions were to the effect that, in considering the question whether the intercourse was against the will of the said Gertie Hollingshead, or with her consent, the jury had the right to consider her failure to make known to her parents or other persons the wrong done her, and that the jury might also consider her subsequent conduct in connection with all the other facts and circumstances in proof. None of these instructions were given. The court had properly permitted the girl to explain that she had not told of the assault because appellant had said at that time that he would kill her if she told; and if the jury believed the statement it would excuse the silence. But, when there is a question as to whether consent was given, the defendant has the right to have the jury told that they may consider the female's subsequent silence and conduct as bearing on that question. The identical question was so decided in the case of *Jackson v. State*, 92 Ark. 71, 122 S. W. 101.

[7] Appellant asked the court to give instruction No. 8 which reads as follows: "You are instructed that it is the privilege of the defendant to either testify in his own behalf or decline to so testify. The failure to testify is neither an evidence of his guilt nor a presumption of law or fact of his guilt. Such fact is not to be considered by you in determining his guilt or innocence in this case."

The court refused to give this instruction and appellant saved his exceptions. This instruction embodies substantially the provisions of section 3088 of Kirby's Digest, which makes any person charged with the commission of crime a competent witness at his own request and not otherwise, and provides that his failure to make such request shall not create any presumption against him. This same question arose in the case of *People v. Provost*, 144 Mich. 17, 107 N. W. 716, in which case a similar instruction was asked, based upon a statute of that state substantially the same as our own. The authorities were there reviewed, and the court announced its conclusions as follows: "(1) It is not error for the court on its own motion to give such a charge as was requested in this case. (2) That the court is not required to give such a charge in the absence of a request so to do. (3) That where such a request to charge has been made, it is error to refuse to give it." And it was there said: "Where such request to charge has been made, we find no authority warranting its refusal. The contention of respondent in this case is founded both upon reason and authority. A respondent is protected in his right under the statute to elect not to testify. A jury, upon his request, should be informed of that right, to prevent the creation in their minds of any

presumption of guilt by reason of his silence. The court was in error in refusing to give the request as presented."

[8] For the errors indicated, the judgment must be reversed; but as the jury has found by its verdict that appellant did have sexual intercourse with Gertie Hollingshead, and as it is undisputed that she was at the time under the age of 16 years and that the appellant is therefore in any event guilty of the crime of carnal abuse, the state may elect, if it sees proper so to do, to have the defendant brought into the court below to be there sentenced for that crime. Unless such election shall be made in 15 days, the cause will be remanded for a new trial.

#### OUTCAULT ADVERTISING CO. v. YOUNG HARDWARE CO.

(Supreme Court of Arkansas. Nov. 10, 1913.)

##### 1. SALES (§ 23\*)—ORDER FOR GOODS—OFFER AND ACCEPTANCE—CANCELLATION BEFORE ACCEPTANCE.

Where an alleged written contract for the sale of goods was at most an order for the goods subject to the seller's acceptance, it was subject to cancellation by the buyer at any time before acceptance, though it provided that it could not be cancelled.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 44-48; Dec. Dig. § 23.\*]

##### 2. PRINCIPAL AND AGENT (§ 103\*)—ORDER FOR GOODS—ACCEPTANCE BY TRAVELING SALESMAN.

Where plaintiff's agent, who took a written order for certain goods from defendant, was but a traveling salesman, and there was no proof that he had special authority to bind the seller, his authority was prima facie limited to the solicitation and transmission of orders, and he had no authority to accept an order on the part of his principal so as to effectuate a binding contract.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 278-293, 353-359, 367; Dec. Dig. § 103.\*]

##### 3. SALES (§ 53\*)—ORDER FOR GOODS—ACCEPTANCE—QUESTION FOR JURY.

Whether an order for goods obtained by a traveling salesman was accepted by the seller before cancellation by the buyer held for the jury.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 145-151; Dec. Dig. § 53.\*]

##### 4. SALES (§ 388\*)—FRAUD—FALSE REPRESENTATIONS.

Where, in an action on a contract for the sale of goods, defendant pleaded and introduced evidence to prove that plaintiff's agent obtained a contract by falsely representing that another had sent such agent to defendant, requesting defendant to purchase the goods for their joint use, the court properly charged that if plaintiff's agent induced defendant to make the contract by fraud, which was material, such act would avoid the contract, and plaintiff could not recover.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1108; Dec. Dig. § 388.\*]

##### 5. ALTERATION OF INSTRUMENTS (§ 4\*)—CONTRACT OF SALE—TERMS.

Alteration of a contract for the sale of goods by the seller, so as to require the payment of \$2.08 instead of \$2.00 per week, was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a material one and sufficient to vitiate the contract.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 16, 17; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Arkansas County; Eugene Lankford, Judge.

Action by the Outcault Advertising Company against the Young Hardware Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The appellant sued the appellee on a written contract, alleging that appellee was indebted to it in the sum of \$108.16, the purchase price of certain advertising matter furnished by the appellant to the appellee. The appellee denied that it was indebted to the appellant in any sum; admitted that it had signed the contract in suit; and set up that appellee's signature to the contract through its manager, R. P. Young, was obtained through false and fraudulent representations of the agent of the appellant, who negotiated the contract with appellee. Appellee further set up that, as soon as it ascertained that the contract had been obtained through the fraudulent representations of the agent of the appellant, it countermanded the order for the shipment of the goods therein mentioned, but that appellant, although receiving the countermand, shipped the goods anyway to the appellee. The appellee, as soon as the goods came, shipped same back to the appellant, and has never heard from same since. The issue turned on whether or not the written contract was executed by the manager of the appellee through the fraudulent representations of the agent of the appellant, with whom the order for the goods was placed.

The appellant, to sustain its cause of action, introduced the witness who was its traveling salesman, and who took the order for the goods mentioned in the contract. The witness produced the contract, and testified that the goods mentioned therein had been furnished to the appellee, that same had not been paid for, and that the amount of the purchase price, \$108.16, was past due. There was a provision in the contract to the effect that same could not be canceled, and also to the effect that salesmen were not authorized to alter the contract by verbal agreement. The contract was signed by Young Hardware Company, and by C. H. Elliott, salesman. The manager of the appellee, R. P. Young, testified that he signed the order introduced in evidence; that Elliott, the traveling salesman of the appellant, came to his store and induced him to sign the contract by representing to witness that McGeorge, a partner of appellee at Hazen, had sent him (Elliott) over there to see witness; that McGeorge wanted a portion of the goods, but not all of it, but that McGeorge wanted witness to buy it,

and to let him (McGeorge) use it too. Two or three days after this, witness went to Hazen, saw McGeorge, and told him that he had bought the advertising matter from appellant for him. McGeorge said he did not want it. Witness told McGeorge that appellant's agent had represented that he (McGeorge) had sent him over to Stuttgart. McGeorge said that he wouldn't look at the stuff, that he had told appellant's agent that he had some postcards that he would not mind having, but denied that he had made the representations to appellant's agent that appellee's manager, R. P. Young, claimed had been made to him when the order for the goods was signed. Witness further testified that appellant's agent had represented that the price would be \$2 a week, but that afterwards, when he came back after he had made out the order, the price was put in at \$2.08. Witness refused to sign it. Then the agent changed it back to \$2. The order, as it now appears in evidence, shows that the price was afterwards changed to \$2.08. The appellant objected to the above testimony in regard to the representations, and the court overruled its objections.

McGeorge testified over the objections of appellant that he did not make the representations; stated that he had told the agent of appellant that nothing in his line interested the witness at all. Appellant duly excepted to the ruling of the court in admitting this testimony. Other representations were set up but no objections were saved to them, and it is not material here to set them out.

Witness Young further testified on behalf of the appellee that he did not hear from the appellant in regard to the order, or get an acceptance of it before he canceled it. He stated that about the time for appellant to get his letter canceling the order, they wired that they had shipped the goods. Witness thought he received the telegram on the 25th. He had written a letter canceling the order on the 21st. Witness, over the objection of appellant, introduced a letter written on the 21st of March, 1910, in which he had requested appellant to cancel the order, giving as a reason that appellant's agent had made the representations alleged. Other correspondence was introduced over the objection of appellant, which is not material to the controversy, and unnecessary to set out.

In rebuttal witness C. H. Elliott testified that he acted as the traveling salesman of appellant in the year 1910, and that he sold the goods and took the contract with the appellee in controversy. He denied the misrepresentations alleged by appellee; stated that he called on the Young Hardware Company; "showed the service, explained how it was used, and they thought well enough of it to sign the order," which witness "accepted, then and there."

The court, at the request of the appellee and over the objection of appellant, instructed the jury as follows:

1. You are instructed that if you find that the order was countermanded before it was accepted by the company then the defendant would not be bound by the order, even though a clause provided, "This contract cannot be canceled."

On its own motion, over the objection of appellant, the court also gave the following: "Gentlemen of the Jury: This is a suit by the plaintiff against the defendant for \$108.16, on a certain contract which they set out in their complaint and introduce in evidence in this case. Now, the law is that a man should comply with his contract. Whatever contract he makes, he should comply with it, unless there is some reason for not doing so—some reason of law. One reason that the defendant gives for not complying with this contract is that he was induced by fraud on the part of the agent of plaintiff to enter into the contract. If you find from the evidence that plaintiff's agent did induce him by fraud, which was material to the terms of the contract, to enter into the contract, then the contract would be void and the plaintiff could not recover. The defendant gives another reason for not complying with the contract, and that is that the contract was changed from \$2.00 per week to \$2.08 per week for the year. That would be a material change, and if you find from the testimony that the plaintiff or its agent did change the contract from \$2.00 a week to \$2.08, that would be such a change as would vitiate it and they cannot recover. If you find that is true, you are the sole judges of the weight of the evidence and the credibility of the witnesses. The burden of proof is on the plaintiff to make out his case by a fair preponderance of the testimony, but, the contract being shown, the burden is on the defendant to show reasons why it or he should not comply with the contract."

The appellant excepted to the ruling of the court in giving the above instruction. The exceptions saved at the trial were brought forward in a motion for new trial, which was overruled, and this appeal has been duly prosecuted.

J. M. Brice, of De Witt, for appellant.  
O. M. Young, of Stuttgart, for appellee.

WOOD, J. (after stating the facts as above). [1] 1. While the written contract specifies that same cannot be canceled, the contract, when taken as a whole, shows that it was but an order for the sale of goods. The case is controlled on this point by Toledo Computing Scale Co. v. Stephens, 96 Ark. 606, 132 S. W. 926; and by Lee v. Vaughn Seed Store, 101 Ark. 68, 141 S. W. 496, 37 L. R. A. (N. S.) 352.

[2] Notwithstanding the testimony of appellant's agent, the traveling salesman, to the

effect that he "accepted the contract then and there," his testimony, taken together, showed that he only meant that he accepted the order. Appellant's agent was a drummer, or a traveling salesman, and, as was held in Lee v. Vaughn Seed Store, supra, in the absence of special authority to bind his principal, a drummer can merely solicit and transmit orders, and the contracts of sale do not become complete until the orders are accepted by his principal.

[3] It was a question for the jury, under the evidence, as to whether or not the order of sale was accepted before the same was countermanded by the appellee. In Merchants' Exchange Co. v. Sanders, 74 Ark. 16, 84 S. W. 786, 4 Ann. Cas. 955, we held that an order for a bill of goods is not a contract of purchase but merely a proposal which may be withdrawn at any time before acceptance. The court properly instructed the jury, in instruction No. 1, on the issue of whether or not the order was accepted before the same was countermanded by the appellee.

[4] 2. The court did not err in its charge to the jury on the issue as to whether or not the contract was signed by the appellee by reason of the false and fraudulent representations of the agent of appellant. Appellee alleged in its answer that but for the representations of appellant's agent set up in the answer, appellee would not have executed the order for the goods; that the false and fraudulent representations in the procurement of the contract avoided the same, and, further, that appellant's agent "fraudulently obtained the signature of appellee by virtue of the false and fraudulent representations." In French & American Importing Co. v. Belleville Drug Co., 75 Ark. 95, 86 S. W. 836, we held: "In a suit to recover for goods sold, it is a good defense that the order for the goods was procured by false representations, knowingly made by plaintiff's agent as to material fact with the intent to mislead and which misled defendant to its injury." False and fraudulent representations that are about a material fact which was the inducement or procuring cause of a contract will avoid the same. Here the alleged representations, set up as the inducement to the contract, were material. The appellee had the right to rely upon them.

Appellant, to sustain its contention that the court erred in admitting testimony tending to show false representations on the part of appellant's agent, and also erred in submitting this question to the jury in its instruction, relies upon the case of Outcault Advertising Co. v. Bradley, 105 Ark. 50, 150 S. W. 148. That case was disposed of upon the theory that the testimony set up, as an inducement to the contract, was in the nature of parol declarations which tended to contradict or vary the terms of the written contract. The question as to whether or not the declarations were material, and whether

or not they were the cause of the contract, and as to whether or not they were fraudulent and relied upon by the appellee in entering into the contract were not discussed in that case. Indeed, from the statement of the case, it does not appear that the alleged fraudulent representations were made for the purpose of procuring the contract, or that they were a material inducement to the contract. If such had been the case, the testimony would have been competent and should have been admitted; but as before stated, the court did not dispose of the case on that theory. An examination of the facts of that record will discover that the cause was correctly decided, for the reason that the answer did not set up the alleged representations as a material inducement to the contract, and, further, for the reason that the alleged representations were not material and such representations as the appellee in that case had the right to rely upon. The appellee in that case did not have the right to rely upon the representations, for the reason that the opportunity was at hand for ascertaining the falsity of such representations. See *Carwell v. Dennis*, 101 Ark. 603, 143 S. W. 135. By inquiry of the local newspaper the appellee could have found out whether or not the representations were false before he entered into the contract. The case, for the reason stated, was correctly decided, but the questions now under consideration were not discussed, and therefore that case is not authority for the appellant's contention in the case at bar.

[8] The court correctly told the jury that, if the contract was changed from \$2 a week to \$2.08 a week, that would be such a material change as to vitiate the contract, and there was testimony to warrant the submission of this question to the jury.

We find no error in the record, and the judgment is affirmed.

#### CARLTON v. STATE.

(Supreme Court of Arkansas. Oct. 20, 1913.)

#### 1. CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS.

Whether it is proper to submit to the jury the question of accused's guilt of any particular offense included in the indictment depends on whether there is evidence which would justify a conviction for that offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

#### 2. HOMICIDE (§ 309\*)—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, where there was testimony that accused shot deceased while the latter had his right hand on the shoulder of his brother and his left hand hanging down by his side, and not in his pocket, an instruction that the killing being proven, the burden of showing an excuse was on accused unless the state's evidence showed the homicide to be justifiable or the offense to be manslaughter, is warranted; the evidence being sufficient to sup-

port a conviction of murder in the second degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

#### 3. HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR.

In a prosecution for homicide, the giving of an instruction casting on accused the burden of showing the offense to be less than murder in the second degree was harmless, where accused was only convicted of manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

#### 4. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS.

Where an instruction given fully covered that requested by defendant, the refusal of defendant's request was not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

#### 5. CRIMINAL LAW (§ 830\*)—TRIAL—INSTRUCTIONS—REQUEST.

Where accused requested the court to instruct on involuntary manslaughter, but did not tender a correct instruction, he cannot complain that the court did not grant his request, and the reading of the statute defining voluntary and involuntary manslaughter was sufficient.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.\*]

#### 6. WITNESSES (§ 380\*)—EXAMINATION—IMPEACHMENT.

Where a witness at trial gives different testimony from that before the grand jury, the prosecutor, being surprised, may examine the witness as to his testimony taken before the grand jury and question him concerning its correctness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.\*]

#### 7. CRIMINAL LAW (§ 1163\*)—TRIAL—APPEAL.

As Kirby's Dig. § 2390, makes it discretionary whether the jury shall be allowed to separate, an accused cannot complain that during an intermission in the trial a separation occurred; no showing of prejudice being made, and it appearing that up to the time of the separation the court had not ordered the jury to be kept together.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.\*]

Appeal from Circuit Court, Newton County; George W. Reed, Judge.

Columbus Carlton was convicted of involuntary manslaughter, and he appeals. Affirmed.

Carlton was a constable in Newton county, Ark. One night in December, 1912, there was a box supper at a schoolhouse for the purpose of raising funds to purchase Christmas presents for the children. Some women requested Carlton to be present to keep the peace, as they had heard that a number of young men in the neighborhood had said they had ordered whisky and had also said they were going to "can" the box supper. Carlton was at the schoolhouse. He told the brother of the deceased and a companion that if any one drunk came into the house amongst the women and children he would arrest them. Carlton then went into the schoolhouse, and

after he had gone the deceased remarked, "B— G—, he could not arrest him." Roscoe Barr, a brother of the deceased, entered the schoolhouse in a drunken condition and approached the stove, around which the women and children were gathered. Carlton went to him and took him by the shoulder and led him or pushed him out of the room. The deceased followed Carlton and his brother out of the house. When deceased got outside, he shoved appellant loose from his brother with the statement, "No G— d— man could arrest his brother." Deceased put his hand either in his right hip pocket or into the opening of his bib overalls, with the remark, "You G— d— s— of a b—, you can't arrest me." Carlton drew his revolver and commanded him to take his hands out of his pocket or to put up his hands. Deceased repeated the statement that he had made to Carlton and made a motion as though to draw a weapon. The revolver that Carlton had was a borrowed one, with which he was not very well acquainted. The pistol was out of repair and would not stand cocked. Carlton had cocked the pistol with his right hand, but, believing that it had not caught, he took hold of the barrel with his left hand and cocked it again. This time he felt it catch, and, thinking it was safely cocked, he took his thumb off the hammer. The hammer immediately fell, firing the pistol, the ball of which passed through appellant's finger and struck the deceased in the temple, killing him instantly. Some one grabbed or jerked the appellant around, and the pistol was again discharged; the ball entering the foundation of the school building back in the opposite direction from where appellant had been facing. When the deceased was picked up and carried in the house, his knife was found lying upon the ground near his right hand. There was some dispute as to whether the knife was open or closed. Appellant stated immediately after the pistol was fired that it went off, but that he would have had to shoot the deceased anyway. The next day the appellant went to the county seat and voluntarily surrendered himself to the sheriff.

The above are substantially the facts as they were developed at the trial by the testimony for the appellant. There was testimony on behalf of the state which tended to show that Carlton said to the deceased, "Hands up!" that Carlton drew his revolver and brought it up, holding it with both hands when the same was fired. He said that he did not aim to do it. Deceased's right hand, at the time, was on his brother's left shoulder, his left hand hanging down by his side, and not in his pocket. Witness did not see him making any effort with his hands. It was shown that Carlton said that he shot deceased accidentally. It was also shown that he stated that he shot him because he thought he had to do it to save his own life. He stated that he shot him because he did not

take his hands out of his pocket; that he thought he was going to draw something. The appellant was tried for murder in the first degree, and the above is substantially the testimony upon which he was convicted of involuntary manslaughter and sentenced to two years' imprisonment in the state penitentiary.

Among other instructions, the court gave the following: "(4) The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." The appellant objected to the giving of the instruction, and also requested the court to modify it by adding the words, "however, if, in the whole case, you have a reasonable doubt of the defendant's guilt, you will acquit him," which the court refused.

The appellant objected to the court's reading the section of the digest pertaining to voluntary and involuntary manslaughter, and at the time specifically requested the court to give a correct charge to the jury as to the law of involuntary manslaughter, which request the court refused, further than the reading of the section of the statute, to which the appellant duly excepted.

The appellant requested the court to charge the jury as follows: "I charge you that the indictment constitutes no evidence against the defendant; it is simply the means by which he is brought into court, and should not be considered by you even a circumstance against him. Upon the interposition of defendant's plea of not guilty to the charge, there arises the legal presumption that he is innocent, and this presumption is, within itself, sufficient to warrant an acquittal at your hands, unless overturned by the proof, and remains with the defendant as a complete defense until it is overcome by legal evidence that satisfies your minds beyond a reasonable doubt of his guilt." The court refused this prayer for instruction, to which appellant excepted.

The court, of its own motion, gave the following: "(8) The indictment is no evidence of the defendant's guilt. It is only the means of bringing the defendant into court, and when this is done it has served its purpose. (9) The defendant is presumed to be innocent, and this presumption clings to him through every material step of the trial until overcome by competent testimony sufficient to convince you beyond a reasonable doubt of the defendant's guilt." Appellant complains that it was error to permit the prosecuting attorney to ask one of the state's witnesses with reference to what he testified before the grand jury, and to read to him in the presence of the trial jury from a book purported to be the minutes of the

grand jury, and asking the witness if he did not testify as was therein written.

The record shows that during the examination of the witness Walter Waters, because of a rain and hail storm, the trial was suspended temporarily, and during the time of such suspension one of the jurors, to wit, J. N. Davis, without the knowledge or consent of the defendant, left the courtroom and was gone for some length of time, and was not present in the courtroom when the court was ready to resume the trial and the further examination of the witness, and did not come back into the courtroom until after a wait of some minutes. Whereupon the court adjourned until the next morning at 7 o'clock, and the jury, being held together, were placed in charge of J. M. Brisco, special deputy sheriff, who was specifically sworn as required by law. The appellant makes the above one of his assignments of error in the motion for a new trial.

Troy Pace, of Harrison, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). [1-3] I. Appellant contends that the strongest force of the testimony on behalf of the state only tends to show that appellant was guilty of manslaughter, and that therefore the court erred in giving instruction No. 4.

In *Allison v. State*, 74 Ark. 444, 86 S. W. 409, we said: "The question of whether it is proper to submit to the jury the question of the defendant's guilt of any particular grade of offense included in the indictment must be answered by considering whether there is evidence which would justify a conviction for that offense."

Under the testimony in this case on behalf of the state, the jury would have been warranted in finding the defendant guilty of at least murder in the second degree. The court therefore did not err in submitting to the jury the issue of appellant's guilt or innocence of the crime of murder in the second degree. One of the witnesses testified that appellant shot Barr while the latter had his right hand on the shoulder of his brother and his left hand hanging down by his side, the same not being in his pocket, and that Barr was making no effort with either hand. This testimony was sufficient, if believed by the jury, to have warranted the jury in returning a verdict of at least murder in the second degree, and therefore there was no error in the giving of instruction No. 4. See *Allison v. State*, *supra*. Moreover, the instruction, even if improper, was not prejudicial because the verdict of the jury was for the lowest grade of homicide included in the indictment.

[4] The court gave an instruction on reasonable doubt which fully covered the modi-

fication asked by appellant, and it was therefore not error to refuse this modification. See *Petty v. State*, 76 Ark. 515-517, 89 S. W. 465.

[5] II. The appellant requested the court to give a correct instruction on involuntary manslaughter, but did not present what he considered a correct instruction. He cannot complain, therefore, that the court did not grant his request. The reading of the statute defining voluntary and involuntary manslaughter without a more specific request of appellant, setting forth his prayers for instructions, was sufficient. *Scoggin v. State*, 159 S. W. 211.

The court, in its instructions 8 and 9, fully covered the matter presented by appellant's prayer as to the presumption of innocence, and there was therefore no error in refusing such prayer.

[6] Where a witness at the trial gives different testimony from that testified by him before the grand jury, the prosecuting attorney, being surprised by such testimony, may read or have the witness read his testimony taken before the grand jury and may question him concerning the correctness thereof. *Derrick v. State*, 92 Ark. 237-239, 122 S. W. 506. See, also, *Davidson v. State*, 158 S. W. 1103.

[7] III. The separation of the juror from his fellows while the trial was temporarily suspended during the thunderstorm is not shown to have been prejudicial to the rights of the appellant. This separation took place before the court had exercised its discretion to keep the jurors together. At the time the juror separated himself from the other jurors, the court had not concluded to keep them together and had not at that time placed them in charge of the bailiff with directions to keep them together with specific instructions not to allow them to separate. The record shows that, at the time the juror separated himself from his fellows, he was under no instructions of the court not to do so, and therefore violated no instructions of the court in so doing. No testimony was offered to show that the juror, while absent from his fellows, was guilty of any conduct prejudicial to appellant.

It is within the discretion of the court to allow the jurors to separate or to keep them together (*Kirby's Dig.* § 2390), and, as the court had not exercised its discretion to keep them together at the time the conduct of the juror here complained of occurred, the burden was upon the defendant to show that the juror was exposed to improper influences. See *Reeves v. State*, 84 Ark. 572, 106 S. W. 945.

The record is free from errors prejudicial to appellant, and the judgment must therefore be affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. GREEN.  
(Supreme Court of Arkansas. Nov. 24, 1913.)

1. CARRIERS (§ 239\*)—TICKETS—STATUTORY REGULATIONS.

Under the statutes, a person who goes to a railroad station for the purpose of becoming a passenger on a train, but is given no opportunity to purchase a ticket, has the right to board the train as a passenger without a ticket.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 974, 975; Dec. Dig. § 239.\*]

2. CARRIERS (§ 246\*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for personal injuries, evidence held to show that plaintiff before attempting to board a train was given no opportunity to purchase a ticket.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1275, 1284, 1296; Dec. Dig. § 246.\*]

3. CARRIERS (§ 247\*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

A passenger's attempt to board a moving train is not necessarily negligence, that being a question for the jury on all the circumstances of the case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.\*]

4. CARRIERS (§ 287\*)—PASSENGERS—TAKING UP PASSENGERS.

Where defendant railway denied an intending passenger the opportunity to purchase a ticket, and when he attempted to board a train turned him back and directed him to purchase a ticket at the office, it owed him the duty of giving him a further reasonable time, and where injury resulted from not doing so it was liable, unless the passenger's own negligence contributed thereto.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154-1159, 1161-1166; Dec. Dig. § 287.\*]

5. APPEAL AND ERROR (§ 1066\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

Where an instruction in an action against a carrier for personal injuries should, on the issues and evidence, have been as to the carrier's duty to wait long enough for the passenger to get a ticket after having denied him the opportunity to do so, an instruction on the ordinary duty to hold a train a reasonable time for passengers to board it was not prejudicial, where the jury necessarily understood it to relate to its failure to hold it long enough to enable him to get a ticket.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

6. APPEAL AND ERROR (§ 1064\*)—ACTION FOR INJURIES.

In an action for injuries from attempting to board a moving train, which plaintiff had the right to do without a ticket after having been denied the opportunity to purchase one, an instruction that if she was told by defendant's ticket agent to get on the train she could rely on such direction, provided she took no more risk in so doing than an ordinarily prudent person would have taken under the circumstances, taken as relating to the direction given by the agent, was not prejudicial; and it was immaterial that the proof did not show who the person in the ticket office was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

7. CARRIERS (§ 317\*)—ACTION FOR INJURIES—ADMISSIBILITY.

In a passenger's action for injuries in boarding a moving train, the fact that defendant's claim agent, standing on the rear end of the train and in a position to assist plaintiff in boarding the train, advised her to do so and offered to help her was admissible on the question of plaintiff's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.\*]

8. TRIAL (§ 194\*)—ACTION FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In a passenger's action for injuries in boarding a moving train, an instruction that if plaintiff was told by defendant's agent to get on she might rely on such direction, provided she took no more risk in so doing than a prudent person would have taken under the circumstances, and that plaintiff to recover must have been free from negligence was not objectionable as giving her the absolute right to rely upon such direction so as to take the issue of contributory negligence from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

Appeal from Circuit Court, White County; Eugene Lankford (on exchange), Judge.

Action by Hazel Green against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and P. R. Andrews, of Helena, for appellant. S. Brundidge, of Searcy, for appellee.

McCULLOCH, C. J. The plaintiff, Mrs. Hazel Green, lived at Kensett, Ark., a small town on defendant's line of railroad, and went to the station one day to take passage on a regular passenger train, and, in attempting to board the train after it was put in motion to leave the station, she was thrown down and received personal injuries, compensation for which she seeks to recover in this action. Her contention is that she went to the station about 30 minutes before the train was due according to schedule, and applied for a ticket, but failed to get one, and had no opportunity to purchase a ticket; and when the train rolled in she offered to board the train, but was refused admittance by the trainman standing at the steps of the coach, and was directed to go back to the ticket office for a ticket; that some one in charge of the ticket office told her to go and get on the train; and that she attempted to board the train as it moved out of the station and fell and received personal injuries.

Her testimony tends to support that contention. Her statement, as abstracted here by defendant's counsel, is as follows: "I went to the depot at Kensett; I got there just as the train pulled in; I tried to buy a ticket at the ticket office but it was closed; I went back to get on the train, and the auditor said, 'Ticket please.' I said, 'I am going to



Judsonia,' He said, 'Let me see your ticket.' I said, 'I have no ticket.' He said, 'You cannot board the train without a ticket.' I said, 'The ticket office is closed.' He said, 'Go back and get a ticket.' He said I would have plenty of time to go and buy a ticket, and I went back to get a ticket. I went to the colored waiting room, and some one directed me around to the other window, and I rapped on the window there. A man was in there, and I said, 'I want a ticket to Judsonia.' He said, 'I cannot sell you a ticket,' and for me to go on and get on the train. I went outside of the depot, and had just taken a few steps when the conductor or some of the employes hollered, 'All aboard!' and I ran. The train had started very slowly; two employes of the railroad were standing on the rear platform of the coach, and one of them said, 'Get on, and I will help you.' I reached up with my right hand, and extended my left hand to the man up there; I caught hold with my right hand to the rail and reached for him with my left hand. The train made a bump; it had not gone far, and was moving slowly, and as I went to fall he reached for me, but he did so too late, and he only caught my purse as it flew up. I fell on the track, and the rail struck me on the back of the neck." She testified further as to the extent of her injuries, but, as there is no contention that the verdict is excessive, her testimony on that point need not be stated.

The testimony adduced by the defendant tends to establish an altogether different state of the case, for, if accepted as true, it shows that the plaintiff had an opportunity to buy a ticket if she had come to the station in time, and that she failed to do that but came up as the train was in motion leaving the station, and negligently attempted to board it. The agents in charge of the ticket office testified that they kept the office open according to the rules of the company until the train rolled in, and that they were both compelled then to go out and look after the baggage. The agent or employe, who, plaintiff claims, stood on the rear platform and told her to get on and offered his assistance, was the claim agent of defendant, who was a passenger on the train that day. He testified that he was standing on the rear platform, and when he saw plaintiff running he remarked to others standing near that a lady was about to try to get on, and that as she attempted to climb aboard he offered assistance, but that she fell in the attempt.

It is contended on behalf of defendant that the evidence is not sufficient to sustain the verdict, and in support of that view it is argued that plaintiff was not a passenger, and that the servants of the company did not owe her any duty save the negative one of doing nothing to injure her while she was attempting to board the train.

[1] That contention is not a sound one, for under the statutes of this state a person who goes to the station of a railway company

for the purpose of becoming a passenger, but is given no opportunity to purchase a ticket, has a right to board the train as a passenger without a ticket. *St. L. & S. F. R. Co. v. Blythe*, 94 Ark. 153, 126 S. W. 386, 29 L. R. A. (N. S.) 299. In a later case we said: "One who has no opportunity to comply with rules requiring the purchase of a ticket cannot be said to have violated such rules, and cannot be denied the right to ride on that ground. Where no such opportunity is given, one may become a passenger without having purchased a ticket; and, when he is refused admittance to the train, or is ejected from the train under such circumstances, the company is liable for the damages which result." *St. L. S. W. Ry. Co. v. Hammett*, 98 Ark. 418, 136 S. W. 191.

[2] The first question which arises in this case is whether the plaintiff was given an opportunity to purchase a ticket, and, if she was not given such opportunity, the further question arises whether or not it constituted negligence on her part to attempt to board the train while it was in motion. The evidence is sufficient to sustain the verdict on both of those issues. Plaintiff testified that she came to the station in plenty of time to procure a ticket, and had no opportunity to purchase one; that she attempted to board the train, and was sent back to the office for a ticket with the assurance that she would have time to do so; that she went back to the office for that purpose, but failed to get a ticket, and before she could return and reach the train it was in motion. Now, if these facts were true, it established her right to board the train as a passenger, provided she could do so in the exercise of ordinary care for her own safety—such care as an ordinarily prudent person would exercise under the same circumstances.

[3] Her attempt to board the moving train did not necessarily constitute negligence. That was a question for the determination of the jury under all the facts and circumstances of the case as established by the evidence. "An attempt by the passenger to board a railway train while it is passing a place at which it should stop to enable him to board it, or at which it has failed to stop a reasonable time for him to get on, will not, as a matter of law, be considered a negligent act unless the attending circumstances so clearly indicate that he acted imprudently or rashly that reasonable minds could fairly arrive at no other conclusion, and that, in the absence of circumstances leading to such a conclusion, the question whether the act was negligent should ordinarily be left to the jury." 3 *Hutchinson on Carriers* (3d Ed.) § 1182.

The testimony tends to show that the train was running very slowly at the time plaintiff attempted to board it, and, according to her testimony, the claim agent, who was standing on the rear platform with other persons, told her to get on and offered to help her.

The claim agent himself, who was introduced as a witness by the defendant, testified that he offered to help her. Under those circumstances, it cannot be said, as a matter of law, that the plaintiff was guilty of negligence in attempting to board the train slowly moving out from the station. It was a matter about which reasonable minds could draw different conclusions and therefore made a case for the determination of the jury. The court was therefore correct in refusing to take the case from the jury by a peremptory instruction in defendant's favor.

Error is assigned in the action of the court in giving an instruction containing the following statement: "It is the duty of defendant to hold its train a reasonable length of time before moving the same, and you are instructed in this connection that a reasonable time is such time as a person of ordinary care and prudence, under the circumstances, should be allowed to take; and if you find from the evidence that the defendant has failed in its duty in this respect, and the plaintiff was injured thereby, then your verdict will be for the plaintiff, unless she was guilty of contributory negligence." It is insisted that this instruction is abstract and therefore erroneous because the undisputed evidence is that the train waited at the station a reasonable length of time, and for this reason there was no evidence upon which to base the instruction. It is true that there is no controversy over the fact that the train waited at the station long enough to give an opportunity to passengers to board it. The instruction was, in a sense, abstract.

[4] But if, as contended by the plaintiff, they had denied her an opportunity to procure a ticket, and when she attempted to board the train the servant of the company turned her back and directed her to go to the office and purchase a ticket, then the company owed her the further duty of giving her a reasonable time within which to purchase the ticket, and return to the train and board it. Failing to do that, they failed to discharge the duty which the company owed to her as one who was offering herself as a passenger, and they are responsible for any injury which resulted, unless the plaintiff's own act of negligence contributed to the injury.

[5] The instruction ought to have been directed to this state of case rather than to the ordinary duty of train operatives to hold the train a reasonable length of time for passengers to board it. But we think this inaccuracy in the instruction was not a material one. The jury necessarily understood it to relate to their failure to hold the train a length of time sufficient to enable her to get a ticket and board the train. The instruction, therefore, is not prejudicial on account of its inaccuracy.

[6] The next assignment relates to instruction No. 5 given at the instance of the plaintiff, as follows: "If the plaintiff was order-

ed or directed by the agent of the defendant to get on the train, she had a right to rely upon said advice or direction, provided she took no more risk in getting on the train than a prudent person would have taken under the circumstances." Counsel for defendant argue that this instruction had reference to the alleged direction or advice given by the claim agent standing on the rear of the train, and, as he had nothing to do with the operation of the train, his conduct in that respect was beyond the scope of his authority and therefore did not bind the company. Plaintiff's counsel insist, on the other hand, that this instruction related to the advice or direction given to her by the person in the ticket office. If it relates to the alleged statement of the person in the ticket office to plaintiff, then it can only be construed to refer to plaintiff's right to board the train without a ticket, and not to the question of her care or negligence in boarding the train. In that view of the case the instruction could not have been prejudicial, for, regardless of any reliance upon the advice or direction of the person in the ticket office, if she was denied an opportunity to buy a ticket, she had a right to board the train, provided she could do so in the exercise of due care and was guilty of no negligence in attempting to do so. Nor is it material that the proof does not show who the person in the ticket office was, because if she went there to buy a ticket and no one was there who could sell her one, it is immaterial whether the person who made this statement to her had authority or not to act for the company, because, as before stated, the question is whether she was denied the right to purchase a ticket. So, in that view of the case, the instruction could not have had any harmful effect.

[7, 8] On the other hand, if the instruction be treated as relating to the claim agent, its harmful effect is not apparent. It would have been correct for the court to tell the jury that, in testing the question of plaintiff's negligence in attempting to board the train, they had the right to consider the fact that a person or persons standing on the rear end of the train and in a position to assist her in boarding it, advised or directed her to board it, and offered to help her. That fact, if it existed, was sufficient to influence a person of reasonable prudence and therefore should have been considered by the jury in determining whether the plaintiff was guilty of negligence in attempting to board the train under those circumstances. It was not correct to say, as a matter of law, that the plaintiff had a right to rely upon that advice or direction, but when it is observed that the court coupled this statement with the further proviso that the plaintiff must, in order to recover, be found to have been free from negligence in boarding the train, it is obvious that the court did not mean by this to tell the jury that the plain-

tiff had the absolute right to rely upon the assurance implied by the invitation or direction to attempt to climb aboard. It is unimportant whether or not the person who gave the direction was an agent of the company with authority to act in that regard, for, if the person who offered the advice was in a position to render such assistance, this was a circumstance for the jury to consider in testing the plaintiff's conduct. It is evident from other instructions given by the court that it was not intended by this instruction to take away from the jury the question of contributory negligence on the part of the plaintiff in attempting to board the train, or to declare the law to be that plaintiff had the right to rely upon advice or direction given to her by some other person. If that interpretation had been placed upon the instruction at the time, the court's attention should have been called to it, and an opportunity given to make it clearer, and for this reason we are constrained to interpret the instruction as it seems to have been interpreted in the trial below. The other instructions given correctly submitted the issues to the jury, and we are of the opinion that the refusal of the court to give others requested by defendant was not prejudicial.

Upon the whole, we think that the case was fairly tried, and that the judgment should be affirmed.

It is so ordered.

#### WARDEN et ux. v. MIDDLETON et al.

(Supreme Court of Arkansas. Nov. 17, 1913.)

#### 1. APPEAL AND ERROR (§ 697\*)—RECORD—BILL OF EXCEPTIONS—EVIDENCE.

A bill of exceptions recited that "plaintiffs, to sustain their cause, introduced the following evidence" giving the testimony of plaintiffs' witnesses, and then recited "the plaintiffs here close their case and the defendants, \* \* \* introduced the following evidence" setting out the testimony of defendants' witnesses, and further recited "the defendants here announced that they had closed their evidence in this case, whereupon plaintiff introduced the following witness in rebuttal," followed by further evidence for plaintiffs after which the bill recited "the plaintiffs here announced that they had closed their evidence in this case, and the court gave the following instructions." *Held*, that the bill showed by implication, that it contained all of the evidence in the case, though there was no express statement that it did so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2918-2927; Dec. Dig. § 697.\*]

#### 2. SALES (§ 347\*)—ACTION FOR PRICE—DEFENSES—MISREPRESENTATION.

If the purchaser was induced by false and fraudulent statements by the seller which were relied on by the purchaser to purchase a jack, and execute his note therefor, and the purchaser was injured by such false representations in that the jack did not breed as represented, the seller could not recover the purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. § 347.\*]

#### 3. SALES (§ 391\*)—ACTIONS BY PURCHASER—DAMAGES FOR MISREPRESENTATIONS—RIGHT OF ACTION.

Where the purchaser of a jack, upon discovering the falsity of representations with respect to it, offered to return it and rescind the contract, he could sue the seller for all damages sustained by reason of such fraudulent misrepresentations.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1110-1127; Dec. Dig. § 391.\*]

#### 4. SALES (§ 359\*)—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE—PARTIES TO CONTRACT.

Evidence in an action on a note given by defendant and his wife for the purchase price of a jack purchased from plaintiff *held* not to show that defendant's wife was interested in the purchase of the animal.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 511, 1056-1059; Dec. Dig. § 359.\*]

#### 5. HUSBAND AND WIFE (§ 156\*)—CONTRACTS OF WIFE—BINDING EFFECT.

A married woman was not personally liable on a note executed by her for her husband's accommodation, which was given for the purchase price of a jack in which she had no interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 608-622; Dec. Dig. § 156.\*]

Appeal from Circuit Court, Carroll County; Jos. S. Maples, Judge.

Action by Joseph Middleton and others against Hal Warden and wife. From a judgment for plaintiffs, defendants appeal. Affirmed as to defendant named and reversed and dismissed as to his wife.

Appellees sued appellants on a promissory note alleged to have been given them for the purchase price of a jack. Appellants' answer admitted the execution of the note and that it was given for the purchase price of the jack. They allege that they were induced to purchase the jack from appellees by reason of false and fraudulent representations of the appellee J. V. Middleton that he would warrant that the jack would get only black and bay colts. Appellants also allege that appellant Inez Warden was a feme covert at the time she signed the note, and is not liable on said note. Appellant Hal Warden testified: "My wife, Inez Warden, and I both signed the note sued on, which was given for the purchase price of a jack which I bought from appellees. My wife was not interested in the purchase of the jack and only signed the note for my accommodation. I bought the jack in the latter part of February, 1911, from appellee J. V. Middleton at his house. I told Mr. Middleton that if he would warrant and guarantee the jack to get, or sire, only black or bay colts, I would give him the sum of \$350 provided he would take my note for said sum due 17 months after date. Mr. Middleton replied that he would warrant or guarantee that the jack would get, or sire, only black and bay colts. Upon such representations and warranties, I agreed to purchase the jack, and executed my note to appellees for the agreed sum, due 17 months after date. He asked my wife to sign the note

with me, and I also asked her to sign it as a favor to me. She was not interested in the purchase of the jack. The reason I wanted the note payable 17 months after date was that I knew that, by the time the note became due, the colts sired by the jack would prove whether they would be black or bay colts. The jack was blue in color, and practically all the colts sired by him during the season of 1911 took after the jack in color, and none of them were black or bays. I then told Mr. Middleton about the jack not coming up to the warranty and told him that I would not pay for it. The jack is of no value to me, and I would not have agreed to pay any price for him if I had known that his colts would take his color. The jack is worthless to me, and I offer to return him to appellees. I published a notice in a newspaper in the county, warning all persons not to purchase my note, as it is without consideration to me." Other testimony was introduced by appellants tending to corroborate the testimony of appellant Warden as to the guaranty or warranty by appellee that the jack would only sire black or bay colts.

J. V. Middleton, one of the appellees, testified: "Appellant Hal Warden saw the jack and examined him before he purchased him. He knew that the jack was blue, with a black stripe down his back. I did not represent to appellant Hal Warden that the jack would only sire black or bay colts, and did not give him a warranty to that effect. The jack had sired colts of other colors, and Hal Warden had seen some of these colts and knew that they were not black or bay."

The jury returned a verdict for appellees for the amount sued for, and the case is here on appeal.

Jas. P. Fancher, of Berryville, and Wade H. James, of Eureka Springs, for appellants. Festus O. Butt, of Eureka Springs, for appellees.

HART, J. (after stating the facts as above). [1] It is first contended by counsel for appellees that the judgment should be affirmed because the bill of exceptions does not affirmatively show that it contains all of the evidence. The bill of exceptions recites the following: "The plaintiffs to sustain their cause introduced the following evidence: (Then follows the testimony of plaintiffs' witnesses.)" It then recites: "The plaintiffs here close their case, and the defendants, to sustain the issue on their part, introduced the following evidence;" and, after setting out the testimony of the witnesses for the defendants, the bill of exceptions contains this statement: "The defendants here announced that they had closed their evidence in this case; whereupon plaintiffs introduced the following witnesses in rebuttal." Then follows the testimony of two witnesses for the plaintiffs. The bill of exceptions then recites: "The plaintiffs here

announced that they had closed their evidence in this cause, and the court gave the following instructions, numbered from 1 to 7." The bill of exceptions then recites that the defendants offered the following instructions, which were refused by the court. The refused instructions are then set out. Thus, it will be seen the bill of exceptions sets out the evidence that was introduced by the parties, and follows this by the instructions given and refused. We are of the opinion that it shows inferentially, and by natural implication from the language used, that it contains all the evidence; and this is sufficient. *Mitchell v. Young*, 80 Ark. 441, 97 S. W. 454, 7 L. R. A. (N. S.) 221, 117 Am. St. Rep. 89, 10 Ann. Cas. 423; *Overman v. State*, 49 Ark. 364, 5 S. W. 588; *Thomas v. Hinkle*, 35 Ark. 450; *Leggett v. Grimmett*, 36 Ark. 496.

[2] The court, at the request of appellees, gave the following instruction: "If you find from a preponderance of the evidence that by false, fraudulent statements made by plaintiff to the defendant that the defendant relying upon said alleged statements so made by the plaintiff was induced to purchase from the plaintiff the jack in question, executing his note therefor for a stipulated sum, and you find from a preponderance of the evidence that said alleged statements were made by plaintiff to defendant, and were relied upon as true when in truth they were false, and the defendant was injured thereby, then you will find the issues for the defendant."

Counsel for appellants insist that the court erred in giving this instruction, and also erred in refusing to give certain instructions asked by them on the question of warranty; but we cannot agree with them in their contention. In the case of *Winter v. Bandel*, 30 Ark. 362, the court, in discussing a similar contention in regard to the false and fraudulent warranty of certain insolvent notes, said: "Where there is a false warranty which contains elements of fraud and deceit in it, the party has his election to affirm the contract and sue upon the breach of warranty, or repudiate it, offer a return of all which was received under it, and to rescind and sue for damages. *Chitty on Contracts*, 366, 369; *Chitty's Pls.* 137 (margin); *Dougl.* 21; 2 *East*, 446; 2 *Starkie*, 162. "In this case there was an offer to rescind, and if there was fraud, the plaintiffs below thereby placed themselves in position to sue for full damages, regardless of the value of the insolvent notes." See, also, *Plant v. Condit*, 22 Ark. 254; *Weed v. Dyer*, 53 Ark. 159, 13 S. W. 592.

[3] In the present case, appellants offered to return the jack and rescind the contract; and if there was fraud practiced upon them by appellees, they have placed themselves in a position to sue for full damages. This issue was submitted to the jury in the instructions given.

At the request of appellees, the court also gave the following instruction: "As to Inez Warden, if you find that she was not interested in the purchase of the jack, but was merely an accommodation security on said note, then she could not be bound on said note, and it could only bind him, if you should find him liable."

[4] Counsel for appellants excepted to the giving of this instruction for the reason that there was no evidence tending to show that appellant Inez Warden was interested in the purchase of said jack. In this position, we think he is correct. It will be noted that the instruction was given at the request of appellees. The only testimony given on this subject is that of the appellant Hal Warden, and his testimony was not objected to by appellees. He testified that his wife was not interested in the purchase of the jack, and only signed the note given for its purchase price as an accommodation to himself. There is nothing in the record tending to contradict his testimony in this regard.

[5] Therefore the undisputed evidence shows that she was a married woman at the time she signed the note, and that it was not made for her debt nor about a matter for which she could bind herself personally. *Hardin v. Jessie*, 103 Ark. 246, 146 S. W. 499; *McCarthy v. People's Savings Bank*, 156 S. W. 1023. In the case of *Hardin v. Jessie*, supra, the court held: "When a married woman has only limited powers of contract, as, for example, only in connection with her separate estate or business, the burden of proof, in an action seeking to enforce her liability, is upon the plaintiff to show that the contract was one she had the power to make."

It follows that the judgment against Hal Warden will be affirmed, and the judgment against Inez Warden will be reversed; and, the case having been fully developed, the cause of action against her will be dismissed.

#### SCHOOL DIST. NO. 56 v. JACKSON.

(Supreme Court of Arkansas. Nov. 24, 1913.)

#### 1. SCHOOLS AND SCHOOL DISTRICTS (§ 56\*)—SCHOOL BOARDS—CONTRACTS.

Members of a board of school directors have no power to act individually, and it is only when convened and acting together as a board that they represent and bind the district by their acts.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 139; Dec. Dig. § 56.\*]

#### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 135\*)—EMPLOYMENT OF TEACHERS—RATIFICATION.

Where plaintiff began teaching under a contract invalid because not entered into by the school board met and acting together, but the two directors who signed the contract knew that she had begun to teach and acquiesced therein for seven weeks, the greater part of the

term, and the other director who had not signed the contract knew that she was teaching and sent his son to school, there was a ratification of the contract; and a suspension of school for two weeks upon notice to quit was not an acquiescence in the directors' contention that it was invalid.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 130, 292-297; Dec. Dig. § 135.\*]

Appeal from Circuit Court, Randolph County; John W. Meeks, Judge.

Action by Elizabeth Jackson against School District No. 56. Judgment for plaintiff, and defendant appeals. Affirmed.

T. W. Campbell, of Pocahontas, for appellant. S. A. D. Eaton, of Pocahontas, for appellee.

HART, J. Appellee sued appellant before a justice of the peace to recover a balance alleged to be due her as teacher's salary. The justice rendered a judgment in her favor, and, on appeal to the circuit court, there was a trial before a jury which resulted in a verdict in her favor for the amount sued for; and from the judgment rendered, appellant has duly prosecuted an appeal to this court.

The facts are as follows: On the 4th day of December, 1911, appellee, Elizabeth Jackson, entered into a written contract with L. I. Bramlett and C. M. McDaniel, directors of School District No. 56 of Randolph county, Ark., to teach a school for three months from that date for the sum of \$35 for each school month. The contract was signed by Bramlett in his field, and by McDaniel at his home about a mile distant from the place where Bramlett signed it. H. H. Wiley, the remaining director, did not sign the contract. Mr. Wiley, however, knew that she began teaching under the contract signed by the other two directors, and sent his boy to the school. After she had taught the school for seven weeks, Bramlett and Wiley, two of the directors, sent her a written notice to stop the school, without giving her any reason therefor. They signed a voucher in her favor for the amount that she had already earned. Two or three days before they sent her this notice, eight of the pupils stayed out of school one afternoon and played on the ice. This was on Friday evening, and on Monday morning, before she went to school, appellee went to see Mr. Wiley about it. Mr. Wiley went to the schoolhouse with her; and of the boys who had played on the ice, his son, Curtis, was the only one present. Mr. Wiley told her not to punish him, because he was the only one present, and said the next time they left school in that manner to punish them all. After receiving the notice to stop the school appellee ceased to teach it for two weeks, and then resumed and taught the balance of the term. The directors refused to pay her for the five weeks taught by her after they had notified her to

quit, and she brought this suit to recover \$43.75, the balance alleged to be due her under the contract.

[1] This court has held that the members of a board of school directors have no power to act individually, and that it is only when convened and acting together as a board that they represent and bind the district by their acts. *School District v. Bennett*, 52 Ark. 511, 13 S. W. 132; *School District No. 54 v. Garrison*, 90 Ark. 335, 119 S. W. 275; *School District No. 22 v. Castell*, 105 Ark. 106, 150 S. W. 407, and cases cited.

[2] Under the undisputed evidence, the contract was invalid in its inception because there was no meeting of the board of school directors, and the contract was signed by only two of its members. The two directors who signed the contract knew that appellee began to teach the school under the contract, and acquiesced in her so doing for seven weeks, the greater part of the term. The evidence, however, shows that Wiley, the director who did not sign the contract, sent his boy to the school, and knew that appellee was teaching it under the contract made with the other two directors. He advised her on one occasion not to punish his son for an infraction of the rules, but told her that if the offense was repeated to punish all the pupils who offended against the rules. She was permitted to teach for seven weeks without any objection, and, under these circumstances, we think there was a ratification of the contract made with her. It is true she stopped the school for two weeks upon being notified to do so by the directors, but she said that they did not give her any reason for their action in the matter, and that when she found out that it was done because her contract was deemed invalid she resumed teaching and taught for the remainder of the term, which was five weeks. Under these circumstances, we do not think that her action in stopping the school for two weeks, upon notification to do so by the directors, was an acquiescence in their contention that the contract was invalid. The reason is that she was ignorant of their reason for notifying her to stop the school, and, immediately upon finding out that they had done so because they deemed the contract invalid, she took advice on the question and resumed teaching, and taught for the balance of the term without any further objection being made.

The judgment will be affirmed.

#### LEWIS v. STATE.

(Supreme Court of Arkansas. Nov. 17, 1913.)

1. CONSTITUTIONAL LAW (§ 205\*)—FISH (§ 9\*)—GAME (§ 4\*)—CLASS LEGISLATION—PRIVILEGES AND IMMUNITIES OF CITIZENS.

Acts 1913, p. 1118, prohibiting nonresidents from hunting and fishing in specified counties without a license, and prescribing a penalty for

violation thereof, is class legislation and violative of Ark. Const. art. 2, § 18, providing that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205;\* Fish, Cent. Dig. §§ 17, 18; Dec. Dig. § 9;\* Game, Cent. Dig. § 3; Dec. Dig. § 4\*]

2. FISH (§ 1\*)—GAME (§ 1\*)—REGULATION. Fish and game, *feras naturae*, belong to the whole people of the state collectively.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 1; Dec. Dig. § 1;\* Game, Dec. Dig. § 1\*]

3. FISH (§ 5\*)—GAME (§ 3\*)—RIGHT TO TAKE—OWNERSHIP OF SOIL.

An individual's rights to take fish and game on his own premises is not an unqualified and absolute one, but is bounded by the limitation that it must always yield to the state's ownership and title held for regulation and preservation for the public use.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 11-15; Dec. Dig. § 5;\* Game, Cent. Dig. § 1; Dec. Dig. § 3\*]

4. CONSTITUTIONAL LAW (§ 205\*)—GAME—REGULATION.

When necessary for propagation and preservation of fish and game for public use, the Legislature may regulate the right of each individual to take and use the same, but the regulation or restraint prescribed must bear equally on all members of the community alike.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

5. CONSTITUTIONAL LAW (§ 205\*)—FISH (§ 8\*)—GAME (§ 3½\*)—REGULATION—PRESERVATION—SPECIFIC TERRITORY.

Where necessity for preservation of wild game and fish exists in certain territories of the state, such districts must be segregated for the purpose of regulating the right, and the privilege of taking and using fish and game within such districts must be extended to all people of the state outside the districts on the same terms prescribed for those who are residents of the territory embraced in the legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205;\* Fish, Cent. Dig. § 18; Dec. Dig. § 8;\* Game, Cent. Dig. § 2; Dec. Dig. § 3½\*]

Appeal from Circuit Court, Grant County; W. H. Evans, Judge.

George Lewis was convicted of violating Acts General Assembly 1913, p. 1118, prohibiting nonresidents from hunting and fishing in certain counties without a license, and he appeals. Reversed and dismissed.

Baldy Vinson, of Little Rock, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. [1] This appeal involves the validity of Act 280 of the General Assembly of 1913, approved March 29, 1913, prohibiting nonresidents from hunting and fishing in Grant, Hot Spring, and Lonoke counties without a license, prescribing a penalty for the violation of the act in a sum not less than \$10 nor more than \$50. The act does not require citizens of those counties to obtain license before hunting and fishing in the counties named, or in other portions of the state. Our Constitution provides that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

'the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Const. Ark. art. 2, § 18. The act in question confers upon the citizens of the counties named privileges and immunities not granted to other citizens upon the same terms. No reason is given in the act why citizens of the above counties should be classified into a favored territory, having privileges not enjoyed by other citizens upon the same terms. The classification is based upon residence only, and without further being shown on the face of the act, it must be held as arbitrary and unjustly discriminative as to citizens of the state outside of the territory mentioned.

In *State v. Mallory*, 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852, the court had under review the act approved April 24, 1903, making it unlawful for any person who is a nonresident of the state of Arkansas to hunt or fish in the state at any season of the year. We held under that act that nonresidents of the state who owned land within the state could hunt and fish on their own lands during the open season. But the act, of course, as to nonresidents of the state who are not owners of land within the state, is still in force, and they are prohibited from hunting and fishing at any season of the year. That act involves a discrimination in favor of residents of the state as against nonresidents who are not owners of land in the state. Such discrimination is a valid exercise of governmental power which the sovereign state has over the fish and game, *feræ naturæ*, within its borders to protect and preserve same for the benefit of its inhabitants. *McCreedy v. Virginia*, 94 U. S. 391, 24 L. Ed. 248. See, also, *Geer v. State of Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793. But the statute now under consideration involves a discrimination in favor of the residents of certain territory in the state against the people of the state residing outside of such territory.

[2] The fish and game of the state, *feræ naturæ*, belong to the whole people of the state collectively.

[3] The right which the individual has to take fish and game on his own premises by virtue of his ownership in the soil on which they may be found, as was said in *State v. Mallory*, 73 Ark. 248, 83 S. W. 959, 67 L. R. A. 773, 3 Ann. Cas. 852, "is not, however, an unqualified and absolute right, but is bounded by this limitation, that it must always yield to the state's ownership and title, held for the purposes of regulation and preservation for the public use." See, also, *Organ v. State*, 56 Ark. 267, 19 S. W. 840.

[4] When it becomes necessary for the propagation and preservation of wild game and fish for the use of the public, the people acting in their sovereign capacity, through their lawmaking power, may pass laws to regulate the right of each individual which

he enjoys in common with every other member of the community to the use of same. But when the sovereign undertakes to regulate or restrain the individual in its right as a member of the community to enjoy the right to take and use this common property of all, it must do so upon the same terms to all members of the community alike. The common right, which one individual of the whole community is entitled to enjoy as much as another, cannot be made by law the exclusive privilege of the people of a certain class or section upon terms and conditions that do not apply to the whole people alike. This right which one individual has in common with every other individual in the community to take and use fish and game, *feræ naturæ*, is one that has existed from the remotest times, and, although at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John. "The rights," says Green, "which the barons claimed for themselves they claimed for the nation at large." *Green's History of the English People*, vol. 4, pp. 252-254. (See footnote.)<sup>1</sup>

These rights were confirmed and established ever thereafter in England by acts of Parliament, and they have come down to us from the laws of England and may be regarded as a common heritage of the English-speaking people. See *Parker v. People*, 111 Ill. 581, 53 Am. Rep. 643. Also, *Geer v. Conn.*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; *Martin v. Waddell*, 16 Pet. 412, 10 L. Ed. 997. The only justification for a law regulating and restricting the common right of individuals to take wild game and fish is the necessity for protecting same from extinction, and thus to preserve and perpetuate to the individual members of the community the inalienable rights which they have had from time immemorial. While the state, holding the title to game and fish, so to speak, in trust for every individual member of the community, may pass laws to regulate the rights of each individual in the manner of taking and using the common property, yet, as we have already stated, this must be done, under the Constitution, upon the same terms

<sup>1</sup>"In words which almost close the charter, the community of the whole land is recognized as the great body from which the restraining power of the baronage takes its validity. There is no distinction of blood or class, Norman or not Norman, of Noble or not Noble. All are recognized as Englishmen, the rights of all are owned as English rights. Bishops and Nobles secured at Runnymede the rights not of Baron and churchman only, but those of freeholder and merchant, of townsmen and villain. The provisions against wrong and extortion which the Baron drew up as against the King for themselves, they drew up as against themselves for their tenants." *Green's History of the English People*, vol. 1, page 252.

to all the people. No special privileges or immunities can be conferred.

[6] Where the necessity for the preservation of the wild game and fish exists in certain territories of the state, that territory may be segregated for the purpose of regulating the right to taking game and fish therein; but the privilege of taking and using same must be extended to the people of the state outside of the territory upon the same terms that are given to those who are residents of the territory embraced in the legislation. *Hayes v. Territory*, 2 Wash. T. 286, 5 Pac. 927. In the cases of *State v. Higgins*, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561, and *Harper v. Galloway*, 58 Fla. 255, 51 South. 226, 26 L. R. A. (N. S.) 794, 19 Ann. Cas. 235, the question here involved was considered and determined in accord with the doctrine we have announced.

It follows that the law under consideration is invalid. The confession of error of the Attorney General is well taken.

The judgment is therefore reversed and the cause is dismissed.

#### ST. LOUIS, I. M. & S. R. CO. v. RODDY.

(Supreme Court of Arkansas. Nov. 10, 1913.)

##### 1. RAILROADS (§ 327\*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

A traveler on a highway which crossed three tracks of a railroad which were four feet eight inches wide from rail to rail, and the space between which was seven feet from rail to rail was struck by a passenger train approaching from the south on the third track. His view towards the south was obstructed by standing box cars on the first track, and a freight train headed south was standing on the middle track just north of the crossing with steam escaping from its engine, but towards the south the tracks were straight for a considerable distance, and only a total failure to look to the south at any time could explain his failure to see the approaching passenger train. *Held*, that he was guilty of contributory negligence as a matter of law, since, even conceding that he had a right to pay greater attention to the freight train, that did not excuse the total failure to look in the opposite direction before starting across the track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

##### 2. RAILROADS (§ 330\*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

Where the circumstances are such as to excuse a traveler at a railroad crossing from the absolute duty to look and listen, the failure of an approaching train to give signals and warning of its approach may be considered by the jury as bearing upon his contributory negligence, but where there is nothing to excuse such duty, the failure to give such signals cannot be so considered.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.\*]

##### 3. RAILROADS (§ 351\*)—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS.

In an action for the death of a person struck by a train at a crossing, where there were no circumstances justifying decedent's total failure to look before starting to cross the track, an instruction that it was the railroad com-

pany's duty to ring the bell or sound the whistle 80 rods from the crossing and to keep it ringing or sounding until the crossing was passed, and that, in the absence of some warning or evidence to the contrary, deceased had a right to assume that it would ring the bell or sound the whistle, and that, if the train struck and killed deceased while he was exercising ordinary care, to find for plaintiff was erroneous, as the jury might have understood that they could consider the failure to ring the bell or blow the whistle in determining whether deceased was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\*]

##### 4. RAILROADS (§ 338\*)—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS.

In an action for the death of a person struck by a train at a crossing prior to the taking effect of Acts 1911, p. 275, requiring all persons running trains to keep a constant lookout for persons on the track, and providing that notwithstanding the contributory negligence of the person injured, where if such lookout had been kept the employees in charge of the train could have discovered his peril in time to have prevented the injury by exercising reasonable care, the company shall be liable, it was error to charge that, notwithstanding deceased's contributory negligence, if defendant's employees discovered his peril, or could have discovered it by keeping a lookout, it was their duty to sound the whistle or ring the bell or lessen the speed of the train, and make use of all reasonable means within their power consistent with the safe operation of the train to avoid striking deceased, and if they failed to exercise any of these precautions after they discovered his peril or could have discovered it by a proper lookout to find for plaintiff, since prior to that act contributory negligence was a defense against the negligent failure to keep a lookout where the peril was not discovered in time to avoid the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.\*]

##### 5. RAILROADS (§ 351\*)—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS.

In an action for the death of a person struck by a north-bound passenger train at a crossing where it appeared that a freight train headed south was standing just north of the crossing or, as shown by some of the evidence, partly on the crossing, with steam escaping from its engine indicating that it was about to move, an instruction that it was unlawful for a freight train to remain standing across any public highway or street for more than ten minutes without leaving a space of 60 feet across such highway or street, that this fixed the standard of care by which defendant's conduct must be tested, and that a failure in this respect was negligence rendering the company liable for any injury resulting as the direct consequence therefrom was erroneous, as the jury might have understood therefrom that the company was negligent if the crossing was obstructed for more than ten minutes, whereas the obstruction of the crossing was not the proximate cause of the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\*]

##### 6. STATUTES (§ 253\*)—TIME OF TAKING EFFECT.

Acts 1911, p. 275, making railroad companies liable for injuries to persons struck by trains notwithstanding contributory negligence where, if a constant lookout had been kept, his peril would have been discovered in time to have prevented the injury by the exercise of reasonable care, though approved May 26, 1911, as it contained no emergency clause, did not



take effect until 90 days after the adjournment of the Legislature on June 2, 1911, and hence did not apply in a suit for the death of a person struck by a train and killed on May 29, 1911.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 335; Dec. Dig. § 253.\*]

**7. RAILROADS (§ 350\*)—CROSSING ACCIDENTS—ACTIONS—QUESTIONS FOR JURY.**

In an action for the death of a person struck by a train, evidence held to make a question for the jury as to whether the engineer, who admitted that he saw deceased, but who testified that he thought he would cross safely ahead of the train, should have slackened the speed of the train or given warning of its approach by proper signals.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by Mrs. A. P. Roddy against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Appellee instituted this suit as administratrix of W. R. Roddy, her deceased husband, and in her complaint she alleged that her intestate was killed on the 29th day of May, 1911, by the negligent operation of one of appellant's trains at Portland in this state. The negligence was alleged to have consisted in failing to keep a lookout and a failure to give signals at a public street crossing. The answer denied that appellant had been guilty of any negligence in the operation of its train by failure to keep a lookout, but says the injury could not have been avoided by any kind of lookout that might have been kept, and denies that there was any failure to give proper statutory signals for the crossing at which the deceased was killed. It was further alleged that deceased's death was due to his contributory negligence in attempting to cross in front of a rapidly approaching train, and that by the exercise of ordinary care he could have seen the train and have avoided his injury and death, and that he could have crossed said track after he went upon it had he hurried across, and that he placed himself in a position where defendant's trainmen could not discover his peril by keeping a lookout in time to avoid striking him.

The evidence discloses that the railroad runs north and south through the town of Portland, a town of a thousand or more people, and that the crossing where the injury occurred is in the southern part of the town and one much used, and runs east and west over three tracks which are only four feet eight inches from rail to rail, and seven feet from rail to rail across the space between the tracks. Just to the left of the crossing is a cotton seed house, and in front of it, on the house or first track, were several box cars close up to the crossing. On the middle or the passing track was a freight train headed south at the time of the injury, and, although there is some conflict as to its ex-

act location with reference to the crossing, there was evidence to support a finding that it was standing out over the crossing to a considerable extent. The evidence would also sustain a finding that the freight engine was popping off steam, but we think the evidence does not show that there was such escape of steam as would have enveloped the deceased and prevented him from seeing and from being seen. In fact a number of witnesses saw the deceased from various angles, and the vision of none was interfered with by the escaping steam. But the train which struck the deceased was approaching from the south, and there is nothing in the evidence to show that escaping steam from the freight engine headed south would have interfered with the view of a train approaching from the south. Deceased came upon the track from the east, and his view to the south was obstructed by the standing box cars until he had crossed over the first or house track, after which there was nothing to prevent him from seeing the passenger train approaching from the south on the third or main line track, for the tracks in that direction were straight for three or four miles. In the absence of any signals on the part of the approaching train, the jury might well have found that deceased did not hear that train because of the noise made by the escape of steam on the freight engine, but only a failure to look at any time to the south could explain deceased's failure to see the train which killed him. The evidence is conflicting as to whether the passenger engine gave proper signals for the crossing.

A number of instructions were given at the request of both appellant and appellee and such of them will be set out in the opinion as it is necessary to discuss.

E. B. Kinsworthy and T. D. Crawford, both of Little Rock, and H. S. Powell, of Camden, for appellant. George & Butler, of Hamburg, and Mehaffy, Reid & Mehaffy, of Little Rock, for appellee.

SMITH, J. (after stating the facts as above). [1, 2] The court gave the jury a number of instructions on the question of contributory negligence, but we think under the facts here stated the jury should have been told, as a matter of law, that deceased was guilty of contributory negligence. Circumstances might be such that a traveler at a crossing would be under no absolute duty to look and listen, and a number of cases discuss the exceptions to the rule requiring one to look and listen, and, where the traveler comes within any exception excusing him from the performance of this absolute duty, the jury may consider the failure of the railway company's employes to give signals and warning of the train's approach to the crossing as bearing upon the contributory negli-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gence of the traveler in failing to look and listen. But if there is nothing in the traveler's approach of the crossing which would excuse him from the absolute duty of looking and listening, then the failure to give signals cannot be considered upon the question of contributory negligence. *Chitwood v. St. L., I. M. & S. R. Co.*, 104 Ark. 38, 148 S. W. 278; *Ark. & La. Ry. Co. v. Graves*, 96 Ark. 643, 132 S. W. 902; *K. C. Sou. R. Co. v. Drew*, 103 Ark. 374, 147 S. W. 50; *St. L., I. M. & S. R. Co. v. Prince*, 101 Ark. 316, 142 S. W. 490.

The thirteenth instruction given at the request of the appellee was as follows: "You are instructed that, while it is the duty of a person about to cross a railway track to look and listen for trains from each direction where it may be reasonably done under the circumstances, yet, if it appears to him before crossing, as a reasonably prudent person under the surrounding circumstances, that greater danger is to be apprehended from one end of the track than the other, he may give more attention to that end of the track from which he, as a reasonably prudent person, under all circumstances, apprehends the greater danger." Even though it be conceded that this was a proper instruction under the facts of this case, and that deceased had the right to pay the greater attention to the freight engine near him whose popping off of steam might indicate that it was about to be put in motion, still that right would not excuse the total failure to look in the opposite direction before starting across the track. *St. L., I. M. & S. R. Co. v. Chamberlain*, 105 Ark. 180, 150 S. W. 156.

[3] The court gave the following among other instructions: No. 2. "You are instructed that it was the duty of the defendant to ring the bell or sound a whistle at a distance of at least 80 rods from the place where the public crossing crossed the railroad, and to keep said bell ringing or whistle sounding until the crossing is passed; and you are further instructed that, in the absence of some warning or evidence to the contrary, the deceased had a right to assume that the defendant would cause the bell to ring or the whistle to sound giving warning of the approach of its train, and if you find from the evidence in this case that the train which struck and killed the deceased while he himself was in the exercise of ordinary care, your verdict must be for plaintiff."

[4] No. 15. "You are further instructed that, notwithstanding contributory negligence, if you find such to have existed upon the part of deceased in going upon the railroad track of the defendant at the place and time he did, yet, if you further find that the employees of defendant's train discovered his peril, or could have discovered his peril by keeping the lookout elsewhere defined in these instructions, it became the duty to sound the whistle or ring the bell, or lessen

the speed of the train, and make use of all reasonable means within their power consistent with safe operation of the train to avoid striking the deceased; and, if they failed to exercise any of these precautions after having discovered his peril, or could have discovered such peril by keeping a proper lookout in time to have prevented the injury, and that his injury was caused by such failure, you will find for the plaintiff."

[5] No. 17. "You are instructed that it is unlawful for any railroad company owning or operating freight trains to suffer or permit the same to remain standing across any public highway, street, alley, or farm crossing, or when it becomes necessary to stop such trains across any public highway, street, alley, or farm crossing for more than ten minutes, and fails to leave a space of 60 feet across such public highway, street, alley, or farm crossing. You are instructed that the above requirement fixes the standard of care by which the conduct of the railroad company must be tested, and a failure in this respect is negligence which renders the company liable for any injury which results as a direct consequence therefrom."

We think the court erred in the giving of each of these instructions. The second is erroneous because the jury might have understood from it that in determining whether deceased was guilty of contributory negligence in failing to look and listen they had the right to consider the failure to ring the bell or blow the whistle, while, as we have stated, under the evidence in this case the duty to look was an absolute one, and was not excused by the appellant's failure to give signals.

[8] The fifteenth instruction was not the law prior to the passage of Act No. 284, page 275 of the acts of 1911. This act is the amended lookout statute, and was approved on May 26, 1911, which was three days before Mr. Roddy was killed. But the regular session of 1911 ended on June 2, 1911, and, as the statute contained no emergency clause, it did not go into effect until 90 days after June 2, 1911. *Ark. Tax Commission v. Moore*, 103 Ark. 48, 145 S. W. 190. Prior to this act contributory negligence was a defense against the negligent failure to keep a lookout where the peril had not been discovered in time to have avoided the injury by the exercise of due care thereafter. *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889; *St. L., I. M. & S. R. Co. v. Leathers*, 62 Ark. 238, 35 S. W. 216.

The seventeenth instruction should not have been given because the jury may have taken it as a direction to find appellant guilty of negligence if they found the crossing had been obstructed for more than ten minutes. The obstruction of the crossing was not the proximate cause of the injury.

[7] Notwithstanding the fact that this cause must be reversed and that the jury should have been told under this evidence

that deceased was guilty of contributory negligence, it does not follow that the cause must be dismissed. The engineer on the passenger train admits that he saw the deceased for a distance of 300 to 320 feet, and that he had shut off steam and was rolling along at a rate not to exceed 20 miles an hour, and that he was getting ready to stop at the depot which is 738 feet north of the crossing where Mr. Roddy was killed. The engineer saw Mr. Roddy distinctly and observed and described his apparel, and he further testified: "He was going along attending to his business. I saw him. I made no effort to alarm him, because the man had measured the distance and I presumed would cross all right. I could have gotten across all right, the distance I was from him about the time I first saw him." One witness testified that, as Mr. Roddy came around the cars on the house track and around the freight engine on the passing track to the main line track, he described a part of a letter "S" and all the witnesses who saw him just before he was struck say that his head was turned to the right as if he was devoting his attention to the freight engine, and the engineer on the freight train testified that he hallooed at Mr. Roddy and as he did so Mr. Roddy jumped but was struck by the passenger engine.

We think it a question of fact for submission to a jury whether the passenger engineer was guilty of negligence after discovering Roddy's peril in taking chances on his getting to a place of safety, and whether the engineer should not have attempted either to slacken his train or to give warning of its approach by proper signals. *Garrison v. St. L., I. M. & S. R. Co.*, 92 Ark. 445, 123 S. W. 657; *Majors v. St. L., I. M. & S. R. Co.*, 95 Ark. 94, 128 S. W. 571.

For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

#### STATE v. WILLIAMS.

(Supreme Court of Arkansas. Oct. 13, 1913.)

#### 1. SHERIFFS AND CONSTABLES (§ 153\*)—PROSECUTION FOR NONFEASANCE—QUESTION FOR JURY—NOTICE.

Under Kirby's Dig. § 1742 (Rev. St. 1837, c. 44, div. 6, art. 3, § 9), providing that when any sheriff has knowledge that any person is guilty of certain violations of the gaming law, it shall be his duty to give notice thereof to any judge or justice of the peace for the county, who shall issue his warrant and cause the offender to be brought before him for examination, it is a question in each case for the jury, in a prosecution of the sheriff for nonfeasance, to determine whether the sheriff had such knowledge, and in doing so to decide whether, in the exercise of an honest and intelligent judgment, he had probable cause for giving such notice.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 343, 344; Dec. Dig. § 153.\*]

#### 2. SHERIFFS AND CONSTABLES (§ 153\*)—NONFEASANCE—STATUTE—NOTICE—JUDICIAL OFFICER.

Although such statute does not prescribe how such notice is to be given, a proper practice requires that it be in writing.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 343, 344; Dec. Dig. § 153.\*]

#### 3. INDICTMENT AND INFORMATION (§ 35\*)—AUTHORITY TO FILE—PROSECUTING OFFICERS—"INFORMATION."

Prosecuting officers have the right to file a criminal "information" which is an accusation in the nature of an indictment, differing only in being presented by a competent public official on his oath of office instead of by a grand jury on their oaths.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 144; Dec. Dig. § 35.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3585-3589.]

#### 4. SEARCHES AND SEIZURES (§ 2\*)—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Kirby's Dig. § 1742 (Rev. St. 1837, c. 44, div. 6, art. 3, § 9), enacted in 1838, providing that when a sheriff has knowledge of certain violations of the gaming law he shall give notice thereof to any judge or justice of the peace for the county who shall issue his warrant and examine into the matter, does not violate Const. 1874, art. 2, § 15, declaring that no search warrant shall issue except on probable cause supported by oath or affirmation, since notice or information is given under the sheriff's official oath.

[Ed. Note.—For other cases, see *Searches and Seizures*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

Appeal from Circuit Court, Garland County; Antonio B. B. Grace, Judge on Exchange.

R. L. Williams, acting sheriff of Garland County, was prosecuted for nonfeasance in office. From a directed verdict for defendant, the State appeals. Reversed and remanded for a new trial.

The appellee is the duly acting sheriff of Garland county and was twice tried upon indictments charging him with nonfeasance in office. It was alleged in each indictment that it had come to appellee's knowledge, as sheriff, that Sam Watt and divers others were guilty of violating the gambling laws of the state, by setting up and exhibiting in certain described buildings various gaming tables and gambling devices at which money was won and lost, and that appellee had unlawfully and knowingly failed, refused, and neglected to give notice of such violations of the law as was his official duty to do to some justice or magistrate of the county. The prosecutions were had under section 1742, Kirby's Digest, which is set out in full in the judge's charge to the jury in the second trial.

At the conclusion of the evidence at the first trial, the court directed the jury to return a verdict of not guilty because, in the opinion of the court, the evidence was not sufficient to warrant a conviction.

At the conclusion of the second trial, upon the second indictment, which was presided over by a different judge from the one pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

siding at the first trial, the jury was instructed to return a verdict of not guilty for the reason that the said section 1742 was unconstitutional. In directing this verdict for the reason that the prosecution was being conducted under an unconstitutional statute, the trial judge gave the following statement of his views: "The defendant, R. L. Williams, is being prosecuted in this case under an indictment alleging what is technically called nonfeasance in office as sheriff of Garland county. The specifications of the charge are that he failed to comply with the provisions of section 1742 of Kirby's Digest of the Statutes of Arkansas, which reads as follows: 'When it shall come to the knowledge of any peace officer that any person is guilty of any offenses aforesaid, it shall be his duty to give notice thereof to any judge or magistrate in the county, who shall issue his warrant and cause such offender to be brought before him; and it shall be the duty of the judge or magistrate to examine the matter in a summary manner, and to discharge, bail, or commit the offender, as the circumstances and the right of the case may require.' (The offenses referred to in this section are certain violations of the gambling statutes.) The section quoted is a part of an act passed in 1838, and incorporated in the old Revised Statutes. At the time it was adopted the Constitution of 1836 was in force, and under this Constitution justices of the peace had no jurisdiction to try persons charged with crime. They could only sit as an examining court and discharge, commit, or admit to bail the person accused. It is also true that in the Constitution of 1836 there was nothing to prohibit the Legislature from enacting a law for the issuance of warrants of arrest not based on any oath or affirmation. Hence, the section first quoted (1742) was a valid exercise of the legislative powers. The purpose of the act was clearly to prohibit and punish gaming and the exhibition of gaming devices, by causing the offenders to be arrested and brought before an inferior court for examination, and there to be bound over or committed to await indictment by the grand jury if the evidence justified it. In 1874 the people of the state adopted a new Constitution, article 2, § 15, of which reads as follows: 'The right of the people of this state to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.' Since the adoption of the above provision, no magistrate or other person in this state had any legal authority to issue a warrant for the arrest of any person on any charge, except after affidavit or affirmation describing the offense shall have first been filed. This is so clearly in direct conflict with section 1742, Kirby's Digest as

to operate to repeal and render it nugatory. It is true that the sheriff might still give the information, but he is not required to do so under an oath, and the magistrate receiving it has no power to compel any other person to do so. Therefore he could not legally issue any warrant of arrest under the law, as it now stands, and the enforcement of the law would be in no wise facilitated. It is a maxim that no man is required by law to do a vain thing, and another that when the reason ceases the rule ceases also. The Constitution having deprived the court or magistrate of the power to act, it would be an idle form for the sheriff to give notice which no one is authorized to act upon—it would be a vain thing. The main object and purpose of section 1742 having been repealed—that is the power to arrest and punish—the mere accessory provisions must fall with it, according to well-known canons of construction. The result is that there is now no law on the statute book authorizing the prosecution of the defendant for the nonfeasance charged in the indictment. It is wholly immaterial whether or not these charges are sustained by the evidence. Even if they were conceded to be true, they constitute no offense at common law, and violate no statute. You are therefore instructed that, as a matter of law, the defendant is not guilty of any crime, and you are directed to return a verdict of not guilty."

We set the charge out in full because it presents the issue raised for our decision. The appellee's counsel say it clearly states their views of the law and they pitch their present defense upon its soundness. And for these reasons we do not set out the evidence, which in our opinion was sufficient to require the submission of the cases to the jury, so far as the proof was concerned.

Section 1472 was brought forward from the Revised Statutes where it is found on page 274 as section 9 of chapter 44, division 6, art. 3, and as there found reads as follows:

"Sec. 9. When it shall come to the knowledge of any sheriff, coroner or constable, or either of their deputies, that any person is guilty of any of the offenses created or prohibited by this title, it shall be their duty to give notice thereof, to any judge or justice of the peace for the county, who shall issue his warrant, and cause such offender to be brought before him; and it shall be the duty of the justice or judge to examine the matter in a summary manner, and to discharge, bail or commit the offender, as the circumstances and the right of the case may require."

This is the correct reading of the section, the changes having been made by the digester in conforming that chapter.

As stated by the learned trial judge, we have adopted the Constitution of 1874 since the enactment of the above-quoted section of the statute, and in this Constitution is found section 15 of article 2 as set out in the

judge's charge. It will be observed that this section 15, art. 2, of our Constitution, is practically identical with the Fourth Amendment to the Constitution of the United States. Is the statute constitutional?

Wm. L. Moose, Atty. Gen., Jno. P. Streep-ey, Asst. Atty. Gen., and Vaughan & Akers, of Little Rock, for the State. M. S. Cobb and W. H. Martin, both of Hot Springs, and X. O. Pindall, of Little Rock, for appellee.

SMITH, J. (after stating the facts as above). It is proper and essential that we consider what duties are imposed upon the officer here charged with the enforcement of the gaming laws. The statute, as applied to the facts of this case, provides that when it comes to the knowledge of a sheriff that any person is guilty of the offense of operating a gambling device, such sheriff shall give notice thereof to some judge or justice of the peace of the county. When this notice has been given, it becomes the duty of the officer to whom it was given to immediately bring before him by appropriate process of his court the person so accused of violating the law, to be dealt with according to the law. This section does not require the sheriff to set the law's machinery in motion whenever he shall merely have heard of a violation of the law. He is not required to run down every idle rumor, or to act upon information which he may not regard as reliable. He is required to act only when it comes to his knowledge that the law is being violated, and he is guilty of a violation of this statute only when he willfully refuses to act upon this information.

[1] It is of course a question of fact in each case for a jury to determine whether or not a sheriff has this knowledge, and in determining that fact, the jury should regard the evidence alleged to constitute the proof of this knowledge from the sheriff's viewpoint, and in doing so, should decide whether this officer, exercising an honest and intelligent judgment, would have knowledge, which in effect here means probable cause, to give notice under this statute of its violation. But it is said this section is void because the officer was not required to give this notice under oath, and because the Constitution provided that warrants for search and seizure can be issued only upon oath or affirmation. But such is not the case. Only officers can give this notice, and only such officers as have been required to take an official oath. They act officially, and are under the sanctity of an official oath. Their action is taken in compliance with their oath. The burden, or privilege, of giving this notice is not imposed by this statute upon any private citizen, whatever his knowledge of the facts may be. If the private citizen who has knowledge of the fact desires this law put in motion, he must apprise the officer whose actions are had under an official oath.

Had the statute intended to dispense with the necessity of an oath the privilege of giving this notice could have been conferred on private citizens. But the private citizen can give this notice to the justice of the peace only by making an affidavit for a warrant of arrest. The Legislature in its wisdom determined that there was a necessity to make certain peace officers prosecuting officers in the enforcement of the laws against gambling. Gambling, in a sense, is an impersonal offense, and there is not usually a prosecutor at hand, as there is in prosecutions of offenses for violation of the laws protecting one's peace, person, or property. And so certain peace officers are made prosecuting officers in regard to gaming, and the judicial officers to whom they report are required to proceed when they have this notice of the violation of the laws against gaming.

[2] The statute does not say how this notice must be given, but a proper practice which would make for an orderly enforcement of the law would require this notice to be in writing. This notice is in the nature of the information which the prosecuting attorney and his deputy are required to file against persons believed to be guilty of carrying concealed weapons, the unlawful sale of liquor, gambling, and certain similar offenses. "The deputy prosecuting attorney provided for in section 6387 shall have authority to file, with any justice of the peace in his county, information charging any person with carrying weapons unlawfully, unlawful sale of or being interested in the sale of intoxicating liquors; violation of blind tiger act, or gambling, whereupon it shall be the duty of the justice of the peace to issue a warrant for the arrest of the offender, and in such cases no bond shall be required for the costs of prosecution." Section 6388, Kirby's Digest. This section might also be said to offend against article 2, § 15, of the Constitution, except that in filing this information the prosecuting attorney is acting under his official oath.

[3] The right of prosecuting officials to file information is well recognized, and has long been a common method of instituting prosecutions for misdemeanors. "A criminal information is an accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. This proceeding by criminal information comes from the common law without the aid of statutes; and is allowable by the common law in a great variety of cases, the rule appearing to be that it is a concurrent remedy with the indictment for all misdemeanors, but not permissible in any felony. The right to make the information is, by the English law as it stood when our forefathers imported it to this country, in the attorney general, who acts upon his own official discretion without the interference of

the court; or, if the office of attorney general is vacant, it is in like manner in the solicitor general. In the American states the criminal information should be deemed to be such, and such only, as in England is presented by the attorney or the solicitor general. This part of the English common law has plainly become common law with us. And as with us, the powers which in England are exercised by the attorney general and the solicitor general are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office, and without leave of court. And such is the doctrine extensively if not universally acted upon in our states, though in some of them it is more or less aided by statutes." *State v. Whitlock*, 41 Ark. 406; *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115.

[4] Section 1742 of Kirby's Digest makes certain peace officers prosecuting officers for the specified purposes, and imposes upon them the burden of giving notice, or filing information under the conditions stated. Likewise, section 1748 of Kirby's Digest imposes similar duties in certain cases upon prosecuting attorneys. "It shall be the duty of each prosecuting attorney in this state who knows or is informed of any person or persons exhibiting or setting up, or aiding or assisting in setting up, any (gambling) device described in the preceding section in his circuit to take immediate steps to have such person or persons immediately arrested for trial, and such prosecuting attorney shall have such person or persons arrested as above provided for each separate offense done or committed on every separate day."

The making of the peace officers named in this section 1742 prosecuting officers and giving them authority to file information under the conditions there required does not in our opinion offend against this section 15 of article 2 of the Constitution, and the judgment of the court below in each of the cases is accordingly reversed and remanded for a new trial.

#### FELKER et al. v. RICE.

(Supreme Court of Arkansas. Nov. 3, 1913.)

#### 1. TRIAL (§ 105\*)—RECEPTION OF INCOMPETENT EVIDENCE—EFFECT OF FAILURE TO OBJECT.

Evidence of a clerk as to the contents of a recorded deed could be considered though the original deed was in existence and was the best evidence, where the clerk's evidence was admitted without objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.\*]

#### 2. PLEADING (§ 423\*)—EXHIBITS—WAIVER.

The failure to make a note an exhibit to the complaint in an action to foreclose a mortgage

and recover the debt was waived by defendant by not objecting on that ground, the mortgage having been made an exhibit and read in evidence and considered with the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1418-1420; Dec. Dig. § 423.\*]

#### 3. MORTGAGES (§ 281\*)—TRANSFER OF LAND—ASSUMPTION OF MORTGAGE.

Where a deed recited that the consideration was a certain sum in cash, and the assumption of a \$400 mortgage by the grantee, the grantee by accepting the deed impliedly promised to discharge the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 738, 739; Dec. Dig. § 281.\*]

#### 4. EVIDENCE (§ 419\*)—PAROL EVIDENCE—CONSIDERATION OF DEEDS—ASSUMPTION OF MORTGAGE.

Parol evidence is admissible to show that a grantee under a deed agreed as a part of the consideration to assume and discharge a mortgage.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

#### 5. MORTGAGES (§ 283\*)—TRANSFER OF LAND—ASSUMPTION OF MORTGAGE—LIABILITY OF GRANTEE.

A grantee under a deed providing that he should assume and pay a mortgage on the premises as a part of the consideration was a surety for the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 756-758; Dec. Dig. § 283.\*]

#### 6. EQUITY (§ 418\*)—DECREE—FAILURE TO ANSWER—TIME OF ENTERING.

Where defendant filed his answer on September 9th, and on October 12th was given ten days from that date in which to file an amended answer by an order which provided that certain evidence be taken on November 27th, but defendant did not file his amended answer, nor appear in court on November 27th, he cannot claim that the judgment then rendered was prematurely entered.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 962-971; Dec. Dig. § 418.\*]

#### 7. EQUITY (§ 430\*)—DECREE—MODIFICATION—AFTER TERM.

After the expiration of the term at which a decree is rendered, the court can only set it aside or modify it upon application under the statute for a specified cause, or by bill of review under the chancery practice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034-1047; Dec. Dig. § 430.\*]

#### 8. MORTGAGES (§ 292\*)—FORECLOSURE—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action to foreclose a mortgage held to sustain a finding that a defendant assumed in a deed to himself to discharge a mortgage which covered part of the land.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 762-771, 780; Dec. Dig. § 292.\*]

#### 9. DEEDS (§ 59\*)—DELIVERY—EVIDENCE.

The acknowledgment and filing for record of a deed was prima facie evidence of its delivery to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 136-139; Dec. Dig. § 59.\*]

#### 10. INJUNCTION (§ 241\*)—JUDGMENT ON BOND.

Immediately upon the dissolution of an injunction staying proceedings on a decree, the chancellor could render judgment against the principals and sureties on the injunction bond, under Kirby's Dig. § 3998, providing that upon dissolution of an injunction to stay proceedings upon a judgment, damages shall be assessed by the court, which may hear the evidence and de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cide the case summarily, or have a jury find the damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544-552; Dec. Dig. § 241.\*]

**11. APPEAL AND ERROR (§ 1043\*)—HARMLESS ERROR.**

Since upon affirmance of a judgment for plaintiff, he is entitled to judgment against defendant and his sureties on the supersedeas bond, there was no prejudicial error in that, upon the dissolution of an injunction staying proceedings on a decree, the chancellor rendered judgment against defendant and the sureties on the injunction bond, where the same persons also signed the supersedeas bond, on appeal from the judgment enjoined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.\*]

Appeal from Washington Chancery Court; T. H. Humphreys, Chancellor.

Action by Nora B. Rice against J. E. Felker and others, in which a cross-bill was filed. From a decree overruling a motion to set aside a judgment entered in the case, and also from a judgment against the sureties on an injunction bond for the debt sued for, defendants appeal. Affirmed.

Nora B. Rice instituted this action in the chancery court against James Pozza, J. E. Felker, et al., to obtain judgment on a debt and to foreclose a mortgage given to secure it. Her complaint alleges, in substance, that James Pozza, on March 25, 1909, gave her a promissory note for \$400 due on or before five years after date, and executed a mortgage on 35 acres of land in Washington county, Ark., to secure the same; the mortgage was made an exhibit to the complaint; that on the 24th day of February, 1910, James Pozza executed to the Bank of Rogers two mortgages on a part of the land embraced in the mortgage to her, but that said mortgages are subsequent in time to her mortgage; that on the 22d day of December, 1909, James Pozza conveyed to John E. Felker a part of the lands embraced in the mortgage to her for a consideration of \$600, \$200 of which was paid at the time, and for the residue of said purchase money said Felker agreed to pay off and discharge the \$400 note and mortgage made and executed to the plaintiff by Pozza; that said deed was duly acknowledged and filed for record on the 20th day of January, 1910; that the note and mortgage executed to her are due and unpaid. The prayer of the complaint is for personal judgment against Pozza and Felker for the debt, and for a decree foreclosing the mortgage. The complaint was filed on the 20th day of August, 1912. On the same day C. O. Baker filed an intervention in the action, setting up that he had a prior mortgage on the lands in question to the plaintiff. On September 9, 1912, John E. Felker filed his separate answer in the action, and denied that he had purchased the lands from James Pozza, and that he had promised to pay off the mortgage debt of Pozza to the plaintiff. On Oc-

tober 4, 1912, James Pozza filed a separate answer, in which he admitted that the mortgage debt was due, and stated that he had sold a part of the lands to John E. Felker, and that Felker, as a part of the consideration therefor, had assumed the payment of the note and mortgage of the plaintiff. On September 9, 1912, W. R. Felker, who had been made a party defendant to the action, filed an answer and cross-bill, in which he denied that the mortgages of Pozza to the Bank of Rogers were subsequent in time to the mortgage of the plaintiff, and alleged that they were prior in time to the mortgage of the plaintiff. He prayed for judgment on the notes given to the bank, and for a foreclosure of the mortgages executed to secure the same. On the 12th day of October, 1912, the chancery court of Washington county made the following order in the case: "On this date the defendant J. E. Felker was given ten days from this date in which to file an amended answer herein. It appearing to the court that James Pozza, who is to be a witness in this cause, cannot speak the English language, on motion of his attorneys, Walker & Walker, it is ordered by the court that said James Pozza appear in this court on the 27th day of November, 1912, at 10 o'clock a. m., and there to testify orally before the court, his testimony to be reported and reduced to typewritten form and used as his deposition herein."

Hugh A. Dinsmore, for the plaintiff, testified that he had known John E. Felker for more than 15 years, and that he thought that Felker had resided in Rogers, in Benton county, during that time. That he had known W. R. Felker, the father of John E. Felker, for 25 years, and that it was his understanding that he had been a resident of the city of Rogers during that time. That the Felkers had been engaged in business as bankers in Rogers for a number of years.

M. F. Croxdale testified that he was the circuit clerk and recorder of Washington county in January, 1910, and that in that month he received and filed for record and recorded a deed from James Pozza to John E. Felker, trustee; that after recording the deed on the 27th day of January, 1910, he mailed the deed to John E. Felker, at Rogers, Ark. The deed record was introduced in evidence, and showed to be dated the 22d day of December, 1909, from James Pozza to J. E. Felker, trustee, to a part of the lands embraced in plaintiff's mortgage. The deed recites: "That I, James Pozza, widower, for and in consideration of the sum of \$200 cash and the assumption of \$400 mortgage, to us in hand paid by J. E. Felker, trustee, do hereby grant, bargain, sell and convey to the said J. E. Felker, trustee, his heirs and assigns, the following described lands, situated in Washington county, state of Arkansas, to wit:"

On the 27th day of November, 1912, which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was a day of the August term of the chancery court, the chancellor heard the case, and found the issues in favor of the plaintiff, rendered judgment against James Pozza and John E. Felker for the mortgage debt, and entered a decree foreclosing the mortgage. On that day the record shows that the court adjourned until Friday, November 27, 1912. On the 29th, court met pursuant to adjournment, and adjourned until December 28, 1912. On December 17, 1912, J. L. Felker filed a motion to quash the execution in the above-styled case. On December 24, 1912, the defendant W. R. Felker made a motion to set aside the judgment and decree in the above-entitled cause; and on the same day the court made an order staying the execution upon John E. Felker, giving a bond with W. R. Felker and A. L. Williams as his sureties, whereby they undertook and agreed to pay to the plaintiff, Nora B. Rice, the said judgment of the chancery court, or any final judgment that might be rendered in said cause in case said judgment of the chancery court be sustained and the motions to set aside and vacate the same and to quash the execution be overruled. At the same term of the court, on the 28th day of December, the court made the following order: "On this day it appears to the court that the separate motions of J. E. Felker and W. R. Felker were filed in vacation. Amended answer of J. E. Felker was filed by permission of the court over objections of plaintiff, Nora B. Rice, and defendants James and John Pozza. This cause be continued and set for February, 1913, term. James Pozza required to appear in open court to testify at such time as may be fixed for. Payment of expenses \$3 per day by J. E. Felker."

The testimony of James Pozza was taken, and he admitted that he executed the note sued on by the plaintiff, and also a mortgage on certain real estate in Washington county, Ark., to secure the same, and that the note and mortgage were due and unpaid. He stated that he sold 12½ acres of the land embraced in this mortgage to J. E. Felker for \$600; that Felker paid him \$200, and agreed to assume and pay his mortgage debt to the plaintiff as a part of the consideration for the deed; that he afterwards paid \$25 interest on the mortgage debt, but never paid anything further, and that he expected Felker to pay the mortgage debt as he had agreed to do.

J. E. Felker, for himself, testified, and stated that he was cashier of the bank at Rogers, but denied that James Pozza executed the deed in question to him, and denied that he assumed or agreed to pay the mortgage debt of Pozza to the plaintiff, Nora B. Rice. He denied that he was a member of the Tontitown Townsite Company, and denied that Captain Willie and P. Bandini were members of any such company. The deed record shows that J. E. Felker, jointly with R. S. Willie, on the 13th

day of April, 1910, executed to P. Bandini a deed which, among other things, contains the following recital: "This deed is executed by us as members of the Tontitown Townsite Company, a partnership composed of J. E. Felker, R. S. Willie, and Pietro Bandini." Felker further testified that he did not know James Pozza; had never met him, and had never had a conversation with him relative to the purchase of the land.

Pozza was an Italian, and testified that he sold the land to John E. Felker in the office of the Bank of Rogers; that there were several gentlemen present; and that he cannot now recognize or identify the one who represented himself to be John E. Felker. It was stipulated that the deposition of James Pozza, taken as evidence on the motion to set aside the original decree in this case, should be treated and considered as the evidence he gave at the trial of the case before the original decree was made.

On March 1, 1913, being a day of a subsequent term of the chancery court, the motions of W. R. and J. E. Felker were heard by the chancellor, and a decree was entered overruling the motion to set aside and annul the judgment and also the motion to set aside and quash the execution. The injunction issued on the 24th day of December, 1912, staying further proceedings under the original decree and the execution issued on it, was dissolved, and judgment was entered against W. R. Felker and A. D. Williams, the sureties on the injunction bond, for the amount of the debt sued on by the plaintiff. The defendants have duly prosecuted an appeal from both decrees of the chancery court. Other facts will be stated or referred to in the opinion.

Dick Rice, of Bentonville, for appellants.  
E. S. McDaniel, of Fayetteville, for appellee.

HART, J. (after stating the facts as above). [1] It is insisted that the court erred in admitting the deed record as evidence of the deed from James Pozza to John E. Felker, because the original deed was in existence and was the best evidence, and that the testimony of the clerk set out in the statement of facts should not have been received in evidence for the same reason. In support of his position, counsel cites the case of *Pendergrass v. Allan*, 101 Ark. 365, 141 S. W. 507; but we do not think that case sustains his position. There objection was made to the introduction of the evidence. Here no objection was made to the introduction of the evidence so far as the record discloses. In regard to a precisely similar contention to that now made by counsel for defendant, in the case of *Allan v. Ozark Land Company*, 55 Ark. 549, 18 S. W. 1042, the court said: "It is contended that the testimony of Cobbs as to the contents of the records in his office was not competent, because the records or certified copies thereof were the



best evidence of their contents. This is true. But it does not appear in the record in this case that there was any objection to its admission as evidence. Appellant had the right to waive the production of the records or certified copies of the same and accept proof of their contents, and did so by his silence. Failing to object, he thereby lulled the appellee into repose, and deprived it of the opportunity of offering better evidence. Had the testimony of Cobbs been incompetent for any purpose or on any condition, the circuit court should have given it no consideration, and in weighing the evidence should have excluded it on its own motion. In such cases, the failure of a party to object does not add to the probative force of the incompetent testimony; but in case of secondary evidence, if he waives the conditions on which its admissibility depends, he thereby gives to it its full force as evidence. This is the rule in actions at law. *Frauenthal v. Bridgeman*, 50 Ark. 348 [7 S. W. 388]. The same rule prevails in actions in equity."

[2] It is also urged that the decree should be reversed because the plaintiff failed to make the note an exhibit to her complaint; but no objection was made to her not doing so, and, under our familiar rules of practice, her failure to do so will be taken as waived by the defendants. The mortgage sought to be foreclosed was made an exhibit to the complaint and was read in evidence and considered by the chancellor with the complaint. *Neff v. Elder*, 84 Ark. 277, 105 S. W. 280, 120 Am. St. Rep. 67.

[3] The testimony shows that the deed from Pozza to John E. Felker was duly acknowledged and filed for record, and, after it was recorded, was sent by the clerk to Felker at Rogers, where he resided. The deed was afterwards found in his possession. The deed recites that the consideration was \$200 cash and the assumption of a \$400 mortgage. Thus it will be seen that the deed contains a stipulation that the property was subject to a mortgage which the grantee agreed to pay. In such cases, a duty is imposed on him by the acceptance of the deed, and the law implies a promise to perform it. See *Patton v. Atkins*, 42 Ark. 197.

[4] Besides, Pozza testified that Felker agreed to assume and pay off the mortgage as a part of the consideration for the deed. Parol evidence to establish this fact was held to be competent in the case of *J. H. Magill Lumber Co. v. Lane-White Lbr. Co.*, 90 Ark. 426, 119 S. W. 822. So, too, in the case of *Strohauer v. Voltz*, 42 Mich. 444, 4 N. W. 161, the Supreme Court of that state, speaking through Mr. Justice Cooley, held: "A deed containing a covenant of warranty 'against all lawful claims whatsoever subject to a certain mortgage given by the parties of the first part for one thousand dollars,' merely leaves the title subject to be defeated by a

failure to pay the mortgage debt, but does not bind the grantee to pay it. And the exception is not such a written contract as will exclude evidence to show that in addition to the consideration expressed, the grantee had also agreed to pay off the mortgage. The exception and the agreement are distinct."

[5] The learned justice in the opinion said that such rule of evidence was not in any respect opposed to the well-known rule that parol proof cannot be introduced to add to and vary written instruments. If plaintiff was unable to satisfy her debt against Pozza by the foreclosure of the mortgage, Pozza would be personally liable for the deficiency, and Felker, having assumed the mortgage debt and agreed to pay it, stood in the position of surety for the debt. The doctrine is stated in *Mount v. Van Ness*, 33 N. J. Eq. 262, as follows: "The mere assumption to pay the mortgage on the land, if made by the grantee to the grantor, is at most an indemnity merely; and though, if the grantor be personally liable for the payment of the mortgage, the mortgagee may, in equity, pursue the grantee on his assumption; that, however, is because, and only because, the mortgagee is, in equity, entitled to the benefit of all collateral securities which his debtor has taken for the mortgage debt. \* \* \* And if the grantor is not personally liable for the mortgage debt, the mortgagee cannot look to the grantee, personally, at all, because the assumption is but an indemnity, and the grantor not being liable, the indemnity is practically a mere nullity."

[6] Finally, it is contended that the original decree should be reversed because it was prematurely entered. The defendant Felker filed his answer on the 9th day of September, 1912, and on the 12th day of October, 1912, at the same term of the court, the chancery court records show that Felker was given ten days from that date within which to file an amended answer, and that the testimony of James Pozza would be taken in court on the 27th day of November, 1912. The defendant Felker should have taken notice that the case would come up on that day for further proceedings, and might be reached for final hearing on the call of the calendar. He did not file his amended answer, and did not appear in court on the 27th day of November, and is not now in position to claim that the judgment was prematurely entered. It is true that on a subsequent day of the same term of court he filed a motion to set aside the decree, and gave his reasons therefor; but he did not press this motion to a hearing, and it was not heard and determined until a subsequent term of the court.

[7] After the expiration of a term at which a decree is rendered, the court rendering the decree has no power to set it aside or modify it except upon application under the statute and for some cause therein specified, or by bill of review under the chancery practice.

Turner v. Vaughan, 33 Ark. 455; Terry v. Logue, 97 Ark. 314, 133 S. W. 1135. But if the motion to set aside the decree be treated as an application under the statute, and for the causes therein specified, still the decree of the chancellor must be affirmed on the whole record.

[8] We have already adverted to the evidence introduced by the plaintiff in our discussion of the original decree, and it is not necessary to repeat it. It is true that John E. Felker testified that Pozza did not convey to him any part of the land embraced in the mortgage, and that he did not assume or agree to pay the mortgage debt. He stated that he had no acquaintance with Pozza, and had never had any dealings with him; but it must be remembered that Pozza testified that he did execute the deed, and that he assumed and agreed to pay the mortgage debt of Pozza to plaintiff.

[9] The deed was acknowledged and filed for record, and this was prima facie evidence of its delivery. *Estes v. German National Bank*, 62 Ark. 7, 34 S. W. 85. And the clerk testified that after he had recorded the deed, he mailed it to the defendant at Rogers, Ark., where he resided. Besides that, the deed was afterwards found among Felker's papers. It will be noted that Felker testified that no such company as the Tontitown Townsite Company, composed of himself and others, existed; and the record shows that Felker executed a deed as a member of the Tontitown Townsite Company, which was recited to be a partnership composed of himself and others. It is true that Pozza was not able to identify Felker at the time he testified, but he testified that the trade was made, whereby he agreed to convey the land to Felker, in the office of the bank of which Felker was cashier at Rogers, and said that there were several gentlemen present but, not having any previous acquaintance with them, he did not recollect which one was John E. Felker. Pozza had had no previous acquaintance with Felker, and this may account for the fact that he could not identify him at the hearing. Under all the circumstances of the case, and considering the multitude of business transactions had by Felker as cashier of the bank, it is probable that he did not remember the transaction with Pozza. In any event, the chancellor, on the whole record, found in favor of the plaintiffs, and refused to set aside the decree, and it cannot be said that his finding was against the clear preponderance of the evidence.

Finally, it is objected that the court rendered judgment against W. R. Felker and A. L. Williams, who became sureties on the injunction bond to stay the execution issued after the original decree was entered of record, and to enjoin the enforcement of the decree.

[10] The injunction stayed the proceedings

on the original decree and enjoined its enforcement, so that immediately on the dissolution of the injunction the chancellor was empowered to render judgment against the principal and sureties on the injunction bond according to its terms. *Kirby's Digest*, section 3998; *Greer v. Stewart*, 48 Ark. 21, 2 S. W. 251; *Stanley v. Bonham*, 52 Ark. 354, 12 S. W. 706.

[11] Moreover, these same parties, A. L. Williams and W. R. Felker, have signed the supersedeas bond in the appeal of J. E. Felker from the judgment rendered against him on November 27, 1912. The judgment and decree against J. E. Felker having been affirmed, the plaintiff is entitled to judgment against him and also his sureties on the supersedeas bond. Therefore no prejudice could in any event result to W. R. Felker and A. L. Williams, and it is well settled that we only reverse judgments and decrees of the lower court for errors which are prejudicial to the rights of appellants.

It follows that the decree must be affirmed.

#### FANCHER v. KENNER.

(Supreme Court of Arkansas. Nov. 10, 1913.)

#### 1. DEPOSITIONS (§ 83\*)—SUPPRESSION—GROUNDS—REFUSAL OF WITNESS TO ANSWER.

The refusal of a witness to answer questions not shown to be material to the controversy was not ground for suppressing the deposition.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 219-226; Dec. Dig. § 83.\*]

#### 2. APPEAL AND ERROR (§ 232\*)—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Where plaintiff saved only a general objection to each of two instructions involving the validity of an alleged gift, he could not object on appeal that the instructions were erroneous because they did not charge that a delivery was an essential element of a gift.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. § 232.\*]

#### 3. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTED CHARGE—DUTY TO MAKE REQUEST.

Where defendant claimed certain property under an alleged gift from testatrix, and instructions given were correct declarations of law applicable to the issue of the validity of the gift, they were not erroneous because of the court's omission to charge that delivery was an essential element of a gift, either *inter vivos* or *causa mortis*, defendant not having requested such instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

#### 4. COURTS (§ 200½\*)—PROBATE COURTS—JURISDICTION—TITLE—ADVERSE CLAIMS.

Const. art. 7, § 34, and *Kirby's Dig.* § 1340, prescribing the jurisdiction of probate courts, do not confer on such courts jurisdiction to hear contests as to the title of property between executors and administrators and third persons claiming title as against the estate, but only authorized such courts to compel a disclosure concerning what property such third persons have in possession belonging to the estate,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and to cause them to deliver the same to the executor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 479; Dec. Dig. § 200½.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 456\*)—DIVISION.

Where, in probate proceedings to discover property and compel its delivery by defendant to plaintiff as executor, plaintiff permitted the suit to proceed as if it was an inquiry to ascertain what property defendant had in his possession belonging to the estate after it was disclosed that defendant was claiming the property in his own right, such procedure did not oust the probate court of jurisdiction, and the executor having recovered only one item of the property demanded, the court properly divided the costs, one-half to each.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941-1967; Dec. Dig. § 456.\*]

#### 6. EXECUTORS AND ADMINISTRATORS (§ 456\*)—RIGHT TO COSTS—STATUTORY PROCEEDINGS.

Kirby's Dig. § 965, providing that plaintiff shall be entitled to costs if he recovers judgment, has no application to a special statutory proceeding by an executor to recover property alleged to belong to his estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941-1967; Dec. Dig. § 456.\*]

Appeal from Circuit Court, Carroll County; Jos. S. Maples, Judge.

Petition by J. P. Fancher against R. B. Kenner. Judgment for defendant except as to a part of the relief demanded, and plaintiff appeals. Affirmed.

The appellant, as executor of Margaret C. Kenner, filed in the probate court of Carroll county a petition alleging that appellee had in his possession money and personal property belonging to the estate of Margaret C. Kenner, and that he withheld or concealed the same from the petitioner. The petition asked that Kenner be required to answer what property he had belonging to the estate of Margaret C. Kenner, and that he be required to deliver the same to the executor.

There was a trial in vacation before the probate judge, who found that Kenner had \$200 belonging to the estate and other articles of personal property. Later this finding of the probate judge was made the judgment of the court, and the matter was appealed to the circuit court. Trial was had in the circuit court as to the title to the property which the appellee had in his possession. The appellee claimed that the property he had in his possession had been given to him by his mother, and the testimony introduced by him tended to prove his contention. Appellant, on the other hand, contended that the property which the testimony showed appellee had in his possession had been disposed of by Margaret C. Kenner by will, and that the same was the property of the estate. There is testimony tending to support his contention. The cause was submitted to a jury, and the verdict was in favor of the appellee as to all the articles claimed by him except the buggy. As to

that their verdict was in favor of the appellant. The court rendered a judgment against appellant for one-half the costs, and appellant prosecutes this appeal. Other facts stated in the opinion.

Guy L. Trimble, of Harrison, for appellant. Festus O. Butt, of Eureka Springs, for appellee.

WOOD, J. (after stating the facts as above).

[1] The appellant complains because the court refused to suppress the deposition of a certain witness, giving as his reason that the witness declined to answer questions, and that her statements were inadmissible. We have examined the questions which appellant contends the witness refused to answer, and do not find that they tended to elicit facts that were material to the controversy, and therefore there was no prejudice in the court's ruling.

[2] The court gave, among others, the following instructions:

"(7) The court instructs the jury that one has a right to dispose of his property as he or she sees fit, and in this case, if you find from the evidence that Mrs. Margaret C. Kenner, prior to her death, when she was of sound mind and disposing memory, gave to the defendant the property or a part of the property in question, intending that it should be his property, then such property claimed as a gift, if you find a gift was made, would in law be the property of the defendant.

"(8) As to whether or not the property in question was the property of Rulus Kenner by gift, or otherwise, from his mother is a question of fact for you to determine from all the facts and circumstances in evidence before you in this cause."

The appellant saved a general objection to each of the instructions, and he contends here that the instructions should have told the jury that there must be a delivery in order to constitute a gift.

[3] The instructions were correct declarations of law, applicable to the issue that was being tried. While delivery of a gift is an essential element of the gift, either *inter vivos* or *causa mortis*, it is not necessary for the court to so instruct the jury unless requested to do so. The gift of a thing includes the delivery thereof, and the instructions were sufficient to present the issue of fact raised by the testimony. If the appellant had desired the court to define more specifically the elements constituting a gift, including delivery, doubtless it would have done so if it had been so requested. Having contented himself with the general objection at the trial, he cannot now urge a specific objection on appeal to an instruction which is not inherently erroneous. *St. L. I. M. & S. Ry. Co. v. Richardson*, 87 Ark. 602, 113 S. W. 794; *Mo. & North Ark. R. Co. v. Daniels*, 98 Ark. 352, 136 S. W. 651; *Green*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

v. St. L. I. M. & S. Ry. Co., 99 Ark. 226, 137 S. W. 1100. See also, *Strickland v. Strickland*, 103 Ark. 183, 146 S. W. 501; *Harmon v. Frye*, 103 Ark. 584, 148 S. W. 269.

The appellant objects to the judgment taxing him with one-half of the costs. Sections 60, 61, and 62, Kirby's Dig., under which the executor instituted this proceeding in the probate court, embody the procedure as contained in chapter 4, §§ 47, 48, 49, and 50 of the Revised Statutes, as amended by the act of March 17, 1885 (Laws 1885, p. 68). The amendment of 1885 added to the laws contained in the Revised Statutes by vesting the probate judge with the right also to proceed in vacation in the same manner as the probate court. This court, in passing upon the provisions of the Revised Statutes, in *Moss v. Sandefur*, Executor, 15 Ark. 381, said that their purpose was "not to invest the probate court with jurisdiction of contested rights, and matters of litigation, as to the title to property, between the executor or administrator and others."

[4] The sections of the Revised Statutes construed by the court in *Moss v. Sandefur*, supra, were under the Constitution of 1836, giving to the probate court such jurisdiction in matters relative to the estates of deceased persons as might be prescribed by law. Const. 1836, art. 6, § 10. At the time when the above case was decided, the Legislature had not conferred upon probate courts jurisdiction to hear contests as to the title of property between executors and administrators and others claiming title to property as against the estate of deceased persons. They had no such jurisdiction then, nor do they have it under the present Constitution. Const. Ark. art. 7, § 34; Kirby's Dig. § 1340.

The court, under the statute, had jurisdiction only to compel the appellee to disclose what personal property he had in his possession belonging to the estate of Margaret Kenner, and to cause him to deliver the same to the executor. The proceeding, up to the time when the probate judge, in vacation, made a finding to the effect that appellee had in his possession certain property belonging to the estate, may be treated as in conformity with the statute, but after the proceedings were erroneous.

[5] The appellant acquiesced, however, in the subsequent proceedings by submitting thereto without objection. He permitted the appeal to the circuit court, and permitted the trial to proceed therein as if it were an inquiry to ascertain what property the appellee had in his possession belonging to the estate. While this was an erroneous method of procedure in making the inquiry after it was disclosed that appellee was claiming the property in his own right, still, the probate court and the circuit court on appeal had jurisdiction of the subject-matter of the inquiry, and an erroneous exercise of that jurisdiction did not defeat it. The appel-

lant, however, as we have stated, acquiesced in this proceeding, and the judgment that was rendered against him in the circuit court was adverse to him as to all the articles of property that had been ordered to be delivered to him, except the buggy. The appellant had it in his power to prevent the erroneous method of procedure in the circuit court had he made timely objection thereto, and much of the costs incident to the trial of the rights of property incurred by appellant he could have prevented and they were unnecessary and had he objected to the procedure. As was held in *Meadows v. Rogers*, 17 Ark. 361: "It is within the power of the circuit court, in the exercise of a sound discretion, to disallow to the plaintiff any costs which he has caused unreasonably and unnecessarily to be accumulated." He submitted, and lost in the circuit court all that the probate court had adjudged him entitled to, except the buggy. Under these circumstances, it cannot be said that the judgment was wholly in appellant's favor. The judgment was in favor of the appellee as to all the articles which appellant contended belonged to the estate, except the buggy. The appellant, therefore, did not recover judgment for these articles. He was in the attitude, under the issues presented, of having asked judgment for all the articles of property and only recovering it as to one.

The awarding of costs, under the peculiar facts presented by this record, was in the discretion of the court, and we find no abuse of that discretion in taxing one-half the costs against appellant. As was said in *Meadows v. Rogers*, supra, "The judge, who presided in the trial of this cause, heard all the witnesses examined, \* \* \* was more competent to give proper directions about the taxing of costs than we can possibly be."

[6] Sec. 965 of Kirby's Digest, is not applicable to this special statutory proceeding. The judgment is affirmed.

#### FULKERSON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Arkansas. Nov. 10, 1913.)

##### 1. MASTER AND SERVANT (§ 20\*)—CONTRACTS OF EMPLOYMENT—CONSTRUCTION.

Where plaintiff was offered employment as a state sales agent, but the offer did not specify any length of time of service, an acceptance would create a contract of employment terminable at the will of either party.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 8-10, 17; Dec. Dig. § 20.\*]

##### 2. TELEGRAPHS AND TELEPHONES (§ 66\*)—DELAY IN TRANSMISSION OF MESSAGE—ACTIONS—DAMAGES.

Where a telegraph company negligently delayed the transmission of a message offering plaintiff employment at will, it cannot be presumed, in an action for damages, that the employment would continue for any given length of time, so as to entitle plaintiff to a recovery for his loss during that period, and hence evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence of the profits he would have made had he obtained the position is inadmissible.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

### 3. *TELEGRAPHS AND TELEPHONES* (§ 73\*)—*TRANSMISSION OF MESSAGES—DAMAGES.*

Where a telegraph company negligently delayed the transmission of an intelligible business message disclosing on its face that it was of importance, it is liable at least for nominal damages, and it is improper to direct a verdict in its favor.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.\*]

### 4. *APPEAL AND ERROR* (§ 1175\*)—*DETERMINATION—REMAND.*

In an action against a telegraph company, where it was only liable for nominal damages, the case will not be reversed and remanded on plaintiff's appeal from a directed verdict, but will be reversed on appeal and judgment for nominal damages there entered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

Appeal from Circuit Court, Benton County; Jos. S. Maples, Judge.

Action by S. W. Fulkerson against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Reversed, and judgment entered for plaintiff for nominal damages.

This is an action by S. W. Fulkerson against the Western Union Telegraph Company for damages for the failure on the part of the defendant to deliver to plaintiff the following telegraphic message: "January 25, 1912. Mr. S. W. Fulkerson, Bentonville, Arkansas. Offer you Tennessee territory Twenty direct five mail effective first. Wire quick answer. International Stock Food Company."

The plaintiff resided near the defendant's telegraph office in Bentonville; but, on account of the negligence of the defendant, the message was not delivered to him. On the next day, the International Stock Food Company wrote him a letter, in which it stated that it had wired him the day before, offering him the state agency for the state of Tennessee on a straight commission basis of 20 per cent. on solicited orders, and five per cent. on mail orders, and had asked him to wire his answer. Upon receipt of this letter, the plaintiff wired an acceptance of the offer; but, in the meantime, the stock food company, not having received any answer to its telegram as requested, had employed another salesman, and was unable to employ the plaintiff. The plaintiff testified that he would have accepted the employment had he received the message, and also offered to introduce evidence tending to show the amount of commission he would have earned under the employment. The court refused to admit the offered testimony, and directed a verdict for the defendant. From the judgment rendered, the plaintiff has duly prosecuted an appeal to this court.

Rice & Dickson and Dick Rice, all of Bentonville, for appellant. H. C. Mecham, of Ft. Smith, for appellee.

HART, J. (after stating the facts as above). In the case of *Merrill v. Western Union Telegraph Co.*, 78 Me. 97, 2 Atl. 847, the facts were that the plaintiff's agent completed a verbal contract that the plaintiff should labor for a manufacturer at \$2.25 per day, and sent a telegraph message to plaintiff, notifying him of that fact. The message was not delivered by the telegraph company in time for plaintiff to begin work as stipulated, and he thereby lost his employment. The telegraph company denied liability beyond nominal damages. The court sustained the position of the telegraph company, and said: "The contract was defeasible at the will of either party. How then, can any substantial damage be measured? Had the engagement to employ the plaintiff been for a stipulated and definite period, not over one year, the plaintiff would have a right to demand damages that could be definitely measured and assessed. He would then have been entitled to enjoy the fruit of his labor during the time of his engagement; but, under the terms of the contract in proof, he was liable to be dismissed from his employment as soon as he had entered upon it, and it cannot be known what damages he has suffered in the premises. The plaintiff must prove his damages before they can be assessed. The case fails to show facts that warrant greater than nominal damages." See, also, *Mondon v. Western Union Tel. Co.*, 96 Ga. 499, 23 S. E. 853; *Larsen v. Postal Telegraph Cable Co.*, 150 Iowa, 748, 130 N. W. 813; *Walser v. Western Union Tel. Co.*, 114 N. C. 440, 19 S. E. 366; *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 35 Pac. 76.

[1] The offer to employ plaintiff by the International Stock Food Company, if accepted by him, must be taken as an employment at will, terminable by either party. *Haney v. Caldwell*, 35 Ark. 156; *Arkadelphia Lumber Co. v. Asman*, 68 Ark. 526, 60 S. W. 238; *St. L. I. M. & S. R. Co. v. Matthews*, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467; *Harrod v. Wineman*, 146 Iowa, 718, 125 N. W. 812; *Savannah F. & W. Ry. Co. v. Willett*, 43 Fla. 311, 31 South. 246.

[2] Counsel for appellant have not cited us to any cases opposed to the rule announced above, and we have been unable to find any. Where the telegram contains an unconditional offer of employment for a definite length of time, and the testimony of the plaintiff shows that he was in a position to accept the employment, and would have done so, this furnishes a fair and just basis for plaintiff's damages, and he is entitled to recover. The rule on the subject is laid down in 37 Cyc. 776, as follows: "Where the message is of such a character that its delivery would have resulted in a binding contract of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

employment, and in consequence of the negligence of the telegraph company no contract is made, plaintiff may recover his actual loss, namely, the amount which the other party would have been legally obliged to pay him under the contract, less what he actually made or could in the exercise of reasonable diligence have made in similar employment during the corresponding time. \* \* \* In the case of an employment from day to day, only nominal damages, or at most one day's salary, can be recovered, while in the case of an employment from month to month the limit of plaintiff's recovery is one month's salary." To the same effect is Jones on Teleg. & Teleph., § 521. We are of the opinion that the court did not err in excluding the testimony offered by the plaintiff as to the amount of profits he could have made under the contract.

[3] The message, however, was intelligible, and the plaintiff was prevented from accepting the employment by the negligence of the defendant in failing to deliver the message. In the case of Western Union Tel. Co. v. Askew, 92 Ark. 133, 122 S. W. 108, the court held: "Where a message offered to a telegraph company for transmission discloses upon its face that it relates to a business transaction of importance and value to the sender, the company has notice of any direct or actual damages that may result from its negligence in the transmission of the message, and is liable therefor." Therefore he was entitled to nominal damages, and the court erred in directing a verdict for the defendant.

[4] Where a plaintiff is entitled to nominal damages only, the judgment will be reversed, but the cause will not be remanded. In such cases, judgment will be entered here for nominal damages and costs. Dilley v. Thomas, 153 S. W. 110, and cases cited. Therefore the judgment of the lower court is reversed, and judgment will be entered here in favor of the plaintiff for nominal damages and all the costs of this cause.

CUNNINGHAM et al. v. KEESHAN et al.  
(Supreme Court of Arkansas. Nov. 10, 1013.)

1. LEVEES (§ 7\*)—ENLARGING LEVEE—CONSTRUCTION OF STATUTE.

Act March 24, 1913 (Laws 1913, p. 791) § 1, authorizing the commissioners of Helena Improvement District "to enlarge and strengthen the levee in said district, which begins approximately at the southeast corner of the Walker street levee, thence in a southern direction \* \* \* to the southerly boundary line of said district," is to be construed as giving authority to enlarge and strengthen all of the levee in said district, the words following "the levee in said district" being intended as description thereof, "which" referring to "levee in said district," and the misdescription not being fatal, as the words "levee in said district" would of themselves be sufficient; the district having been created by Act May 31, 1897 (Laws 1897 [Ex. Sess.] p. 22), for the purpose of construct-

ing a levee in front of the district along the Mississippi river, that act making Walker street, along which, in a westerly direction from near the river, ran an old levee, the northern boundary of the district; Laws 1907, p. 166, enlarging the district so as to extend it a mile and a quarter north of Walker street; a levee having then been constructed along the river front the entire length of the district; and in 1913, the entire length of the levee needing to be enlarged and strengthened to protect the district from high water.

[Ed. Note.—For other cases, see Levees, Dec. Dig. § 7.\*]

2. LEVEES (§ 2\*)—IMPROVEMENT—CONSENT OF LANDOWNERS.

Act March 24, 1913 (Laws 1913, p. 791), in authorizing the commissioners of Helena Improvement District to make an additional improvement in its levee without first obtaining the consent of a majority in value of the property owners, is not invalid, the district including suburban as well as urban territory, and the constitutional provision regulating improvement districts applying only to one embracing exclusively urban property.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 2; Dec. Dig. § 2.\*]

3. LEVEES (§ 25\*)—ASSESSMENTS—INCREASE BY COMMISSIONERS.

The commissioners of Helena Improvement District, under the authority given them by Act March 24, 1913 (Laws 1913, p. 791), to cause assessments for an enlargement and strengthening of the levee of the district, to be made in accordance with Act May 31, 1897 (Laws 1897 [Ex. Sess.] p. 22), creating the original district, have power to increase the assessment on discovering before it becomes effectual that it is insufficient to make the improvement, this being included in the power given by the original act to levy additional assessments if the first assessments prove insufficient to complete the improvements.

[Ed. Note.—For other cases, see Levees, Cent. Dig. §§ 24, 28; Dec. Dig. § 25.\*]

4. LEVEES (§ 34\*)—BORROWING MONEY—CONTRACTING FOR INTEREST.

The authority to borrow money to enlarge and strengthen a levee, given by Act March 24, 1913 (Laws 1913, p. 791), to the commissioners of Helena Improvement District, implies the power to contract for payment of interest not exceeding the legal rate on the loan.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 19; Dec. Dig. § 34.\*]

Appeal from Phillips Chancery Court; Edward D. Robertson, Chancellor.

Action by R. E. Cunningham and others against D. Keeshan and others for injunction. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

Mehaffy, Reid & Mehaffy, of Little Rock, for appellants. P. R. Andrews, of Helena, and Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellees.

McCULLOCH, C. J. The General Assembly of 1897, during the extraordinary session of that year, enacted a special statute (Laws 1897, p. 22) creating an improvement district designated as the Helena Improvement District, embracing substantially all the territory of that city and certain other contiguous territory on the south, for the purpose of constructing a levee along the Mississippi riv-

ver in front of the district. At that time there was an old levee running from near the river bank in a westerly direction along Walker street, which was near the northern boundary of the city. The act of 1897, creating the district, mentions Walker street in the city of Helena as the northern boundary of the district. This statute was amended by the act of 1907, p. 166, enlarging the boundaries of the district so as to include the balance of the city of Helena lying north of Walker street, and also outlying territory on the north outside of the city for a distance of about a mile and a quarter, and also additional territory lying south of the district as originally formed. In the district thus enlarged a levee was constructed along the river front from the north to the south end of the district, the levee connecting on the north with the foothills of Crowley's Ridge, which approaches the river at that point, and with the line of levee on the south end of the district known as Cotton Belt Levee District No. 1. This levee, if built of sufficient height and strength, would completely protect the lands lying in the district.

After the overflows of the years 1912 and 1913 the General Assembly of 1913 enacted a statute, approved March 24, 1913 (Laws 1913, p. 791), which authorized the commissioners to enlarge and strengthen the levee, and to levy assessments to pay for the same, and issue bonds for that purpose. The first section of the act of 1913, the construction of which is involved in this controversy, reads as follows: "The commissioners of Helena Improvement District, being the improvement district organized by Act 9 of the extraordinary session of the General Assembly of 1897, approved May 31, 1897, are authorized and directed to enlarge and strengthen the levee in said district, which begins approximately at the southeast corner of the Walker street levee, thence in a southerly direction along and adjacent to the Mississippi river to the southern boundary line of said district, together with the necessary canals and drains to make said levee effective and properly drain the district protected by it. Said commissioners are authorized and directed to make said improvement without the formality of a petition signed by a majority in value of the landowners of said district, and without waiting to secure the consent of any number of landowners in said district; the said canals and drains to be constructed, and said levee to be enlarged and strengthened according to plans, of the material and in the manner that the commissioners deem best." The commissioners of the district construed the act as authority to enlarge and strengthen the levee along the whole front of the district, and made plans, levied assessments, and are proceeding to issue bonds to that end.

Appellants are property owners in the district, and instituted this action in the chancery court of Phillips county to restrain the

commissioners from attempting to do any work on the levee except that part which lies south of Walker street, the contention being that the act of 1913 only gave authority to expend money on that part of the levee. The legality of the proceedings of the commissioners in levying assessments and issuing bonds is assailed in other respects, which will be noticed later.

[1] The principal contention in the case is the one above referred to, namely, that the commissioners are exceeding their authority in expending money in enlarging and strengthening a part of the levee not referred to in the recent statute. This controversy, as before stated, involves the construction of the language of the act of 1913 to determine whether the lawmakers intended to give authority to the commissioners to enlarge and strengthen the whole of the levee, or whether they meant to separate a portion of the levee and authorize the work to be done on that part alone.

There are certain elemental rules of construction to be observed in the interpretation of statutes, from which we will not depart. One is that, where a law is plain and unambiguous, there is no room left for construction, and neither the exigencies of a case nor a resort to extrinsic facts will be permitted to alter the meaning of the language used in the statute. Even where a literal interpretation of the language used will lead to harsh or absurd consequences, that meaning cannot be departed from unless the whole of the statute furnishes some other guide. These rules of interpretation are set forth in the recent case of *State ex rel. Attorney General v. Trulock*, 160 S. W. 516, and need not be further enlarged upon at this time.

The contention of appellants is that the Legislature, in the enactment of this statute, have not undertaken to deal with the whole of the levee, but to separate one part from the other and authorize work to be done upon that. The question we have to consider is whether the language of the whole statute, when fairly construed, refers to the whole of the levee or to part of it. The language employed in the statute carries authority "to enlarge and strengthen the levee in said district," and we are of the opinion that the succeeding words in that paragraph were intended to refer to a description of the whole levee, and, though it prove to be an inaccurate description, it does not have the effect of limiting the antecedent words. The word "which" is used as a simple relative pronoun, and relates to the term "levee in said district," and therefore the words which follow must be construed as an attempt at a description of that which precedes. In other words, the lawmakers were not attempting to separate the line of the levee into parts, and describe the part which is referred to in granting authority to the commissioners; but they clearly meant to grant authority to the commissioners to enlarge and strengthen the

"levee in said district," and the error or inaccuracy occurs in their attempt to describe the levee in the whole district.

It is unnecessary to determine how far the word "approximately" can be stretched so as to make it fit the description. We are inclined to think, speaking relatively, that a point a mile and a quarter north of Walker street could not be held to be "approximately at the southeast corner of the Walker street levee"; but it is, as before stated, unnecessary to pass upon that question, for we conclude that this error relates merely to the description of the whole levee, and that it is not fatal to the act even if it be conceded to be erroneous. The words "levee in said district" are, of themselves, sufficient description, and everything which follows in that paragraph could very well have been omitted. This furnishes a sufficient reason, if no other existed, for saying that the error contained in the language which follows is not fatal to the description of the subject-matter of the statute.

We do not overlook the fact that, under the original act of 1897 organizing the district, the levee began at the southeast corner of the Walker street levee, and this is probably what induced the framers of the statute to adopt the erroneous description. The description of the levee had been amended by the act of 1907, which, under settled rules of construction, substituted the description in the amendatory act for that contained in the original, and the fact that the original act only was mentioned does not lessen the force of the descriptive words used applying the act of 1913 to the whole line of the levee. Notwithstanding the fact that the district had been enlarged by the amendatory statute of 1907, yet the fact remains that the Helena Improvement District was organized by the act of 1897; but the words "levee in said district" referred to the territorial bounds of the district as enlarged by the amendatory act of 1907. The lawmakers, in the enactment of the recent statute, were dealing with the district as it existed at that time, and the language used very clearly, we think, refers to the whole line of the levee. We are strengthened in this view by the facts set forth in the complaint that the levee in front of the whole district "is not of adequate height or construction to be serviceable as a levee for said district, and that the Walker street levee is no longer adequate to retain any overflow waters from the Mississippi river from invading the district," and that, if only the levee south of Walker street could be enlarged and strengthened, "the property within the district would not be protected from the high water inasmuch as the water could come over the levee that is located north of Walker street."

The allegations of the complaint show that a construction of the language of the statute,

to the effect that only the levee south of Walker street was to be enlarged and strengthened, would import a purpose on the part of the lawmakers to do the absurd thing of authorizing a large expenditure of money from which no good could result. It is true that the language of the statute indicates a legislative determination of what was necessary to be done to the levee and the extent of the authority needed by the commissioners to improve the lands in the district, but the construction which we adopt does no violence to the language of the act, but, on the contrary, we think, is in accord with its literal meaning. The case of Cypress Creek Drainage District v. Wolfe, 158 S. W. 980, recently decided by this court, is pressed upon our attention by learned counsel for appellants as decisive of the question now presented. It is true that in that case we found it necessary, as in this, to construe certain language employed, and we held that the Legislature had not conferred the authority which the commissioners of the district were attempting to exercise. The statute involved in that case bore some indicia of a design on the part of the lawmakers to confer the authority claimed by the commissioners, but our conclusion was that the language of the statute could not be interpreted so as to give authority to that extent. We entertain now no doubt of the correctness of that conclusion, but the language here is different, and we think that we have already expressed a fair interpretation of what the lawmakers meant by the language which was used. The charge that the commissioners are about to levy assessments for the purpose of enlarging and strengthening a portion of the levee not embraced within the authority conferred by the act of 1913 is therefore groundless.

[2] An attack is made on the validity of this statute in authorizing the additional improvement "without the formality of a petition signed by a majority in value of the landowners of said district, and without waiting to secure the consent of any number of landowners in said district." The constitutional provision regulating improvement districts applies only to territory exclusively urban, and does not apply to that which includes contiguous suburban territory. *Butler v. Board of Directors of Fourche Drainage District*, 99 Ark. 100, 137 S. W. 251. The enactment of the statute presupposes a legislative finding as to the consent of a majority of the landowners, and therefore it is within the power of the lawmakers to dispense with the necessity for formal petition or ascertainment by any other agency. The statute is not rendered invalid on account of the omission to provide some other agency for the ascertainment of the consent of a majority of the landowners.

[3] There is another contention that the commissioners exhausted their authority in



changing the resolution fixing the amount and percentage of assessments to be paid each year. The contention is that the first resolution, passed on August 18, 1913, exhausted the power of the commissioners, and that the subsequent resolutions, passed on August 29 and October 23, 1913, were therefore void. The statute gives authority to the commissioners to make plans for the improvement, and to cause assessments of benefits to be made by the assessors in accordance with the original act of 1897 and amendatory act of 1907. The original act, which in that respect remains unchanged, authorizes the commissioners, after the assessment of benefits has been made by the assessors, to assess the cost of the improvement upon the real property in the district and apportion it on the separate tracts or lots thereof, and to provide for the annual installments in which it is to be paid. There is nothing in the act which limits the authority of the commissioners in assessing the cost of the improvement until it is completed, and, if the first resolution contained an error as to the cost of the improvement, the power of the commissioners to levy correct assessments was not impaired by it. The act expressly provides that, if the first assessments should prove insufficient to complete the improvement, the board of improvement could make another assessment. Therefore if before any of the assessments were actually collected it was ascertained that the amount of the original levy was insufficient to make the improvement, the commissioners had the power to change the assessment before it became effective. This was equivalent to, or rather, was embraced in, the power to increase assessments or to levy additional assessments.

[4] Further complaint is made that the commissioners were about to issue bonds or other obligations for the payment of money and interest on money borrowed. The act of 1913 expressly authorizes the board to fund the existing indebtedness of the district, and "in order to hasten the work, the board shall have power to borrow money and issue negotiable evidences of indebtedness therefor, and to pledge and mortgage the assessment of benefits as security for the repayment of such loans." The authority to borrow money necessarily implies the power to contract for the payment of interest not exceeding the legal rate, and that authority is not exceeded in the proposal to issue bonds bearing six per cent. interest. *Althelmer v. Board of Directors of Plum Bayou Levee District*, 79 Ark. 229, 95 S. W. 140.

Our conclusion, upon the whole case, is that the attack upon the proceedings of the commissioners is not well founded, and that the decree of the chancellor dismissing the complaint for want of equity was correct.

The decree is therefore affirmed.

### Ex parte PATTERSON.

(Supreme Court of Arkansas. Nov. 10, 1913.)

#### CONTEMPT (§ 36\*)—POWER TO PUNISH—INFERIOR COURTS.

The mayor of an incorporated town, by Kirby's Dig. § 5588, merely declared to be a conservator of the peace "with all the powers and jurisdiction of a justice of the peace," has no power to punish for contempt except that committed in the presence of the court or in disobedience of its process; that being the limit of power, in that respect, of a justice of the peace by provision of section 726, and also of any inferior court in the absence of statute expressly conferring more, whether the creation of the court be authorized by the Constitution or only by statute.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 100, 107-109; Dec. Dig. § 36.\*]

Appeal from Circuit Court, Searcy County; George W. Reed, Judge.

G. W. Patterson was, by the mayor of an incorporated town, adjudged in contempt of court, his petition by certiorari to the circuit court was dismissed, and he appeals. Reversed, and mayor's judgment quashed.

A. Y. Barr, of Marshall, for appellant. Grover C. Bratton, of Leslie, for appellee.

McCULLOCH, C. J. Appellant, G. W. Patterson, was by the mayor of the incorporated town of Marshall adjudged to be in contempt of court for publishing in a newspaper an article criticising and ridiculing the mayor on account of his rulings in a certain case which had been pending in his court against one Lindsay for alleged violation of an ordinance of the town. The case against Lindsay had been disposed of by judgment imposing a fine, which had been paid, and the matter was thus ended. We pass over consideration of the question raised by appellant as to whether or not the article published amounted in fact to contempt, and proceed to the initial question of the jurisdiction of the mayor of an incorporated town to punish for contempt not committed in the presence of the court or in disobedience of its process. Appellant applied to the circuit court for certiorari to bring up the record, which was done, but the court, on hearing the cause, dismissed the petition, and an appeal to this court has been prosecuted.

There is no statute in this state expressly authorizing the mayor of an incorporated town to punish for contempt, but by statute that officer is declared to be a conservator of the peace throughout the limits of the corporation with "all the power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising under the laws to the state, to all intents and purposes whatever." Kirby's Dig. § 5588. The power of justices of the peace to punish for contempt is limited by statute to misconduct committed in the presence of the court or in disobedience of any process issued by the court requiring

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the attendance of a witness. Kirby's Dig. § 726.

It is seen, therefore, that there is no statutory authority to punish for contemptuous conduct committed other than in the presence of the court or in disobedience of the court's process. It is contended, however, that a mayor or justice of the peace, as well as all other courts, possesses inherent power to punish for contempt. The case of *State v. Morrill*, 16 Ark. 384, is relied on in support of this contention. This question was not raised in the *Morrill* Case, for it involved the question of contemptuous conduct toward the Supreme Court.

It seems to be very generally settled at common law, and also in this country, that inferior courts do not possess the power, in the absence of statute expressly conferring it, of punishing for contempt except that committed in the presence of the court or in disobedience of process. That rule is stated in the *Cyclopedia of Law*, vol. 9, p. 28, and numerous authorities cited in support.

The case of *The Queen v. Lefroy*, 8 L. R. Q. B. 134, involved the power of the county court to punish an attorney for contemptuous conduct committed, not in the presence of the court, by publishing a statement derogatory to the judge of the court. Chief Justice Cockburn, delivering his opinion as one of the judges on appeal, said: "I think that the judge of the county court has no authority to punish for contempt not committed in the face of the court. It is perfectly true that it is laid down by authority, and reason shows the correctness of the rule, that all courts of record have power to fine and imprison for any contempt committed in the face of the court, for the power is necessary, for the due administration of justice, to prevent the court being interrupted. But it is quite another thing to say that every inferior court of record shall have power to fine or imprison for contempt of court when that contempt is committed out of court, as the writing or publication of articles reflecting on the conduct of the judge. There are other remedies for such proceedings. The power to commit for contempt is fully gone into by Blackstone and Hawkins; but, though this power is recognized in the superior courts, it is nowhere said that an inferior court of record has any power to proceed for contempt out of court; and there is an obvious distinction between the superior courts and other courts of record. \* \* \* No case is to be found in which such a power has ever been exercised by an inferior court of record or, at all events, upheld by a decision of the superior courts."

Mr. Rapalje, in his work on Contempts, § 4, says: "The power to punish by commitment for contempt is a power belonging only to judges of certain courts and does not arise from the mere exercise of judicial functions. The power, so far as it may be exercised by judicial officers, is an incident to a court, be-

longing alike to civil and criminal jurisdictions, but not extending, at the common law, below such as are courts of record recognized by the common law."

The same rule is stated in another textbook on the subject, where it is said that: "The jurisdiction of inferior courts of record (such as a court of quarter sessions, the mayor's court, and a county court) is confined to such contempts as are perpetrated in *facie curiæ* and does not extend to such as are committed out of court, unless by virtue of some statutory enactment." Oswald, *Contempt of Court*, p. 11.

In a well-considered opinion of the New Jersey Supreme Court we find the law on this subject thoroughly reviewed, and the doctrine is shown to be well established that, in the absence of statute, the power to punish for contempt is not possessed by inferior courts not of record except for contemptuous conduct committed in the presence of the court or in disobedience of its process. That case involved the power of the recorder of a municipality to punish for contempt. The learned judge delivering the opinion in that case, said: "To punish by a commitment for contempt is a power belonging only to judges of certain courts and does not arise from the mere exercise of judicial functions. \* \* \* That power, so far as it may be exercised by judicial officers, is an incident to a court, belonging alike to courts of civil and criminal jurisdictions, but not extending, at the common law, below such as are courts of record recognized in the common law. The general doctrine of the English law is that all courts of record may fine or imprison for contempts in the face of the court. \* \* \* A power to fine or imprison in such cases, although necessary for the proper discharge of the duties of a court not of an inferior jurisdiction, and for the maintenance of its independence and dignity, should not belong to all persons, bodies, or tribunals, who may have a judicial duty to perform. The common law wisely did not recognize it in courts below those of record; and we would be doing violence to the liberty of the citizen to encourage its existence in any of our own courts, except those that, in their very nature, \* \* \* are courts of record, with jurisdictions not beneath the character of those so treated in the common law." In *re Kerrigan*, 33 N. J. Law, 344.

It is insisted by counsel for the municipality, while conceding the general doctrine thus stated, that it does not apply to justices of the peace and mayors in this state because their creation is expressly authorized by the Constitution of the state. We do not see the force of that distinction, because it is merely a question of the legal existence of the court, whether created by express constitutional authority or merely by legislative authority.

The reason for the rule at all time has been that inferior courts not of record shall

not be granted such power unless expressly intrusted with it by the lawmakers. The courts will not construe the law to grant such inherent power to courts of that class.

The mayor being without jurisdiction to punish for the alleged contemptuous conduct specified in the information filed before him the judgment rendered against appellant was void and should have been quashed by the circuit court. The judgment of the circuit court is therefore reversed, and the mayor's judgment is quashed.

### TURQUETT v. McMURRAIN.

(Supreme Court of Arkansas. Nov. 17, 1913.)

#### 1. BOUNDARIES (§ 41\*)—AGREED BOUNDARY LINE—CONTEST—INSTRUCTIONS.

In a suit involving a disputed boundary line, the court properly charged that where there is doubt or dispute as to the true location of a boundary, the parties may fix a line by parol, which, when followed by possession, will be conclusive upon them, though the possession is not for the full statutory period; and, if the jury believe that the true location of the line between plaintiff and defendant was in doubt, and they agreed on a line in furtherance thereof, constructed a joint fence and took possession of the land and cultivated the same up to the fence, then the line fixed was conclusive between them whether correct or not.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 205-207; Dec. Dig. § 41.\*]

#### 2. TRIAL (§ 243\*)—INSTRUCTIONS—CONFLICT.

Where, in an action involving a disputed boundary line, the court correctly charged on agreed boundary, but later made plaintiff's right to recover the disputed land to depend solely on whether he had occupied it adversely for seven years, intending to claim it as his own, regardless of whether the line established by a certain survey was the true line, such instruction was conflicting and erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.\*]

#### 3. TRIAL (§ 253\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in a suit involving a disputed boundary line, defendant's testimony showed that plaintiff promised to pay rent for the land in controversy for the year 1912 without condition, while plaintiff testified that such agreement was on condition that it should afterwards be determined that defendant was the owner of the land which plaintiff at the time was controverting, an instruction that, if the jury found that plaintiff held possession, claiming ownership, of the strip for seven years before defendant took possession, that would vest title in plaintiff, if adverse, and the testimony as to the alleged rent contract could only be considered to determine whether the plaintiff's possession prior to defendant's taking possession was adverse to the right or claim by defendant, and "it cannot be considered at all unless you find that the rent contract was made unconditionally," was erroneously modified by striking out the language quoted as in effect withdrawing plaintiff's testimony from the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

Appeal from Circuit Court, Howard County; Jeff T. Cowling, Judge.

Ejectment by J. W. L. Turquett against G.

W. McMurray. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This is a suit in ejectment by appellant against the appellee for a strip of land about 75 feet wide at one end and about 45 feet wide at the other end, along the section line between sections 34 in township 9 S., range 27 W., and section 3 in township 10 S., range 27 W., also the township line running east and west between said sections. The complaint alleged that appellant was the owner of the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 34, township 9 S., range 27 W., including all the inclosed land, and which, in addition to the above, included the strip in controversy. It also alleged that something over 20 years ago the line between the land of the appellant and the appellee was surveyed and established by I. M. Puckett, the county surveyor of Howard county, "with the knowledge, consent, and approval" of the appellee, and had been recognized by the appellee, as well as by the appellant, as the line between their land for more than 20 years; that the parties, 15 years ago, had built a partnership fence on the line thus established; that appellant had been in the adverse possession of the lands claimed by him for more than 20 years. He alleged that since December 31, 1912, appellee had fenced and taken possession of the strip on the south boundary of appellant, and had been in the unlawful possession thereof since that time. The appellee denied that any line was ever established between sections 3 and 34 that was ever acquiesced in until the year 1912, at which time the line was run out by the surveyor of Howard county and the line established; that in establishing said line appellant's fence was found to be over the south boundary line between sections 3 and 34, and inclosing certain land in section 3 belonging to appellee which appellee had always owned and had the right to possession of; that appellee owned and always claimed all of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 3 in township 10 S., range 27 W., and appellant was the owner of the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 34, township 9 S., range 27 W., claiming to the section line and no further; that the land inclosed by appellant belonging to appellee was not held by him under the claim of ownership, but only believing that he was the owner of the land in section 34; that appellant always acknowledged the right of ownership of appellee of all land in section 3 adjoining appellant's land in section 34.

The appellant testified, in part, as follows: He owned 80 acres of land in sections 33 and 34. Appellee's land lay south of appellant's east 40, and, as appellant supposes, is in section 3. He considered the land he had inclosed as his by description in his deed. He claimed the land south of the line established by Surveyor Huddleston as a part of section 34, and had never claimed any land

in section 8. Appellant's land had been under fence about 22 years. Appellee and appellant made a lane through there for road convenience. The fence was placed about six feet north of appellant's line. This fence remained there about eight years. Appellant and appellee then decided to inclose the road and make a partnership fence between them, which they did. The line between appellant and appellee was first established by Puckett, the county surveyor; appellee and appellant being present. Each left six feet space for the road, and they afterwards inclosed the road and built a partnership fence on the line established by Puckett. That had been about 15 years ago. He had been claiming the land to the line as established by Puckett ever since. Had always intended to claim to where this line was run.

The appellee, in part, testified as follows: "I have always contended for the land that was to the section line, and Mr. Turquett's fence. We put the fence up there not knowing just where the section line was. I didn't know, and I told him that I didn't know whether it was correct or not. He told me that he didn't know. It was my understanding with him that he claimed to the section line. At the time the wire fence was put up there was no understanding or agreement that it was to be the line unless it was the section line. It has always been the agreement that the true line should govern as between us. There was an agreement between Mr. Turquett and myself in March, 1912, about the strip of land in controversy. At first he wanted to buy the land, but I would not sell it to him. He then rented it from me and agreed to pay me the third and fourth of the 1912 crop, and to move the fence or help me move it when we got time."

The appellant further testified that he never proposed to buy the strip of land in controversy from the appellee. He rented the land from appellee after Huddleston made his survey in this way (quoting appellant's language): "I said (to appellee), 'You are claiming according to the Huddleston line, and I am claiming according to the Puckett line.' I said, 'I'll make you this proposition: I will rent this land from you, and when this thing is finally settled, if you get the land I will pay you rent, and if I get the land I don't owe you anything.' With that condition I rented the land."

The above is enough of the testimony to show the theory upon which the cause was submitted to the jury.

The court, among other instructions, gave at the instance of appellant the following:

"(2) You are further instructed that where there is doubt or uncertainty or a dispute as to the true location of a boundary line, the parties may, by parol, fix a line which will at least, when followed by possession with reference to the boundary so fixed, be conclusive upon them, although the possession is not for the full statutory period; and, if

you believe from the evidence in this case that the true location of the line between plaintiff and defendant was in doubt or uncertainty, and that the parties agreed upon a line between them, and in furtherance thereof put a joint fence thereon, and that the parties took possession of the land and cultivated same up to the fence so constructed, then you are instructed the line so fixed is conclusive upon the parties, whether right or wrong, although the possession of the land after agreement is not for the full statutory period of seven years."

The court refused to give prayer for instruction No. 9, as follows: "If you find from the evidence that the plaintiff held possession and claimed ownership of the strip of land in controversy for seven years before the defendant took possession about the first of the present year, this would vest title in the plaintiff if adverse, and the testimony as to the alleged rent contract can only be considered to determine whether the possession of the plaintiff prior to the time of taking possession by the defendant was adverse to the right or claim of the defendant, and cannot be considered at all unless you find that the rent contract was made unconditionally." But, over the objection of appellant, the court amended the above instruction by striking out the words, "and cannot be considered at all unless you find that the rent contract was made unconditionally," to which appellant excepted.

The court granted appellee's request for instruction No. 1, to the effect that the appellant could only acquire title to the strip of land in controversy by reason of open, continuous, notorious, hostile, and adverse possession of the same for a period of seven years, and claiming it all the time as his own, and not intending to claim at any time only to the true boundary line between appellant and appellee, "if the jury found that the Puckett survey was not the true line."

And, further, in appellee's prayer for instruction No. 2, the court told the jury: "So, if the jury find in this case that the plaintiff during the time that he has had the land inclosed only intended to claim to the true boundary line, then his possession would not be adverse within the meaning of the law, and your verdict will be for the defendant."

Exceptions were duly saved to the rulings of the court in the giving and refusing of instructions, and from a judgment in favor of the appellee appellant prosecutes this appeal.

W. P. Feazel and W. C. Rodgers, both of Nashville, for appellant. Sain & Sain, of Nashville, and Steel, Lake & Head, of Texarkana, for appellee.

WOOD, J. (after stating the facts as above).

[1] One of the issues presented by the pleadings was as to whether or not appellant and appellee had agreed upon a boundary

line between their adjoining lands. The court correctly presented this issue in instruction No. 2, given at the instance of the appellant. This instruction was in accord with the rule announced in *Payne v. McBride*, 98 Ark. 168, 131 S. W. 463, Ann. Cas. 1912B, 661.

[2] But in instructions given at the instance of the appellee the court made the appellant's right of recovery depend solely upon whether or not he had occupied the land by adverse possession for seven years, intending to claim the same as his own, regardless of whether or not the line established by the Puckett survey was the true boundary between them.

One ground of appellant's objection to these instructions, given at the instance of the appellee, was that they were in conflict with instructions given at the request of the appellant, and "because they were confusing to the jury, in connection with the instructions given for appellant."

These instructions, given at the instance of the appellee, ignored the contention of the appellant as to the boundary being established by parol agreement, and the court erred in not harmonizing the instructions.

[3] The court erred in modifying the appellant's prayer for instruction No. 9 by striking out the words, "and cannot be considered at all unless you find that the rental contract was made unconditionally." The testimony of the appellee, it is true, tended to show that appellant promised to pay rent for the year 1912, and that this promise was made without condition, which would tend to show a recognition of the title to the property in the appellee, and that appellant agreed to occupy the same as his tenant. But the testimony of the appellant, on the other hand, tended to show that he agreed to pay rent to the appellee for the year 1912 only upon condition that it should be afterwards determined that appellee was the owner of the strip of land in controversy, which fact appellant at that time was controverting. Now, the court, by striking out the words mentioned, permitted the jury to consider the agreement upon the part of the appellant to pay rent for the year 1912 as tending to show an unconditional recognition of appellee's claim of ownership in the land in controversy. This was highly prejudicial to appellant, for, according to his testimony, the agreement to pay rent was only by way of a compromise or settlement of the issue between them as to the occupancy of the land for the time being; that is, until it should be legally determined as to who was the owner of the land in dispute. In other words, the declarations of appellant, as he contends, were in the nature of a temporary compromise of that issue, and not at all a recognition of appellant's claim of ownership. The striking out of the words objected to deprived

the appellant of the benefit of this contention before the jury. The testimony of the declarations of appellant, tending to show his agreement to rent the land, would be competent only on the issue of adverse possession, provided they were not made, as he claimed, by way of temporary compromise of a matter that was then at issue between him and the appellee.

We find no substantial error in the other rulings of the court, but for those indicated the judgment must be reversed, and the cause remanded for a new trial.

### JONES v. BURKS et al.

(Supreme Court of Arkansas. Nov. 10, 1913.)

#### 1. ESTOPPEL (§ 119\*)—QUESTION FOR JURY.

In replevin for an automobile offered and exhibited as the prize in a contest for newspaper subscriptions, where a defendant who was represented to have sold the car to the newspaper company claimed to be the owner thereof, *held* on the evidence that the question whether defendant had estopped himself from such claim was for the jury.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 309; Dec. Dig. § 119.\*]

#### 2. PARTNERSHIP (§ 218\*)—SALES—AUTHORITY TO DELIVER—QUESTION FOR JURY.

In replevin for an automobile claimed by plaintiff as the prize in the contest for newspaper subscriptions, *held* on the evidence that whether one interested with defendant in the sale of the car to the newspaper company on commission had authority to deliver it was for the jury.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 426-428; Dec. Dig. § 218.\*]

#### 3. SALES (§ 181\*)—SUFFICIENCY OF EVIDENCE—DELIVERY—REPLEVIN.

In replevin for an automobile won by plaintiff as a prize in a contest for newspaper subscriptions, evidence *held* sufficient to show that the automobile had been delivered to plaintiff in pursuance of the contract of sale between the defendant and the newspaper company.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.\*]

#### 4. ESTOPPEL (§ 117\*)—TRIAL—ADMISSIBILITY OF EVIDENCE.

In replevin for an automobile won by plaintiff in a contest for newspaper subscriptions, in which the automobile, though exhibited as the prize, was claimed by defendant to be his property, and not that of the newspaper, the exclusion of evidence as to the declaration of defendant to the effect that the contest was on the square, and that the person who "won" the car would get it, though not shown to have been communicated to the plaintiff, were admissible as tending to show defendant's participation in the contest and his consent to the delivery of the car to plaintiff after the contest had closed, and on the same ground evidence as to streamers on the car indicating that it was the one to be given the winner, and as to the car being in front of the newspaper office, were admissible.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 307; Dec. Dig. § 117.\*]

#### 5. REPLEVIN (§ 8\*)—TITLE AND RIGHT OF POSSESSION.

Where the automobile which plaintiff won in the contest for newspaper subscriptions was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—12

not delivered to him, he could not maintain replevin to recover possession; but where it was delivered to him with the consent, either express or implied, of the party selling it to the newspaper and participating in the scheme, the title passed and he could recover.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 45-68; Dec. Dig. § 8.\*]

#### 6. LOTTERIES (§ 12\*)—RIGHT OF ACTION.

Where there was a contract of sale of an automobile completely executed by delivery to the winner in the contest for newspaper subscriptions, it was wholly immaterial whether the contest was a lottery.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. §§ 12, 13; Dec. Dig. § 12.\*]

Appeal from Circuit Court, Garland County; Calvin T. Cotham, Judge.

Replevin by Earlie Jones against J. P. Burks and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded for new trial.

This is a suit by appellant to replevy from the appellees an automobile, which she alleged was worth the sum of \$500. Appellant alleged that she acquired title to the property as follows: She entered a contest to procure subscriptions for the Bulletin Publishing Company, a newspaper that had offered to the person procuring the greatest number of subscribers a five-passenger automobile; that she was the successful contestant and was so declared by the Bulletin Publishing Company; that the Bulletin Publishing Company had arranged with J. A. Riggs to procure the automobile; that the automobile was advertised and paraded on the streets by Riggs and the Bulletin Publishing Company as the automobile to be given as a prize to the successful contestant; that, after the contest was ended and the appellant declared the successful contestant, the appellee Riggs, by his copartner, Shelton, delivered the machine to the appellant as her property, but that they afterwards kept the same in their possession and refused to deliver the same to the appellant. She further alleged that Riggs was financially interested in the Bulletin Publishing Company; that he knew that the company was offering to sell and deliver the automobile in controversy upon the terms presented in the contest; knew that the appellant was working to win the contest, and that the Bulletin Publishing Company was receiving the benefit of her work; that the appellee made no objection to the fact that the Bulletin Publishing Company was representing said car as its own property and the car to be delivered to the successful contestant at the termination of the contest. But, on the contrary, that he permitted the publishing company to exhibit the same as the prize to be given the successful contestant and never claimed any interest in the automobile until after the contest and after the car had been delivered to the plaintiff. She set up that Riggs was therefore estopped from asserting any claim to the automobile in controversy.

Appellee Riggs answered, denying the allegations of the complaint, and alleging that he at all times claimed to be the owner of said automobile, and that he had never sold it to any one or done any act that would estop him from claiming the ownership of the automobile.

The testimony in the case was substantially as follows: Appellee J. A. Riggs knew of the contest that was being presented through the Bulletin Publishing Company, a newspaper, for prizes, which, among other things, included a 27 Overland automobile, to be given to the one who obtained the greatest number of subscriptions to the paper. He carried an automobile to Hot Springs and took it down to the Bulletin office each day at a stated hour and left it standing before the Bulletin office 20 or 30 minutes. One day it stood there a couple of hours—the evening that the contest closed. He stated that the car belonged to him. He had a partner by the name of Shelton, who was interested with him in the sale of Overland cars, but he had no interest in the machine in controversy. He stated that he was not interested in the contest. He knew that the contest was going on, and knew that the appellant was in the contest. He read in the paper that the Bulletin car would be exhibited at 4 o'clock at the Bulletin office every day.

Burks, the owner of the paper, said he wanted a good car, as they would be enabled to induce the people to work harder for a new car. It was the purpose of Burks to show the car in controversy as being the car that the Bulletin Publishing Company offered to the winner in the contest; but the purpose of the appellee was to sell the car for cash. When the appellee took the car to Burks, he told appellee he did not have the money for it and to bring it down again. The contest came off, Burks never paid appellee anything, and appellee kept the car. Appellee told Burks that he would not in any sense of the word consent that the car was the car of the publishing company, but he did let Burks put the banners on it, and appellee drove it up the street with the banners on. The banners read that this car was to be given to the lucky contestant in the contest given by the Bulletin company.

Witness Shelton testified that he was interested with Riggs in the Overland automobile sales in Hot Springs in April, 1911. He had no ownership in the machines, but was interested in the commission on sales. The only commission they were to get on this machine was the benefit of the advertisement that the publishing company was to carry in the paper for him and Riggs. The car was brought to Hot Springs for the Bulletin Publishing Company. The car was the capital prize in the contest. Witness stated: "I took Miss Jones out in the machine after the contest closed. She didn't ask me to deliver the machine to her; didn't say any-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thing about wanting the possession of it. If she had, I don't think I would have turned it over to her, for I had no authority to turn it over to her without an order. I didn't understand that taking her out for a ride she was asking me to turn the machine over to her. I just supposed she thought the machine was hers and didn't know any difference but that the machine did belong to her."

Appellant, in her own behalf, testified, in part, that she entered into the contest, knew the terms, knew the prizes offered, and succeeded in getting \$1,400 in subscriptions for the capital prize, and the Bulletin Company announced that she had won the prize and she owned the car, got it, and took it to her home and showed it to her mother, bought the gasoline to run it, and would not have worked in the contest had she known the car was not the Bulletin car. She saw the car at the Bulletin office and at the garage before the contest closed.

Other witnesses testified that the car was exhibited in front of the Bulletin office as the capital prize to be given to the winner of the contest; that it was run up and down the streets of Hot Springs with streamers on it showing that it was the prize car.

One witness testified in regard to the delivery of the car as follows: "I was there the Saturday night when the contest closed. The next day Miss Jones and myself went to the garage. Mr. Shelton said if Miss Jones would get some gasoline he would take her out for a ride. We went and got the gasoline and rode all around town. He took the automobile to Miss Jones' home and asked her if he should take it in the barn, and she said, 'No, we will keep it in the garage until we get a place for it.' Mr. Riggs was not present."

Other witnesses testified that they had talked with Riggs about the machine before the contest closed, and that he stated that the contest was on the square, and that the winner would get the machine. At that time the machine had banners and streamers on it showing that it was the machine offered in the prize contest.

One witness testified that Riggs and Burks made a contract to the effect that Riggs would furnish him a 47 Overland car and that Riggs told him that he could not deliver it for some time.

The court, at the conclusion of the testimony, excluded from the jury the testimony to the effect that Riggs said that the person that won the car would get it, and also the testimony showing that streamers were placed on the car announcing that this was the car to be given away to the winner in the contest. Also, testimony that the machine was at the Bulletin office on the night the contest closed. This testimony was excluded on the ground that there was nothing to show that what Riggs said was communicated to the appellant, and nothing to show that she knew that the streamers were on

the car, and nothing to show that she knew the car was at the Bulletin office. The appellant excepted to the ruling of the court in excluding this testimony. The court, at the request of appellee, instructed the jury to return a verdict in his favor, to which appellant excepted. From the judgment rendered on this verdict appellant duly prosecutes this appeal.

Earlie Jones, pro se. John A. Riggs, pro se.

WOOD, J. (after stating the facts as above). [1] The court erred in directing a verdict in favor of the appellee. As to whether or not appellee had estopped himself from claiming title and right to the possession of the automobile in controversy was a question for the jury under the evidence.

Appellee relies upon the authority of *Watkins v. Curry*, 103 Ark. 414, 147 S. W. 43, to support the ruling of the court directing a verdict in his favor; but in that case the facts were entirely different. There we said: "There is no testimony in the record to warrant the conclusion that appellee, Curry, estopped himself from setting up his right to the automobile, under his contract with Hughes, after the latter had failed to pay the purchase money." Again: "There is no testimony whatever to warrant the finding that the appellee, after the sale, participated in the purpose of Hughes, and sold the car for the purpose of having the same advertised as one of the prizes to be given away in the contest." But here there is testimony which would have warranted the jury in finding that appellee sold the car to the Bulletin Publishing Company for the very purpose of having the same advertised as one of the prizes to be given away in the contest. In the case of *Watkins v. Curry*, supra, Curry, who was seeking to recover the automobile in controversy in that suit, had a written contract reserving title until the car was paid for, and he had done nothing whatever to encourage the contest which had been instituted by the newspaper while the same was in progress. He in no manner participated therein. Curry lived at Monticello. He did not know at the time that he sold the automobile that the purchaser bought it for the purpose of awarding it as a prize in a newspaper contest in the adjoining county of Bradley. There was nothing to show that he was present when the contest was going on or that he in any manner encouraged or participated in the contest. The most that the testimony showed was that while the contest was in progress he wrote to the paper expressing gratification at its success. But here the testimony of Shelton, a partner of Riggs in the commission on sales, showed that the only commission they were to get was that "they were to carry an ad. in the paper for us." Riggs and Shelton were personally present while the contest was in

progress, participating in and encouraging the contestants to believe that the car in controversy would go to the successful contestant.

[2] Appellee himself testified that he drove the car up and down the streets of Hot Springs; that the car bore banners and streamers with red and black letters on them showing that the car in controversy was the contest car. While Shelton testifies that he had no authority, without an order, to deliver a car that was not paid for, yet he and the appellee both say that he was a partner with appellee and interested in the commission sales. Shelton stated that he was interested "with Mr. Riggs in the Overland automobile sales in Hot Springs in April, 1911; that the Overland model in controversy was brought to Hot Springs for the Bulletin Publishing Company." As to whether Shelton had authority to deliver the automobile was, under the circumstances, for the jury to determine.

[3] The testimony of appellant herself and of a witness in her behalf tended to show that after the contest was over, and appellant had been declared the winner of the prize, Shelton delivered to appellant the machine in controversy. This testimony, in connection with the other evidence, was sufficient to warrant the jury in finding that the automobile in controversy had been delivered to the appellant in pursuance of the contract of sale between the appellee Riggs and the Bulletin Publishing Company, and that the sale was completed by such delivery. *Shaul v. Harrington*, 54 Ark. 305, 15 S. W. 835; *Elgin v. Barker*, 153 S. W. 598. The testimony was sufficient to warrant a finding that the appellee had turned the car over to the Bulletin Publishing Company for the purpose of being advertised and used as the car that would go to the winner of the contest. Appellant succeeded in getting \$1,400 subscriptions for the capital prize, which she turned over to the manager of the Bulletin Publishing Company, and she would not have done this had she known the car was not the Bulletin car. The testimony warranted the finding that appellee, by his own conduct, had held the car in controversy out to the public as the car which the Bulletin Publishing Company had offered as the prize to the successful contestant.

[4] The court erred in excluding the testimony of witness as to the declaration of appellee to the effect that the contest was on the square and the person who won the car would get it. It was not shown that these declarations were communicated to the appellant, but the testimony tended to establish appellee's participation in the contest and his consent to the delivery of the car to appellant after the close of the contest.

For the same reasons, the testimony as to the streamers on the car, and as to the car

being in front of the Bulletin office on the night that the contest closed, should not have been excluded.

[5] The case turns on the question of appellee's participation in the scheme of awarding the car as a prize to the successful contestant, and of the delivery of the car to appellant. Those questions should have been submitted to the jury by appropriate instructions. If the car was not delivered to appellant, she cannot maintain replevin to recover possession of it. If it was in fact delivered to her with the consent of appellee, either express or implied, and he participated in the scheme, then the title passed to her and she can recover.

[6] If there was a contract of sale completely executed by delivery to appellant, it is wholly immaterial whether or not the contest instituted by the newspaper was a lottery. See *Carey v. Watkins*, 97 Ark. 153, 133 S. W. 1016.

Judgment reversed, and cause remanded for a new trial.

#### REICH v. WORKMAN.

(Supreme Court of Arkansas. Nov. 10, 1913.)

##### 1. BROKERS (§ 49\*)—COMPENSATION—DEFENSES.

Where defendant, a landowner, did not reside at the place his property was located, the fact that plaintiff, a broker who claimed to have been instrumental in effecting a sale, did not notify him of the name of his prospective purchaser is no defense to an action on the contract which provided for a commission, if the broker should be instrumental in effecting a sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

##### 2. APPEAL AND ERROR (§ 231\*)—PRESENTATION FOR REVIEW IN COURT BELOW—NECESSITY.

In an action by a broker for commission under a contract providing for the payment in case he was instrumental in effecting a sale, the court for defendant charged that being instrumental would mean the doing of something in connection with the sale that was the direct moving cause of its being made. The court also gave plaintiff's instruction charging that the fact that the sale was finally consummated between defendant and his grantee would not defeat plaintiff's right, providing his action caused in any way the trade to be made. *Held* that, as the court by giving defendant's instruction adopted his theory of the case, a specific objection was necessary to raise the point that plaintiff's instruction was in conflict with the definition of the word "instrumental."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.\*]

##### 3. BROKERS (§ 56\*)—COMPENSATION—RIGHT TO COMPENSATION.

Where plaintiff and defendant contracted that plaintiff might sell defendant's land, but providing that defendant might dispose of the property himself and that the commission should be payable only if plaintiff was instrumental in making a sale, plaintiff is entitled to commission where he interested the purchaser

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and was the procuring cause of the sale, although it was consummated by defendant.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.\*]

Appeal from Circuit Court, Boone County; George W. Reed, Judge.

Action by R. L. Workman against J. L. Reich. From a judgment for plaintiff, defendant appeals. Affirmed.

R. L. Workman instituted this action against J. L. Reich to recover commissions for selling real estate for the latter. The material facts are substantially as follows: On the 20th day of June, 1911, R. L. Workman and J. L. Reich entered into a written contract whereby the former became agent for the latter, for a stated commission, to sell his real estate. That part of the contract material to the issue raised by the appeal is as follows: "It is further agreed that the above contract shall not in any way prevent said J. L. Reich from disposing of said property himself, and that the 10 per cent. commission shall only be binding when the said R. L. Workman is instrumental in making sale or trade." Workman immediately began to try to find a purchaser for the property and spent some money in advertising the same for sale. He interested J. E. Potts in the property, and Potts offered him \$5,000 for it. On July 15, 1911, Workman wrote to Reich at Wagoner, Okl., where he then resided, that he had an offer for the property at \$5,000, and that that was the best offer he had been able to get. In the letter he stated that if Reich would sell the property at that price he would agree to cut his commission to \$250. Reich declined the offer. Soon after this his wife went back to Everton, Ark., where the property was situated, on a visit, and while there found out that Potts was interested in buying it. Some days after Reich had declined the offer made by Potts to Workman, Potts again went to Workman's office and asked if he had heard anything further from Dr. Reich. Workman replied that he had not, and Potts then told him that he believed he would write to Reich, and Workman told him all right. On July 25th Potts wrote to Reich that at the time Reich's wife was at Everton he did not think he wanted to buy the property but had decided, if Reich would price it right, he would buy. After some further correspondence, Reich sold the property to Potts at the price of \$6,500. Workman did not inform Reich that Potts was the man he had interested in the property. The jury returned a verdict for the plaintiff, Workman, and the defendant has appealed.

Troy Pace, of Harrison, for appellant.  
E. G. Mitchell, of Harrison, for appellee.

HART, J. (after stating the facts as above). At the request of the defendant,

the court instructed the jury as follows:

"(1) It is admitted that the defendant made the sale in question, and therefore your verdict will be for the defendant, unless you further find from a preponderance of the testimony that the plaintiff was instrumental in making the sale."

"(2) By 'instrumental' is meant the doing of something in connection with the sale by the plaintiff that was a direct moving cause of the sale being made."

At the request of the plaintiff, and over the objection of the defendant, the court, among other instructions, gave the following:

"(2) The fact that Potts and defendant Reich finally consummated the trade between them will within itself not defeat plaintiff's right to recover, providing you believe that plaintiff's action caused in any way that trade to be made."

"(3) The fact that plaintiff did not notify the defendant that he was trying to sell to Potts is not a matter to be considered by you against him. The contract did not require such notification. The only question is: Did the plaintiff cause the trade to be made in any way?"

The defendant assigns as error the action of the court in giving these instructions for the plaintiff.

[1] No prejudice resulted to the defendant from the giving of instruction No. 3. He resided at Wagoner, Okl., and the land he wished to sell was situated near Everton, Ark. It was not of any interest to him to know that Potts was the probable purchaser of the land; nor can it be said that he even suffered any injury from the fact that Workman did not state to him that Potts was interested in purchasing the land. In the case of *Veasey v. Carson*, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241, the court held: "The concealment of the identity of the purchaser from his principal will not preclude a broker from recovering his commission on a sale of land where it does not appear that there was anything in the facts or circumstances to render that fact of any importance to the seller."

The contract between Workman and Reich did not preclude Reich from himself making the sale of the land, but the contract provided that Workman would be entitled to his commission, provided he was instrumental in making the sale.

[2] Instruction No. 2, given at the request of the plaintiff and assigned as error by the defendant, concludes with the clause: "Providing you believe that plaintiff's action caused in any way that trade to be made." The words "in any way," as used in the instruction, refer to the means used by the plaintiff in securing Potts as a purchaser of the land and do not mean that Workman was entitled to recover if he did anything

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

whatever to interest Potts in the land. This is shown by the fact that the court defined the word "instrumental," at the request of the defendant, to mean the doing of something in connection with the sale by the plaintiff that was a direct, moving cause of the sale being made. The giving of this instruction at the request of the defendant shows that the court adopted his theory of the meaning of the contract, and if the defendant thought that the instructions complained of were in conflict with the meaning of the word "instrumental," as defined at his request, he should have made a specific objection to the instructions complained of, and, doubtless the court would have changed the phraseology of them to meet his objection.

[3] It is finally urged by the defendant that the verdict is not supported by the evidence; but we do not agree with him in this contention. While the contract between Workman and Reich gave to the latter the right to make the sale himself, it was also provided that the former should be entitled to his commissions if he was instrumental in making the sale. The testimony shows that he took up the matter of selling the property to Potts and interested him in it. He endeavored to sell the property to Potts for the best price obtainable but was unable to complete the sale himself. Afterwards Reich completed the sale, but we think the testimony shows that Workman was instrumental in making the sale or was the procuring cause of the sale, under his employment for that purpose, within the meaning of our previous decisions on the subject. *Stiwell v. Lally*, 89 Ark. 195, 115 S. W. 1134; *Branch v. Moore*, 84 Ark. 462, 105 S. W. 1173, 120 Am. St. Rep. 78; *Hunton v. Marshall*, 76 Ark. 375, 88 S. W. 963; *Scott v. Patterson*, 53 Ark. 49, 13 S. W. 419.

The judgment will therefore be affirmed.

#### ARMISTEAD v. BISHOP.

(Supreme Court of Arkansas. Nov. 17, 1913.)

#### 1. MORTGAGES (§ 199\*)—FORECLOSURE—MORTGAGEE IN POSSESSION—TENANT—ACCOUNTING TO JUNIOR MORTGAGEE.

Where a senior mortgagee was in possession as tenant of the administrator and heir of the deceased mortgagor, and not as mortgagee, he could not be required to account for rents and profits for the benefit of a junior mortgagee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 513-525; Dec. Dig. § 199.\*]

#### 2. HOMESTEAD (§ 146\*)—MORTGAGES—DEATH OF MORTGAGOR—RIGHT TO RENTS.

On the death of the mortgagor of a homestead his heir was entitled to rents and profits until one of the mortgagees asserted his right to foreclose or take possession of the property to subject the rents and profits to the payment of mortgages.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 257; Dec. Dig. § 146.\*]

#### 3. HOMESTEAD (§ 146\*)—MORTGAGES—DEATH OF MORTGAGOR—RENTS AND PROFITS.

On the death of the owner of a mortgaged homestead his heir succeeded by inheritance to the mortgagor's rights, and, so far as a junior mortgagee was concerned, it was immaterial whether the rents and profits were paid to the heir or to the mortgagor's administrator.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 257; Dec. Dig. § 146.\*]

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Action by G. R. Bishop to foreclose a mortgage on certain lands of William Civils, since deceased, and to which K. R. Armistead, mortgagee, filed objections. Decree for complainant, and Armistead appeals. Affirmed.

Allen Hughes, of Memphis, Tenn., for appellant. A. B. Shafer, of Memphis, Tenn., for appellee.

McOULLOCH, C. J. Appellee, G. R. Bishop, instituted this action in the chancery court of St. Francis county to foreclose a mortgage or deed of trust on lands in that county executed by one William Civils to secure a debt in the sum of \$900, evidenced by note payable five years after date, with interest. The mortgagor, Civils, died, unmarried and intestate, a short time after the execution of the mortgage, leaving his daughter, Pearl Civils, as his only heir at law; she being a minor at that time. An administrator was appointed, and the administrator and heir were both joined as defendants in this suit. Appellant is mortgagee under a junior mortgage, and was made a party to the suit at his own request. The original defendants made no defense in the action, and the controversy is entirely between the two mortgagees.

The case was tried upon an agreed statement of facts, from which it appears that shortly after the death of Civils, the mortgagor, appellee entered into possession of the lands by express agreement with the administrator that he was to occupy and cultivate the same as tenant, and pay a certain stipulated rent. For the first two years of this tenancy appellee was to pay one-half of the stipulated rent to the administrator, and the other half was to be credited on the mortgage debt, which was done. For the next two years, which completed the term of his tenancy, and ran up to the time of the commencement of this suit, he was to pay a stipulated rent, all of which was paid to the administrator and to Pearl Civils, the heir.

The controversy between the two mortgagees arose over the application of the rents; it being contended on behalf of appellant, as junior mortgagee, that appellee should be treated as a mortgagee in possession and accountable for the rental value of the lands during the years he occupied the same, except as to the amount paid by him to Pearl Civils, the heir of the mortgagor.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is admitted that the lands constituted the homestead of the mortgagor, William Civils. Therefore the administrator was not entitled to possession. The heir was entitled to possession until foreclosure, or until one of the mortgagees sought possession for the purpose of subjecting the rents and profits to the payment of his mortgage debt.

It may be conceded, for the purposes of this case, without deciding it, however, that a junior mortgagee, where the mortgagor is insolvent, and the mortgaged property is insufficient to pay off both debts, can hold the senior mortgagee in possession accountable for the rents and profits received by the latter. The cases cited on the brief seem to sustain that view.

[1] It is, however, essential, before there is any accountability as mortgagee in possession, that the possession must be taken under and by reason of the mortgage, or under such circumstances as would justify a court in treating the possession as being under the mortgage.

In speaking on this subject, Professor Pomeroy said: "In order, however, that these special rights and liabilities may arise from his possession, it must be a possession taken and held by him as mortgagee." 3 Pomeroy's Equity Jurisprudence, § 1215.

The Supreme Court of Alabama, in an opinion by Chief Justice Brickell, stated the law on that subject as follows: "It is only when the mortgagee is in possession as mortgagee, taking the rents and profits, that he may be required to account for them, or for waste, on a bill to redeem or to foreclose. A court of equity cannot, in either suit—and those are the only suits which can be maintained between them—call the mortgagee to account for trespasses he may have committed, or because of his possession as the tenant of the mortgagor." *Daniel v. Coker*, 70 Ala. 280.

The same rule is stated by Judge Mitchell, in delivering the opinion of the Supreme Court of Minnesota in the case of *Rogers v. Benton*, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613, as follows: "The only logical rule is that, to constitute 'a mortgagee in possession,' the mortgagee must be in possession by reason of the agreement or assent of the mortgagor or his assigns that he have the possession under the mortgage and because of it."

Now, in the present case the undisputed evidence establishes the fact that appellee was not in possession as mortgagee nor by reason of his mortgage, but as tenant of the administrator, and that this tenancy was created in good faith, and not for the purpose of avoiding accountability for the rents.

[2] The question of right of possession as between the administrator and the heir did not arise, though it appears that a part, at least, of the rent was paid over to the heir. The heir was, as before stated, entitled to all

the rents until one of the mortgagees asserted the right to foreclose or to take possession for the purpose of subjecting the rents and profits to the payment of the mortgage debts. The fact that all the rent was not paid to the heir is of no concern to appellant as junior mortgagee. He could at any time have instituted proceedings to foreclose his mortgage, and perhaps have insisted on the senior mortgagee while in possession accounting for the rents and profits received. In this way the possession of appellee could have been changed from that as tenant to mortgagee in possession. But as long as the latter occupied the premises solely as tenant of the administrator or heir, and accounted to his landlord for the rents, he is not chargeable with the same as a credit on his mortgage debt. The case stands the same as if the mortgagor was still alive, and had rented the mortgaged premises to appellee. Under those circumstances it would scarcely be contended that appellee, after having paid the rents to the mortgagor according to the terms of his contract, would be accountable to a junior mortgagee for the amounts so paid.

[3] In the present case the heir succeeded by inheritance to the rights of the deceased mortgagor, and, so far as the junior mortgagee is concerned, it is unimportant whether the rents were actually paid to her or to the administrator.

We are of the opinion, therefore, that the decree of the chancellor was correct, and the same is affirmed.

#### STORTHZ v. SMITH.

(Supreme Court of Arkansas. Oct. 27, 1913.)

#### 1. LANDLORD AND TENANT (§ 209\*)—FARM LEASE—STATUTE—"CULTIVATED OR OCCUPIED."

Where defendant rented 20 acres of land, 10 of which his lessee sublet, the subtenant is, under Kirby's Dig. § 5035, providing that any person subrenting lands shall be responsible for the rent of only such as is cultivated or occupied by him, liable to defendant only for the rent of the 10 acres; the expression "cultivated or occupied" meaning the quantity of land which the subtenant contracts to take.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 832-834; Dec. Dig. § 209.\*]

#### 2. CHATTEL MORTGAGES (§ 48\*)—DESCRIPTION—SUFFICIENCY.

A chattel mortgage on a crop to be raised on defendant's land, which described it as the entire crop to be raised on plaintiff's farm in Faulkner county or elsewhere in that county, is sufficiently definite to give all persons notice of the lien on any crop raised by the mortgagor on defendant's land in the county.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 93-95; Dec. Dig. § 48.\*]

#### 3. COSTS (§ 60\*)—PERSONS LIABLE.

Defendant was the lessor of land and as such had a lien on the crop in suit, which plaintiff claimed as the tenant's mortgagee. Held that, as defendant's lien was prior to that of the mortgage, and his possession of the crop

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which had been turned over to him for the purpose of gathering and paying his rent was not wrongful, costs of the suit, even though more rent than due was claimed, particularly those for the receivership, should not be imposed solely on defendant; it not appearing that plaintiff tendered defendant the amount to which he was entitled.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 261-271; Dec. Dig. § 60.\*]

Appeal from Faulkner Chancery Court; Jordan Sellers, Chancellor.

Action by S. C. Smith against L. Storthz. From the decree, defendant appeals. Modified and affirmed.

W. T. Tucker, of Little Rock, for appellant. R. W. Robins, of Conway, for appellee.

MCULLOCH, C. J. Appellant, L. Storthz, owned a farm in Faulkner county, Ark., and rented a portion of it to one Robert Carr to cultivate during the year 1911. Before the time passed to plant the crop, Carr died, and appellant agreed with the latter's widow that she should carry out the rental contract; the effect of the contract, as disclosed in the evidence, being to constitute a new rental contract between appellant and Mrs. Carr. Mrs. Carr subrented 10 acres of the land to one Gordon, who raised a crop thereon, and mortgaged it, before maturity, to appellee, S. G. Smith, a merchant in Conway, Ark., to secure an account for supplies. Gordon left before the crop was gathered, and Mrs. Carr authorized appellant's agent to take possession of it for the purpose of gathering it to pay the rent.

Appellee Smith instituted this action in the chancery court of Faulkner county to foreclose his mortgage, making Gordon, Mrs. Carr, and appellant defendants; and he asked that a receiver be appointed by the court to take charge of the crop, and the chancellor in vacation made an order for the appointment of a receiver. Appellant resisted this order on the ground that he was solvent and was therefore accountable for the crop, and also offered to make bond for the delivery of the crop according to the orders of the court.

Appellant claims that there were 32 acres of the land and that he was to be paid \$8 an acre for it, and the proof introduced on his part tends to establish that contention. The proof, however, adduced by appellee, which the court accepted as true, tends to establish the acreage of the land rented at only 20 acres, and that Gordon cultivated 10 acres thereof. It also shows that only the 10 acres cultivated by Gordon could be put in cultivation that year; the remainder being covered at planting time by overflow water. The chancellor found that appellant was only entitled to enforce a lien for the sum of \$60, being \$6 per acre on the 10 acres of land on which was the Gordon crop, and that the balance of proceeds of the crop, which was sold under order of the court, should be

paid over to appellee Smith on his mortgage debt. A decree to that effect was rendered, and all of the costs of the cause, including the fee of the receiver and other expenses of the receivership, were awarded against appellant. It is insisted on behalf of appellant that the decree was erroneous in not awarding him the full amount of rent which he claimed; in other words, it is contended that a lien should be declared in his favor against the crop for rent on 32 acres of land at \$6 per acre.

[1] The testimony is sufficient, we think, to warrant the finding of the chancellor that there were only 20 acres of the land rented by appellant to Carr, and that only 10 acres of this was cultivated by Gordon. The proof is not entirely satisfactory, but our conclusion is that it is sufficient to show that it was a subrenting to Gordon and that he only subrented the amount that he put into cultivation. This being true, he is only liable for the 10 acres of land at \$6 per acre under the statute of this state which declares that "any person subrenting lands or tenements shall only be held responsible for the rent of such as are cultivated or occupied by him." Kirby's Digest, § 5035. The purpose of this statute is to limit the liability of a subtenant to the rent of the land which he subrents at the price specified in the contract between the principal tenant and the landlord. The words "cultivated or occupied," as used in the statute, mean the quantity of land which the subtenant contracts to take. *Jacobson v. Atkins*, 103 Ark. 91, 146 S. W. 133. We cannot say that the chancery court erred in its finding that appellant was only entitled to enforce a lien for the sum of \$60 against Gordon's crop.

[2] Nor do we think there is any foundation for the contention of appellant's counsel that the mortgage executed by Gordon to appellee, Smith, was void on account of the lack of a correct description of the property, which is described as "entire crop of cotton, cotton seed, corn, oats, small grain, and all other products which shall be grown or cultivated [by the mortgagee] on S. G. Smith's farm, or elsewhere, in Faulkner county, Ark., during the year 1911." The crop was not raised on the Smith farm but on appellant's farm in Faulkner county. But we think the description is sufficient to give notice to all parties of the lien on any crop raised by the mortgagor in that county. *Gurley v. Davis*, 39 Ark. 394; *Johnson v. Grissard*, 51 Ark. 410, 11 S. W. 585, 3 L. R. A. 795.

[3] Our conclusion, however, is that the court erred in taxing the costs of the case, particularly the costs of the receivership, against appellant. His lien was prior to that of the mortgagee, and his possession of the crop, which had been turned over to him for the purpose of gathering and paying his rent, was not wrongful. If appellee, as mortgagee, had tendered to appellant the true

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

amount of his rent, and he had refused to accept it, then his holding of the crop might be treated as wrongful so as to subject him to the costs of any litigation which followed; but that is not the state of the present case, for the suit was brought against Gordon, and appellant was made a party without any offer to pay his rent. So there is no reason why the costs should be taxed against him and taken out of his rent, for which he is entitled to have a first lien declared.

The decree, in so far as it fixes the amount of appellant's rent to be charged against the crop, is affirmed; but the decree is modified so as to strike out the award of costs against appellant. The costs of this appeal will be divided equally between the parties.

### McALISTER et al. v. HARNESS.

(Supreme Court of Arkansas. Nov. 24, 1913.)

#### EJECTMENT (§ 65\*) — COMPLAINT — SHOWING DERIVATION OF TITLE.

Under Kirby's Dig. § 2742, providing that in actions for the recovery of lands plaintiff shall set forth in his complaint all deeds and other written evidence of title relied on and state such facts as shall show prima facie title in himself, a complaint in ejectment, alleging that plaintiffs were the owners of certain land, that on a date specified patents therefor were issued by the government to D., that on a specified date M., then being the owner and in possession of the land, leased it for the term of the lessor's natural life, that the lessor had died, and that defendant was in the unlawful possession of the land, was insufficient, as it did not show title in plaintiffs by descent, purchase, nor operation of law, nor show who plaintiffs were or by what right they claimed.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 165-174; Dec. Dig. § 65.\*]

Appeal from Circuit Court, Van Buren County; J. W. Meeks, Judge on Exchange.

Ejectment by A. G. McAlister and others against J. D. Harness. From an order dismissing the complaint, plaintiffs appeal. Affirmed.

This is an action in ejectment, and the recitals of the complaint are as follows: The plaintiffs, by permission of the court, file this their amended complaint, and for cause of action against the defendant herein say: That they are the owners in fee simple and entitled to the immediate possession of the W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 33, township 10 N., range 13 W., in Van Buren county, Ark., containing 80 acres more or less. Plaintiffs derive and claim title in the said land, as follows: On the 1st day of March, 1859, the United States of America issued to Katherine H. Davis patent certificate No. 16,140 for the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of said section 33; and on the 10th day of August, 1859, the United States of America issued to Katherine H. Davis patent certificate No. 16,916 for the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of said section 33. Said patent certificate No. 16,140 is filed herewith as Exhibit

A to this amended complaint and asked to be taken as a part hereof. Said patent certificate No. 16,916 was duly filed in the office of the circuit court clerk and recorder of Van Buren county, Ark., and the original is not in the possession of these plaintiffs and cannot be produced; but a certified copy thereof is filed herewith and marked Exhibit B to this amended complaint and asked to be taken as a part hereof. On the \_\_\_\_\_ day of \_\_\_\_\_, 1871, the said Celia McAlister, being then the owner and in the actual possession of the said land, made, executed, and delivered to P. J. Rollow a lease in writing, conveying, leasing, and letting to the said P. J. Rollow all of the said land, for and during the term of her natural life, and placed said Rollow in possession thereof. In said lease it was stipulated, covenanted, and agreed that at the death of the said Celia McAlister said P. J. Rollow, his heirs and assigns, should immediately, and without process of law, deliver up said land to the said Celia M. McAlister, or to her heirs and assigns. Said P. J. Rollow occupied and used said lands under the lease aforesaid for a few years, when he assigned the same to some person or persons to the plaintiffs unknown. The said Celia McAlister departed this life intestate in the year 1909. The defendant, John D. Harness, is in the unlawful possession of the said land, and has unlawfully occupied, held, and used the same for more than three years last past. The rental value of the said land is \$300 per annum. Wherefore plaintiffs pray judgment for the recovery of said land, and for the possession thereof and the sum of \$900, their damages for said use and occupation thereof, and for their costs and all other proper relief. The transcript does not contain the original complaint, and we do not know what its recitals were, although a writ of certiorari was granted by the clerk of this court to correct the record by showing that the amended complaint was dismissed by the court below. The appellee demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the complaint was dismissed as shown by the return of the circuit clerk upon the writ of certiorari, and this appeal was prosecuted from that order of the court.

A. G. McAlister et al., pro se. Fraser & Fraser, of Clinton, for appellee.

SMITH, J. (after stating the facts as above). Section 2742, Kirby's Digest, reads as follows: "In all actions for the recovery of lands, except in actions of forcible entry and unlawful detainer, the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same as far as they can be obtained, as exhibits therewith, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

shall state such facts as shall show prima facie title in himself to the land in controversy, and the defendant in his answer shall plead in the same manner as above required from the plaintiff."

The recitals of this complaint give appellants no right to recover. All the allegations of the complaint may be true and yet make no prima facie right in appellants entitling them to recover the possession of the land. While we construe pleadings liberally, no charity in construction can excuse this total failure of allegations. There is not a hint nor a suggestion in the complaint as to who the plaintiffs are or by what right they claim. They do not plead title by descent, nor by purchase, nor by operation of law. No explanation is offered of appellants' failure to amend their complaint, and we cannot surmise what amendments might have been made. It is unnecessary to notice other defects in the complaint.

The judgment is affirmed.

#### COULTER v. STATE.

(Supreme Court of Arkansas. Nov. 17, 1913.)

##### 1. CRIMINAL LAW (§ 1038\*) — PRESENTATION BELOW—MODIFICATION AND INSTRUCTION.

If accused thought that an instruction, given in a prosecution for assault with intent to kill, made the question of guilt depend upon the existence of reasonable grounds of belief that he was in danger, irrespective of how apparent the danger was to him, he should have objected to it on that specific ground, so that the court could have remedied the defect, and, not having done so, cannot complain on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.\*]

##### 2. CRIMINAL LAW (§ 778\*)—INSTRUCTIONS—PRESUMPTION OF INTENTION.

It was error to instruct, in a prosecution for assault with intent to kill, defended on the ground of self-defense, that every sane man is presumed to intend the natural and probable consequences of his acts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.\*]

##### 3. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR.

Error in instructing, in a prosecution for assault with intent to kill, that every sane man is presumed to intend the natural and probable consequences of his acts was not prejudicial to accused, where he admitted that he in fact shot prosecuting witness with intent to kill for the purpose of protecting his own life.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

##### 4. HOMICIDE (§ 300\*)—INSTRUCTIONS — DUTY TO RETREAT.

In a prosecution for assault with intent to kill, it was not error to instruct that, if accused thought that he might be murderously assaulted by A., the prosecuting witness, "or" his brother, it was accused's duty to do everything in his power, consistent with his safety, to avoid the difficulty, and that he could not be excused if he did not do so, where accused testified that when he shot prosecuting witness he believed

that he and his brothers were making a concerted attack upon him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

##### 5. HOMICIDE (§ 300\*)—INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

Where there was evidence, in a prosecution for assault with intent to kill, that accused had his pistol in his hands some moments before he shot at prosecuting witness, and, when the latter started to leave, defendant said, "You do not believe I will shoot you?" whereat the prosecuting witness whirled, and defendant shot, an instruction that, if accused, after he drew his pistol, could have prevented an injury to himself without shooting, which was apparent to him at the time, and did not do so, he could not plead self-defense was not objectionable, on the ground that the jury could have inferred therefrom that there was evidence that, after accused drew his pistol, he could have prevented injury to himself without shooting.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

##### 6. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS — REQUESTS.

Requested instructions presenting the question of reasonable doubt and the presumption of innocence were properly refused, where the court had fully instructed thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

##### 7. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS — REQUESTS—CHARGES ALREADY GIVEN.

A requested charge that, if the jury had a reasonable doubt that the assault was committed by accused while acting under the influence of passion caused by a provocation apparently sufficient to make the passion irresistible, they should acquit of assault with intent to kill was sufficiently covered by instructions that, to convict, the jury must find beyond a reasonable doubt that accused had in mind at the time the specific intent to take the life of the person assaulted and the personal ability to do so, and that a killing would have amounted to murder, and that, while mere words will not justify an assault, yet words accompanied by violent or threatening acts may reduce the crime from assault with intent to kill to aggravated assault or a justification thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

##### 8. CRIMINAL LAW (§ 1166½\*) — APPEAL — HARMLESS ERROR — REMARKS OF TRIAL COURT.

Accused was asked on cross-examination if he had not been convicted for killing his brother, and on objection the court stated that it was proper to ask the question to affect his credibility, when accused's counsel remarked that, if accused did kill his brother, he was justifiable, when the court remarked, "You know he was not justifiable" but added, "I did not mean that; I meant it would not be competent to go into that question here in this trial at all; it is competent to ask him if he had been convicted of a felony, \* \* \* but, as to how long he stayed in the penitentiary, that is not material," and instructed the jury that they should not consider the fact that accused had been previously convicted of a crime as establishing his guilt of the crime charged, but only as it might affect his credibility. Held that, in view of his subsequent action, the first quoted remarks of the trial court were not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Circuit Court, Sevier County; Jeff T. Cowling, Judge.

Jim Coulter was convicted of assault with intent to kill, and appeals. Affirmed.

Steel, Lake & Head, of Texarkana, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

HART, J. The defendant, Jim Coulter, was indicted for the crime of assault with intent to kill, charged to have been committed by shooting Cal Rollins. He was convicted, and his punishment fixed by the jury at one year in the penitentiary. From the judgment of conviction, he has duly prosecuted an appeal to this court.

The facts, so far as are material for a consideration of the issues raised by the appeal, are substantially as follows: On the 31st day of August, 1912, the defendant, Jim Coulter, and the prosecuting witness, Cal Rollins, and his brothers, Al and Dural Rollins, attended a negro picnic in Sevier county, Ark. Cal Rollins arrived there about noon, and his two brothers and the defendant were already there. During the morning some trouble occurred between Al and Dural Rollins and the defendant, Jim Coulter. Later in the afternoon some words again passed between Al Rollins and the defendant. The defendant placed his hand in his bosom, and Al Rollins started off. About this time Cal Rollins came up. Dural Rollins was also present. Some words passed between Cal Rollins and the defendant, and the defendant said, "Don't you believe I will shoot you?" Cal Rollins replied, "No," and turned towards his brother Dural, intending to go away, and the defendant again said, "Don't you believe I will shoot you?" Cal Rollins then whirled, facing the defendant, and just as he did so the defendant shot him with a pistol. Cal Rollins was about 10 feet away from the defendant, and says that he made no demonstration to draw a gun or to do the defendant any harm. Other witnesses for the state testified that at the time the defendant shot Cal Rollins the latter was not making any hostile demonstrations towards him at all. Other witnesses said that just prior to the shooting Cal Rollins had run his hand in his pocket as if to draw a weapon of some kind, and another witness states that a knife was found near where he was standing after the shooting. The defendant testified for himself, and stated that Cal Rollins was approaching him with a knife in his hand, and that he began to walk backwards; that Cal Rollins kept approaching him with the knife, and that he then jerked out his pistol, and shot him in order to save his own life; that at the same time he was trying to keep his eyes on Dural Rollins, who was trying to slip up on him with a knife. He stated that Cal wheeled after he shot and ran away; that he

did not try to shoot Cal Rollins any more, and gave up his gun, and went home immediately after the shooting. He said that he had carried his pistol with him to the picnic because threats had been made against him, and that he carried it in self-defense. Other witnesses tended to corroborate his testimony.

[1] It is first contended by counsel for defendant that the court erred in giving the instruction No. 10. They contend that the instruction makes the guilt or innocence of the defendant depend upon the existence of reasonable grounds of belief that he was in danger, regardless of how the danger appeared to him. We do not deem it necessary to set out the instruction complained of. At the request of the defendant, the court fully instructed the jury on the question of appearance of danger to him. In discussing an objection to an instruction similar to the one now complained of in the case of *Manasco v. State*, 104 Ark. 397, 148 S. W. 1025, the court said that the instruction, when taken in connection with an instruction given at the request of the defendant, was not open to the objection that it substitutes the judgment of the jury for the judgment of the defendant as to the necessity for taking life, and that the instructions taken together correctly declared the law, as announced by this court. If counsel for defendant thought at the trial that the instruction was open to the construction that they now insist on, they should have made a specific objection to it, and, inasmuch as the court gave, at their request, two instructions on the subject of the appearance of danger to the defendant, there can be no doubt that it would have changed the phraseology of the instruction now complained of had a specific objection been made to it.

It is next contended that the court erred in giving the following instruction: "You are further instructed that every sane man is presumed to intend the natural and probable consequences of his acts."

[2, 3] The court should not have given this instruction; but, under the facts as disclosed by the record, we do not think it was prejudicial to the rights of the defendant. The defendant himself testifies that at the time he shot the prosecuting witness the latter was advancing upon him with a knife, and was close upon him, and that he shot in order to save his own life. In other words, he admitted that he drew his pistol, and shot the prosecuting witness with the intent to kill him, because he thought his own life was in danger. Therefore we cannot see in what manner he was prejudiced by the giving of the instruction.

[4] Counsel for the defendant next complain that the court erred in giving instruction No. 17. They say that the defendant was being tried for shooting Cal Rollins, and that they object to instruction No. 17, be-

cause in it the court, in effect, told the jury that, if the defendant thought he might be murderously assaulted by Al Rollins, Cal Rollins, or Dural Rollins, it was his duty to do everything in his power, consistent with his safety, to avoid the difficulty, and, if he failed to do so, he cannot be excused. According to the testimony of the defendant himself, at the time he shot at Cal Rollins he believed that the three Rollins brothers were engaged in making a concerted attack upon him. Under these circumstances, it was all one transaction, and we do not think the court erred in giving the instruction.

It is also contended that the court erred in giving instruction No. 18, which is as follows: "If you believe from the evidence in this case that the defendant, Jim Coulter, after he drew his pistol, could have reasonably prevented an injury to himself without shooting, and that such fact was apparent to him at the time, and he failed to do so, he could not set up the plea of self-defense."

[5] Counsel object to this instruction, because they say the jury might have drawn the conclusion therefrom that the court was of the opinion that there was evidence to the effect that after Jim Coulter drew his pistol he could have done something to have prevented the injury to himself without shooting, when the undisputed evidence is to the effect that the shot was fired just as the pistol was drawn. Cal Rollins testified that the defendant had the pistol in his hand some moments before he shot at him; that he had started to leave, and the defendant said to him, "You do not believe I will shoot you?" that he then whirled towards the defendant, and the defendant then fired, when he was about 10 feet away from him. Therefore we do not think the court erred in giving this instruction.

[6] Counsel for defendant complain that the court erred in refusing to give instruction No. 4 requested by them. This instruction was directed towards the question of the presumption of innocence and that of reasonable doubt. The court, in other instructions given for the defendant, fully instructed the jury on both these questions, and there was no error in refusing the instruction complained of.

[7] It is insisted that the court erred in refusing to give instruction No. 8, which is as follows: "If you believe from the evidence, or if the evidence raises in your mind a reasonable doubt, that the alleged assault was committed by the defendant while he was acting under the influence of passion and excitement caused by a provocation apparently sufficient to make the passion irresistible, you will acquit the defendant of assault with intent to kill."

The court, however, did give, at the request of the defendant, instructions Nos. 7 and 13, which are as follows:

"Before you can convict the defendant of

assault with intent to kill, you must find and believe from the evidence beyond a reasonable doubt, first, that at the time of the alleged assault he had in mind the specific intent to take the life of the party alleged to have been assaulted, second, that he at the time had the present ability to carry such intent into execution, and, third, that the killing, had death ensued, would have amounted to murder."

"The court tells you that, while mere words, however opprobrious, will not justify an assault, yet words accompanied by acts of a violent or threatening character will be a provocation that may reduce the crime from assault with intent to kill to an aggravated assault, or to a justification of aggravated assault."

Thus it will be seen that the matters embraced in instruction No. 8 were fully covered by instructions Nos. 7 and 13. In No. 13 the court told the jury that, while mere words, however opprobrious, would not justify an assault, yet words accompanied by acts of a violent or threatening character would be a provocation that might reduce the crime from assault with intent to kill to aggravated assault, or to a justification of aggravated assault.

[8] The defendant was a witness for himself, and on cross-examination the prosecuting attorney asked him if he had not been convicted for killing his brother. Counsel for defendant objected to this question, and the court stated that it was proper to ask him as a witness if he was convicted as a matter affecting his credibility. Counsel for defendant remarked that, if the defendant did kill his brother, he was justifiable, and the court then remarked to counsel for defendant, "You know, Judge Steel, he was not justifiable." The defendant excepted to this remark of the court, and the court said: "I did not mean that; I meant it would not be competent to go into that question here in this trial at all. It is competent to ask him if he had been convicted of a felony. You can ask him how long he has been living over there; but, as to how long he stayed in the penitentiary, that is not material." At the request of the defendant, the court instructed the jury as follows: "You will not consider the fact that defendant has previously been convicted of a crime as in any manner establishing his guilt of the crime charged; but it may be considered only as it may affect his credibility." Under these circumstances, we do not think that the remarks made by the court were prejudicial to the rights of the defendant. The court at once explained to the jury what he meant by the remarks, and explained to the jury that the defendant could only be asked if he had been convicted of a felony to affect his credibility as a witness, and that it did not tend in any way to prove him guilty of the crime for which he was on trial. He later instructed the jury



to this effect, and, as above stated, this action removed any prejudice that might have resulted from the remark.

The court gave many instructions at the request of the state and of the defendant. The jury were fully instructed on every phase of the case, and the judgment will be affirmed.

#### DAVENPORT v. DAVENPORT.

(Supreme Court of Arkansas. Nov. 17, 1913.)

#### EXECUTORS AND ADMINISTRATORS (§ 227\*) — CLAIMS AGAINST ESTATE—AFFIDAVIT—SUFFICIENCY.

Kirby's Dig. § 114, requires a claimant against an estate to append to his demand an affidavit of its justice, made by himself or an agent and, if made by claimant, requires it to state that nothing has been paid on the demand except as credited thereon, and that the amount demanded is justly due. Section 113 provides that the claim may be exhibited if it be founded on a note, etc., by delivering to the administrator a copy of such instrument with the credits thereon; and section 119 provides that, if the affidavit for authenticating be not produced in an action against the administrator, the court shall, on motion, enter judgment of nonsuit, and that the affidavit must appear to have been made before commencement of the action. *Held* that, while the affidavit is jurisdictional, a substantial compliance with the statute as to the form of the affidavit is sufficient, and, in an action against the administrator on a note, it was sufficient that the affidavit was attached to a verbatim copy of the note.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 811-818, 842; Dec. Dig. § 227.\*]

Appeal from Circuit Court, Marion County; Geo. W. Reed, Judge.

Action by S. A. Davenport against Sallie Davenport, administratrix. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded, with directions to hear claim on the merits.

The appellant held a claim in the form of a promissory note against the estate of which appellee is the administratrix. After appellee had refused to allow the note as a claim against the estate, appellant presented it to the probate court for allowance and classification, and, at the time of the presentation of the same, appellee appeared and filed a motion to dismiss it; but the motion was overruled, and the claim was allowed, and judgment was entered thereon, from which action the appellee appealed to the circuit court, where the cause was submitted to and tried by the court upon a motion to dismiss and an agreed statement of facts. The substance of the agreed statement is that the maker of the note died on February 12, 1910, and on the 21st day of October thereafter the appellant had a verbatim copy of the note, with a proper affidavit attached thereto, served on the administratrix, and at the time of this service the original note was exhibited. But no affidavit was ever attached to the original note.

The point in the case is indicated by the declarations of law which appellant asked and which were refused and the ones given by the court.

The declarations of law asked by the appellant were as follows:

First: "That the affidavit required by section 114, Kirby's Digest, does not have to be attached to the original note, but having been made before the commencement of the action, and filed with a verbatim copy of the original note, will support the claim of plaintiff."

Second: "That a verbatim copy of a note with the affidavit attached and filed as a basis of the action is a sufficient and a substantial compliance with the statute and will support the action. The statute does not require that the original note, with an affidavit attached to it, shall be filed."

The declarations of law made by the court were as follows:

First: "That the affidavit required by section 114, Kirby's Digest, must be attached to the original note and these filed as a basis of the action, and it is not a sufficient and substantial compliance with the statute to file a verbatim copy of the note with the proper affidavit attached thereto as a basis of the action."

Second: "Although the affidavit was made before the commencement of the action herein and filed with a verbatim copy of the original note and the original note filed and exhibited at the time of the presentation of the claim for allowance to the probate court, still there was not a substantial or a sufficient compliance with the statute, and the plaintiff must suffer nonsuit."

The question, therefore, is whether section 114 of Kirby's Digest requires the verifying affidavit to be attached to the original note and, if so, is an exact rather than a substantial compliance required.

Gus Seawell, of Yellville, for appellant. S. W. Woods, of Marshall, for appellee.

SMITH, J. (after stating the facts as above). Section 114 of Kirby's Digest is as follows: "And the claimant shall also append to his demand an affidavit of its justice, which may be made by himself, or an agent, attorney or other person. If made by the claimant, it shall state that nothing has been paid or delivered towards the satisfaction of the demand, except what is credited thereon, and that the sum demanded, naming it, is justly due. If made by any other person, it shall state that the affiant is acquainted with the facts sworn to, or that he has made diligent inquiry and examination, and that he verily believes nothing has been paid or delivered towards the satisfaction of the demand, except the amount credited thereon, and that the sum demanded is justly due." This section should be read in connection

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with section 118, which reads as follows: "Any person may exhibit his claim against any estate as follows: If the demand be founded on a judgment, note or written contract, by delivering to the executor or administrator a copy of such instrument, with the assignment and credits thereon, if any, exhibiting the original, and if the demand be founded on an account, by delivering a copy thereof, setting forth each item distinctly and the credits thereon if any."

Section 119 relates also to the affidavit, and its provisions are as follows: "If the affidavit required for authenticating claims against deceased persons be not produced in an action against an executor or administrator for a debt against the deceased, the court shall, on motion, enter a judgment of nonsuit against the plaintiff; and the affidavit must appear to have been made prior to the commencement of the action."

It has been frequently decided by this court that "in suits against estates, either by ordinary action or before the probate court, it is necessary to produce at the trial an affidavit of the justice of the claim and of its nonpayment made before commencement of the action, or the claimant will be nonsuited. *Hayden v. Hayden*, 105 Ark. 97, 150 S. W. 415; *Ryan v. Lenon*, 7 Ark. 78; *State Bank v. Walker*, 14 Ark. 234.

The essential thing, the jurisdictional requirement, is the making of the affidavit, and a nonsuit must be suffered when it is not made within the proper time, and the statute prescribes its form. But it is held that a substantial compliance in the matter of the form of the affidavit is sufficient. *Hayden v. Hayden*, supra; *Eddy v. Loyd*, 90 Ark. 340, 119 S. W. 264; *Wilkerson v. Eads*, 97 Ark. 296, 133 S. W. 1039.

Here the proper affidavit was made and was attached to a verbatim copy of the note sued on, and the jurisdictional requirement was complied with. If it be said that a literal reading of the statute provides that the affidavit be physically attached to the note itself, which we do not decide, there has been a substantial compliance with it. This question was raised and decided in the case of *Wilkerson v. Eads*, 97 Ark. 296, 133 S. W. 1039, where, in a suit upon a note instituted in the chancery court, the only affidavit consisted in the verification of the complaint; but its language was such that the court held it to be a substantial compliance with section 114 of Kirby's Digest, although it was there expressly stated that the statute applied to actions according to the forms of the common law against estates of deceased persons, as well as to presentations in the probate court of claims against such estates.

The law having been at least substantially complied with, the court below should not have dismissed the proceeding, and for its

action in so doing the judgment is reversed, and the court directed to hear the demand upon its merits.

### SETZER v. STATE.

(Supreme Court of Arkansas. Nov. 17, 1913.)

#### 1. CRIMINAL LAW (§ 619\*)—CONSOLIDATION OF INDICTMENTS.

While it was not the best practice to consolidate separate indictments charging hog theft, and the alteration of hog marks with intent to steal, upon a showing that the indictments related to the same transactions, it was not error to do so if accused consented.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1376; Dec. Dig. § 619.\*]

#### 2. CRIMINAL LAW (§ 372\*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for hog theft, the state's theory was that accused and T. were in the business of hog stealing and had stolen three hogs from the particular owner alleged, as well as a number from others, and the hogs in question were found at accused's house, together with several others killed and dressed. Accused claimed that W. had employed him to collect and butcher his hogs, but the evidence showed that W. had been dead for some time and that T.'s whereabouts were unknown at the time of the trial. One witness testified that, some time during the winter in which the indictments were returned, he stopped near accused's house at night and heard one person say to another, "This is a pretty good one, and a better one than we got the day before," and saw them carry a large hog toward accused's house, and thought from his size that one of the men was accused, and another witness testified that accused and T. and W. had taken up some of witness' hogs, and that he followed the wagon tracks to the road which led to accused's house and spoke to accused and the others about his hogs, and they agreed to replace them. *Held*, that the evidence was admissible on the state's theory of a conspiracy to steal hogs generally, on the question of whether accused had been employed by W. for an honest purpose, or merely to steal hogs.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.\*]

#### 3. CRIMINAL LAW (§ 371\*)—EVIDENCE—OTHER OFFENSES.

Evidence of the commission of similar offenses is only admissible where the act may be either lawful or criminal, depending upon the intent, when such evidence is admissible to show intent.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 830-832; Dec. Dig. § 371.\*]

#### 4. CRIMINAL LAW (§ 730\*)—TRIAL—ARGUMENT OF COUNSEL.

In a prosecution for hog theft in which accused claimed that he took up the hogs for W., who was dead, there was no prejudicial error in the prosecuting attorney stating in argument that if W. were here he would tell a different tale, where on objection the statement was withdrawn and the jury admonished not to consider it.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

#### 5. CRIMINAL LAW (§ 720\*)—TRIAL—ARGUMENT OF COUNSEL—COMMENTS ON EVIDENCE.

In a prosecution for hog theft, C. testified that during the same winter, while near accused's house one night, he saw two men carrying a hog, one of whom looked like accused, and

heard one of them say, "This is a pretty good one." M. testified that he spoke to accused and others about taking his hogs after following wagon tracks from where they were to the road leading to accused's house, and that accused and the others promised to replace the hogs. The prosecuting attorney stated in argument that the jury had a right to consider the evidence of C. and M., which "shows that these parties were engaged in the hog stealing business," and that while accused denied that he was the party testified to by C., "If it was not him, who was it? You would expect him to deny it, wouldn't you?" and further stated that the jury could consider those circumstances as throwing light on accused's intention, since they were all straws showing which way the wind blows. *Held*, that such remarks were a proper comment on the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.\*]

Appeal from Circuit Court, Marion County; George W. Reed, Judge.

Dave Setzer was convicted on consolidated indictments charging hog theft and altering the marks on hogs with intent to steal, and appeals. Affirmed.

Sam Williams, of Yellville, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Strepey, Asst. Atty. Gen., for the State.

SMITH, J. [1] On the 27th day of January, 1911, the grand jury of Marion county, Ark., returned two indictments against appellant and one Green Tigie. The first indictment charged them with the crime of grand larceny alleged to have been committed by stealing three hogs the property of J. F. Dillard. The second indictment charged them with the crime of altering the marks of three hogs the property of J. F. Dillard, with the felonious intent to steal them. At the time of appellant's trial Tigie was not in custody, and on the calling of the case, it being made to appear to the court that both these indictments related to the same transaction, it was agreed that by consent they should be consolidated and be treated as one indictment containing two counts and tried as such. No objection was made, or is now made, to the action of the court in ordering the cases consolidated and treated as separate counts in a single indictment. While this is not a practice to be approved, it is not error when done with defendant's consent. Bishop's New Criminal Procedure, § 1042; Halley v. State, 158 S. W. 121; McClelland v. State, 32 Ark. 609; McDonald v. State, 149 S. W. 95; Price v. State, 71 Ark. 130, 71 S. W. 948; Lucas v. State, 144 Ala. 63, 39 South. 821, 3 L. R. A. (N. S.) 412.

[2] A number of exceptions were saved during the progress of the trial to various rulings of the court which were assigned as error in the motion for a new trial and have been discussed in appellant's brief. But the only points which appear to be of sufficient importance to require discussion, and the ones upon which appellant chiefly

relies for a reversal, are the alleged errors of the court in the admission of certain testimony given by a witness named Oscar Crunkleton, and another named Henry Morris, and the alleged prejudicial remarks of the prosecuting attorney in the argument of the case before the jury. The evidence of Crunkleton and Morris was objected to because, as appellant says, its effect was to show that appellant was guilty of a larceny other than the one alleged to have been committed by stealing hogs the property of J. F. Dillard. The evidence was substantially as follows: Crunkleton testified that some time in the winter of 1911—and he did not remember just when this was except that it was on a Sunday afternoon about dark—as he was traveling on the road near appellant's house, he stopped to light his lantern, and as he did so he heard one man say to another: "This is a pretty good one and a better one than we got the day before." He did not go up to the parties he heard talking, but he observed them to see whom they were and where they would go, and he finally saw them carry a large hog on a pole between them, and he thought, from the size and shape of one of the men, that he was the appellant; and the men carried the hog towards appellant's house.

The evidence of the witness Morris was to the effect that appellant and Tigie and one Sam Wilson had gotten up some of witness' hogs, and he went to the place where he had been told the hogs had been tied, and he followed the wagon tracks from this place to the road which led to appellant's house. He testified that he spoke to Wilson, Tigie, and appellant about his hogs and they agreed to replace them. Appellant denies that he made any such promise and says the witness should not be allowed to give any evidence against him of statements made by Wilson and Tigie in his absence about replacing the hogs. But witness testified that appellant himself made this promise.

[3] Appellant cites many cases to the effect that a conviction may not be had for one crime by proof of commission of similar crimes. And this rule is well settled, an exception being where an act may either be lawful or criminal, depending upon the intent with which it was committed. In such cases proof of similar acts is admitted for the purpose only of showing intent and design. Upon the examination of the witness Morris, the following colloquy took place: "Counsel for Defense: As I understand the question, it is introducing the evidence of some other crime for the purpose of showing motive or intent of the one on trial? Counsel for the State: This is connected with intent and shows a similar act for a similar crime. The Court: For that purpose it will be admitted. For the purpose of showing intent, it is not proper to show

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

whether or not he was getting witness' hogs." Ordinarily such evidence is not admissible, and the jury should never be permitted to hear evidence of the commission of one crime as a circumstance from which to infer guilt of another; but we think the evidence competent under the facts in this case. The theory of the state was that appellant and Tigie were in the hog stealing business and had stolen three hogs from J. F. Dillard and had stolen a number of other hogs from other owners. The hogs in question were found at appellant's house together with several other hogs, killed and dressed, and he could not deny having these hogs in his possession and could only excuse himself by claiming the right to kill them. Appellant claimed that Sam Wilson had employed him to get up his hogs and butcher them for him and had promised him one-third of all the hogs so gotten up. The proof shows that at the time of the trial Wilson had been dead for some time, and that Tigie's whereabouts were then unknown, and that appellant had left the country and remained away for some months after the hogs had been found at his home. Dillard testified that he came to defendant's house one Saturday afternoon and saw five or six hogs which had been lately killed, and upon examining them he recognized three of the hogs as his property. Wilson, appellant, and Tigie were all present at the time, and Dillard interrogated them about the hogs and the change of mark, and Wilson said he had told appellant not to change the mark, and also stated that the hogs were not his, and neither appellant nor Tigie made any reply to this statement made in their presence. Dillard demanded that the hogs be brought to his house, and on the following Monday a half of one hog was brought to him, and on the next day two hogs were brought him, except their heads, which Tigie claimed they had eaten, together with half of the hog which had been brought Monday.

The hogs belonging to the witness Morris were taken by the three same men, and according to the state's theory in pursuit of a common purpose and conspiracy, and the state was entitled to introduce this evidence in determining whether appellant had been employed by Wilson for any honest purpose or not. And the evidence of the witness Crunkleton was admissible for the same reason. *Howard v. State*, 72 Ark. 586, 82 S. W. 196; *Johnson v. State*, 75 Ark. 427, 88 S. W. 905; *Woodward v. State*, 84 Ark. 119, 104 S. W. 1109; *Ross v. State*, 92 Ark. 481, 123 S. W. 756.

The argument of the prosecuting attorney complained of was as follows: "Gentlemen of the jury, if they (meaning the defendant and the party jointly indicted with him) were not in the hog stealing business, why did they have Henry Morris' hogs tied up over there in the hollow? Gentlemen of the jury,

the defendant claims that he was employed by Sam Wilson, and that Sam Wilson claimed these hogs, but I say to you that Sam Wilson is dead; that if he was here he would tell a different tale." By attorney for defendant: "Your honor, we object to that statement." By the Court: "Mr. Fee, you had better not argue what Sam Wilson would swear." By Mr. Fee: "All right, I withdraw the statement." By attorney for defendant: "Your Honor, we want you to instruct the jury that they are not to consider this statement nor what Sam Wilson would swear." By the Court: "I think the jury understands that." And also the following closing argument by the prosecuting attorney: "Gentlemen of the jury, in determining the intent in this case you have a right to consider the evidence of Oscar Crunkleton and Henry Morris, which show that these parties (meaning defendant and the parties jointly indicted with him) were engaged in the hog stealing business. The defendant denies that he was the party testified to by Oscar Crunkleton. If it was not him, who was it? You would expect him to deny it, wouldn't you? He denies that he got Henry Morris' hogs. Henry's hogs were gone, and if they (meaning the defendant and the party jointly indicted with him) did not get them, where did they go? Who did get them? Gentlemen, you have a right to consider these circumstances as throwing light on the intention of the defendant in this case. They are all straws that show which way the wind blows."

[4, 5] We have just shown that the evidence of Morris was proper, and the prosecuting attorney was therefore within the law in his comments upon it, and the statement in regard to what Wilson would have testified had he been present was withdrawn by the attorney and the jury admonished not to consider it, and any possible prejudice was thereby removed.

The concluding argument of the prosecuting attorney was a proper comment upon the evidence of Crunkleton and Morris.

Finding no prejudicial error, the judgment of the court below is affirmed.

#### MISSOURI & N. A. R. CO. v. REED, Circuit Judge.

(Supreme Court of Arkansas. Nov. 24, 1913.)

#### 1. EXCEPTIONS, BILL OF (§ 53\*)—SIGNING BILL—MANDAMUS.

Mandamus is the proper remedy to compel a circuit court judge to sign a bill of exceptions, though time for filing the same has expired, when the judge is responsible for the delay.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 80-85, 87, 88; Dec. Dig. § 53.\*]

#### 2. EXCEPTIONS, BILL OF (§ 51\*)—APPROVED BILL—MANDAMUS.

Act March 9, 1913 (Laws 1913, p. 961) § 2, directs the official court stenographer, when

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

required by the presiding judge, to make a report of the proceedings, section 3 provides that a copy of the notes shall be used as a portion of the transcript on appeal, and section 4 authorizes the court to assess a fee therefor to be taxed as costs. *Held*, that the act does not provide an exclusive method for the preparation of bills of exceptions, and that the trial judge was bound to examine and approve a bill of exceptions prepared by petitioner himself.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 74, 78; Dec. Dig. § 51.\*]

Mandamus by the Missouri & North Arkansas Railroad Company against Honorable George W. Reed, Judge of the Circuit Court of Boone County. Writ awarded.

The petitioner seeks a mandamus against the Honorable George W. Reed, judge of the circuit court of Boone county, to require him to sign a bill of exceptions in a case in which it was defendant and H. R. Magness and James Mallard, partners doing business under the firm name of Magness & Mallard, were plaintiffs, and in which an adverse judgment was rendered against it, and from which an appeal was prayed and granted. The controversy arose over the approval of the bill of exceptions. Within the time allowed by the court, petitioner presented to respondent a bill of exceptions which it claimed was a correct report of the trial. Respondent declined to examine or approve it and says in his response that he declined to examine for the purpose of approving the bill of exceptions tendered him for the reason that it was not prepared by the official stenographer of that court, and he says that he is in duty bound to examine and approve only those bills of exceptions prepared by the official stenographer.

The General Assembly passed an act which was approved March 29, 1913, entitled "An act to provide to appoint an official court stenographer for the Fourteenth judicial district of Arkansas" (which includes Boone county), and the portions of this act which are necessary to be considered are contained in sections 2, 3, and 4, which are as follows:

"Sec. 2. It shall be the duty of said court stenographer when required by the presiding judge to make a stenographic report of all proceedings of said court, which shall be required by law to be made a matter of record in the proceedings of said court and that are not already a matter of record therein.

"Sec. 3. It shall be the duty of said stenographer to transcribe into longhand from said stenographic report duplicate copies of all matters or proceedings so taken, as aforesaid, by him, and file the same with the clerk of said court when so required under the provisions of this act, one of which such copies shall be preserved by said clerk as a record of his office in said proceedings, and the other of which may be used as a portion of a transcript on appeal to the Supreme Court as though prepared by the clerk from the

original; provided, that in no event shall said stenographer be required to transcribe and file said duplicate copies from his stenographic notes until the party requesting the same shall have deposited with the clerk of the court a sum sufficient, as determined by the presiding judge, to pay for said transcript, at the rate of fifteen cents per one hundred words of the original in all civil and misdemeanor cases; \* \* \* provided, further, that this requirement shall not be made of a pauper after due proof of such pauperism.

"Sec. 4. There shall be assessed by the court and collected by the sheriff in cash the sum of not less than three dollars, nor more than twenty-five dollars in cash in each case tried and reported in said circuit court, which shall be taxed and collected as other costs." Laws 1913, pp. 962, 963.

Under the provisions of this act the respondent had appointed one J. A. Philbrick as official stenographer, and he served in that capacity in the trial of the case below and reported the case in shorthand under the directions of the court. After the trial respondent made and entered of record an order requiring petitioner to deposit \$15, the estimated cost, under said act, of the transcript of the official report of such case. Petitioner did not deposit this sum as required by the order of the court, nor did he call upon the official stenographer for a transcript of his notes as required by section 3, but, upon the contrary, presented a bill of exceptions made by its private stenographer from a stenographic report of the trial.

W. B. Smith and H. M. Trieber, both of Little Rock, and Troy Pace, of Harrison, for appellant. Gus Seawel, of Yellville, for appellee.

SMITH, J. (after stating the facts as above). It will be seen that section 2 of this act provides that the presiding judge may order the official stenographer to make a stenographic report of any proceedings in the court not already a matter of record therein. And section 3 provides for the making of a bill of exceptions and a transcript on appeal by this stenographer and the payment of his fees therefor. Section 4 authorizes the presiding judge to assess a fee in each case tried and reported by the official stenographer in his court to be taxed and collected as other costs. This fee provided for in section 4 is assessed like other costs against the unsuccessful litigant and paid as costs of the trial, whether an appeal was taken or not, or any transcript of the evidence was ever made or not.

[1] Respondent says the writ prayed for should not be awarded for the reason, first, that he has not declined to approve a bill of exceptions, and because section 3 provides the exclusive method for the prepara-

tion of bills of exceptions, and under the terms of the act he can only consider a bill of exceptions made in conformity with its requirements. It is conceded that mandamus is the proper remedy to compel the circuit judge to sign a bill of exceptions, and it has been so expressly decided in the case of *Sea Insurance Co. v. Fulk*, 103 Ark. 503, 148 S. W. 251. But respondent says that the case last cited is authority for his position that this court will not control his discretion, and that he has not declined to approve a bill of exceptions, but has only declined to approve one not made in conformity with section 3 of the act above referred to.

[2] We think the act in question has not undertaken to provide an exclusive method for the preparation and approval of bills of exceptions. If this was so, the provisions of the statute in regard to bystander's bills of exception would be repealed and inoperative in the Fourteenth judicial circuit. But there is nothing in the act which would indicate that petitioner might not resort to that method of making a bill of exceptions if it conceived the one made by the official stenographer was not correct and the court had declined to approve any other or to change the one prepared by the official reporter. The presiding judge must determine the correctness of the bill of exceptions, and he cannot delegate that duty to the stenographer who reported the case. The act in question gives the presiding judge the authority to order any case reported by the official stenographer and allows him to assess as costs of the case a fee for this service of not less than \$3 nor more than \$25 to be paid as other costs in the case. But the act does not provide that a bill of exception shall not be considered by the court unless prepared by the official stenographer. The court is therefore in duty bound to examine the bill of exceptions presented by petitioner and approve same, if found correct, or to make such changes or additions as are necessary to make it correct.

The writ of mandamus will therefore be awarded, notwithstanding the fact that the time originally given for its filing has expired, because respondent is responsible for the delay. *Springfield v. Fulk*, 96 Ark. 316, 131 S. W. 694.

#### FELTON v. BROWN et al.

(Supreme Court of Arkansas. Nov. 24, 1913.)

APPEAL AND ERROR (§ 1207\*)—REMAND—DISPOSITION—POWERS OF LOWER COURT.

Where, on appeal in an action involving a homestead right, the decree of the chancery court was affirmed in so far as it related to the homestead of the plaintiff, and reversed in so far as it awarded to a third person a one-third interest of the estate of plaintiff's deceased husband and awarded to a party certain portions of the personal property of the estate and remanded, with directions to enter a decree in accordance with the opinion, a decree on remand disposing of land not in issue

and not embraced in the land affected by the original decree was beyond the scope of the mandate and would be to that extent reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4696-4699; Dec. Dig. § 1207.\*]

Appeal from Lonoke Chancery Court; Geo. Sibby, Special Chancellor.

Action by Mary A. Felton against Carrie Brown and others. From a decree of the Chancery Court on remand, plaintiff appeals. Reversed in part, affirmed in part, and remanded with directions.

This cause was heard upon the mandate of this court in *Felton v. Brown*, 102 Ark. 658, 145 S. W. 552. In that case we affirmed the decree of the chancery court "in so far as it relates to the homestead of Mary A. Felton," and reversed the decree in so far as it awarded to Alice Lamb one-third of the estate of Marion Felton, deceased, and so much of the decree as awarded to Carrie Felton certain portions of the personal property of the estate. The cause was remanded, with directions "to enter a decree in accordance with the opinion, and for further proceedings if necessary." The chancery court, in disposing of the cause under the mandate from this court, found, among other things, as follows: That Mary A. Felton, Carrie Brown, and Louis Felton entered into an agreement for the disposition of the residue of the estate of Marion Felton, deceased; that in pursuance of said agreement Louis Felton and Mary A. Felton executed a deed to Carrie Brown for her share or portion of the estate, and delivered the same to Mary A. for the sole use and benefit of the said Carrie Brown, which deed included the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 2, township 2 N., range 9 W., which deed, the testimony in the case discloses, has been lost or mislaid and could not, upon the former trial, be produced and is not of record; that by the execution by the said parties of said deed and the delivery thereof to Mary A. for the use and benefit of Carrie, said Carrie Brown became the owner of the said S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ , section 2, township 2 N., range 9 W., and is now the owner of the same; that the parties and the subject-matter all being before the court and within its jurisdiction, and the said Carrie demanding relief, and there being no question upon the proof in the case as to the facts, the court decrees "that all the title of the makers of said deed and other heirs of the estate of Marion Felton be divested out of them and invested in Carrie Brown." From this decree, the appellant prosecutes this appeal.

Trimble & Trimble, of Lonoke, for appellant. Geo. M. Chapline, of Lonoke, for appellees.

WOOD, J. (after stating the facts as above). When the case of *Felton v. Brown*,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

102 Ark. 658, 145 S. W. 552, was remanded with directions "to enter a decree in accordance with the opinion," the chancery court was only authorized to make disposition of the lands involved in that controversy and embraced within the decree, and the chancery court, when the case was remanded, could only dispose of the lands in accordance with the decree of this court affirming the decree of the chancery court disposing of and settling the homestead and dower rights of Mary A. Felton in the land of her deceased husband, Marion Felton.

An examination of the pleadings will discover that the land now in controversy was not in issue and was not embraced in the lands disposed of by the decree, and there was nothing in the original decree divesting the title to the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 2, township 2 N., range 9 W., out of Mary A. Felton and investing same in Carrie Brown. This court affirmed the decree of the chancellor in the disposition made of the homestead and dower rights of Mary A. Felton in the land of her deceased husband, Marion Felton. This disposition of the land in controversy was not germane to the issues raised and disposed of by the former decree in the case and was without authority under the mandate issued on the decree in Felton v. Brown, above mentioned.

So much, therefore, of the decree now on review as divests the title out of the appellant and invests the same in appellee Carrie Brown is reversed and set aside. In other respects the decree is in all things affirmed. The cause will be remanded to the chancery court, with directions to enter a decree in accordance with this opinion.

### TINER v. STATE.

(Supreme Court of Arkansas. Nov. 24, 1913.)

#### 1. CRIMINAL LAW (§ 594\*) — CONTINUANCE — CONVICT'S TESTIMONY.

Kirby's Dig. § 3137, provides that the examination of a person confined under sentence for a felony must be taken by deposition, and section 3157, subsec. 3, provides that depositions may issue, where, from imprisonment, a witness is unable to attend court. *Held*, that as Acts 1913, p. 961, making the testimony of convicts competent, made no provision for their attendance at trial, one desiring the testimony of a convict must secure his deposition and is not entitled to a continuance to secure his attendance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.\*]

#### 2. CRIMINAL LAW (§ 600\*) — CONTINUANCE — ABSENCE OF WITNESSES — ADMISSION OF TRUTH OF TESTIMONY.

Where the court found that accused's motion for a continuance on the ground of the absence of a material witness was sufficient, the continuance cannot be denied merely upon the state's agreeing to admit that the witness, if present, would testify as alleged in the motion,

for the jury might have accepted the witness' testimony as true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347, 1604; Dec. Dig. § 600.\*]

#### 3. CRIMINAL LAW (§ 406\*) — EVIDENCE — ADMISSIONS.

In a prosecution for homicide, evidence of a statement made by accused at the coroner's inquest, which conflicted with the theory of his defense, is admissible, being in the nature of an admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

#### 4. CRIMINAL LAW (§ 406\*) — EVIDENCE — ADMISSIBILITY.

In a criminal prosecution, evidence of a party's voluntary declarations showing how the crime was committed is admissible against him, regardless whether they were favorable or unfavorable to his interest at the time of the admission; but such declarations are not admissible when offered by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

#### 5. CRIMINAL LAW (§ 81\*) — MOTIONS TO ELECT.

Where accused was tried on an indictment charging him not only with murder, but with being an accessory before the fact, and he did not move to have the state elect, the state may introduce the judgment of conviction of the principal; the conviction of the principal being prima facie evidence of accused's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 103-111, 1384; Dec. Dig. § 81.\*]

#### 6. CRIMINAL LAW (§ 721\*) — TRIAL — ARGUMENT OF COUNSEL.

In a criminal prosecution, when accused did not take the stand in his own behalf, the prosecutor should not refer to his failure.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

Appeal from Circuit Court, Randolph County; J. W. Meeks, Judge.

Dee Tiner was convicted of murder in the second degree, and he appeals. Reversed and remanded.

S. A. D. Eaton, of Pocahontas, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. On the 24th of September, 1912, John R. Davis, while riding by what, in the neighborhood, was known as Tiner's wine cellar, located something like 200 yards west of Swartz post office, in Randolph county, was shot and instantly killed. Thos. L. Tiner and the appellant, his son, were indicted for the killing of Davis, the indictment charging them with murder in the first degree, and in a second count appellant was charged as accessory before the fact to murder in the first degree. Thos. L. Tiner was tried at the January term of the circuit court and convicted of murder in the second degree and sentenced to the penitentiary. At the July term, 1913, appellant was placed on trial, which resulted in his conviction for murder in the second degree, and the case is here on appeal.

The circumstances developed by the evidence in the trial of Thos. L. Tiner are substantially the same as on the trial of appellant, and these are set forth in the case of *Tiner v. State*, 158 S. W. 1087. Such other facts as may be necessary will be stated as we proceed.

[1] Several days prior to the trial of appellant, he filed a petition, alleging that Thos. L. Tiner was an important and material witness in his behalf, and that he was incarcerated in the penitentiary of the state. He prayed the court to take such legal steps as might be necessary to secure the attendance of the witness at the trial. The court refused the prayer of the petition, and this was made one of the grounds of the motion for a new trial.

The statute provides that an examination of a person confined in any prison in this state under sentence for a felony must be taken by deposition. Section 3127, Kirby's Digest. Depositions may be used on a trial of all issues in any action where, from imprisonment, the witness is unable to attend court. Section 3157, subd. 3, Kirby's Digest. The court had no power, under the law, to compel the attendance of Thomas L. Tiner, who was sentenced to imprisonment in the penitentiary. Tiner was beyond the jurisdiction of the court, and his testimony could only be had by deposition. The Legislature of 1913 passed an act making the testimony of convicts competent. But no provision is made for procuring their attendance at the trial. Acts 1913, p. 961. The court therefore did not err in overruling the motion, so far as he was concerned.

[2] The appellant moved for a continuance of the cause on account of the absence of witness Maria Tiner, setting out the facts to which she would testify if present, and showing that she was unable to attend court on account of illness; that her testimony was material, and the same facts could not be established by any other witness; that the appellant had used due diligence to obtain her testimony; and that the witness could be had at the next term. The record recites that: "The court sustained said motion on account of the absence of the witness Maria Tiner. The state, through its attorney, proposed to admit that if the witness Maria Tiner were present she would testify to the facts as alleged in said motion for a continuance, whereupon the court, over the objection of defendant, ruled that defendant should proceed to trial."

The court, having found that the motion of appellant was sufficient to entitle him to a continuance on account of the absence of Maria Tiner, and having sustained said motion, should not thereafter have overruled same merely because the attorney for the state admitted that she would testify to the facts alleged in said motion. The motion being otherwise sufficient to meet the requirements of the law, this admission upon the

part of counsel could not deprive appellant of his right to have the witness present in person. It will be observed that counsel did not admit that the testimony set up in the motion was true, but only that the witness "would testify to the facts as alleged."

In *Jones v. State*, 99 Ark. 394, 138 S. W. 967, the trial court overruled a motion for a continuance, and allowed certain parts of the testimony set up in the motion to be read, and instructed the jury to consider the testimony the same as if the witness had been present and testified. The appellant in that case "had brought himself within the requirements of the law in his endeavor to procure the attendance of his witness," and we held that the court erred in overruling the motion. In that case we said: "Had the witnesses been present in person before the jury and given their testimony, their appearance and manner of testifying might have impressed the jury that their testimony was true. The appellant, having exercised all the diligence that the law requires to procure the attendance of these witnesses, could not be forced into trial and have the purported testimony of the witnesses, as given on a former trial, substituted for the testimony of the witnesses in person before the jury. The ruling of the court, under the circumstances of this case, was erroneous, and was tantamount to a denial of the appellant's right, under the Constitution, to have compulsory process for obtaining witnesses in his favor. *Graham v. State*, 50 Ark. 161, 6 S. W. 721. A continuance under such circumstances is a matter of legal right, which could not be denied appellant without an abuse of the court's discretion."

That case rules the present one. Had the court found that the motion was insufficient because the appellant had failed to show due diligence, or that it otherwise failed to meet the requirements of the statute, the case would have been different, and in such case the court would be justified in refusing a continuance without the imposition of terms, and in such case the appellant would not be prejudiced by requiring the state to admit that the witnesses, if present, would testify to the facts alleged in the motion. But where a motion is otherwise sufficient, it is prejudicial to overrule it for no other reason than that the counsel for the state admits that the witnesses would testify to the facts set up therein.

In *Graham v. State*, supra, Judge Cockrill, speaking for the court, said: "A large measure of discretion is vested in the trial courts in reference to postponement of trials. It is within the range of this discretion to force the prosecuting officer to submit to a postponement or to permit the statement of the testimony of the absent witness to go to the jury in some form. This is commonly done by requiring an admission of the absolute truth of what is expected to be proved. 1 Bishop, Cr. Proc. § 951a. But in a case where



the court would be clearly justified in refusing the continuance without the imposition of terms, the accused would be aided rather than injured by an admission such as the statute requires, and it is then permissible."

[3, 4] During the progress of the trial, the court, over the objection of the appellant, allowed to go to the jury what purported to be the written testimony of appellant before the coroner's inquest, and to this ruling the defendant duly excepted. A witness stated that he was clerk of the coroner's inquest; that he took down the minutes of the statements of witnesses before the jury. He identified a writing handed him as the record of the minutes, and stated that it contained Dee Tiner's statement given before the coroner's jury on the day of the killing of Davis. He further testified that Dee Tiner, after witness had taken the statement down, signed the same. Witness was asked if he took down everything that was said on that occasion by the witnesses, and answered: "I don't know that I took down everything that was said; I tried to take down the important part." On redirect examination, the witness testified that he did not think he wrote into the record anything that the witnesses did not say, and, further, that he could not recall having left out anything that the witnesses did say. What he wrote down is what the witnesses said. The writing purporting to contain the statement of appellant before the coroner's jury was read to the jury, as follows: "This morning we were in the cellar, and Pa was sitting at the window working on some books. John Davis shot the first shot at Pa. Then Pa got the shotgun and shot at John Davis with the shotgun. Then John Davis said, 'Oh.' Then Pa got the other gun and shot it. Then John Davis fell from his horse. Then Pa walked out to the gate, then walked back to me, and said, 'Ain't it awful?'"

On behalf of the defendant, the statement of facts contained in the motion for a continuance was read to the jury in evidence, in which it is stated that the absent witness, Maria Tiner, would testify in part as follows: "When Davis fired, defendant was out in the vineyard near the southwest corner of the wine cellar, going towards his father's house, and had nothing in his hands. Immediately after the shot was fired, defendant ran into the wine cellar."

The writing purporting to be the statement of the appellant before the coroner's jury was sufficiently identified as his statement. It was shown that he signed it, and the witness who took it down, in summing up his testimony, says that the writing contained what Dee Tiner said before the coroner's inquest. Appellant Tiner, however, was not a witness in his own behalf at the trial of his case in the lower court, and therefore the above statement or writing was not competent for the purpose of contradicting him as a witness. The writing, however, was competent

as a declaration of the defendant tending to show his presence in the wine cellar at the time his father shot Davis. It was a story of the appellant, made soon after the killing, relating to the transaction in question and showing that he was present in the wine cellar at the time his father shot Davis.

Appellant was contending at the trial, through the testimony of witness Maria Tiner, that he was not present in the wine cellar when the shot took place; but the statement shown to have been made by him before the coroner's jury tends to establish the fact that he was present. This statement, therefore, should be admitted as tending to show a declaration against interest.

In *State v. Mowery*, 21 R. I. 376-384, 43 Atl. 871, 874, the state, over the objection of the defendant, was allowed to show by witnesses that the defendant had related to them certain alleged occurrences in connection with the murder with which he was charged, tending to exculpate himself and show that others had committed the crime. The court said: "Whether the testimony objected to was strictly a declaration against interest or not, we think it was admissible as being the defendant's statement of what took place at the Matheson house and in the vicinity thereof on the night of the murder. In other words, in so far as it goes it is his version of the affair. While he does not thereby attempt to directly account for the murder with which he is charged, yet it was evidently his intention to have the witnesses to whom he told the story do so by inference. The testimony was clearly admissible for another purpose, namely, as an admission that the defendant was at the house on the night of the murder. \* \* \* The prosecution also had the right to prove the defendant's explanation of the affair, in whole or in part, for the purpose of showing that it was wholly unreasonable and evidently made up for the occasion."

In 2 Jones on Evidence, p. 300, it is said: "Nor is it necessary that the statement should at the time of making it appear to be against the interest of the party. The statement is admissible if at the time of the trial it is inconsistent with the contention of the party who made it."

Here the declarations shown to have been made by the appellant on the day the killing took place, to the effect that he was present in the wine cellar where the shooting occurred, were in conflict with the contention set forth in the testimony to the effect that he was "out in the vineyard" and not in the wine cellar. Evidence of a party's voluntary declarations showing how the alleged crime was committed is admissible against him without regard to whether they were favorable or adverse to his interest at the time of utterance. Such testimony, giving the explanation of the defendant himself as to the transaction, is admissible at the instance of the state, no matter whether they were

against the defendant's interest at the time he made them or not. But, of course, such declarations could not be used in his own defense, because they would necessarily be in the nature of self-serving declarations. See 1 Greenleaf on Ev. § 169 et seq. Prof. Wigmore says: "The accused in a criminal case may make admissions just as a party in a civil case, by saying things inconsistent with the present points of his proof. Admissions, in the sense of inconsistencies, are not peculiar to civil cases." See note to section 170, 1 Greenleaf, Ev. p. 293. The court therefore did not err in admitting the written statement purporting to be the appellant's testimony before the coroner's jury to be read in evidence.

[5] The court, over the objection of appellant, permitted the state to introduce and have read to the jury the judgment of conviction of Thos. L. Tiner for the killing of John R. Davis. Appellant was being tried on an indictment which charged him not only with murder, but also which charged him as being an accessory before the fact to the murder of John R. Davis by Thos. L. Tiner. Appellant did not move to have the state elect as to the charge on which it would prosecute. Appellant was therefore being tried for accessory before the fact to the crime of murder.

In *Jones v. State*, 158 S. W. 132, we held that the conviction of the principal is prima facie evidence of his guilt on the trial of an accessory before the fact to the crime. But the record of conviction does not exclude other competent evidence of the guilt of the principal, nor does not prevent the dispute of such record collaterally on the issue of the guilt of the accessory. The court did not err in permitting the record showing the conviction of Thos. L. Tiner to be read in evidence.

[6] The court gave, among others, the following instruction: "You are instructed as a matter of law that the defendant has a right to testify in his own behalf or not, as he deems fit, and that the failure to testify in his own behalf shall not create any presumption against him." The prosecuting attorney, in commenting on this instruction, used the following language: "Yes the defendant has a right to go onto the witness stand and deny that he was in the wine cellar when those shots were fired; he has a right to deny that he fired—" Here the attorney for the defendant objected to the remarks, whereupon the court stopped the attorney and stated to him, in the presence and hearing of the jury, that he should make no comment whatever on the defendant's failure to testify in his own behalf. The defendant at the time duly excepted to the language used. The appellant did not ask the court to withdraw specifically the remarks. The ruling of the court informed the jury that the state's attorney should make

no comment whatever on the defendant's failure to testify. That was tantamount to advising the jury of the impropriety of such remarks. The counsel was interrupted before he had concluded his sentence, but the character of the remarks was such as to direct the attention of the jury to the failure on the part of the defendant to go upon the witness stand and deny that he was present when the shots were fired, and that he also fired shots. The remarks of counsel were exceedingly reprehensible, as it is difficult to conceive how any reference whatever upon the part of counsel to the failure of the defendant to testify would not be creating a presumption against him. Such remarks should never be indulged in. But it is unnecessary for us to decide in the present case as to whether we would treat the remarks as prejudicial error which it would be impossible for the court to cure by any sort of admonition to the jury (as appellant's counsel contends), for the reason that the cause must be reversed for the refusal of the court to grant appellant's prayer for a continuance. We may safely assume that no such improper remarks will be indulged in by counsel on another trial.

Other rulings of the court are assigned as error, which it becomes unnecessary to consider in view of what we have already said in regard to the ruling of the court in refusing appellant's prayer for a continuance. For the error in this ruling, the judgment is reversed, and the cause remanded for a new trial.

#### MENASHA WOODEN WARE CO. v. HUDGINS PRODUCE CO.

(Supreme Court of Arkansas. Nov. 24, 1913.)

SALES (§ 176\*)—WAIVER OF DEFECTS IN QUALITY—ACCEPTANCE.

Where defendant ordered a car load of cooperage by sample and after receiving it, and with knowledge of defects in quality, paid a part of the purchase price and promised to pay the balance in order to secure an extension of time of payment, he thereby waived all right to object on the ground of such defects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.\*]

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by the Menasha Wooden Ware Company against the Hudgins Produce Company. Judgment for defendant, and plaintiff appeals. Reversed, and judgment entered for plaintiff.

Pratt P. Bacon, of Texarkana, for appellant. Simms & Cella, of Texarkana, for appellee.

HART, J. Appellant sued appellee for \$600, alleged to be balance due on a car load of cooperage sold by the former to the

latter. There was a trial before a jury, which resulted in a verdict for appellee for \$378.75, and the case is here on appeal.

Appellant was a manufacturer of cooperage in the state of Wisconsin, and sent to appellee, at Texarkana, Ark., samples of cooperage it proposed to furnish. Appellee tested the samples and on the 7th day of April, 1911, gave appellant an order for a car of 10 and 15 gallon kegs for use in the shipment of cider and agreed to pay therefor \$978.85. The car load of cooperage was received by appellee on April 18, 1911. On May 20th following, appellee wrote appellant, inclosing a check for \$378.85, to be applied in payment of the cooperage. The letter stated that appellee was short of funds but would send another check on the 25th for \$300 and another for the balance on June 1st. The letter also stated that the kegs were a disappointment to appellee because they were built so light that they would not hold cider; that the tops, as well as the bung staves, swelled and caused a leak, and in shipping any distance they would not stand the hard handling to which they were subject in transit. Appellee failed to make the additional payments promised in this letter, and appellant drew a draft on it for the amount. On June 17, 1911, appellee wrote appellant as follows: "Texarkana, Arkansas, June 17th, 1911. Menasha W. W. Co. Menasha, Wis.—Gentlemen: We regret to advise that we are not able to take care of draft which you drew on us and we are to-day having bank return same to you. We are a little hard pressed at this time on account of four car loads of produce which came in on us this week. We are going to ask a special favor that you give us a little bit more time on this and will let you have check not later than the 29th. We wish to state that we are having no end of trouble with the cooperage which you have sent us, and it is working quite a hardship on us to have to pay for something which we cannot use in our business. While we were corresponding with you we wrote you that we wanted a cider keg, and, being new in the business, depended upon you to sell us something that would hold cider. We not only have on our hands a car of cooperage which will not hold cider, but added to this misfortune, we are having to make good the cider which we are getting out in your kegs and are also losing customers on account of bad cooperage. We can put up a keg of cider and let it stand for twenty-four hours and the heads begin to warp and spring a leak. We have filled those kegs with water to test them and find that water acts on them just the same as cider does. We are not going to complain because we got the worst of this deal, but we are going to ask you not to press us for payment before the time stated above. Under these circumstances we believe that you will grant us this favor. Thanking you for your in-

dulgence, we are, Yours truly, Hudgins Produce Company."

Evidence was introduced by appellant tending to show that the sample kegs were made of maple and birch, paraffin lined on the inside and stained on the outside, and that the car load shipped to appellee was made of the same kind of wood and was lined and stained as the samples' and was exactly like the samples. On the other hand, appellee adduced evidence tending to show that none of the car load of kegs shipped to it were made like the samples and that all of them leaked badly. The president of appellee company testified: "On May 20th, when I sent the check, I knew we were having trouble with the kegs. When the letter of June 17th was written, I knew the condition of the kegs to my sorrow. I have not used any of them since then. We have used about half of the kegs. I probably used some of them in October, and might have used some in August, because we had run short of cooperage. Appellant granted the extension of time asked for in the letter of June 17th."

In the case of Smith v. New Albany Rail Mill Company, 50 Ark. 31, 6 S. W. 225, the court held: "The defendant having ordered iron rails from the plaintiff, second class rails of inferior quality were sent to him, although in previous dealings he had instructed the plaintiff never to send him second-class rails. On being notified that the rails were inferior, the plaintiff replied that if they were bad not to receive them. But the defendant accepted and used the rails and afterwards admitted his indebtedness for them at the price charged. In an action to recover the price, held, that the defendant was liable for the price charged; that evidence of the market value of the rails was properly excluded; and it was not error to refuse to instruct the jury that more than their market value could not be recovered."

We think the principle there announced controls here. At the time appellee wrote the letters of May 20th and June 17th, it knew as much about the alleged defects in the kegs as it ever did. This is admitted in the letters and afterwards testified to by the president of appellee company at the trial of the case. Appellee accepted the cooperage with full knowledge of its defects, and expressly stated to appellant that it was not going to complain, but asked for an extension of the time of payment, which was granted by appellant. These facts are uncontroverted. Appellee paid a part of the purchase price with full knowledge of the alleged defects, and promised to pay the rest of the stipulated price in order to secure an extension of the time of payment which was granted to it. Having thus acted with a full knowledge of all the facts and circumstances connected with the alleged

defects in the car load of kegs, it will be deemed to have waived them.

It follows that the judgment must be reversed, and, it appearing that the facts were fully developed at the trial in the court below under the undisputed evidence, judgment will be entered here for appellant in the sum of \$600, the amount sued for.

**PENNSYLVANIA MINING CO. v. BAILEY.**  
(Supreme Court of Arkansas. Nov. 24, 1913.)

**1. APPEAL AND ERROR (§ 664\*)—RECORD—CONSTRUCTION.**

Where a bill of exceptions recited that plaintiff offered record book No. 52 at page 277 showing the record of a lease between certain parties, and that a true and correct copy thereof was attached and marked Exhibit G and contained a lease which was so marked, but in response to a writ of certiorari the clerk certified another lease of the same date between the same parties, which appeared to be the one recorded in the book and at the page mentioned, the lease contained in the bill of exceptions apparently not having been recorded at all, the facts showed that the lease sent up on certiorari was the one offered in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2856-2859; Dec. Dig. § 664.\*]

**2. MINES AND MINERALS (§ 64\*)—LEASES—ASSIGNMENT OR SUBLETTING.**

Where a mining lessee, under a lease which would expire in 1928, in 1910 leased the property for 20 years, the lessee, under this lease, was an assignee of the original lease and not a sublessee, since, where a lessee parts with his whole interest, there is an assignment of the lease, and it is immaterial what kind of an instrument or conveyance is used to dispose of the term.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 181-184; Dec. Dig. § 64.\*]

**3. MINES AND MINERALS (§ 64\*)—RENT OR ROYALTIES—LIABILITY OF ASSIGNEE.**

An assignee of a mining lease was liable to the original lessor for the stipulated royalty.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 181-184; Dec. Dig. § 64.\*]

Appeal from Circuit Court, Johnson County; Hugh Basham, Judge.

Action by J. T. Bailey against the Pennsylvania Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee was the plaintiff below and alleged in his complaint that appellant was the transferee and owner of a lease executed July 14, 1904, by appellee, together with Margaret Norris and others, heirs of J. W. Norris, deceased, to M. E. Anderson et al.; the lease embracing the coal and mineral rights under a certain hundred acres of land there described. It was there alleged: That appellee was the owner of 40 acres of the land and was entitled to 40 per cent. of the royalty on the coal mined, the quantity of which was not in dispute. It was further alleged that this lease was assigned November 17, 1904, to the Western Anthracite Coal

Company, and by that company assigned on August 1, 1907, to J. K. Gearhart, C. H. Langford, and Freemont Stokes. That on May 20, 1909, Gearhart, Langford, and Stokes transferred the lease to the Pennsylvania Anthracite Coal Company, which last-named company changed its name to Pennsylvania Mining Company. But the proof shows that, instead of succeeding the Pennsylvania Anthracite Coal Company upon its change of name, the Pennsylvania Mining Company is a distinct corporation and acquired the mining rights of the first-named company by a transfer of the lease in question to it. This suit was brought expressly upon the theory that appellant is an assignee of the original lease; that it stands in the shoes of the original lessees and is therefore in privity with the original lessors; and appellants concede that if this theory is correct appellee is entitled to maintain this suit. The answer contained a general denial of all the material allegations of the complaint, and specifically denied that it was the owner and transferee of the lease to M. E. Anderson and others, upon which the suit was based.

There is no question but that Gearhart, Langford, and Stokes by successive assignments became the owners of the original lease, and on May 20, 1909, they executed an instrument to the Pennsylvania Anthracite Coal Company, by virtue of which they undertook to lease for a period of 25 years their mineral rights in the lease in question, together with mineral rights in other property. The terms and conditions in this lease were materially different from those in the original lease from Norris to Anderson. On October 31, 1910, the Pennsylvania Anthracite Coal Company executed two leases to appellant. One of these was for the term of ten years and two months from the date of its execution and expired, therefore, on December 31, 1920, which would be eight years earlier than the expiration of the original lease from Norris et al. to Anderson, which expired April 11, 1928. This lease dated October 31, 1910, covered various lands and mining rights and privileges incident thereto not contained in the original Anderson lease, and its terms and conditions were materially different from those of the original lease. This short-term lease of date October 31, 1910, is the one contained in the bill of exceptions and was the only one of that date contained in the record at the time of filing appellant's brief. This brief undertook to show that appellant did not sustain the relation of assignee of the original lease but was a sublessee of the original lease, and there is an interesting discussion of the distinction between the assignment of a lease and a subletting and of the difference between the obligations and liabilities of the two relations. But upon appellee's application the clerk of this court issued a writ of certiorari to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

clerk of the circuit court requiring him to furnish and certify a copy of the lease dated October 31, 1910, and recorded in Deed Book 52 at pages 274-277 of the deed records of Johnson county.

The call in the bill of exceptions for the paper writing is as follows: "Mr. Covington, the plaintiff here offers and presents Record Book No. 52 at page 277 showing record of lease from Pennsylvania Anthracite Coal Company to Pennsylvania Mining Company dated August 31, 1910. This lease embraces the land here in question." (A true and correct copy of which is hereto attached and marked Exhibit G.) The language in the parentheses is inclosed in parentheses in the bill of exceptions and does not there purport to be the language of the attorney in offering the record in evidence but is evidently a notation made by the clerk in making up the transcript. The lease contained in the bill of exceptions does have upon it the letter "G." It is conceded that attorney's statement that the lease offered in evidence was dated August 31, 1910, was a lapsus linguae, for there is no lease of that date, and the date should have been stated to be October 31, 1910.

In response to this writ of certiorari the clerk of the circuit court has certified a lease dated October 31, 1910, from the Pennsylvania Anthracite Coal Company to Pennsylvania Mining Company, which embraced the land here in question, together with other lands and mining rights, and was for a period of 20 years, which is obviously beyond the date of the expiration of this Anderson lease and therefore conveyed all rights granted by that original lease.

Moore, Smith & Moore, of Little Rock, for appellant. J. J. Montgomery and Webb Covington, both of Clarksville, for appellee.

SMITH, J. (after stating the facts as above). [1] The important and controlling question in this case therefore is: Which of the two leases dated October 31, 1910, was in fact offered in evidence, the one contained in the bill of exceptions or the one certified by the clerk in response to the writ of certiorari? After a careful study of the evidence we have concluded that, while the call in the bill of exceptions might ordinarily identify either writing, the one in fact introduced is the one sent upon certiorari. We reach that conclusion because it appears to be the instrument recorded in Record Book 52 at pages 274 to 277, whereas the lease in the bill of exceptions does not appear to have been recorded at all.

[2] This lease, which we therefore consider as the one offered in evidence, conveys the whole interest demised in the Anderson lease, and it is therefore academic to consider the difference in the obligation and liability which would have arisen under the short-

term lease as compared with the one which extended beyond the expiration of the term of the original Anderson lease. A sufficient statement of the law for the purpose of this case is found in 18 American & Eng. Enc. of Law (2d Ed.) 656-657, where it was said: "A lessee parting with his interest in the whole of the leasehold estate for the balance of his term, or with his interest in a part of the demised premises for the entire term, constitutes an assignment or assignment pro tanto of the lease, and the person to whom such an interest is conveyed becomes an assignee of the term with all the rights and liabilities incident to such a position. It is immaterial by what kind of an instrument or conveyance the term is so disposed of. Thus the grantee or nominal lessee becomes an assignee if the lessee executes a quitclaim deed of his rights in the leasehold estate, or executes an instrument purporting to be a lease or demise of the premises for the balance of his unexpired term, or a period exceeding his term, or conveys the premises in fee simple. To constitute an assignment the lessee must, however, part with his entire interest in the whole or a part of the premises."

[3] The liability of the assignee of a lease is conceded and is fixed by the authorities, and the judgment therefore against appellant for the royalty on the coal mined by it was fully authorized and is therefore affirmed.

#### HART v. LEQUIEU et al.

(Supreme Court of Arkansas. Nov. 24, 1913.)

#### 1. JUSTICES OF THE PEACE (§ 164\*)—APPEAL—PROCEEDING.

Under Kirby's Dig. § 4670, providing that, before the first day of the circuit court next after the appeal shall have been granted, the justice shall file his transcript, the appellant must see that it is done, although the statute imposes the duty on the justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 607-636; Dec. Dig. § 164.\*]

#### 2. JUSTICES OF THE PEACE (§ 164\*)—APPEAL—STATUTES.

Kirby's Dig. § 4670, requiring a transcript of an appeal from the justice court to be filed before the first day of the circuit court next after appeal granted, while directory, cannot be ignored, and the appeal must be dismissed for failure to file the transcript within that time, unless the appellant shows an excuse for the delay.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 607-636; Dec. Dig. § 164.\*]

#### 3. JUSTICES OF THE PEACE (§ 166\*)—APPEAL—DISMISSAL—REINSTATEMENT.

Where the circuit court dismissed an appeal from a justice court, it may at the same term vacate the dismissal, and reinstate the appeal for good excuse shown.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 638-646; Dec. Dig. § 166.\*]

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by H. Lequieu and others against Adolph Hart begun in justice court, where judgment was rendered for plaintiffs. Defendant's appeal was dismissed by the circuit court, and, his motion to reinstate being overruled, he appeals. Reversed and remanded.

This was an action brought by the appellees in the court of a justice of the peace to enforce a laborer's lien against a certain crop of vegetables in the possession of appellant. On December 20, 1912, which was the return day of the summons and attachment, the case was tried, and judgment rendered in favor of appellees for the sum of \$299.99, and the attached property was ordered sold in satisfaction of this judgment. Appellant filed an affidavit and bond for an appeal on the 30th day of December, 1912, and demanded a transcript of the case from the justice of the peace, and paid the fee therefor. The transcript was not filed by the justice of the peace until the 13th day of March, 1913. This was ten days after the beginning of the first term of the court after the trial in the justice's court, and the appeal was dismissed on the day the transcript was filed. In fact the transcript appears to have been filed by appellees on that day for the purpose of making this motion, and enforcing the judgment of the justice of the peace. Appellant filed a motion for the reinstatement of this appeal on the 15th of March, 1913, which motion contained the following recitals: That the appeal had been taken in apt time, and the necessary fees paid therefor, and a proper appeal bond executed and filed with the justice of the peace. That appellant had called several times at the office of the justice of the peace to procure the transcript for filing with the clerk of the circuit court, and had been repeatedly told that the transcript would be prepared and filed on or before the first day of the ensuing March term of the Pulaski circuit court. That the last visit to the justice of the peace was on the 20th day of February, at which time appellant was again informed that he would see that the transcript was filed in apt time. The motion further alleged that during the latter part of November appellant's manufacturing plant was destroyed by fire, and that, owing to the inaccuracy of his records, he was forced to travel over considerable territory to procure proper inventories in order to adjust his losses, and that during the month of February his little child was burned to death at his home, and that since that time his wife had been suffering with nervous prostration, and required his constant attention, so he had been unable to look after his business duties. The motion to reinstate this appeal was overruled by the court on

the 12th of April, and the order of the court made thereon reads as follows: "On this day, defendant's motion to set aside the order or dismissal heretofore rendered herein now coming on to be heard, same is submitted to the court, after argument of counsel, and the court, being well and sufficiently advised, doth overrule said motion, on the ground that the court has no jurisdiction."

Jones & Owens, of Little Rock, for appellant. Laurence C. Maloney, of Little Rock, for appellees.

SMITH, J. (after stating the facts as above). [1] Section 4670 of Kirby's Digest reads as follows: "On or before the first day of the circuit court next after the appeal shall have been allowed, the justice shall file in the office of the clerk of such court a transcript of all the entries made in his docket relating to the cause, together with all the process and all the papers relating to such suit."

This section has been construed in several cases, and it has been held that, while the statute makes it the duty of the justice of the peace to file the transcript in the clerk's office within the time prescribed, it is nevertheless incumbent on the appellant to see that this is done—that he must prosecute his appeal. *Hughes v. Wheat*, 32 Ark. 292.

[2] That case holds that, although the provisions of this section are directory, they cannot be ignored, and other cases hold that, where the transcript is not filed within the time limited by the law, the appeal should be dismissed in the absence of a satisfactory explanation of this failure. "It is the duty of the appellant to see that his appeal was perfected in time, and, when no diligence on his part was shown, nor excuse for the delay, the appeal should have been dismissed, or the judgment of the justice of the peace affirmed." *Smith v. Allen*, 31 Ark. 268; *McGehee v. Carroll*, 31 Ark. 550; *Wilson v. Starks*, 48 Ark. 73, 2 S. W. 346; *Bates v. Mitchell*, 96 Ark. 555, 132 S. W. 917.

[3] The court did not undertake to pass upon the sufficiency of the excuse for failing to file the transcript, but dismissed the cause, as stated in the record, for the want of jurisdiction. This was error, for the court had the jurisdiction to set aside an order of dismissal made at the same term of court. *McPherson v. Consolidated Casualty Co.*, 151 S. W. 283.

We do not know the court's view of the sufficiency of the showing for the reinstatement of the appeal when considered upon its merits, and we will not, therefore, undertake to pass upon that question.

The judgment will be reversed, and the cause remanded, with directions to the court below to pass upon the motion to reinstate the appeal upon its merits.

**ALLEN v. LOUISVILLE & N. R. CO.†**  
(Court of Appeals of Kentucky. Dec. 11, 1913.)

**JUDGMENT (§ 715\*)—CONCLUSIVENESS—IDENTITY OF ISSUES.**

Where a railroad's action to recover for undercharges of freight, decided against the company, was reversed on appeal, and the road held entitled to recover, and the shipper then paid an amount in settlement, such judgment was a bar to the shipper's subsequent suit to recover the amount paid on the ground that the company had fraudulently furnished him the lower rate intending to induce him to manufacture lumber and ship over its road and then exact the higher lawful rate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1246; Dec. Dig. § 715.\*]

Appeal from Circuit Court, Allen County.

Action by J. W. Allen against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Bradburn & Basham, of Bowling Green, and O. M. Hinton, of Scottsville, for appellant. Benjamin D. Warfield, of Louisville, Goad & Oliver, of Scottsville, and Charles H. Moorman, of Louisville, for appellee.

CARROLL, J. In 1912 the appellee herein brought suit against the appellant in the Allen circuit court to recover from him \$732 alleged to be due it on account of undercharges made by it to him in a shipment of freight. The lower court decided this case against the railroad company, and, upon appeal to this court, we reversed the judgment of the lower court, holding that the railroad company was entitled to recover the amount sued for. See opinion in 152 Ky. 145, 153 S. W. 198. Afterwards Allen, in settlement of that case, paid to the railroad company \$962.44, and thereupon brought this suit, seeking to recover from the Louisville & Nashville Railroad Company the amount so paid. The lower court dismissed his petition, and he appeals.

In his petition he averred in substance that the railroad company purposely concealed from him the freight rate that he should have been charged for the shipments he was about to make and, for the purpose of inducing him to purchase and manufacture a lot of timber to be shipped over its line, furnished to him a freight rate less than the rate that should have been charged, and that, acting upon the information as to what the freight rate would be, he purchased and manufactured a lot of timber and shipped it over the road of the company, paying therefor the rates it had represented to him would be charged.

The right of recovery in this action is based on the ground that the company deceived the plaintiff by representing that the freight charges would be a specified sum, on the faith of which representation he was induced to purchase the lumber, manufacture

the timber, and ship it over the road of the company; that he would not have purchased or manufactured the timber or have paid out in the purchase and manufacture the sums he did, had he known that he would be required to pay a larger freight rate than the rate that was agreed on before he purchased or manufactured it. In other words, the substance of the charge is that the company, with the fraudulent purpose of inducing him to purchase and manufacture the timber and ship it over its line of road, in order that it might receive the charges for transportation, furnished to him a rate that it knew was less than it had the right to exact, and did this with the purpose and expectation of subsequently requiring him to pay the lawful rate.

It seems to us that the appellant's right to recover in this case is conclusively barred by the opinion of this court heretofore referred to. If the appellant in this action should be allowed to recover back the amount he was required to pay in the other case, the result would be precisely the same as if he had succeeded in the other case. Whatever right the appellant may have had to obtain the relief here sought is concluded adversely to him by the former opinion of this court.

Wherefore the judgment is affirmed.

**TAYLOR et al. v. RINEY et al.**

(Court of Appeals of Kentucky. Dec. 11, 1913.)

**1. COUNTIES (§ 116\*) — POWERS OF FISCAL COURT.**

If the fiscal court could employ an accountant for investigating the affairs of county officers, they could, in their discretion, accept the proposal of the particular bidder for the work who, in their judgment, was best qualified, though his bid was higher than that of others; the fiscal court having a large discretion in such matters, which will not ordinarily be controlled by the courts.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 187; Dec. Dig. § 116.\*]

**2. COUNTIES (§ 160\*)—CONTRACTS BY FISCAL COURT—AUTHORITY—APPROPRIATION.**

Though there was no tax levy for that purpose, the fiscal court could order the amount of a contract made by it for services to be paid out of the general fund of the county, which presumably consists of the surplus remaining from funds appropriated for other purposes.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 219; Dec. Dig. § 160.\*]

**3. COUNTIES (§ 113\*) — POWERS OF FISCAL COURT.**

The fiscal court has only limited jurisdiction, and can do only such things as the statute permits.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.\*]

**4. COUNTIES (§ 113\*) — POWERS OF FISCAL COURT—CONTRACTS.**

Ky. St. § 1840, giving the fiscal court jurisdiction "to regulate and control the fiscal affairs and property of the county," authorized it to contract for the employment of an accountant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied January 15, 1914.

for the purpose of investigating the affairs of county officers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.\*]

Appeal from Circuit Court, Daviess County.

Action by George M. Taylor and others against W. G. Riney and others. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

George W. Jolly and L. P. Tanner, both of Owensboro, for appellants. C. M. Finn, Co. Atty., and R. W. Slack, Miller, Sandidge & Malin, R. A. Miller, and La Vega Clements, all of Owensboro, for appellees.

CARROLL, J. This suit was brought by the appellant taxpayers against the members of the fiscal court of Daviess county to enjoin them from paying T. A. Pedley, an accountant who had been employed by the fiscal court for the purpose of investigating the affairs of the various county officers. The lower court dismissed the petition, and the taxpayers have appealed.

It appears from the petition that several accountants presented bids to do the work in answer to proposals solicited by the court, and that the price at which some of these bidders offered to do the work was a good deal less than the offer made by Pedley, whose bid was accepted.

[1] If the fiscal court had the right to employ an accountant for the purpose stated, they had the right to exercise a sound discretion in making the employment, and to accept the proposal of that bidder who, in their judgment, was best qualified to execute the work in a satisfactory manner, although his bid might be higher than the bids of other accountants. Necessarily in matters like this the fiscal court is invested with a large measure of discretion, and under ordinary circumstances this discretion will not be controlled by the courts, as it is to be presumed that the fiscal court will act in the discharge of matters under its care in such a manner as to best conserve the interests of the county.

[2] It is further insisted that no tax had been levied to pay the amount the contract with Pedley called for, and therefore the court was without authority to enter into the contract of employment, as it could not expend in this business money raised by taxation under levies made for other purposes. But the order of the fiscal court shows that the appropriation necessary to pay Pedley for his work was appropriated out of the "general fund" of the county, which fund we presume consists of a surplus left remaining from funds appropriated for other purposes after the purpose for which the fund was appropriated had been satisfied. *Whaley v. Com.*, 110 Ky. 154, 61 S. W. 35.

[3, 4] The principal question in the case

relates to the power of the fiscal court to make the employment. We have written in a number of cases that the fiscal court is a court of limited jurisdiction, and is only authorized to do such things as the statute permits or directs it to do. *Woodruff v. Shea*, 152 Ky. 657, 153 S. W. 1005, and cases therein cited. And so we must look to the statute for the purpose of ascertaining if the fiscal court had authority to employ an accountant for the purpose stated. In section 1840, defining the jurisdiction of the fiscal court, it is provided among other things, that it shall have jurisdiction "to regulate and control the fiscal affairs and property of the county," and it seems to us that this right carries with it by necessary implication the authority to examine and investigate the books, and accounts, and records of the various officers, agents, and employes of the county who have the control of or who are charged with the collection or expenditure of the funds of the county arising from taxation or any other source. It might be deemed wise and expedient by the fiscal court to investigate the affairs of one or more of these officers, agents, or employes of the county, and this investigation, of course, the fiscal court could not make without employing some competent person.

The fiscal court is charged by the statute with the duty of looking after the fiscal affairs of the county, and this puts upon it the responsibility that attaches to any other business body, and, if it could not, when the occasion seemed to demand it, have an investigation made of the books, and accounts, and records of any one or more of the officers, agents, or employes of the county who have the control of or right to receive or pay out the funds of the county, the court could not, in any proper manner, perform the duty required of it in the management of the fiscal affairs of the county. There is scarcely a business institution in the state of any magnitude that does not have its books examined by some skilled accountant, and there are many good reasons why the fiscal court should be permitted to exercise this character of supervision over the persons charged with the collection or expenditure of the public funds.

We think the judgment of the lower court was correct, and it is affirmed.

#### GOTT v. BEREA COLLEGE et al.

(Court of Appeals of Kentucky. Dec. 11, 1913.)

#### 1. TORTS (§ 1\*) — INJURIOUS CONSEQUENCE FROM LAWFUL ACT.

One is not liable for injurious consequences incidental to the performance of a lawful act in a proper manner.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 1, 3, 5; Dec. Dig. § 1.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## 2. COLLEGES AND UNIVERSITIES (§ 9\*)—CONTROL OF STUDENTS—AUTHORITY.

College authorities stand in loco parentis as to the mental training and physical and moral welfare of pupils and may in their discretion make any regulations for their government which a parent could make for the same purpose, without interference from the courts, unless the regulations are unlawful or against public policy.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 23-28; Dec. Dig. § 9.\*]

## 3. COLLEGES AND UNIVERSITIES (§ 9\*)—REGULATION OF STUDENTS.

A college may prescribe requirements for the admission of students and rules of conduct governing them, unless it is supported in whole or part by public appropriations, when its power of regulation is somewhat more restricted, and a student entering college impliedly agrees to conform to such rules.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 23-28; Dec. Dig. § 9.\*]

## 4. SCHOOLS AND SCHOOL DISTRICTS (§ 169\*)—REGULATIONS—CONDUCT OF STUDENTS.

Except as to the parental right of control, the power of school authorities over pupils extends to all acts detrimental to the best interest of the school, whether committed in school hours or after the pupil's return home.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 341; Dec. Dig. § 169.\*]

## 5. COLLEGES AND UNIVERSITIES (§ 9\*)—GOVERNMENT OF STUDENTS—VALIDITY OF REGULATIONS—EATING HOUSE RULES.

Berea College, whose students were largely immature and inexperienced country youths, and which itself provided board and lodging for a nominal charge and gave the students opportunity to earn their way through school, etc., could under its charter, empowering the board of trustees to make such legal by-laws as were necessary to promote its interest, prohibit students from entering eating houses and amusement places in the town, not controlled by the college, on pain of dismissal.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 23-28; Dec. Dig. § 9.\*]

## 6. COLLEGES AND UNIVERSITIES (§ 9\*)—TORTS (§ 10\*)—REGULATION OF STUDENTS—PERSONS ENTITLED TO OBJECT.

Even if a rule of a college, prohibiting its students from entering eating houses in the town, not controlled by the college, under pain of dismissal, was unreasonable, one who ran a restaurant near the campus, which was largely patronized by students, but who had no children in the school, could not object to such rule.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 23-28; Dec. Dig. § 9; \* Torts, Cent. Dig. § 10; Dec. Dig. § 10.\*]

Appeal from Circuit Court, Madison County.

Action by J. S. Gott against the Berea College and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. A. Sullivan, of Richmond, S. Mayner Wallace, of St. Louis, Mo., and John Noland, of Richmond, for appellant. Burnam & Burnam, of Richmond, for appellees.

NUNN, J. The appellant, J. S. Gott, about the 1st of September, 1911, purchased and was conducting a restaurant in Berea, Ky.,

across the street from the premises of Berea College. A restaurant had been conducted in this same place for quite a long while by the party from whom Gott purchased. For many years it has been the practice of the governing authorities of Berea College to distribute among the students at the beginning of each scholastic year a pamphlet entitled "Students Manual," containing the rules and regulations of the college for the government of the student body. Subsection 3 of this manual, under the heading "Forbidden Places," enjoined the students from entering any "place of ill repute, liquor saloons, gambling houses," etc. During the 1911 summer vacation, the faculty, pursuant to their usual practice of revising the rules, added another clause to this rule as to forbidden places, and the rule was announced to the student body at chapel exercise on the first day of the fall term, which began September 11th. The new rule is as follows: "(b) Eating houses and places of amusement in Berea, not controlled by the college, must not be entered by students on pain of immediate dismissal. The institution provides for the recreation of its students, and ample accommodation for meals and refreshment, and cannot permit outside parties to solicit student patronage for gain."

Appellant's restaurant was located and conducted mainly for the profits arising from student patronage. During the first few days after the publication of this rule, two or three students were expelled for its violation, so that the making of the rule and its enforcement had the effect of very materially injuring, if not absolutely ruining, appellant's business because the students were afraid to further patronize it.

On the 20th day of September appellant instituted this action in equity and procured a temporary restraining order and injunction against the enforcement of the rule above quoted, and charging that the college and its officers unlawfully and maliciously conspired to injure his business by adopting a rule forbidding students entering eating houses. For this he claimed damages in the sum of \$500. By amended petitions he alleged that in pursuance of such conspiracy the college officers had uttered slanderous remarks concerning him and his business and increased his prayer for damages to \$2,000. The slanderous remarks were alleged to have been spoken at chapel and other public exercises to the student body as a reason for the rule, and were to the effect that appellant was a bootlegger, and upon more than one occasion had been charged and convicted of illegally selling whisky. Berea College answered and denied that any slanderous remarks had been made as to appellant, or that they had conspired maliciously or otherwise, or that the rule adopted was either unlawful or unreasonable. In the second

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

paragraph the college affirmatively set forth that it is a private (incorporated) institution of learning, supported wholly by private donations and its endowment and such fees as it collects from students or parents of students who desire to become affiliated with said institution and abide by and conform to the rules and regulations provided by the governing authorities of the college for the conduct of the students; that every student upon entering said institution agrees, upon pain of dismissal, to conform to such rules and regulations as may be from time to time promulgated; that the institution aims to furnish an education to inexperienced country, mountain boys and girls of very little means at the lowest possible cost; that practically all of the students are from rural districts and unused to the ways of even a village the size of Berea; and that they are of very limited means. It is further alleged that they have been compelled from time to time to pass rules tending to prevent students from wasting their time and money and to keep them wholly occupied in study; that some of the rules prohibit the doing of things not in themselves wrong or unlawful, but which the governing authorities have found and believe detrimental to the best interest of the college and the student body. For these reasons the rule in question was adopted, but they say at the time that they had no knowledge that the plaintiff owned or was about to acquire a restaurant, and that the rule was in no way directed at the plaintiff. Upon motion the restraining order was dissolved, but, on account of allegations charging slanderous remarks, the lower court overruled demurrer to the petition. After filing of the answer, proof was heard, the case submitted and tried by the court with the result that the petition was dismissed, and Gott appeals to this court.

Passing the question as to whether an ordinary action can be joined with an equitable action for restraining order, there being no objection to it in the lower court, it is sufficient to say that on the question of uttering the slanderous words issue was joined, and the case submitted to the court without the intervention of a jury, and we are disposed to accept its finding against Gott since it is supported by sufficient evidence. The larger question, and the one we are called here to pass upon, is whether the rule forbidding students entering eating houses was a reasonable one and within the power of the college authorities to enact, and the further question whether, in that event, appellant Gott will be heard to complain. That the enforcement of the rule worked a great injury to Gott's restaurant business cannot well be denied; but, unless he can show that the college authorities have been guilty of a breach of some legal duty which they owe to him, he has no cause of action against them for the injury.

[1] One has no right of action against a

merchant for refusal to sell goods, nor will an action lie, unless such means are used as of themselves constitute a breach of legal duty, for inducing or causing persons not to trade, deal, or contract with another; and it is a well-established practice that, when a lawful act is performed in the proper manner, the party performing it is not liable for mere incidental consequences injuriously resulting from it to another. 38 Cyc. pp. 418-423.

[2] College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy. Section 881 of the Kentucky Statutes, applicable to corporations of this character, provides that they may "adopt such rules for their government and operation, not inconsistent with law, as the directors, trustees, or managers may deem proper." The corporate charter of Berea College empowers the board of trustees to "make such by-laws as it may deem necessary to promote the interest of the institution, not in violation of any laws of the state or the United States." This reference to the college powers shows that its authorities have a large discretion, and they are similar to the charter and corporate rights under which colleges and such institutions are generally conducted.

[3] Having in mind such powers, the courts have without exception held to the rule which is well settled in 7 Cyc. 288: "A college or university may prescribe requirements for admission and rules for the conduct of its students, and one who enters as a student impliedly agrees to conform to such rules of government." The only limit upon this rule is as to institutions supported in whole or in part by appropriations from the public treasury. In such cases their rules are viewed somewhat more critically; but, since this is a private institution, it is unnecessary to notice further the distinction.

[4] A further consideration of the power of school boards is found in Mechem on Public Officers, § 730, from which we quote: "There is no question that the power of school authorities over pupils is not confined to schoolroom or grounds, but to extend to all acts of pupils which are detrimental to the good order and best interest of the school, whether committed in school hours, or while the pupil is on his way to or from school, or after he has returned home." Of course this rule is not intended to, nor will it be permitted to, interfere with parental control of

children in the home, unless the acts forbidden materially affect the conduct and discipline of the school.

[8] There is nothing in the case to show that the college had any contract, business, or other direct relations with the appellant. They owed him no special duty; and, while he may have suffered an injury, yet he does not show that the college is a wrongdoer in a legal or any sense. Nor does he show that in enacting the rule they did it unlawfully, or that they exceeded their power, or that there was any conspiracy to do anything unlawful. Their right to enact the rule comes well within their charter provision, and that it was a reasonable rule cannot be very well disputed. Assuming that there were no other outside eating houses in Berea, and that there never had been a disorderly one, or one in which intoxicating liquors had been sold, still it would not be an unreasonable rule forbidding students entering or patronizing appellant's establishment. In the first place, the college offers an education to the poorest, and undertakes to offer them the means of a livelihood within the institution while they are pursuing their studies, and at the same time provides board and lodging for a nominal charge. Whatever profit was derived served to still further reduce expenses charged against the pupil. It stands to reason that when the plans of the institution are so prepared, and the support and maintenance of the students are so ordered, there must be the fullest co-operation on the part of all the students, otherwise there will be disappointment, if not failure, in the project. It is also a matter of common knowledge that one of the chief dreads of college authorities is the outbreak of an epidemic and against which they should take the utmost precaution. These precautions, however, may wholly fail if students carelessly or indiscriminately visit or patronize public or unsanitary eating houses. Too often those operating such places are ignorant of, or indifferent to, even the simplest sanitary requirements. As a safeguard against disease infection from this source, there is sufficient reason for the promulgation of the rule complained of.

[9] But, even if it might be conceded that the rule was an unreasonable one, still appellant Gott is in no position to complain. He was not a student, nor is it shown that he had any children as students in the college. The rule was directed to and intended to control only the student body. For the purposes of this case the school, its officers and students, are a legal entity, as much so as any family, and, like a father may direct his children, those in charge of boarding schools are well within their rights and powers when they direct their students what to eat and where they may get it, where they may go, and what forms of amusement are forbidden. A case very similar and often quoted is that of *People v. Wheaton College*, 40 Ill. 186. It illustrates

the principles here announced so well that we quote with approval the following from it: "Wheaton College is an incorporated institution, resting upon private endowments, deriving no aid whatever from the state or from taxation. Its charter gives the trustees and faculty power to adopt and enforce such rules as may be deemed expedient in the government of the institution, a power which they would have possessed without such express grant, because incident to the very object of their incorporation and indispensable to the successful management of the college. Among the rules they have deemed it expedient to adopt is one forbidding students to become a member of secret societies. We perceive nothing unreasonable in the rule itself, since all persons familiar with college life know that the tendency of secret societies is to withdraw students to some extent from the control of the faculty and to impair the discipline of the institution. Such may not always be the effect, but such is their general tendency. But, whether the rule be judicious or not, it violates neither good morals nor the laws of the land and is therefore clearly within the power of the college authorities to make and enforce. A discretionary power has been given them to regulate the discipline of their college in such manner as they deem proper; and, so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family. It is urged that the Good Templars are a society established for the promotion of temperance and incorporated by the Legislature and that any citizen has a right to join it. We do not doubt the beneficent object of the society, and we admit that any citizen has the right to join it if the society consent. But this right is not of so high and solemn a character that it cannot be surrendered, and the son of the relator did voluntarily surrender it when he became a student of Wheaton College, for he knew, or must be taken to have known, that by the rules of the institution which he was voluntarily entering he would be precluded from joining any secret society. When it is said that a person has a legal right to do certain things, all that the phrase means is that the law does not forbid these things being done. It does not mean that the law guarantees the right to do them at all possible times and under all possible circumstances. A person in his capacity as a citizen may have the right to do many things which a student at Wheaton College cannot do without incurring the penalty of college laws. A person as a citizen has a legal right to marry or to walk the streets at midnight or to board at a public hotel, yet it would be absurd to say that a college cannot forbid its students to do any of these things. So a citizen as such can attend church on Sunday or not as he may think proper, but it would hardly be contend-

ed that a college would not have the right to make attendance upon religious services a condition of remaining within its walls. The son of the relator has an undoubted legal right to join either Wheaton College or the Good Templars, and they have both the undoubted right to expel him if he refuses to abide by such regulations as they establish, not inconsistent with the law and good morals."

There is no similarity between this and the case of the Standard Oil Co. v. Doyle, 118 Ky. 662, 82 S. W. 271, 111 Am. St. Rep. 331, and many others of like import relied upon by appellant. These all relate to unlawful combinations and conspiracies between trading corporations or between individuals in trade, together with the use of unlawful and fraudulent measures in restraint of trade and to throttle competition. Of course trading corporations have no such wide latitude or discretion in the scope and character of rules and by-laws they may adopt or enforce in conducting their business. They are limited and controlled both by statute and common law. But the mere fact that one's trade has been restrained, as Gott's admittedly has, gives him no ground to invoke the law, unless the means used to restrain it have been malicious and wrongful. And as above indicated the proof shows neither malice or wrong on the part of appellee.

Considering the whole case, the judgment of the lower court is affirmed.

#### CHESAPEAKE & O. RY. CO. v. WEDDINGTON'S ADM'R.

(Court of Appeals of Kentucky. Dec. 11, 1913.)

##### 1. APPEAL AND ERROR (§ 1036\*) — GRANTEE PENDENTE LITE—NONJOINDER — WAIVER OF OBJECTION.

Where pending a suit against certain railroad companies to recover damages for breach of a crossing covenant in a right of way deed, plaintiff conveyed the land to his son, reserving a life estate, but the son actively participated in the litigation as agent for his father, verified the reply, and was the plaintiff's principal witness, he was thereby estopped from claiming any rights against the defendants by virtue of the conveyance, and defendants were therefore not prejudiced by the court's failure to make him a party, or his failure to ask to join in the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4074; Dec. Dig. § 1036.\*]

##### 2. CONTINUANCE (§ 33\*)—ABSENCE OF WITNESS—DENIAL.

Where an affidavit for a continuance for absence of witness was read as the deposition of the witness with plaintiff's consent, and substantially the same facts were proved by witnesses who were present and testified, the denial of the motion was not error.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 113; Dec. Dig. § 33.\*]

##### 3. APPEAL AND ERROR (§ 880\*)—RIGHT TO ALLEGE ERROR—SUMMONS—MOTION TO QUASH.

Appellant could not object to the overruling of a motion to quash the return of the

summons against its codefendant to the rights of which in the property in controversy it had succeeded, where the latter did not appeal from the judgment against it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.\*]

##### 4. APPEAL AND ERROR (§ 1050\*) — REVIEW — EVIDENCE—PREJUDICE.

Where, in an action against a railroad company for breach of a covenant to construct crossings, there was evidence that the probable cost of the construction of a crossing ranged from \$30 to \$50, and that the rental value of the land to be served was from \$30 to \$100, and the court limited the damages to the cost of a good crossing and damages for inconvenience in the use and enjoyment of the upper tract of the land, plaintiff having recovered only \$200, defendant was not prejudiced by evidence relative to the probable cost of the construction of a haul road off the right of way, to enable plaintiff to use the crossing constructed on the lower end of the track so as to render accessible the upper end thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Appeal from Circuit Court, Floyd County.

Action by J. W. Weddington's administrator against the Chesapeake & Ohio Railway Company and another. Judgment for plaintiff and defendant Chesapeake & Ohio Railway Company appeals. Affirmed.

Harkins & Harkins, of Prestonsburg, F. T. D. Wallace, of Ashland, and Worthington, Cochran & Browning, of Maysville, for appellant. James Goble, of Prestonsburg, for appellee.

HANNAH, J. J. W. Weddington, in 1902, sold and conveyed to the Big Sandy Railway Company a right of way, 100 feet wide, through two tracts of land in Floyd county, then owned by him. The two tracts so owned by him were not contiguous, an intervening tract being the property of Grant Weddington, a son of J. W. Weddington. The deed conveying said rights of way contained this provision: "The grantee agrees to furnish the necessary crossings." On September 5, 1910, said J. W. Weddington, complaining that the terms of said covenant had not been complied with by the Big Sandy Railway Company, and its successor in title, the Chesapeake & Ohio Railway Company, instituted in the Floyd circuit court an action against them for damages for the alleged breach of said covenant, fixing said damages at the sum of \$1,350. Upon the trial, at the conclusion of plaintiff's evidence, the court sustained defendants' motion for peremptory instruction as to the cause of action affecting the crossing on the lower of the two tracts, and at the conclusion of all the evidence overruled defendants' motion for peremptory instruction as to the cause of action affecting the crossing on the upper tract. The court then instructed the jury that it was the duty of defendants to erect and maintain the necessary crossings on said

upper tract, and that if defendants failed to provide plaintiff with a necessary and convenient crossing that could be used on said upper tract, they should find for plaintiff such damages as he had sustained by reason of such failure, to be estimated by what it would cost to make a good crossing at the most convenient place, and also such damages as may have directly resulted from September 5, 1910 (the date of the filing of the petition), up to the time of trial (October 19, 1912), for inconvenience in the use and enjoyment of said upper tract by reason of not having such crossing. The jury found a verdict for plaintiff in the sum of \$200, and from the judgment thereupon entered, this appeal is prosecuted.

[1] During the trial of the action, after the jury had been selected, defendants filed an amended answer, alleging that plaintiff was no longer the owner of the land in the action mentioned and described, having sold and conveyed same, only a few days prior thereto, to his son, Grant Weddington. The deed in question was dated October 14, 1912, and contains the following language: "It is further understood that the said James W. Weddington is to retain control of all said land during his lifetime, and at his death, his wife, Lucy Weddington, if living, shall hold the house and garden where they now live, during her life, and at her death, to belong to said Grant Weddington." It is contended that because plaintiff was only a tenant for life at the time of the trial, he was not entitled to recover on said verdict, for the reason that it includes, not only damages for inconvenience suffered by him in the use and enjoyment of said farm, but also damages based on the cost of constructing a crossing, and therefore in discharge of the covenant to furnish same. But the record discloses that said grantee in said deed, Grant Weddington, was in active charge of the conduct of this action; that he verified the reply, the affidavit stating that Grant Weddington "is agent for his father, J. W. Weddington; that J. W. Weddington is nearly 87 years of age, and is at home, very feeble and seriously ill, and unable to attend the trial or to verify the pleading, and that affiant, Grant Weddington, is acquainted with the issues and facts in the case." The record also shows that Grant Weddington was the principal witness for the plaintiff. He, having actively participated in the proceedings operating to deprive him of whatever rights he may have had in this recovery, and being by these acts estopped from hereafter asserting them, the defendants were therefore not prejudiced by the failure to make him a party, or his failure to ask to be made a party to the action.

[2] Appellant also complains of the action of the trial court in refusing it a continuance to another day in the term. The motion therefore was supported by an affidavit setting forth the facts which defendants would

prove by the absent witnesses; and the plaintiff thereupon consented that on the trial said affidavit might be read as the deposition of the absent witness; this was done. We find no error in this, especially as substantially the same facts were proven by witnesses who were present and testified.

[3] Appellant, Chesapeake & Ohio Railway Company, also complains of the action of the trial court in overruling a motion to quash the return on the summons against the Big Sandy Railway Company. The Big Sandy Railway Company has not appealed from the judgment against it, and appellant cannot complain for it.

[4] Appellant also contends that the jury, in fixing the amount of their verdict, must have taken into consideration certain evidence which was permitted to go to them relative to the probable cost of the construction of a haul road not on the right of way, to enable plaintiff to use the crossing constructed on the lower end of said tract so as to render accessible the upper end of said tract. However, the evidence as to the probable cost of the construction of a crossing ranged from \$30 to \$50; and the evidence as to the rental value of the land ranged from \$30 to \$100 per year; and under this state of proof, a verdict for as much as \$250 would have been supported by the proof. The instruction given limited the damages to the cost of a "good crossing," and damages for "inconvenience in the use and enjoyment" of the upper tract; and the evidence complained of, even if incompetent, was not prejudicial.

The issues of fact were presented to the jury under instructions that were more favorable to defendants than they were entitled to; and the verdict, being supported by the evidence, will not be disturbed.

Judgment affirmed.

## LOUISVILLE RY. CO. v. WIGGINGTON et al.

(Court of Appeals of Kentucky. Dec. 12, 1913.)

### 1. LIMITATION OF ACTIONS (§ 55\*)—ACCRUAL OF ACTION—TRESPASS.

A right of action immediately accrued to plaintiff for injury to his land by defendant railroad company dumping earth from its cut on plaintiff's land, so that an action after five years was barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.\*]

### 2. MASTER AND SERVANT (§ 315\*)—DAMAGE TO THIRD PERSON—INDEPENDENT CONTRACTOR.

If one making a railroad cut was an independent contractor, over whom the company had no control, he alone, and not the company, was responsible for a trespass committed by him in dumping earth on plaintiff's land.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1241, 1244-1253, 1255, 1256; Dec. Dig. § 315.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—14

### 3. RAILROADS (§ 114\*)—CONSTRUCTION—INJURY TO ADJOINING LAND—PLEADING.

Allegations of the petition, in an action against a railroad company for damage to land, that, in grading the right of way, defendant had thrown large quantities of dirt on plaintiff's land, and allowed it to remain there, and had failed to properly drain its right of way, by reason of which large quantities of water had accumulated on plaintiff's field, did not allege that defendant, in constructing its right of way, obstructed the natural flow of water or cast more than the natural flow upon plaintiff's land; the allegation as to not draining referring to the dirt placed on the land from the right of way.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 365-371; Dec. Dig. § 114.\*]

### 4. RAILROADS (§ 113\*)—TORTS—LIABILITY.

That the L. & I. Ry. Co. had the same general officers and was under the same control as the L. Ry. Co. would not make the one liable for the defaults or debts of the other.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. § 113.\*]

### 5. RAILROADS (§ 72\*)—DEED TO RIGHT OF WAY—COVENANTS.

A railway company which accepted a right of way deed containing covenants to maintain a sufficient right of way fence could not exempt itself from such obligation by conveying the property to another company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 168-178; Dec. Dig. § 72.\*]

### 6. RAILROADS (§ 113\*)—RIGHT OF WAY—CONVEYANCE—LIABILITIES.

A former owner of a railroad right of way would not be responsible for injury to adjacent land in grading the right of way by its grantee by dumping earth on such land; the grantee, who committed the wrong, only being responsible therefor.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. § 113.\*]

Appeal from Circuit Court, Jefferson County.

Action by J. H. Wiggington and others against the Louisville Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded for new trial.

Clarence Dallam, of Louisville, for appellant. Edwards, Ogden & Peak, of Louisville, for appellees.

HOBSON, C. J. J. H. Wiggington and his two sons, M. B. Wiggington and B. M. Wiggington, brought this suit against the Louisville Railway Company. They alleged that Helena B. Wiggington, in April, 1904, conveyed to the railway company a strip of land 30 feet wide through a farm owned by her in Jefferson county, and that by the deed it was provided that the defendant would put up and maintain a good and substantial fence along the easterly side of the right of way; that she died in November, 1905, and that the land had descended to them upon her death; that the defendant had failed to erect or maintain a good and substantial fence, by reason of which a large number of

their hogs had escaped upon the railroad track, and been killed, and others had strayed away, for which they prayed damages. In the second paragraph of their petition they alleged that in building and grading its line of railway the defendant had thrown large quantities of dirt from the right of way, and placed it on their land, and allowed it to remain upon the land, and had failed to properly drain its right of way, by reason of which large quantities of water had accumulated upon the field, and it became wet and unfit for cultivation, to their damage in the sum of \$5,000. The petition contained a third paragraph, which need not be noticed, as no recovery was permitted under it. The railroad company filed answer, and, the issues having been made up, the case came on for trial before a jury, who returned a verdict in favor of the plaintiffs for \$700. The court having entered judgment on the verdict, the defendant appeals.

[1] The chief ground relied on for reversal is as to the cause of action set out in the second paragraph of the petition. The proof showed that the road was constructed more than five years before the suit was brought. It also showed that the road was constructed by an independent contractor under a written contract, and that the earth complained of was placed on the plaintiffs' land by him. He testified that he placed it there with the plaintiffs' consent; but this was denied by them. The defendant pleaded the five-year statute of limitations. The circuit court sustained the plaintiffs' demurrer to the plea of limitations. The defendant had bought only a strip 30 feet wide; if it, in making its cut, went outside of the strip it had bought, and dumped the earth taken out of the cut on the plaintiffs' land, this was a trespass, and a right of action immediately accrued to the plaintiffs to recover therefor. We are therefore of opinion that the demurrer to the plea of limitations was improperly sustained in so far as the petition sought damages for the earth placed on the plaintiffs' land.

[2] Under the written contract the work was done by an independent contractor, and, if he, in the progress of his work, went outside of the right of way, he was responsible for this; but the defendant was not. If he, without the plaintiffs' consent, dumped the earth on the plaintiffs' land, he is responsible for this trespass; but the railroad company, having no control over him, is not responsible for the trespass committed by him.

[3] It is true that in the petition, after setting out the dumping of the earth on the plaintiffs' land, and the fact that it had been permitted to remain there, the plaintiffs alleged that the defendant had failed to properly drain its right of way along their land. But we think this allegation must be taken to refer to the earth which is named in the first part of the sentence, and that the

petition is not sufficient to show that the defendant, by anything it did on its right of way, obstructed the natural flow of the water, or threw upon the plaintiffs' land any more water than by nature would flow there.

Under the evidence no recovery should have been allowed for the matters complained of in the second paragraph of the petition. The instructions of the court to the jury submitting these matters to them were, for the reasons indicated, erroneous.

[4] The defendant pleaded and showed that it had conveyed the right of way to the Louisville & Interurban Railway Company, and that this corporation built the railroad, and operated it; the Louisville Railway Company having nothing to do with it. But the proof showed that the Louisville & Interurban Railway Company is a corporation under the same control as the Louisville Railway Company, having the same president, the same general manager, the same paymaster, and the same officers to employ and discharge servants and agents. But this is not sufficient to show that one corporation is liable for the debts of the other. Two corporations may, though operated by the same officers, be entirely distinct. The articles of incorporation of the Louisville & Interurban Railway Company are in the record, and show that its stock was regularly subscribed for by certain individuals. It is a going concern, doing business regularly, and may be sued for any liability incurred by it; but the Louisville Railway Company is not on the facts shown liable for its defaults. *Louisville Gas Co. v. Kaufman, Strauss & Co.*, 105 Ky. 131, 48 S. W. 434, 20 Ky. Law Rep. 1069; *Calor Oil & Gas Co. v. Franzell*, 128 Ky. 730, 109 S. W. 328, 33 Ky. Law Rep. 98, 36 L. R. A. (N. S.) 456. In *Southern R. R. Co. v. Thomas*, 90 S. W. 1044, 28 Ky. Law Rep. 951, the proof was materially different from that in this case. Facts were shown there which do not appear here.

[5, 6] The circuit court improperly held that the action could be maintained against the Louisville Railway Company for wrongs done by the Louisville & Interurban Railway Company after the conveyance of the property by the Louisville Railway Company to it. But the Louisville Railway Company, having accepted the deed made by Mrs. Wiggington, is liable for any failure to comply with the obligations imposed by the deed, and it cannot exempt itself from this responsibility by conveying the property to the Louisville & Interurban Railway Company. The cause of action set out in the first paragraph of the petition may be asserted against the Louisville Railway Company; but the cause of action set out in the second paragraph of the petition, being for wrongs done after the conveyance of the property, and not because of a violation of any covenant in the deed, can only be asserted against the Louisville & Interurban Railway Company.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

# **FIRST NAT. BANK OF LOUISVILLE v. DOHERTY et al.**

(Court of Appeals of Kentucky. Dec. 11, 1913.)

## **1. CORPORATIONS (§ 327\*)—LIABILITY OF OFFICERS—CONTRACTS—CONSIDERATION.**

If a bank renewed notes held by it against a corporation, or took new ones on the faith of an agreement signed by defendants, who were officers of the company, "in consideration of loans already made and to be made" by the bank to the corporation, to be jointly bound to the bank on all of the corporation's obligations indorsed by either of the signers, there was a sufficient consideration for such agreement.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1444; Dec. Dig. § 327.\*]

## **2. CORPORATIONS (§ 327\*)—LIABILITY OF OFFICERS—INDORSERS—RELATION.**

Under Negotiable Instrument Act (Ky. St. § 3720b), subsec. 31, requiring an indorsement to be made upon the instrument or an attached paper, a separate instrument signed by corporate officers agreeing, in consideration of loans made to the corporation by a bank, to be jointly bound to the bank on the corporation's obligations did not make the signers liable merely as indorsers on the notes.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1444; Dec. Dig. § 327.\*]

## **3. CONTRACTS (§ 153\*)—CONSTRUCTION FAVORING VALIDITY.**

A construction of a written contract from its language which will make it binding upon the parties will be preferred rather than one making it not binding.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. § 153.\*]

## **4. CORPORATIONS (§ 361\*)—ACTIONS AGAINST OFFICERS—SUFFICIENCY OF EVIDENCE.**

In an action on an instrument signed by corporate officers agreeing, in consideration of loans made by plaintiff bank to the corporation, to be jointly bound to the bank on all of the corporate obligations indorsed by the signers, evidence held to show that the instrument was executed for the bank's benefit, and not merely as a memorandum of an agreement among themselves.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1506; Dec. Dig. § 361.\*]

## **5. CONTRACTS (§ 187\*)—ACTIONS—PERSONS SUI JURIS—PERSONS NOT PARTIES.**

A bank could sue on a contract made for its benefit by corporate officers, to be jointly bound, to the bank on the corporation's obligation, even if there was no consideration as to the bank.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

## **6. BANKS AND BANKING (§ 253\*)—OFFICERS—DUTIES.**

The directors of a corporation, such as a national bank, are regarded as trustees for the stockholders, and the strictest performance of their duties as such is required.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 944-949; Dec. Dig. § 253.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by the First National Bank of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Louisville against Charles J. Doherty and another. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded for further proceedings.

Helm Bruce and Bruce & Bullitt, all of Louisville, for appellant. O'Doherty & Yonts, of Louisville, for appellees.

HANNAH, J. In May, 1907, and for some time prior thereto, appellees, Charles J. Doherty and C. C. McClarty, and one George M. Boone (now deceased) were officers and directors of a corporation known as the Paracamph Company; said Doherty being president and said Boone being treasurer of said corporation. All the directors of said Paracamph Company were directors of appellant, the First National Bank of Louisville, and all the directors of said bank were directors of said Paracamph Company. Said McClarty was president of appellant bank, and secretary of the Paracamph Company.

On May 2, 1907, appellant bank owned and held notes of said Paracamph Company aggregating over \$60,000. There were a number of these notes, and they were payable on different dates; part of them bearing the indorsement of Doherty, McClarty, and Boone, and part of them the indorsement of only Doherty and Boone.

On said date there was drawn up and signed by them a writing, which reads as follows (it was written upon letter heads of the appellant bank): "Louisville, Ky., May 2nd, 1907. We, the undersigned, being officers and directors in the Paracamph Company, agree, in consideration of loans already made and to be made by the First National Bank of Louisville to said Paracamph Company, to be jointly bound to said bank on all obligations of the above company indorsed by either one of us, to the extent of seventy thousand dollars (\$70,000). [Signed] Charles J. Doherty. Clint C. McClarty. Geo. M. Boone."

It is contended by appellant bank that this writing was executed and delivered to it as collateral security for the above-stated indebtedness of said Paracamph Company. On the next day after this writing was executed said Doherty, McClarty, and Boone agreed among themselves that they would, from time to time, as the Paracamph Company notes fell due in appellant bank, execute new notes to said bank to be signed by said Paracamph Company, but to bear the indorsement of only one of the three persons named, until each had indorsed one-third in amount thereof, which was done.

The Paracamph Company went into bankruptcy. Appellee Doherty paid the notes which he indorsed under the last-named agreement, but declined to pay those upon which either Boone or McClarty was indorser, and, Boone having died, and his estate being insolvent, appellant bank brought this action against appellees Doherty and

McClarty upon the notes which said Boone and said McClarty had indorsed under the above-stated agreement made after said writing was executed.

Their defense was that the writing of May 2, 1907, was merely a private agreement between themselves, and one with which appellant bank had nothing to do; that it was neither executed nor delivered to appellant bank; that appellant bank never had any interest in said writing of May 2, 1907; that prior to the execution of that instrument Boone and appellee Doherty had been indorsers upon the notes of the Paracamph Company, but that there had been a verbal understanding between them and McClarty that all three of them were to be equally bound on those notes, and that the writing of May 2, 1907, was executed only for the purpose of putting that understanding into writing; that said writing was signed in triplicate, each party thereto taking one copy; that shortly after its execution, and under the subsequent agreement among themselves, as above mentioned, they carried out this understanding by indorsing the notes separately as same matured and were renewed, each of them indorsing one-third of said notes in amount, and thus separating their liabilities, after which the said writing of May 2, 1907, was no longer of any force or effect.

Upon a trial of the case, at the conclusion of the evidence for defendants, the court instructed the jury to find a verdict for defendants, and, from the judgment dismissing the petition, this appeal is prosecuted.

There is nothing in the record to indicate the reason which actuated the lower court in dismissing the petition, and we have been unable to find any more, especially as to McClarty, who is indorser upon one-half of the notes sued on.

H. L. Rose testified for appellant bank that he was discount clerk of said bank at the time of the execution of the writing of May 2, 1907; that as such he had charge of the notes and collateral of said bank; that appellee McClarty, then president of appellant bank, handed the said writing of May 2, 1907, to him, stating to him, on that date, that it was to be held by the bank as security for the Paracamph Company's loans; and that he, the witness, then placed it with the collaterals of said appellant bank, where it remained until called for by the National Bank examiners. Mr. McClarty does not explain that testimony. He testified that: "I put it [the writing] in a little side drawer in my desk. What became of it, I am uncertain; I may have given it to Mr. Rose to keep for me. I am not clear on that point. I cannot recollect; to save my life, I cannot do it." He was then asked: "Was that paper ever at any time held by you for the bank, or delivered by you to the bank for anybody?" and he answered, "No, sir."



Two of the National Bank examiners, Mr. Yerkes and Mr. Johnson, testified that they made an examination of the appellant bank in July and August, 1907, shortly after the execution of the writing in question, and that, when they were criticizing these loans to the Paracamph Company, this writing was exhibited to them by President McClarty as part of the bank's collaterals, and that Mr. McClarty stated to them that this writing was security for the Paracamph loans, and that, if he and Boone were not good, the other (Doherty) was.

It was also shown by appellant bank that on September 1, 1906, a meeting was held of the board of directors of said appellant bank, at which meeting both Boone and McClarty were present, and that at that meeting this writing was brought before said board, and they ordered that it be spread upon the minute book of the directors' meetings, which was done. Mr. James Clark, who was secretary of that meeting of the board of directors, testified that, when the order was made to spread the writing of May 2, 1907, on the minute book, neither Mr. McClarty nor Mr. Boone made objection or any claim that it was merely a private paper, or that it had performed its purpose, or ceased to exist. McClarty neither denies nor attempts to explain this testimony.

[1] It is insisted by appellees that there was no consideration for the writing mentioned, and that appellees, therefore, are not bound by it. They contend that it is clear that the bank did not thereby become bound to make any new loans to the Paracamph Company, nor to renew those already made. But, if this writing was executed to or for the benefit of the bank, and the bank did in fact grant the renewal of those notes, or make new ones on the faith thereof, there was sufficient consideration to support the agreement.

[2, 3] It is also contended by appellees that the writing of May 2, 1907, could only be construed as an attempt to make the signers thereof liable as indorsers, that is, to be jointly bound as indorsers, with the indorser upon all obligations indorsed by either of them, and that they were released from liability, because no notice was given them of the nonpayment of the notes at maturity. There is more ingenuity than logic in this contention. To bind oneself as indorser, one must indorse upon the instrument or upon a paper thereto attached. Subsection 31, Negotiable Instruments Act; Kentucky Statutes, § 3720b. Moreover, there are no words of limitation upon the agreement to be "jointly bound" in said writing of May 2, 1907. As was said by this court in *Berry v. Frisbie*, 120 Ky. 343, 86 S. W. 559, 27 Ky. Law Rep. 724: "Where a written contract can, from the context, be construed so as to be binding upon the parties to it, instead of not binding, the former construction is preferred, as it is

not to be deemed that the parties have been to so much care to do nothing. The deliberateness of entering into a written engagement of itself implies a purpose to become bound by the making of an enforceable agreement, unless the very terms of the paper repel the idea." To give the writing in question the construction contended for by appellees would be to destroy it, and this will not be done.

[4, 5] But it is contended by appellees that the writing of May 2, 1907, was never accepted or adopted by appellant bank, and that it was no party to the consideration therefor, and, for that reason, it cannot sue thereon. The testimony for appellant bank showed that the writing was, by the president of said bank, delivered to the discount clerk, and placed in the collateral files of said bank, that it was presented to and considered by the National Bank examiners in July and August, 1907, that it was thereafter spread upon the minute book of the board of directors, and we think these quite sufficient to refute the claim that appellant bank was an alien to the writing in question. If the contract was made for the benefit of the bank, it could sue thereon, even if it was a stranger to the consideration.

In *Blakeley v. Adams*, 113 Ky. 392, 68 S. W. 393, a deed had been made to a married woman, in which a lien was reserved in favor of a third person, who was not a party to the deed. It is not even shown that the person in whose favor this lien was reserved knew anything about the purpose to reserve the lien in his favor at the time of the execution of the deed. He seems to have been a creditor of grantees, and they wanted his debt secured by their deed. In its opinion this court said: "It is earnestly insisted that, as appellee, John C. Adams, was a stranger to the conveyance from Hazell to the appellant Hettie S. Blakeley, he cannot maintain an action to enforce the lien reserved therein in his favor, and especially as the grantee, Hettie S. Blakeley, was a married woman. The authorities are very conflicting upon the question as to whether a third person can sue on a contract made for his benefit between others, to the consideration of which he is a stranger. The general rule in England and some of the American states, especially in Massachusetts, Michigan, New Hampshire, and Vermont, is that a promise made by one person to another for the benefit of a third person, who is a stranger, will not support an action by the latter. But the generally recognized doctrine in American courts is that a third party, for whose benefit a contract was made between others, may maintain an action on the contract against the promisor [citing authorities]. And in no state has this doctrine been carried farther than in Kentucky. In *Paducah Lumber Company v. Paducah Water Supply Company*, 89 Ky. 340 [12 S. W.

554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536], it was held that, where a water company contracted with a city to furnish a supply of water sufficient for the protection of the property of the inhabitants of the city against fire, an inhabitant of the city, who had suffered loss by fire by reason of the water company's breach of contract with the city, might maintain an action against the water company in his own name, although he was not a party to the contract. And the same principle was recognized by this court in *Smith v. Lewis*, 42 Ky. [3 B. Mon.] 229, in which Lewis executed a writing acknowledging that he had received of Smith certain sugar and coffee, which he promised to deliver to Woolridge & Sweeney. It was held that Smith could not maintain an action of covenant upon the face of this writing for a failure to deliver the articles as stipulated; that the party legally entitled to the interest involved should sue for the breach. And this doctrine was followed in *Allen v. Thomas*, 60 Ky. [3 Metc.] 198 [77 Am. Dec. 169], and *Mize v. Barnes*, 78 Ky. 506, in which it was held that, if, by an arrangement between the vendor and vendee, the latter executed his note for purchases to a third person, a lien could be retained in the deed in favor of such person."

It follows, therefore, that, even if appellant bank was a stranger to the consideration, it could sue on the writing in question.

[6] It must be remembered that the appellees were directors of the Paracamph Company and of appellant bank. Their interests in this transaction were adverse to the bank. As is said in *Morse on Banks & Banking*, § 125: "The high degree of confidence and responsibility resting upon directors of a corporation has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and cestuis que trustent. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations. \* \* \* The law is, and ought to be, very jealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied."

In this case, if the contention of appellees should be upheld, we would have a case where they, being indorsers upon over \$60,000 of the notes of a corporation, which notes were owned and held by a bank, of which they were directors, would obtain their release from approximately two-thirds of that liability by procuring the renewal of notes evidencing their original liability, without their indorsement thereon. There can be no doubt in the mind of any reasonable man that such release from liability could not have been effected except by reason of their connection as directors with said bank, nor

could they, even by reason of their being directors, have obtained the renewals to be continued without their indorsements as originally made had it not been for the execution and delivery to appellant bank of the writing of May 2, 1907.

Moreover, the writing itself contradicts the contention of appellees. It states that they "agree, in consideration of loans already made and to be made by the First National Bank of Louisville to said Paracamph Company, to be jointly bound to said bank, on all obligations of the above company indorsed by either of us, to the extent of \$70,000." It is in fact susceptible of but one construction, and that is the manifest and literal meaning of the language used.

We are therefore of the opinion that the writing of May 2, 1907, was executed for the benefit of appellant bank, that there was sufficient consideration to support the agreement, and we therefore conclude that the lower court erred in instructing the jury to find for defendants, and in not sustaining plaintiff's motion to instruct the jury peremptorily to find a verdict for it against both defendants on the notes sued on.

The judgment is reversed for proceedings consistent with this opinion; the whole court sitting.

#### SHEPHERD v. BANK OF MONTREAL et al. (Court of Appeals of Kentucky. Dec. 16, 1913.)

##### 1. LOGS AND LOGGING (§ 3\*)—SALES OF STANDING TIMBER—TIME FOR REMOVAL.

Where a deed conveying certain standing trees provided that the grantee should have six years in which to remove them from the grantor's land, but that if he should desire to have them stand upon the land for a longer period than six years he should have the right to let them stand until he should desire to remove them, except that the grantor after six years might deaden the trees standing on land which he desired to clear and cultivate, after giving notice to remove them, the grantee's title was not divested by his failure to remove the trees within six years or a reasonable time thereafter; since, while if a contract for the sale of standing timber is silent on the question of removal, but the situation and circumstances show that a severance of the timber from the soil was contemplated, the title may be defeated by a failure to cut and remove within a reasonable time, this rule does not apply where the time for removal is fixed by the parties, and a party can buy growing timber and hold it as land, if he so frames his contract.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

##### 2. COVENANTS (§ 67\*)—SALES OF STANDING TIMBER—NATURE OF GRANTEE'S PROPERTY.

Where trees were conveyed by deed to the grantee, his heirs and assigns, with covenant of general warranty, and the title secured by a lien on the land, and the deed provided that the trees might remain on the land for six years and for so long thereafter as the grantee desired, the trees passed as realty, and the covenant of title would follow them into the hands of any vendee.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 64; Dec. Dig. § 67.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Circuit Court, Breathitt County.

Action by the Bank of Montreal and another against Henry Shepherd. Judgment for plaintiffs, and defendant appeals. Affirmed.

Martin T. Kelly, of Pineville, and Byrd, Nickell & Howard, of Lexington, for appellant. E. S. Jouett, of Louisville, John S. Goodwin, of Chicago, Ill., Hugh Riddell, of Irvine, and G. W. Fleenor, of Jackson, for appellees.

CLAY, C. [1] By deed dated March 24, 1899, and thereafter duly recorded in the Breathitt county clerk's office, defendant, Henry Shepherd, and his wife, Jane Shepherd, sold and conveyed to C. E. Smith, his heirs and assigns, with covenant of general warranty, 314 white oak trees and 68 poplar trees, standing on a small tract of land situated in Breathitt county, Ky. All the trees were branded. The deed contained the following provision: "Said trees being all the trees of the kinds aforesaid standing on said lands and bearing the following marks: MF, thus, MF, being all the green standing merchantable timber of the above-named kinds on said land. The white oak trees being of and above 20 inches in diameter inside the bark three feet above the ground on the upper side, and the poplar trees being of and above 18 inches in diameter inside of the bark three feet above the ground on the upper side with the usual and customary right of way of ingress, egress, and regress for the purpose of cutting and removing said timber with the free right to use such stone and timber as may be necessary to make and construct all such roads, dams and other contrivances as may be necessary for the purpose of removing said timber or any timber the party of the second part may own and desire to remove from the lands herein described or adjacent thereto, and the party of the second part is given the period of six years from and after this date in which to remove said trees from off said lands. But if the party of the second part should desire to have said trees stand on said land for a longer period than six years he shall have the right to let said trees stand on said land until he shall desire to remove them, except that the party of the first part shall after the expiration of said period of six years have the right to deaden such trees as stand on land where the said party of the first part desires to clear and cultivate, first giving the second party or his assigns 12 months personal written notice to remove the said trees off said land where the party of the first part desires to clear or cultivate; and the party of the first part guarantees to the party of the second part the care and protection of said trees hereby conveyed except when it may be necessary to deaden any of said trees on the terms and conditions aforesaid." A lien was also reserved on the

land on which the trees stood to secure the grantee against failure of title to any of the trees. By appropriate mesne conveyances, containing provisions similar to the above, the title to the trees in question passed to the Bank of Montreal. On February 1, 1913, plaintiff the Bank of Montreal brought this action against the defendant, Henry Shepherd, to quiet its title to the trees in question. The Royal Trust Company, as executor of Angus Kirkland, manager for the Bank of Montreal, was joined as plaintiff and united in the action, asking that the recovery be for the benefit of the Bank of Montreal. The petition sets out the various conveyances by which the Bank of Montreal acquired title. Defendant, Henry Shepherd, interposed a demurrer to the petition, which was overruled. Having declined to plead further, judgment was entered in accordance with the prayer of the petition. The defendant appeals.

The sole question presented is: Has the title to the trees reverted to the defendant, the grantor in the deed dated March 24, 1899?

Defendant's position is that the title has reverted to him by reason of the failure on the part of the plaintiff and those through whom it claims to cut and remove the timber in question within six years from the date of sale, or within a reasonable time thereafter. In our opinion, neither one of these propositions can be maintained. By the very deed which defendant executed the grantee is not only given six years within which to remove the trees, but the further right after that time to let the trees stand on the land until he desires to remove them, subject, however, to the right of the grantor to deaden the trees after first giving the grantee 12 months' personal notice to remove the trees off the land where the grantor desires to cultivate. True, we have held that where the contract for the sale of standing timber is silent on the question of removal, but the situation of the parties and the circumstances surrounding them at the time the contract is executed are such as to show that the severance of the timber from the soil was contemplated, the title thereto may be defeated by a failure to cut and remove the timber within a reasonable time. *Ky. Coal & Timber Development Co. v. Carroll Hardwood Lumber Co.*, 154 Ky. 523, 157 S. W. 1109; *Hicks v. Phillips*, 146 Ky. 305, 142 S. W. 394. But that rule has no application to a case where the time for removal is fixed by the parties. In other words, it does not prevent the parties from agreeing on the time for removal. There can be no doubt that a party can buy growing timber with no intention of manufacturing it, and may hold it just as he might buy or hold land, if he so frame his contract. *Hicks v. Phillips*, supra.

[2] Here the trees were conveyed by deed to the grantee, his heirs and assigns, with

covenant of general warranty. The title to the trees was secured by a lien on the land on which they stood. The parties not only agreed that the trees should remain on the land for six years, but for so long thereafter as the vendee desired. Under these circumstances, the trees passed as realty, and the covenant of title would follow into the hands of any vendee. It was so adjudged in the case of *Asher Lumber Co. v. Cornett*, 63 S. W. 974, 23 Ky. Law Rep. 602, in construing a deed containing provisions substantially like those in the deed under consideration. It follows that the trial court properly adjudged that plaintiff was the owner of the timber in question.

Judgment affirmed.

**DERRINGTON v. CHILDERS et al.†**  
(Court of Appeals of Kentucky. Dec. 16, 1913.)

**1. FORCIBLE ENTRY AND DETAINER (§ 6\*)—ELEMENTS—ACTUAL POSSESSION.**

The issue involved in forcible entry is whether the complainant was in the actual possession of the premises, and no question of title or right of possession arises, and it is immaterial whether defendant had a right to enter or not.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 29-32; Dec. Dig. § 6.\*]

**2. FORCIBLE ENTRY AND DETAINER (§ 9\*)—EXTENT OF ACTUAL POSSESSION.**

The possession of a cabin upon a tract having well-marked boundaries was sufficient possession of the entire tract.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 37-51; Dec. Dig. § 9.\*]

**3. FORCIBLE ENTRY AND DETAINER (§ 9\*)—RIGHT OF ACTION—ACTUAL POSSESSION.**

Complainant trespassing upon the actual possession of defendant did not come into possession by that act, and hence could not maintain forcible entry.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 37-51; Dec. Dig. § 9.\*]

**4. TENANCY IN COMMON (§ 28\*)—RIGHT TO POSSESSION AND USE.**

Each tenant in common is equally entitled to the use, enjoyment, and possession of the common property, and neither is entitled to the exclusive use, enjoyment, and possession thereof.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 76-88; Dec. Dig. § 28.\*]

**5. FORCIBLE ENTRY AND DETAINER (§ 9\*)—RIGHT OF ACTION—ACTUAL POSSESSION.**

Complainant, who asserted his claim, not as a joint owner with defendant but as an adverse claimant of the exclusive possession of the land in question, and whose entry thereon without the consent of defendant was a mere trespass, had no such actual possession of the premises as would enable him to maintain forcible entry.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 37-51; Dec. Dig. § 9.\*]

**6. TENANCY IN COMMON (§ 38\*)—ACTION BETWEEN COTENANTS—POSSESSION OF JOINT TENANT.**

The possession of one joint tenant being the possession of the other, and each being equally entitled to the use, enjoyment, and possession of the joint estate, one joint owner cannot maintain forcible entry against his cotenant.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 100-104, 107-118; Dec. Dig. § 38.\*]

Appeal from Circuit Court, Graves County.

Forcible entry and detainer by W. A. Derrington against J. C. Childers and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Hester & Hester, of Mayfield, for appellant. Webb & Weaks, of Mayfield, for appellees.

HANNAH, J. W. A. Derrington, on the 4th day of November, 1912, made complaint before the county judge of Graves county that on March 10, 1911, J. C. Childers and Hence Childers forcibly entered upon, and had since that time forcibly detained from him, a certain 25-acre tract of land in Graves county, which he claimed had been in his peaceable possession at the time of said entry. The county judge thereupon issued a warrant against said J. C. Childers and Hence Childers. The defendants pleading not guilty, a trial was had on November 15, 1912, and defendants were found guilty. They traversed the finding; and upon a trial in the circuit court, at the conclusion of the evidence for defendants, the court instructed the jury to find the defendants not guilty. From an order overruling plaintiff's motion for a new trial, this appeal is prosecuted.

Upon the trial in the circuit court, plaintiff amended the warrant so as to exclude, from from the description of the 25-acre tract therein set forth, a certain three-acre lot in the northwest corner of said tract, being an inclosure around a cabin. The record shows that this amendment was made by verbal motion on the first trial.

It appears from the evidence that the 25-acre tract of land in question was cleared land that had been cultivated and occupied by Steve Childers for some 25 or 30 years next before his death, after which it continued to be held by his children, until finally Mattie Childers, a daughter of Steve Childers, rented it to Walter Clark and Hence Childers, and they moved into the cabin on the tract and were living in it at the time of the issual of the writ. The plaintiff, W. A. Derrington, claiming to have bought the land from George Childers, a son of Steve Childers, entered upon the land in March, 1911, and constructed some fencing, which was so attached to the fences of adjoining landowners as to inclose all of the 25 acres. Appellees, immediately after the erection of this fence, cut part of it down, and proceeded

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 29, 1914.

to plow up the land; and this is the forcible entry complained of by appellant. J. C. Childers was acting as agent for Mattie Childers in the care and management of the property.

[1] It has been held many times by this court that, in forcible entry, the issue involved is whether the complainant was or was not in the actual possession of the premises forcibly entered upon, at the time of said entry; and that no question of title or right of possession can arise; and that it is immaterial whether the defendant had a right to enter or not; that although a person may have the right of entry, and be entitled to the property, he will be guilty of forcible entry if he enters without the consent of the person in actual possession.

[2, 3] The evidence shows that this tract has well-marked boundaries, and the possession of the cabin was therefore sufficient to extend the actual possession of appellees to the entire tract. Appellant when he entered and constructed the fences mentioned, therefore, was a trespasser upon the actual possession of appellees. He did not come into possession by that act, for there cannot be two adverse claimants in possession of the same land at the same time. And never having had actual possession himself, of course he cannot maintain forcible entry against another.

But appellant claims that Steve Childers, and his son George Childers, bought this land together; that each owned an undivided one-half interest therein; that he (appellant) bought George Childers' interest; and that the land at the time of his construction of the fencing was owned jointly by him and the heirs of Steve Childers; that, because of this fact, he had a right to enter thereon; and that the possession thus acquired was an actual possession supporting an action for forcible entry for this ejectment therefrom.

[4] There is no competent proof in the record that Steve Childers and George Childers owned this land jointly, nor is there any competent proof that appellant bought and owns the alleged interest of George Childers. But, assuming that appellant was in fact the owner of an undivided one-half interest in the said land, acquired by him from George Childers, and that he and appellees or those under whom appellees claim were joint owners of the land in controversy herein, the question still is whether appellant ever had an actual possession of said land. Each tenant in common is equally entitled to the use, enjoyment, and possession of the common property; and neither is entitled to the exclusive use, enjoyment, and possession thereof.

[5] Appellant, the proof shows, before he constructed the fencing mentioned, notified appellees that he had bought the land and for them to move off. He thereby asserted

his claim, not as that of a joint owner, but as an adverse claimant to the exclusive possession of the land in question. So, when he thereafter went upon the land and fenced it, his act was not the lawful entry of a tenant in common upon the joint property, but was a mere trespass committed upon the land of another by an adverse and hostile claimant. Appellant therefore never had actual possession of the premises in question. Appellees had a right to withhold their consent to the entry of appellant, in the character of hostile claimant in which that entry was made.

[6] Moreover, if it be granted that appellant was a joint owner of the premises and made his entry as such joint owner, then he cannot maintain this proceeding, for the general rule is that one joint owner cannot maintain forcible entry against his cotenant; the possession of the one being the possession of the other, and each being equally entitled to the use, enjoyment, and possession of the joint estate.

Judgment affirmed.

#### DAVIS v. STRANGE.

(Court of Appeals of Kentucky. Dec. 12, 1913.)

#### 1. JUDGMENT (§ 910\*)—BAR OF JUDGMENT—RIGHT OF SURETY.

Where surety paid a judgment, but his principal made no new promise to him, and made no payment during the period of limitations, the judgment is barred by the lapse of 20 years; it appearing that no execution was issued thereon during that time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1732-1737; Dec. Dig. § 910.\*]

#### 2. LIMITATION OF ACTIONS (§ 141\*)—NEW PROMISE—ESSENTIALS.

In order to toll the statute of limitations, the debtor must, within the statutory period, expressly promise to pay the obligation, or acknowledge it as an existing debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 574; Dec. Dig. § 141.\*]

#### 3. LIMITATION OF ACTIONS (§ 142\*)—ACKNOWLEDGMENT—TO WHOM MADE.

To toll the statute of limitations by acknowledgment, the acknowledgment of the debt must be made to the creditor or to one authorized to act for him, and hence, in an action involving a debt which otherwise would be barred by limitation, evidence of statements made to third persons wherein the debtor admitted his indebtedness is inadmissible.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 575-577; Dec. Dig. § 142.\*]

#### 4. WITNESSES (§ 143\*)—COMPETENCY—DECEASED PERSONS.

A creditor who claimed that a deceased debtor had acknowledged his debt, and made a new promise, thus taking the case out of the statute of limitations, is not a competent witness in an action involving that question, even though he had assigned his claim, for Civ. Code Prac. § 606, provides that no person shall testify for himself concerning any verbal statement or transaction with one who is dead, and subsection 7 provides that the assignment of a

claim by a person who is incompetent to testify shall not make him competent to testify for another.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 619-624; Dec. Dig. § 143.\*]

Appeal from Circuit Court, Edmonson County.

Action by E. M. Harvey against John D. Davis, revived in the name of N. R. Strange, plaintiff's administrator. From a judgment for plaintiff, defendant appeals. Affirmed.

James Garnett and Logan & Hazellip, all of Frankfort, for appellant. Sims & Rodes, of Bowling Green, for appellee.

MILLER, J. In 1884 M. N. Drake recovered a judgment against E. M. Harvey, as principal, and J. W. Woosley, J. M. Massey, and John R. Harvey, sureties, upon a note for \$220. No execution issued upon the judgment in favor of Drake.

On October 1, 1889, John R. Harvey paid \$50 upon the judgment, and again on September 8, 1890, he paid the further sum of \$40.36. In March, 1891, Massey paid \$106 upon the judgment, and on August 14, 1891, Woosley paid the balance owing thereon, amounting to \$100.50.

The note bears the following indorsements: "\$100.50 paid August 14, 1891, by T. J. Woosley." "Credit by cash by John R. Harvey \$50.00 October 1st, 1889. M. N. Drake." "Credit by \$40.36 paid by John R. Harvey this September 8th, 1890. T. C. McIntyre, Atty." "For value received I assign the within note and judgment rendered thereon to T. J. Woosley, J. R. Harvey, and J. M. Massey. August 14th, 1891. M. N. Drake."

In 1912 Woosley assigned his interest in the judgment to Davis for a consideration of \$25, and Massey also agreed to assign his interest in the judgment, under an agreement with Davis to be paid one-half of whatever sum might be collected; but no formal assignment was ever made by Massey.

John R. Harvey had died many years prior to 1912, and no assignment was ever made of his interest to Davis. In the meantime E. M. Harvey, the original debtor, had been discharged in bankruptcy in 1899.

On March 27, 1912, Davis, claiming to be the owner of the judgment by assignment from Woosley and Massey, caused an execution to be issued thereon from the office of the clerk of the Edmonson circuit court, addressed to the sheriff of Warren county, which was, on April 2, 1912, levied upon three tracts of land, containing about 82 acres, near Bowling Green, as the property of E. M. Harvey. This execution was indorsed as follows: "This fi. fa. is issued for the use and benefit of John D. Davis, to whom the judgment has been assigned by T. J. Woosley and J. M. Massey; this judgment having been paid by them. The judgment is subject to the following credits: '\$50.00 paid October 1, 1889; \$40.36 paid

September 8, 1890; and \$75.00 paid about May, 1910. J. V. Carder, C. E. C. C."

It will be noticed this indorsement upon the execution by the clerk makes no distinction between payments made by the sureties to Drake and payments by E. M. Harvey to the sureties, and it adds an additional credit of "\$75.00 paid about May, 1910." It does not show who made this last indorsement, or to whom the \$75 or the \$50 was paid, or by whom they were paid. It is claimed by Massey that the \$75 was paid to him by E. M. Harvey.

On April 30, 1912, E. M. Harvey brought this action against Davis, Drake, and McNeal, the sheriff of Warren county, claiming that the debt against him, by reason of the judgment above referred to, was barred by the statute of limitations, alleging that the credit for \$75 claimed to have been paid by him in May, 1910, as shown by the above indorsement of the clerk upon the execution, was a false credit, that he never paid such sum or any sum at that time, or at any time within the last 20 years, and asking that the sheriff be enjoined from selling his land levied on for the purpose of paying said debt. E. M. Harvey further filed and relied upon his discharge in bankruptcy.

The answer contains a traverse of the allegations of the petition, and further alleges that about May, 1910, plaintiff, E. M. Harvey, willingly and voluntarily paid the sum of \$75 on the judgment, which was duly credited thereon, and that, after the said original judgment and debt were barred by the statute of limitations, said Harvey repeatedly and unconditionally promised to pay said judgment in full.

The plaintiff, E. M. Harvey, died before the trial, and the action was revived in the name of Strange, his administrator.

The case turned upon whether E. M. Harvey had made a new promise by which he had voluntarily agreed, after the debt had been barred by limitation, to pay the same. The circuit court adjudged the debt and judgment were barred by the statute of limitations, and that there was no competent evidence of any new promise having been made by Harvey; whereupon the petition was dismissed, and Davis appealed.

[1] No payment was ever made to Woosley, no new promise was ever made to him, and no execution ever issued upon the judgment in his favor. Without doubt, therefore, the claim of Woosley was barred by limitation, when he assigned his interest in the judgment to Davis on March 22, 1912. Woosley produced the note, with the indorsements thereon as above shown.

Massey testified, over the plaintiff's objection, as follows: "Q. In May, 1910, or thereabout, did E. M. Harvey pay any sum to you on this note and judgment? If so, how much? (Objected to by plaintiff.) A. Away back yonder he paid me \$30, and about

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

three years ago he paid me \$75. Q. About how long ago has it been since he paid you the \$30? A. The best of my recollection it has been 22 or 23 years. Q. Did Harvey make any promise at the time he paid you the \$75 to pay the balance of the judgment? (Objected to by plaintiff.) A. Yes, sir; he said that he had been down in Florida, and had been sick; said that he had an interest in some land down on Barren river—he and Bill Lewis—and he said, 'Massey, as soon as I dispose of that, I will finish paying for it.'

W. H. Houchin testified as follows: "Q. Did E. M. Harvey have a conversation with you at any time in the last three or four years about paying J. M. Massey any money? If you state he did, tell as near as you can what he said. A. He did; he said that he had paid J. M. Massey \$75, and he further said that he was going to pay all of his old debts."

T. C. Ferguson testified as follows: "Q. Did you have a conversation with E. M. Harvey before he brought the suit about some money he had paid J. M. Massey? If so, state what he said. A. Yes; he said he sent for J. M. Massey, and made him a present of a check for \$75. He also said that Massey had paid some security money for him."

This is all the testimony upon the subject of the payment of the \$75 in 1910 by E. M. Harvey and his alleged new promise.

[2] In the early leading case of *Bell v. Rowland's Adm'r*, *Hardin*, 301, 3 Am. Dec. 729, we laid down the rule defining the character of a new promise that is necessary to bind the debtor as follows: "Upon the whole, we are of opinion that the only safe rule that can be adopted, capable of any reasonable degree of certainty, is that, in order to take the case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at that time (coupled with the original consideration), or an express promise to pay it, must be proven to have been made within the time prescribed by the statute. And we are of opinion that the acknowledgments of David Rowland, deceased, proved upon the trial, as stated in the bill of exceptions, were not such express acknowledgments, or promise, as could, by law, take the case out of the operation of the statute. The utmost extent of his acknowledgment was 'that he had once owed the plaintiff, but he supposed his brother had paid it in Virginia (the place where the original transaction took place, in the year 1785), and if his brother had not paid it, he owed it yet.' This was far from an acknowledgment of a debt due, or subsisting at that time, when he insisted the debt had been paid by his brother."

In *Harrison v. Handley*, 1 Bibb, 445, the court, after a careful examination of the question, re-announced the rule as follows: "Mere loose expressions, or vague acknowledgments, will not suffice; the acknowledgment from

which the law is to raise a promise, contrary to the provisions of the statute, must be clear and express, where the mind is brought directly to the point—debt or no debt at the present time, not whether the debt was once an existing demand. That the law will argumentatively make it a debt in present, if the party does not in his acknowledgment say it is not, or prove payment, is a proposition that cannot be granted in opposition to the provisions of the statute."

The rule thus laid down has been consistently followed by this court to the present time. See *Marcum's Adm'r v. Terry*, 148 Ky. 148, 142 S. W. 209, 37 L. R. A. (N. S.) 885, and the cases there cited.

[3] Furthermore, in order for an acknowledgment to take a case out of the statute, it must be made to the creditor, or to some one authorized to act for him; it is not enough if it be made to a stranger. *Truesdale v. Anderson*, 9 Bush, 276; *Hargis v. Sewell*, 87 Ky. 63, 7 S. W. 557, 9 Ky. Law Rep. 920; *Dowell v. Dowell's Adm'r*, 137 Ky. 167, 125 S. W. 283; *Dorsey v. Gunkle*, 18 S. D. 454, 101 N. W. 36, and the note thereto in 5 Ann. Cas. 811.

Under this rule the statements made by Harvey to Houchin and to Ferguson, who were not parties to the transaction, does not satisfy the rule, and they must therefore be excluded.

[4] Furthermore, the only testimony of the payment and the new promise which comes within the rule that the new promise must be made to the creditor is the testimony of Massey; but, clearly, his testimony is incompetent under section 606 of the Civil Code, which provides that no person shall testify for himself concerning any verbal statement of or any transaction with one who is dead when the testimony is given, and subsection 7 thereof, which reads as follows: "The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another." E. M. Harvey being dead, Massey could not testify against him under the general rule, and, under subsection 7 above quoted, he could not testify for Davis, his assignee. *Alexander's Ex'rs v. Alford*, 89 Ky. 105, 20 S. W. 164.

The circuit court should have sustained the objection to Massey's testimony, and, that being excluded, there was no competent testimony showing either the payment of the \$75 in May, 1910, or a new promise to the creditor.

Having reached the conclusion that there was no new promise upon the part of E. M. Harvey, it is unnecessary to consider the question whether a judgment comes within the rule by which a new promise suspends the operation of the statute of limitations and continues the cause of action. That question is considered in *Olson v. Dahl*, 99 Minn. 433, 109 N. W. 1001, 8 L. R. A. (N. S.) 444, 116 Am. St. Rep. 435, 9 Ann. Cas. 252,

with note; 25 Cyc. 1327; and Splide v. Johnson, 132 Iowa, 484, 109 N. W. 1023, 8 L. R. A. (N. S.) 439, 119 Am. St. Rep. 578.

Judgment affirmed.

**MOUNT et ux. v. FOURTH STREET BANK.**  
(Court of Appeals of Kentucky. Dec. 16, 1913.)

**1. HOMESTEAD (§ 199\*) — PROTECTION OF RIGHTS—ALLOTMENT OF HOMESTEAD.**

Where, in a suit to set aside a conveyance from a husband to his wife as fraudulent, the court determined that defendants were entitled to a homestead in the land and appointed commissioners to allot a homestead, but after hearing evidence on exceptions to the commissioners' report concluded that their allotment was insufficient, he could on such evidence make the allotment himself instead of appointing other commissioners to make a new allotment.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 370, 371; Dec. Dig. § 199.\*]

**2. HOMESTEAD (§ 180\*)—FORFEITURE—FRAUDULENT CONVEYANCE.**

Where land was bought and paid for before a debt was created, the fact that a conveyance thereof to the debtor's wife was fraudulent did not defeat their right to a homestead as against such creditor.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 349, 350; Dec. Dig. § 180.\*]

**3. HOMESTEAD (§ 162\*)—ABANDONMENT—REMOVAL FROM HOMESTEAD.**

Where a debtor and his wife were occupying land as a homestead when a creditor sought to have it subjected to the payment of his debt on the ground that a conveyance thereof to the wife was fraudulent, the fact that when the debt was created they were temporarily absent and the land was under lease did not defeat their right to a homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 315-319; Dec. Dig. § 162.\*]

**4. FRAUDULENT CONVEYANCES (§ 269\*)—SUITS TO SET ASIDE—BURDEN OF PROOF.**

One seeking to subject property conveyed by a husband to his wife to the payment of a judgment against the husband on the ground that the conveyance was fraudulent must allege and prove fraud as in other cases.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 789-795; Dec. Dig. § 269.\*]

**5. FRAUDULENT CONVEYANCES (§ 295\*)—SUITS TO SET ASIDE—SUFFICIENCY OF EVIDENCE.**

In a suit to set aside a conveyance on the ground that it is fraudulent as to creditors, though all the direct and positive evidence shows the payment of the consideration stated in the deed, the court is not concluded thereby but may look into all the facts and circumstances discovered by the testimony, reject the positive evidence, and be controlled by the facts and circumstances appearing to be entitled to more weight, especially when the transaction is between a husband and wife, who naturally have a community of interest, purpose, and desire, making it unusually difficult to establish fraud, and is unsupported except by their statements.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. § 295.\*]

Appeal from Circuit Court, Daviess County.

Action by the Fourth Street Bank against J. A. Mount and wife to set aside a conveyance as fraudulent. From a judgment sub-

jecting part of the land conveyed to the payment of plaintiff's debt, defendants appeal, and, from so much thereof as allows defendants a homestead, plaintiff cross-appeals. Affirmed.

W. E. Aud and E. B. Mason, both of Owensboro, for appellants. W. T. Ellis, of Owensboro, for appellee.

**CARROLL, J.** The appellee bank brought this suit attacking as fraudulent a conveyance made by the appellant J. A. Mount to his wife, the appellant N. A. Mount, and seeking to subject the land conveyed to the payment of the balance due on a judgment it obtained against J. A. Mount in 1909 on a debt created in 1906. The petition charged that the conveyance attacked, which was made subsequent to the creation of the debt sued on, was without consideration and made for the purpose of defrauding the creditors of J. A. Mount.

The answer, after traversing the averments of the petition, set up that the defendants were entitled to a homestead in the land. The lower court adjudged that the defendants were entitled to a homestead but subjected the remainder of the tract to the debt of the bank, and from that judgment the defendants prosecute this appeal, and the bank prosecutes a cross-appeal, complaining of the action of the lower court in awarding to the Mounts a homestead.

Preliminary to a discussion of the merits of the case, we may notice the objection raised by counsel for the bank that the lower court committed error to its prejudice in setting aside the allotment of 18 acres, made by the commissioners appointed to set apart a homestead, and allotting as a homestead 27 acres.

[1] It appears that the court, after determining that the Mounts were entitled to a homestead in the land sought to be subjected, appointed commissioners to allot the homestead. These commissioners reported that in their judgment 18 acres of land with improvements was sufficient to set apart as a homestead. To this report exceptions were filed, and, after hearing the evidence introduced on the exceptions, the court reached the conclusion that the number of acres set apart by the commissioners was not sufficient and adjudged that there should be set apart 27 acres.

We think the court in cases like this, where commissioners have been appointed to allot a homestead, has the undoubted right, when exceptions are filed to the allotment and evidence heard, to either diminish the quantity of property set aside or increase it, as the facts may seem to him to justify. If the court concludes that the allotment is too small or too large, he is not limited in the action he may take to the practice of sustaining the exceptions and appointing other

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



commissioners to make a new allotment but may proceed on the evidence heard on the exceptions to make the allotment himself. The action of the commissioners is not conclusive, and the court may, after receiving their report, exercise his own judgment in determining the rights of the parties. The settlement of questions like this is at last merely a question of fact, and the report of the commissioners is only intended for the guidance of the court and to aid it in reaching a correct conclusion.

[2] It is further insisted that the Mounts were not entitled to a homestead. We think they were. The land sought to be subjected was bought and paid for before the debt of the bank was created, and the fact that the conveyance by the husband to his wife was fraudulent did not defeat their right to a homestead as against the bank. *Dowd v. Hurley*, 78 Ky. 260; *Rothwell v. Rothwell*, 104 S. W. 276, 31 Ky. Law Rep. 851; *Kuevan v. Specker*, 11 Bush, 1.

[3] The debtors were occupying the land as a homestead at the time it was sought to be subjected in this action, and although for three or four years between the date of purchase and the institution of this suit, and at the time when the debt of the bank was created, the Mounts were not in the actual occupancy of this land, this circumstance does not affect the homestead right, as during their absence it was under lease, and the evidence shows that their absence was only temporary; there being no permanent abandonment of the premises. *Hansford v. Holdam*, 14 Bush, 210; *Fant v. Talbot*, 81 Ky. 23; *Carter v. Goodman*, 11 Bush, 228; *Nichols v. Sennitt*, 78 Ky. 630; *Hensley v. Hensley*, 92 Ky. 164, 17 S. W. 333, 13 Ky. Law Rep. 426. On the question of fraud in the conveyance, we think the lower court reached a correct conclusion.

[4] In *Guthrie v. Hill*, 138 Ky. 181, 127 S. W. 767, and *Cogar v. National Bank of Lancaster*, 151 Ky. 470, 152 S. W. 278, we held that a creditor of the husband, who seeks to subject property conveyed by the husband to the wife upon the ground that the conveyance was fraudulent, must allege and prove the fraud as in other like cases; but we think from a careful consideration of the evidence that this conveyance was fraudulent, at least in the sense that it was without consideration. The land in controversy was purchased by and conveyed to the husband in 1902. In 1906 the debt to the bank was created, and in March, 1907, Mount conveyed the land to his wife for the recited consideration of \$1,500 in cash.

Counsel for the bank took the depositions of Mount and his wife, and each fully corroborated the statements of the other. Mrs. Mount testified in substance that in 1906 she gave her husband \$500 in cash, which he needed in connection with the saloon business he was then engaged in, but did not take

from him any note or other evidence of the loan. Her testimony as to the source from which she received this \$500 is contradictory and inconsistent. It is in effect that 20 or more years before she advanced it to her husband she received it from her mother's estate or, at any rate, from some of her mother's people, and kept in her house in a black satchel during all of these years the identical money so received until she lent it to her husband in 1906. She further testifies that in the early part of 1902 her husband, out of his earnings as workhouse keeper of Owensboro, gave her \$1,000 in gold, and she put this gold in the satchel with the \$500 and kept the gold there until the day the deed was written, when she paid to her husband the same \$1,000 in gold that he had given her in 1902, and this money, together with the \$500 advanced to him in 1906, made up the \$1,500 paid by her for the land. Another witness said he was present when the \$1,000 was paid, but we attach little weight to the evidence of this witness, as he only knew what was told him by Mount. It is true that both Mount and his wife testify that the wife paid him, in the manner and at the time stated, \$1,500 for the land, but there are many convincing circumstances disclosed by their evidence tending to impeach the verity of their statements dealing directly with these transactions, and these circumstances, together with the inconsistencies in the evidence of Mount and his wife, leave the impression that their purpose was to defeat the collection of this debt that they both knew was in existence when the conveyance to the wife was made.

[5] It is very true that so far as the direct and positive evidence is concerned, and looking to that alone, it shows that the wife paid to the husband the consideration stated in the deed; but, in an effort to get at the truth and do justice in cases like this, courts are not concluded by the positive evidence of witnesses but may look into all the facts and circumstances discovered by the testimony and, after weighing it all, feel at liberty to reject the positive declarations and be controlled by other facts and circumstances appearing to be entitled to more weight. Especially should this rule prevail when the transaction assailed as fraudulent occurs between husband and wife and is unsupported except by their statements. Reasonably and naturally they have a community of interest, a community of purpose, and a community of desire. What one does, the other will do; what one wants, the other will agree to; and declarations made by one will generally be corroborated by the other.

These ever-present conditions, existing as a result of the marital relation, make it unusually difficult to establish that purely private and personal transactions between husband and wife are fraudulent or without consideration; and if the courts were bound to accept as true their declarations as to what

occurred, without feeling free to look behind the statements and see, in the light of the surrounding circumstances, what actually happened, the creditors of the husband could rarely succeed in showing the real nature of the transaction or the fact that it was arranged to defeat his creditors. So that, while in this class of cases the burden of proof is on the creditor to show the fraud complained of by him, this rule of evidence will not furnish a shield behind which husband and wife may hide property to which the creditor is entitled if he produces facts and circumstances sufficient to overcome the presumption that puts upon him the burden of showing that the transaction assailed was tainted with fraud. *Stix v. Calender*, 155 Ky. 806, 160 S. W. 514.

Wherefore the judgment on the original and cross appeal is affirmed.

#### CITY OF NEWPORT v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. Dec. 12, 1913.)

##### 1. TAXATION (§ 47\*)—FRANCHISE TAX—DOUBLE TAX.

Ky. St. § 4077, requires a railroad to pay an annual franchise tax to the state and also a local tax thereon to any city in which its franchise may be exercised, and sections 4078-4080, provide that the corporation shall report to the State Auditor its indebtedness and the interest paid thereon, and the amount of its stock and the dividends paid thereon, from which the state board shall capitalize its total earning power, including all its property, tangible and intangible, and deduct the assessed value of its tangible property to ascertain the value of its franchise. A city assessed a street railroad's tangible property at \$366,900, on which tax was paid, and thereafter the state board, in fixing the franchise tax therein, deducted the value of its tangible property therein as fixed by the county assessor, which was \$36,840 less than the city's assessment thereon. The company tendered a franchise tax to the city, based on the deduction of the city's assessment of its tangible property from the capitalization. *Held*, that the amount tendered was all that the city could demand, since to have required the road to pay the tax assessed by the state board would have been double taxation to the extent of \$36,840, and illegal.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 104-114; Dec. Dig. § 47.\*]

##### 2. TAXATION (§ 117\*)—NATURE OF FRANCHISE TAX.

A franchise tax is not a license or occupation tax, but simply an ad valorem or property tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 214; Dec. Dig. § 117.\*]

##### 3. TAXATION (§ 463\*)—FRANCHISE TAX—APPLICATION FOR CORRECTION.

Under Ky. St. §§ 4077-4080, requiring a railroad to pay a franchise tax for the valuation thereof, and section 4083, providing that within 30 days after the value of the franchise is determined, the State Auditor shall certify the amount of the tax in counties, cities, etc., to the county clerk, a railroad claiming an over-assessment of its franchise tax in a city was not required to apply, within 30 days, to the

state board for correction, since before the valuation became final it had no means of knowing what the assessment would be.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 824-827; Dec. Dig. § 463.\*]

Appeal from Circuit Court, Campbell County.

Action by the city of Newport against the South Covington & Cincinnati Street Railway Company. From a judgment for defendant on overruling a demurrer to the answer, plaintiff appeals. Affirmed.

Otto Wolff, of Newport, for appellant.  
Matt Herold, of Newport, for appellee.

SETTLE, J. The State Board of Valuation and Assessment, looking to its taxation for the year 1911, fixed the value of the appellee South Covington & Cincinnati Street Railway Company's franchise in the appellant, City of Newport, at \$122,344. This valuation was certified by the Auditor of State to the clerk of the Campbell county court, and by the clerk to the appellant, city, whereupon the latter made out the city's bill for the franchise tax, upon a levy of \$1.40 per \$100, amounting to \$1,712.82, the payment of which was demanded of appellee. It appears that in the same year the assessor of Campbell county had assessed, or fixed, the value of appellee's tangible property in the city of Newport at \$330,060, and, by the city's assessor, the value of the same property was for the same year fixed at \$366,900, which exceeded the county assessor's valuation by \$36,840; but the state board, in arriving at the value of appellee's franchise in the city of Newport, deducted the valuation of appellee's tangible property, as fixed by the county assessor, from its total capitalization. In the meantime, and before the state board fixed or certified the value of its franchise, appellee paid to the city the tax on its tangible property therein on the city assessor's valuation of \$366,900, so, when the city demanded the tax of \$1,712.82 on its franchise, it declined to pay same, but tendered to the city \$1,197.08, this amount being the tax on its franchise in the city for 1911, as certified by the State Auditor, less \$36,840, the excess of the city's valuation of its tangible property, above that made of it by the county assessor. The appellant refused to accept, in payment of appellee's franchise tax, the \$1,197.08 thus tendered by the latter, and brought against it this action to recover the \$1,712.82 contained in the tax bill. Appellee's answer set up the excess of the city's valuation of its tangible property over the amount deducted by the state board; alleged the payment by it of the tax on its tangible property at the city's valuation, and the tender of \$1,197.08 in satisfaction of the tax it claimed to owe the city on its franchise, which amount, upon the filing of the answer, it paid into court. A demurrer to the answer

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was filed, which the court overruled, and, the city refusing to plead further, judgment, requiring it to accept the \$1,197.08 tendered by appellee, was entered. The city, being dissatisfied with the judgment, has appealed.

The ruling of the circuit court was based upon the theory that, to have compelled appellee to pay the tax bill of \$1,712.82 demanded by the city would have taxed it twice to the extent of \$36,840, the excess of the city's valuation of its tangible property in the city over the state and county's valuation of the same property.

[1, 2] A railway company is one of the corporations that is required, by section 4077, Kentucky Statutes, to annually pay a tax on its franchise to the state, and also a local tax thereon to the county, incorporated city, town, or taxing district where its franchise may be exercised; the State Board of Valuation and Assessment, composed of the Auditor, Treasurer, and Secretary of State, being required to fix the value of such franchise, as provided in that and succeeding sections down to 4080, inclusive. Briefly stated, the corporation must, among other things, report to the State Auditor the facts upon which the valuation of its franchise is based. From these reports the state board capitalizes the total earning power of the corporation, say on a 6 per cent. basis, and this capitalization, called the "capital stock" of the corporation, being arrived at, there must be deducted from it the assessed value of all tangible property of the corporation, and the remainder thus ascertained constitutes the value of its franchise subject to taxation. The entire capitalization must, and does, include all the property of the corporation, be it bonds, stock, real estate, notes, accounts, rails, power house, cars, or any other property, tangible and intangible, and if the tangible property upon which the corporation pays taxes were not deducted from the total capitalization, there would be double taxation, because this capitalization represents the very property (tangible) upon which the taxes are already paid; therefore the assessed value of the tangible property is deducted from the gross or total capitalization, and the remainder constitutes the value of the franchise. So, where the capitalization is fixed at \$1,500,000, which includes tangible property assessed at \$500,000, this would leave the value of the franchise \$1,000,000. If the board deducted only \$300,000, although the assessment is \$500,000, the company would pay taxes on \$1,700,000, or on \$200,000 more than its total property is valued at.

As the statute does not provide for any report by the corporation of the assessed value of its tangible property, either as assessed by the county assessor or any municipal authority, but only of the amount, kind, where situated, assessed, or liable for taxation, all it can do is to report where it is assessed or liable for taxation and give

its fair cash value. So, the deduction of the assessed value of the tangible property from the total capitalization made by the state board is based on the report of the county clerk to the State Auditor of the local assessment made of the tangible property; and the county clerk of Campbell county, in reporting the assessed value of appellee's tangible property, seems to have taken the assessment of its value as made by the assessor of the county, instead of that made by the assessor of the city of Newport. It is therefore apparent that if the municipality assesses, as was done in this case, the tangible property subject to taxation higher than does the county assessor, and the assessment of the latter is used by the state board in fixing the value of the franchise, it follows that the city's assessment increases the total or aggregate value of the company's capitalization or capital stock to that extent; and, had the state board in this case deducted the higher assessment made by the city from the total capitalization, the value of the franchise would have been fixed at a lower amount than it was.

As appellee had already paid to the appellant city the tax on its tangible property as valued by the city assessor, if it had paid the tax of \$1,712.82 demanded by the city upon its franchise, it would have been double taxation to the extent of \$36,840, the excess of the city's assessment of its tangible property over the valuation given it by the state board in fixing the value of its franchise. In this view of the matter, the \$1,197.08 tendered appellant by appellee was all the former was entitled to as a tax on the latter's franchise for the year 1911. A franchise tax is not a license or occupation tax, but simply an ad valorem or property tax; and to impose a tax on the capital stock of the corporation, and also upon the property in which its capital stock is invested, would be double taxation and illegal. Our condemnation of double taxation is stated in *Commonwealth v. Walsh's Trustee*, 133 Ky. 103, 117 S. W. 398, as follows: "Throughout the whole scheme of taxation adopted by this state there is an evident purpose to avoid double taxation, not alone in not taxing the same property twice in the same year for the same purpose, but as well in not taxing the same thing, *whatever its form*, twice in the same year for the same purpose. Double taxation is \* \* \* oppressive, and, where it is imposed upon some classes of property and not upon others, works an inequality that is fundamentally vicious."

The question here involved seems to have been directly settled in *Owensboro Water Co. v. City of Owensboro*, 75 S. W. 268, 25 Ky. Law Rep. 434. The action was brought to enjoin the city of Owensboro from selling the waterworks plant under a levy for franchise taxes for the years 1893 and 1894. The water company had previously brought an-

other action against the city for water rents, which it asked to offset against the latter's claim for taxes. The actions were consolidated, the claim for water rents allowed and offset against the taxes, and judgment rendered against the water company for the taxes credited by the amount of the water rents, with direction to sell the waterworks plant for the amount of taxes thus left due the city. On the appeal, among other grounds urged for a reversal, was the claim that the city was not authorized to levy a franchise tax for 1893; that the water company was illegally charged with interest on the taxes due the city, and that to allow the entire tax claim of the latter would be doubly taxing the water company because of the valuation by the city of its tangible property for the year 1893 at a sum greater than that at which it was fixed by the state board in valuing its franchise, upon which overvaluation the water company had paid the tax. With respect to the last contention, which presents the only question bearing on the instant case, we in the opinion said: "For one year the city valued the tangible property of the corporation at \$15,000 more than it was assessed at by the state board. As the water company has paid taxes on this \$15,000 in its tangible property, the amount should be deducted from the franchise tax for that year, as otherwise it would pay to this extent twice on the same property."

In *City of Louisville v. Louisville Railway Co.*, 118 Ky. 534, 81 S. W. 701, 84 S. W. 535, 26 Ky. Law Rep. 378, 27 Ky. Law Rep. 141, the same principle, in effect, was recognized. In that case, the street railway company continued to pay the sum of \$50 as a tax or license on each of its cars, under an ordinance or law enacted before the adoption of the present Constitution and the enactment of the statutes thereunder, but no such tax was required by any law or ordinance enacted subsequent to the adoption of the new Constitution. It was, however, held by us that, while the city was entitled to recover certain taxes imposed under the new law, the railway company was entitled to a credit for such payments of the \$50 tax on each car as were made by it after the new law, which repealed the former law, became effective, and although the opinion in thus holding does not use the term "double taxation," it is patent that a contrary ruling would, in effect, have subjected the property of the railway company to double taxation.

Appellant relies upon *Southern Ry. Co. v. Coulter*, Auditor, 113 Ky. 657, 68 S. W. 873, 24 Ky. Law Rep. 203, as sustaining its contention that the credit allowed appellee by the circuit court on its franchise tax was not permissible. It does not appear that any such question was raised in that case. One of the questions decided therein was that sections 4077 to 4081, Kentucky Statutes, which impose a tax on the franchise of rail-

road and other corporations to the state, also a local tax thereon to the various counties, cities, towns, and taxing districts where such franchise is exercised, and provide that the State Board of Valuation and Assessment shall fix the value of the franchise for that purpose, were not unconstitutional. Another question decided was that the valuation of the franchise of each railroad corporation must be made by the State Board of Valuation and Assessment and not by the Railroad Commission. And yet another question, that though section 4081, Kentucky Statutes, provides that when the lines of a railroad corporation extend beyond the limits of the state, the franchise of such corporation "shall be liable to taxation in each county, incorporated city, town or district, through or into which said lines pass, or are operated, in the same proportion that the length of the line in such county, city or district bears to the whole length of line in the state, less the value of any tangible property assessed or liable to assessment, in any such county, city, town or taxing district," the value of the entire tangible property having been deducted in arriving at the value of the franchise for the entire state, the value of the tangible property in each county and city is not to be again deducted in arriving at the local taxation. Other questions were also decided in the opinion, but the one last mentioned is the only question passed on that seems to be at all germane to the question of taxation involved in the case at bar, and it, as will readily be seen, does not sustain the proposition urged by appellant; for here there was no second deduction of the value of the appellee's tangible property, but merely a ruling by the circuit court that appellee could only be taxed on its franchise, according to its value as fixed by the State Board of Valuation by deducting from its entire capitalization the assessed value of its tangible property, as made by the assessor of Campbell county, credited by the tax it had previously paid to the city upon the excess of its valuation of such tangible property over that of the county assessor adopted by the state board.

[3] We are unable to agree with appellant's counsel that appellee should have applied to the State Board of Valuation and Assessment for a correction of the difference in the valuation of its tangible property, as made by the county assessor, and that made by the assessor of the appellant city, in order to obtain a rectification thereof. It is contended by counsel that this application should have been made within the 30 days after appellee received notice of the tentative valuation of its franchise by the state board. This contention disregards the fact that the tentative valuation is not the valuation of the franchise in any particular city, town, or taxing district, but is the valuation of the entire or whole franchise, wherever exercised

in this state, arrived at by deducting from the entire capitalization of the corporation the value of the whole of its tangible property. It was only in 30 days after the final determination of the value of the franchise is made, as provided by section 4063, that the State Auditor can certify to the respective county clerks the amount or portion of the whole franchise, for which the corporation is liable for taxation in the counties, cities, towns, and taxing districts, respectively. It is patent, therefore, that there is no statutory provision for the state board to consider anything affecting the value of a franchise in any particular city, town, or taxing district, apart from the value of the entire or whole franchise; nor any provision for the certification or apportionment provided, until 30 days after the valuation of the franchise becomes final. So, it is apparent that appellee could not complain to the state board before the valuation became final, as it had no means of knowing what the apportionment or certification would be, until the 30 days after the valuation became final.

We are likewise unable to see that the case of the Commonwealth v. C. & O. Ry. Co., 122 Ky. 283, 91 S. W. 1137, 28 Ky. Law Rep. 1201, cited by appellant's counsel, has any application to the question under consideration. That was a case in which the state board simply omitted to apportion and certify the value of the railroad company's franchise in a turnpike taxing district; and there was an attempt on the part of the sheriff of the county to have the omitted franchise listed for taxation by proceedings in the county court, as in the case of other omitted property. But we held that the proceeding instituted by the sheriff was unauthorized, and that the state board should have been mandamus by the taxing district to apportion and certify to it the value of the railroad company's franchise in the district, and, furthermore, that this remedy was exclusive.

As, in our opinion, the judgment appealed from properly determined the rights of the parties, it is affirmed. Whole court sitting.

#### BURKS v. DOUGLASS et al.†

(Court of Appeals of Kentucky. Dec. 16, 1913.)

#### 1. FRAUDS, STATUTE OF (§ 138\*)—CONTRACT FOR THE SALE OF REAL PROPERTY—ORAL CONTRACT—MONEY PAID—RECOVERY—DEFENSE.

It was no defense to an action to recover money paid as part of the purchase price, under a parol contract for the sale of land, that plaintiff had abandoned the purchase.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 327-333; Dec. Dig. § 138.\*]

#### 2. LIMITATION OF ACTIONS (§ 28\*)—RENT OF REAL PROPERTY.

A claim for rent of real property for a period prior to August 28, 1905, was barred by

limitations, and was not recoverable in an action instituted March 27, 1911.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 134, 135, 142; Dec. Dig. § 28.\*]

#### 3. VENDOR AND PURCHASER (§ 203\*)—INJURIES TO REAL PROPERTY.

Defendants, after purchasing a house and lot from plaintiff, the house consisting merely of a leaky cabin, moved a better house onto the lot, and tore down the old one, using the lumber that was of any value in building an outhouse and repairing fences. Held, that defendants were not liable for tearing down the old house, though the new one was later removed from the lot, but without defendants' permission.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 398, 402, 420-422; Dec. Dig. § 203.\*]

#### 4. NEW TRIAL (§ 167\*)—ACTION—GROUNDS.

An action for a new trial was properly dismissed where it appeared that plaintiff had no defense to the original action.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 246-249; Dec. Dig. § 167.\*]

Appeal from Circuit Court, Hickman County.

Petition by G. H. Burks against Malissa Douglass and others to vacate and set aside a judgment in favor of defendant Douglass against plaintiff and to obtain a new trial. From an order denying such relief, plaintiff appeals. Affirmed.

J. Kelly Smith, of Clinton, for appellant. R. B. Flatt and Bennett, Robbins & Thomas, all of Clinton, for appellees.

HANNAH, J. On December 2, 1909, Malissa Douglass filed a suit in equity against G. H. Burks in the Hickman circuit court, alleging that on August 28, 1905, she purchased from the said Burks by verbal contract a certain house and lot in Columbus, Hickman county, Ky., for the agreed price of \$150; that he placed her in possession of said premises; that she had paid him the sum of \$70 on said purchase price; that said Burks had made a pretended sale of said property to one Lindsey Jackson, who was setting up claim thereto. She prayed for specific performance of the contract, or, in lieu thereof, for judgment against said Burks in the sum of \$70, and that same be enforced as a lien upon said property. On May 21, 1910, defendant Burks filed a demurrer to the petition, and on October 19, 1910, a judgment by default was rendered against defendant Burks, adjudging plaintiff Malissa Douglass a lien on said property in the sum of \$70; the judgment containing the necessary order for the enforcement thereof by sale of the property. When said property was sold, under said judgment and order of sale, appellant, Burks, became the purchaser, and executed bond for the purchase price thereof to the master commissioner of the court. Appellant then filed exceptions to the said commissioner's report of sale, upon the ground that he had employed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—15

†Rehearing denied February 17, 1914.

J. W. Bennett, an attorney, at Clinton, Hickman county, to represent him in said action, and had paid him a fee therefor; that he (appellant) was present at the first term of said court after the service of the summons in said action, and his attorney had then filed a demurrer to the petition, no further steps being taken at that term; that during the next succeeding term of said court he, said Burks, was at his home in Paducah, Ill and unable to attend court; that the attorney whom he had employed and paid negligently failed to make defense of said action in his behalf; and that the judgment was rendered against him by default. The exceptions to the report of sale were overruled. On March 27, 1911, said Burks filed in the Hickman circuit court a petition for vacation of the judgment above mentioned, under section 518 of the Civil Code, and for a new trial of said action, upon the grounds of accident and unavoidable casualty as the result of the negligence and failure of his employed and paid counsel. He further alleged that he has a good defense to the action. The allegation setting out his defense is as follows: "Now plaintiff says that he has a good and sufficient defense to the said action of Malissa Douglass, plaintiff, v. G. H. Burks and Lindsey Jackson, defendants, to wit: That the said Malissa Douglass is indebted to this plaintiff in the sum of \$270 as follows, to wit: Seven years rent at \$2.50 per month, \$210; total destruction of house, \$50; destruction of fruit trees, \$10—making a total, as stated, of \$270, all of which sum the said Malissa Douglass rightfully and justly owes this plaintiff. Plaintiff further denies that he owes this defendant anything, either in the sum of \$70 or any other sum, and alleges that she is largely indebted to him, and that she came to him, and of her own accord relinquished the property on which the said \$70 had been paid, stating that she could make no further payment thereon, and thereafter abandoned and left said property, then in debt to this plaintiff as above set out." Issue was joined on this petition, and proof taken. Upon submission, the chancellor dismissed the petition; the judgment dismissing same is by this appeal sought to be reversed.

To vacate a judgment and obtain a new trial, there must be (1) grounds for the vacating of the judgment, and (2) the defendant applying for such relief must establish that he has a valid defense to the action. Appellant alleges that he employed an attorney to represent him in the case, and that said attorney neglected to do so; that appellant was absent on account of illness; and that judgment went against him by default. On this question, the evidence is conflicting. The attorney swears that he was not employed in this case, but that the employment was to defend an action appellant was expecting the aforesaid Lindsey Jackson to enter against him. He says that he went to

the clerk's office with appellant, and asked the clerk whether such a suit had been filed, and that the clerk gave them the papers in this case, and that appellant then said that this was not the case that he had employed him in. Appellant contradicts the attorney in this, and introduced a witness who heard part of the conversation, and who corroborates appellant in part. The record shows that a demurrer was filed to the petition; but there is no evidence showing who presented said demurrer to be filed, and the evidence shows that said demurrer has been lost out of the record.

[1] The petition in the original action sets out in full three receipts for \$70 paid on said house and lot, each signed by appellant, and each showing that same was a payment on a house and lot. Appellant does not deny the contract of sale, but seeks to avoid it by alleging that appellee "relinquished the property on which the said \$70 had been paid, and abandoned and left the property." This allegation is no defense to an action to recover back the money paid on a verbal contract for the sale of land. The contract was not enforceable, and appellee had a right to elect to abandon the property and sue for the money paid.

[2] It will be seen that appellant, in his petition, fails to show when any of the items set out in his account against appellee became due. Appellee, in an amended answer, pleads and relies on the statute of limitations to all of said items.

The item of \$210 was for rent of the house and lot in question herein, and before the sale thereof by appellant to appellee. Appellee took possession under said sale on August 28, 1906, and appellant's petition was filed March 27, 1911, 5 years and 7 months thereafter, so it will be seen that this item was barred by limitation. Appellee swears that she did not owe him any rent, and it is not reasonable that appellant would sell her on credit property for \$150 on which she then owed him \$210 for rent.

[3] On the \$50 item "for total destruction of a house," the evidence shows that appellee, while she lived on this lot, under an arrangement with her brother-in-law Lindsey Jackson, moved a better house on this lot than the one she had bought from appellant, and that she tore down the old one (a leaky cabin), and used the lumber that was of any value whatever in building an outhouse, and in repairing the fencing, leaving a better house on the lot than the one received. It is true the evidence shows that this brother-in-law, after appellee went away, moved the house off of this lot; but under the contract with her he had no right to do so, and appellee is not chargeable with his action in that respect.

The \$10 item is for destruction of fruit trees, and there is no evidence that appellee destroyed any of the fruit trees. She swears

that a storm destroyed them, and the only evidence to the contrary is that of one witness who swears that a son-in-law of appellee split some limbs from a peach tree while he was getting some peaches, and another witness who says he saw some of the family cutting some of the limbs of the apple trees for wood, and that all the trees were worth from \$5 to \$10, and all of this was done while appellee Malissa Douglass owned the lot.

[4] So from the evidence in the case it is evident that the lower court concluded that appellant had no defense to the original action, and, for that reason, dismissed appellant's petition for a new trial. We find no error in this conclusion; and the judgment is affirmed.

### BASSETT v. LUSH.

(Court of Appeals of Kentucky. Dec. 16, 1913.)

#### 1. PLEADING (§ 129\*)—ADMISSIONS BY FAILURE TO DENY.

Where, in an action for trespass, defendant alleged ownership of a tract of land and that a part of his boundary was within the boundary alleged to be owned by plaintiff, which allegations were not denied, no issue was raised by the pleading as to whether the tract claimed by both parties was covered by defendant's deed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

#### 2. DEEDS (§ 41\*)—DESCRIPTION OF PROPERTY—REFERENCE TO GRANTOR'S DEED.

Where a deed, though containing different calls than those contained in the deed to the grantor and earlier deeds, referred to the land as the same land conveyed to the grantor by a deed dated and recorded as therein recited, the tract conveyed was the same tract conveyed to the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 84; Dec. Dig. § 41.\*]

#### 3. ADVERSE POSSESSION (§ 103\*)—EXTENT OF POSSESSION.

Where an interference between a grant of land and an earlier patent was well known, no one had ever lived thereon or occupied it, and for many years it had been a disputed question whether it was a part of such patent or embraced in an exception therein, an occupant of the earlier grant under a title bond, claiming under a deed embracing the interference, who, though living outside of the interference, cleared land, erected fences and cultivated land within it, had possession of the whole interference.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590-594; Dec. Dig. § 103.\*]

Appeal from Circuit Court, Grayson County.

Action by E. R. Bassett against Leo Lush. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

G. W. Stone, of Leitchfield, and M. M. Logan and Ora E. Hazelip, both of Frankfort, Ky., for appellant. J. M. Campbell and W. O. Jones, both of Leitchfield, for appellee.

TURNER, J. This is an action by appellant against appellee wherein he alleges he is the owner and in possession of 306 acres of land in Grayson county, and that appellee had wrongfully entered upon it and cut timber. Appellee in his answer denied that appellant was either the owner of or in possession of the whole tract of land described in the petition, and set up in himself ownership of 127 acres, more or less, and further alleges that a part of his boundary so described was also within the boundary alleged to be owned by plaintiff, to wit, a strip 74 poles wide on the southwest end of his (appellee's) above-described tract; and appellee further set up title by adverse possession for the statutory period.

The tract of land in question embraces about 40 or 45 acres, and the controversy seems to have originally arisen out of whether or not it was embraced within a certain exception in what is known as the old May patent and is the small tract shown by the map on file as the "Collard interference," and was so designated on the map made by appellant's vendor prior to his purchase, and to which map he had access before his purchase. The case was transferred to equity and tried before the chancellor, who dismissed the plaintiff's petition, and he appeals.

It is appellant's contention that he has shown a complete chain of title from the commonwealth to himself; but in our view of the case this is immaterial. Appellee claims title by possession, holding under color of title by himself and his vendors, beginning with a deed from Jarboe to Sims in 1879. It is earnestly insisted for appellant that appellee's deed from his immediate vendor (Collard) does not embrace the land in controversy, although this question seems to have been made in this court for the first time. It is conceded, however, by appellant's counsel that the land was embraced in the deed from Jarboe to Sims and from Sims on down to Collard, appellee's immediate vendor; but it is claimed that in Collard's deed to appellee the calls were different and do not embrace it.

[1] It is sufficient to say in answer to this contention that appellee's answer in the second paragraph thereof expressly set up the fact that a portion of the boundary which he claims was within the boundary claimed by the plaintiff, and in a general way refers to the interference as a strip 74 poles wide on the southwest end of his (appellee's) tract, evidently referring to the "Collard interference," and this allegation remains undenied, so that there is in the pleadings no issue as to whether this interference is embraced within appellee's deed.

[2] Not only so, but in Collard's deed to appellee Collard expressly refers to the land conveyed as the same land conveyed to him by Layman by deed dated the 13th of May, 1898, and recorded in a certain deed book at a cer-

tain page, and a reference to the deed from Layman to Collard shows that it has the precise description contained in the deed from Jarboe to Sims. From this there would appear to be no doubt that the tract of land conveyed by Collard to appellee was the same tract of land conveyed by Jarboe to Sims and by Layman to Collard, although the calls may not be the same.

This action was instituted in July, 1911. At that time there was inclosed by fence, cleared, and in cultivation about 16 or 18 acres of this Collard interference. The balance of it was outlying woodland, but the boundary was marked by well-defined lines. Of the 16 or 18 acres of cleared land Collard, who had owned it after 1898, had cleared and cultivated about 8 or 10 acres on the interference, and the remaining 8 or 10 acres had been cleared and cultivated for a number of years prior to 1898.

[3] After the date of the deed from Jarboe to Sims in 1879, and about 1889, Ben Kennison, claiming under a title bond from Layman, who claimed under a title bond from some of Sims' vendees, took possession of the Collard house and, as previously said, exercised acts of ownership over the Collard interference. He not only cut and hauled timber from the Collard interference but he cleared and cultivated 8 or 10 acres of land on it and actually fenced it. So that, if Kennison's possession of the inclosed part of the Collard interference was sufficient to give him possession of the whole of the interference, then appellee's claim of adverse possession must be sustained.

The Collard interference was well known; no one had ever lived upon or occupied it; and for many years it had been a disputed question whether or not it was embraced in an exception out of the May patent or whether it was a part of the May patent. Under these circumstances, Kennison in 1889, although living in a house outside of the interference, cleared land, erected fences, and cultivated land within the interference. Such acts are certainly open and notorious and could have had no other effect than to notify the whole world that he was claiming it.

It has been consistently held by this court, beginning with the early case of *Fox v. Hinton*, 4 Bibb, 559, that, where there is an interference or lap, the possession of one who enters, even under a junior patent, upon a part of the lap will be deemed to extend to and be coextensive with the whole interference. Under the rule laid down in that case there can be no doubt that Kennison, who claimed under the deed from Jarboe to Sims, which embraced the whole of the Collard interference, when he cleared and fenced a part of that interference, from that time had possession of it all. *Overton v. Perry*, 129 Ky. 415, 111 S. W. 369, 33 Ky. Law Rep. 931; *Continental Realty Company v. Harvey*, 151 Ky. 705, 152 S. W. 755.

There is some evidence in the record that Kennison, during his occupancy of the Collard house, did not claim to own the interference; but it is very unsatisfactory and cannot be given much weight in the face of the fact that he actually cleared 8 or 10 acres within the interference and fenced and cultivated it.

We have concluded that from the time Kennison made this entry on the interference and actually cleared and fenced this land he had possession of the whole of the interference, and that appellee and his vendors have been in actual adverse possession of it since, and that he therefore has a good possessory title.

Judgment affirmed.

#### LEXINGTON & E. RY. CO. v. BAKER.

(Court of Appeals of Kentucky. Dec. 16, 1913.)

##### 1. DAMAGES (§ 111\*)—INJURIES TO REAL PROPERTY—RESTORATION.

Where plaintiff's house and barn were injured as the result of defendant's blasting operations, the measure of damages was such a sum as was sufficient to restore the property to its condition prior to the injury, and such further sum as would compensate plaintiff for the diminution in value of the use of the property and not the difference in value of the house and barn before and after the injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 274-278; Dec. Dig. § 111.\*]

##### 2. ADJOINING LANDOWNERS (§ 8\*)—BLASTING OPERATIONS—INJURY TO ADJOINING PROPERTY—NEGLIGENCE.

Where blasting operations are conducted on a railroad's right of way and result in a direct trespass on the premises of an adjoining owner by casting soil and rock thereon, the railroad company's liability is absolute, irrespective of the question of negligence or want of skill.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. §§ 60-66; Dec. Dig. § 8.\*]

##### 3. MASTER AND SERVANT (§ 319\*)—BLASTING OPERATIONS—INJURY TO ADJOINING PROPERTY—INDEPENDENT CONTRACTOR.

Where blasting operations on a railroad right of way resulting in injuries to adjoining property by casting rock and soil thereon are necessary in the execution of a contract for the improvement and progress and such as would naturally and probably result in injury to plaintiff's property, if done with ordinary care, the railroad company cannot escape liability on the ground that it employed independent contractors to do the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1259, 1260; Dec. Dig. § 319.\*]

Appeal from Circuit Court, Perry County.

Action by R. C. Baker against the Lexington & Eastern Railway Company and others. Judgment for plaintiff, and defendant named appeals. Reversed.

Wootton & Morgan, of Hazard, and S. M. Wilson, of Lexington, for appellant. Miller & Wheeler, of Hazard, and H. C. Faulkner, of Barbourville, for appellee.



CLAY, C. On the east bank of the North fork of the Kentucky river in the town of Hazard, Ky., R. C. Baker owned a lot upon which were located a house and barn. During the years 1910 and 1911 the Lexington & Eastern Railway Company was engaged in constructing its road along the west bank of the river. At a point only a little over 200 feet from Baker's residence there was a cliff of solid rock. In reducing the grade and constructing the roadbed, they used dynamite and other explosives and threw large quantities of rock on Baker's residence and barn. Baker brought this action against the railroad company, Jones, Davis & Co., R. E. Mason, and John Hurst, contractors, to recover damages in the sum of \$650. The jury found for Mason and Hurst and returned a verdict against the railroad company and Jones, Davis & Co., for the sum of \$300. From that judgment the railroad company appeals.

Appellant first insists that the trial court should have awarded it a peremptory instruction because there was no competent proof of plaintiff's ownership of the property injured. The record, however, discloses the fact that plaintiff testified without objection that he was the owner of and in possession of the premises at the time of the blasting, and this was sufficient evidence of ownership to support an action for damages such as this. Plaintiff and his witnesses testified that on frequent occasions during the blasting large rocks were thrown on his house and barn, and set out in detail the injuries resulting therefrom. Frequently when the blasting was going on he and his family would have to leave the premises. He testified that he thought it damaged his barn about \$100 and his house and household goods about \$400 or \$500. He had the premises repaired in some respects, but was unable to state definitely what these repairs cost. The repairs which he actually made on the property did not aggregate the amount of damages recovered. The testimony of his other witnesses in regard to the damage was of a character similar to his. Their estimates of the damage done, without giving any facts on which to base them, were objected to. The court should have permitted the witnesses to set out in detail the injuries resulting from the blasting, and should have required them to state what sum was reasonably necessary to restore the buildings to the condition they were in prior to the injury.

[1] The court in its instructions told the jury that the measure of damage was the difference between the value of the house and barn before they were injured and their value to plaintiff after the injury, and such further sums as would compensate plaintiff for his loss of time and loss of the reasonable use and enjoyment of his house and home. This is not the correct measure of damages in a case like this. The injury was

not permanent, but one that could be easily repaired. In such a case the measure of damages is a sum sufficient to restore the property to the condition it was in prior to the injury, and such further sum as will compensate the plaintiff for the diminution in the value of the use of the property during the continuance of the injury. *Southern Ry. Co. v. A. M. E. Church's Trustees of Harrodsburg*, 121 S. W. 972; *Pickerill v. City of Louisville*, 125 Ky. 229, 100 S. W. 873; *Wallingford v. Maysville & Big Sandy Ry. Co.*, 107 S. W. 781, 32 Ky. Law Rep. 1049.

[2] It is further insisted that the court erred in telling the jury to find against the railroad company if the blasting was reasonably necessary, thus making it liable even though the injury to plaintiff's property was caused solely by the negligence of independent contractors. In answer to this contention, it is sufficient to say that the allegation of the company's answer that the work was done by independent contractors was denied by reply, and there was no proof showing that they were independent contractors. That being true, the contractors were mere agents or servants of the railroad, and it is well settled in this state that, where blasting operations result in a direct trespass upon the premises injured by casting soil or rock thereon, the liability of the railroad company causing the injury is absolute, and it must respond in damages irrespective of the question of negligence or want of skill. *Langhorne v. Turman*, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211.

[3] However, in view of the fact that on another trial there may be evidence tending to show that those engaged in doing the blasting were independent contractors, we deem it proper to say that, if the work of blasting was necessary in the execution of the contract and such as would naturally and probably result in injury to plaintiff's property, if done with ordinary care, the company cannot escape liability on the ground that it employed independent contractors to do the work. *Probst v. Hinesley*, 133 Ky. 64, 117 S. W. 389; *Langhorne v. Turman*, supra.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

#### MASON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 16, 1913.)  
FORGERY (§ 29\*)—INDICTMENT—FORGING OR UTTERING BANK CHECK.

Under Ky. St. § 1189, providing that any person forging a note, check, or draft upon a bank, or certificate of deposit of money therein of any bank or company authorized by law of the United States, or any state thereof, or any foreign government, and who shall utter such forged instrument knowing it to be forged, shall be punished as therein provided, an indictment for forging or uttering a forged bank check must be drawn under that section, and must charge

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the bank upon which the check was drawn was authorized by the laws of the United States, a state, or a foreign government; and, unless it so charges, it is insufficient to support a conviction.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. § 29.\*]

Appeal from Circuit Court, Scott County.

Maggie Mason, alias Maggie Scott, was convicted of uttering a forged instrument, and she appeals. Reversed.

Llewellyn F. Sinclair, of Georgetown, for appellant. James Garnett, Atty. Gen., and Overton S. Hogan, Asst. Atty. Gen., for the Commonwealth.

**HANNAH, J.** The appellant was convicted in the Scott circuit court, under an indictment which reads as follows: "The grand jury of the county of Scott, in the name and by the authority of the commonwealth of Kentucky, accuse Maggie Mason, alias Maggie Scott, of the crime of uttering a forged writing, committed as follows: The said Maggie Mason, alias Maggie Scott, in the said county of Scott, on the 8th day of May, A. D. 1913, and within 12 months before the filing of the indictment, did unlawfully and feloniously deliver to one W. F. Baumstark, a writing in words and figures, as follows, to wit: 'Georgetown, Ky. April 1st, 1913. No. 9250. Farmers Bank & Trust Company—Pay to Mollie Cason or bearer \$7.00 seven dollars for work Mrs. Jane E. Sutton.' On reverse side: 'Mollie Cason'—which writing purported to have been signed by Mrs. Jane E. Sutton and said Maggie Mason, alias Maggie Scott, represented to the said Baumstark, when she delivered to him the said writing, that said Sutton had signed her name thereto, and on the faith of said statement, said Maggie Mason, alias Maggie Scott, obtained from said Baumstark goods of the value of \$2.25, and cash in lawful money of the value of \$4.75, when at the time said Mason, alias Scott, delivered said writing and made said representation she knew it was false, and knew that said Sutton had not signed her name to said writing, and that her name had been forged and said paper was delivered and said representation made with the intent to defraud said Baumstark, against the peace and dignity of the commonwealth of Kentucky." From a judgment sentencing her to the penitentiary under said conviction, she appeals.

It will be noticed that the writing alleged to have been forged is a check upon a bank, and the indictment fails to aver that the bank upon which the check was drawn was authorized by the law of the United States or a state of the United States or foreign government. It has been repeatedly held by this court that an indictment for forging or uttering a forged bank check must be drawn under section 1189, Kentucky Statutes, and must charge that the bank upon

which the said check was drawn was authorized by the laws of the United States or a state of the United States or a foreign government, and that unless the indictment so charges, it does not state a public offense. See *Kennedy v. Com.*, 59 Ky. (2 Metc.) 36; *Com. v. Lee*, 37 S. W. 72, 18 Ky. Law Rep. 484; *Rawlins v. Com.*, 7 Ky. Law Rep. 595; *Com. v. Miller*, 115 S. W. 234. Under these decisions, the indictment under which appellant was convicted failed to state a public offense; and her motion to set aside the verdict of conviction should have been sustained, and a new trial granted.

The judgment is reversed for proceedings consistent herewith.

#### CRONINGER v. BETHEL GROVE CAMP GROUND ASS'N.

(Court of Appeals of Kentucky. Dec. 10, 1913.)

##### 1. CORPORATIONS (§ 18\*)—ARTICLES OF INCORPORATION—KNOWLEDGE OF STOCKHOLDERS.

Both stockholders and officers of a corporation are chargeable with knowledge of the provisions of the articles of incorporation, which are a contract between the stockholders and the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 20, 21; Dec. Dig. § 18.\*]

##### 2. CORPORATIONS (§ 309\*)—ULTRA VIRES CONTRACTS WITH DIRECTORS.

A contract, made by a corporation of which plaintiff was director when it had reached the limit of indebtedness prescribed by its articles, which recited that plaintiff knew that the association could not then contract any further debt and that the debt to him contemplated by the contract was not authorized by the articles, and provided that plaintiff agreed to pay for certain necessary repairs with the understanding that the money advanced would be returned with interest from the first surplus from the earnings, was ultra vires and unenforceable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1366-1373; Dec. Dig. § 309.\*]

##### 3. CORPORATIONS (§ 482\*)—CORPORATE DEBTS—INDIVIDUAL LIABILITY OF STOCKHOLDERS.

It would violate the articles of incorporation, provided that the private property of stockholders should not be subject to payment of corporate debts, to apply a surplus in the hands of the commissioners after the sale of corporate property under a mortgage, which surplus consisted of what was left of the capital stock after payment of the bonded indebtedness and did not include any earnings, to the payment of a general claim for money advanced to the corporation, beyond the limit of debt permitted by the articles of incorporation, as the creditor knew.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877-1888; Dec. Dig. § 482.\*]

##### 4. CORPORATIONS (§ 413\*)—PAYMENT FROM PARTICULAR FUND.

Where a contract with a corporation provided that one advancing money to it should be repaid "out of the first surplus remaining from the earnings, after provisions for current expenses and interest on bonded debt," such creditor was only entitled to repayment from any surplus from the earnings, which could only exist when its debts were paid and the value of the capital stock returned to its stockholders, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

could not enforce his claim against any other fund.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1647-1649; Dec. Dig. § 413.\*]

**5. CORPORATIONS (§ 309\*)—ULTRA VIRES CONTRACTS—ESTOPPEL.**

A corporation cannot retain the benefits of an ultra vires contract and also refuse to perform; but the rule is not applicable to the case of a director, who, knowing that the company is indebted up to the legal limit, advances money to it, agreeing to repayment only out of surplus earnings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1366-1373; Dec. Dig. § 309.\*]

**6. CORPORATIONS (§ 310\*)—DIRECTORS—FIDUCIARY RELATION.**

A corporate director is a trustee for the stockholders and is responsible for failure to conduct the corporate business according to the rules relating to such trust and is liable to the stockholders for loss resulting from failure to perform his duties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1352-1362; Dec. Dig. § 310.\*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

Action by Ed. H. Croninger against the Bethel Grove Camp Ground Association. From a judgment for defendant, plaintiff appeals. Affirmed.

John E. Shepard, of Covington, for appellant. Schmidt & Holmes, of Covington, for appellee.

**SETTLE, J.** The appellee, Bethel Grove Camp Ground Association, was incorporated July 12, 1901, to provide a place for holding religious services, on grounds secured by it, for all classes of people, and especially to hold camp meetings and cultivate a better fraternal feeling between the different denominations. Its grounds are situated on the Licking river, near Visalia in Kenton county. They contain an auditorium, dining hall, and a number of cottages, in use for the meetings held by the association. As originally adopted, the articles of incorporation fixed the capital stock of the association at \$4,000, divided into 400 shares of \$10 each. The business of the corporation was under the control of a board composed of seven directors, who were empowered to elect from their own number a president, vice president, secretary, and treasurer. To prevent loss to the stockholders, the articles of incorporation expressly provided that the highest amount of indebtedness which the corporation could incur should not exceed one-half of the amount of its paid-up capital stock, and that the individual, or private, property of the stockholders should be exempt from liability for the debts of the corporation. There were originally 220 shares subscribed aggregating \$2,200; therefore the limit of indebtedness which could be incurred was \$1,100. By amended articles of incorporation, duly adopted and recorded

February 13, 1904, the amount of the capital stock was reduced to \$3,000, divided into 300 shares of \$10 each, and the highest amount of indebtedness which the corporation could, at any time, incur was limited to \$2,500. As appellee, at the time of making this change in its articles of incorporation, was owing a part of the purchase price for its grounds, and for necessary improvements which had been erected thereon, its board of directors were, by resolution, authorized to issue bonds to the amount of \$2,500, bearing 6 per cent. interest per annum, payable semiannually, to be secured by a mortgage on its property, which bonds the board of directors was authorized to sell that their proceeds might be applied to the payment of the indebtedness referred to. On May 16, 1904, the mortgage and bonds in question were duly made and issued, the latter to mature September 1, 1915, and be paid at the Citizens' National Bank of Covington, Ky. The mortgage was executed to one Henry Feltman as trustee, and provided that, if any of the interest coupons should not be paid at maturity and such default should continue for a period of 60 days thereafter, the entire debt secured thereby should immediately become due and payable, and the trustee authorized to enforce, by suit, the mortgage lien and subject the mortgaged property to the payment of the bonds, principal and interest, according to law. The bonds, issued by appellee as above stated, were at once sold and their proceeds applied to paying the debts of appellee and improving its property.

It appears from the record that, instead of being relieved of its financial embarrassments by the sale of the bonds, appellee's indebtedness was further increased until its affairs became so involved that it failed to pay the semiannual interest, which became due on its bonds April 1, 1908, and, not having paid same within 60 days after maturity, Feltman, the trustee named in the mortgage, brought suit in the Kenton circuit court to recover the amount thereof and enforce the mortgage lien for the benefit of the bondholders. At the succeeding term of the court, he obtained judgment as prayed, and thereafter the mortgaged property was sold by the master commissioner and purchased by the appellant, Ed. H. Croninger, at a price sufficient to pay the aggregate amount of the bonds, principal and interest, and leave a surplus of \$1,191 in the hands of the master commissioner. Following this sale and the confirmation thereof, appellant brought this action in the Kenton circuit court, seeking to recover of appellee an indebtedness of \$509.70, alleged to be due him for money expended, as alleged, at its request, and upon its promise to repay same, in making certain necessary repairs upon the property covered by the mortgage executed to Feltman, trustee.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tee, for the benefit of the holders of its bonds. The several items going to make up the aggregate amount sued for are explicitly set forth in the petition. It was also alleged in the petition that appellee was insolvent, but that it had in the hands of the master commissioner the surplus arising from the sale of the mortgaged property, which it was seeking to have distributed to its stockholders, and that same should be applied to the payment of appellant's claims sued on, and to this end the surplus in question was attached in the hands of the master commissioner.

It appears from the record that, shortly after the issuance of the bonds and execution of the mortgage by appellee, the appellant became one of its board of directors and also its treasurer, and it is alleged in the answer and counterclaim of appellee that, as such treasurer, appellant received \$226.23 belonging to appellee, for which he failed to account. Appellant, by reply, denied that he had received as treasurer for appellee \$226.23, but admitted in an amended reply that he had received \$200 for which he had not accounted. The answer denied appellant's right to subject the surplus in the hands of the master commissioner to the payment of his demands, or any of them, and alleged that same should be distributed pro rata among its stockholders. It was further alleged in the answer that the items of expenditure, sought to be recovered by appellant, created no legal indebtedness on the part of appellee or its stockholders; and that the contract authorizing such expenditures was ultra vires, as it was intended to, and did, burden appellee with a liability in excess of the limit of indebtedness allowed by its articles of incorporation. The contract in question was made November 23, 1904, and is contained in the following writing: "The Bethel Grove Camp Ground Association, Inc., of Visalia, desires to make certain repairs and improvements, viz., to roof the auditorium, to make a new cistern, to repair an old one at the auditorium, and to put in gutters and pipes connecting same in order to have a good water supply. Mr. E. H. Croninger of Covington, Ky., being desirous of the prosperity of said association agrees to pay for these repairs and improvements as stated, with the understanding that the money so advanced will be returned to him with interest out of the first surplus remaining from the earnings after provision for current expenses and interest on bonded debt. He declares himself cognizant of the fact that the association cannot legally contract any larger debt than it has at the present time; that the above prospective debt to him is not authorized by the articles of incorporation and that the directors will not be held personally liable in any event for the indebtedness to him as stated herein, but relies entirely on the earning power of the associa-

tion to discharge the debt." On the hearing, the circuit court dismissed the appellant's petition and gave appellee judgment against him on its counterclaim for the \$200, which he admitted he had received and had not accounted for. From the judgment entered in accordance with these conclusions, this appeal is prosecuted.

The judgment of the circuit court rests upon the theory that the contract under which appellant made the expenditures in question was ultra vires, as it contemplated a liability in excess of the limit of indebtedness permitted by appellee's articles of incorporation, and that this was, at the time, known to appellant, as a director and officer of the corporation, because in the writing evidencing the contract he expressly declared himself cognizant of the fact that appellee could not legally make such a contract and his willingness to look alone to the earning power of the association to discharge the debt.

Section 538, subsec. 8, Kentucky Statutes, requires corporations of this state to specify in their articles of incorporation "the highest amount of indebtedness or liability which the corporation may at any time incur"; and subsection 9, "whether the private property of the stockholders, not subject by the provisions of the law under which it is organized, shall be subject to the payment of corporate debts, and if so, to what extent."

[1] As a matter of law, the articles of incorporation constitute the contract between the stockholders of the corporation and is binding alike upon the stockholders and officers of the corporation; therefore both the stockholders and officers are chargeable with knowledge of all the provisions of the articles of incorporation. This is not a case in which a creditor, not a stockholder of the corporation, is attempting to enforce a contract which, by its terms, is ultra vires; but a case in which a derelict director and officer is trying to enforce a contract, admittedly ultra vires, made with the board of directors of the corporation.

[2] As its amended articles of incorporation provided that appellee should not incur an indebtedness exceeding \$2,500, and this limit had been reached by the issuance and sale of the bonds aggregating that amount, secured by mortgage upon all the property owned by the corporation, we agree with the circuit court that its contract with appellant, out of which the items of indebtedness sued for arose, was ultra vires, and therefore of no binding force; and, further, that the illegality of the contract made by appellee's board of directors with appellant was known to the latter as well as the board of directors, when it was made. This is shown by the writing evidencing the contract and the agreement therein that appellant would take his chances of being repaid the amount he proposed to expend for appellee out of the first surplus remaining from earnings, after

paying the current expenses and the interest on the bonded indebtedness.

[3] We are also of opinion that the surplus in the hands of the commissioner is not made up of earnings of the corporation, but is what is left of the capital stock, after the payment of the bonded indebtedness, which should be distributed among the stockholders; and that to apply such surplus to the payment of appellant's demands would be violative of that provision of the articles of incorporation which declares that the private property of the stockholders shall not be subject to the payment of the corporate debts.

[4] Moreover, it is not alleged in the petition, or shown by any proof introduced in appellant's behalf, that there has been, or is, any surplus remaining from the earnings of the corporation, after providing for the payment of its current expenses and the interest on its bonded indebtedness.

In *Kauffman & Co. v. Loventhal*, 8 Ky. Law Rep. 62, a teacher was employed by the trustees of an academy to teach its school, under an agreement that he was to be paid for his services out of what remained of tuition collected after paying all expenses. It was held that a creditor, who sought to subject the amount due the teacher from the academy trustees, must allege and prove that they had collected more than enough to pay all expenses, or that there was more than enough for that purpose that could be collected, and that there had been sufficient time to make the collection; and, as this would have been so had the teacher himself been suing to recover his compensation, a creditor seeking to subject the debt due him from the trustees of the academy would have no greater right than the teacher himself could have asserted and enforced. *Ledford v. Smith*, 6 Bush, 130; *Anderson v. Ewing*, 3 Litt. 247; *In re Spanish Prospecting Co., Ltd.*, 20 Ann. Cas. 677; *Maculsky v. Klosterman*, 20 Or. 108, 25 Pac. 368, 10 L. R. A. 787.

Having elected and agreed to be repaid the disbursements he made for appellee in the manner stated, and out of the particular fund specified in the contract, appellant has no claim upon any other fund; and it appears from the record that appellee never had a surplus of earnings, after paying its current expenses and the interest on its bonded indebtedness. Indeed, its earnings were never sufficient for these purposes. If they had been, we take it that appellee would not have made default in the payment of the interest upon its bonds. The language of the contract descriptive of the fund from which appellant was to be paid can have no other meaning than that he was to be paid out of the net profits of the corporation; and, if this should be treated as a case looking to a liquidation of appellee's affairs, there could be no surplus of earnings or net

profits until its debts had been paid and the value of the capital stock restored to the stockholders, who advanced its equivalent in money to carry on the corporation's business. In point of fact, the business of the corporation was conducted at a loss to the stockholders, and the amount in the commissioner's hands was not sufficient to repair this loss.

[5] We are not unmindful of the rule of law that a corporation, in dealing with an ordinary creditor, cannot retain the benefit of an ultra vires contract and at the same time refuse to perform its part of the obligation imposed by its terms. *Albin Co. v. Commonwealth*, 128 Ky. 295, 108 S. W. 299, 33 Ky. Law Rep. 367; Page on Contracts, § 1084. So, if appellant had been an ordinary creditor, appellee would not be heard to say that the contract in question was ultra vires. But, as previously intimated, appellant is not an ordinary creditor, but a director, who knowingly made a contract which imposed upon the corporation a liability in excess of the corporate limit of indebtedness. It is, however, contended by counsel for appellant that his relation as a director and officer of the corporation cannot affect the validity of the contract, as he was guilty of no fraud in its procurement and it did not result in profit to him. This, however, does not alter the fact that the contract was not within the corporate powers; in other words, his fault was in dealing with a corporation in a matter which he, as a director and officer, was bound to know was beyond its powers.

[6] As well stated in the written opinion of the circuit court: "A director is a trustee for the stockholders; it is his duty to conduct the business of the corporation in accordance with the laws relating to such trusts. When he fails in this duty, he is held responsible for his acts. In this state he is liable to the stockholders for any loss sustained by them by reason of a failure of his trust. Not only is he liable to the cestui que trust, but likewise to other persons who may have been injured by his disregard of the law. If then the directors pay an indebtedness in excess of the limit fixed in the corporate charter, the stockholders may recover from the directors. So also a creditor whose claim originated in an act of the directors beyond the corporate power may recover directly from the directors if the corporation is unable to pay. *Randolph v. Ballard County Bank*, 142 Ky. 145 [134 S. W. 165]. \* \* \* Now if the directors or the association could be held liable for a claim such as Mr. Croninger presents, it would be absurd to contend that he, a director, could have any claim against the corporation. And this is especially true when the corporation is without assets other than a small part of its capital stock. \* \* \* It may be that, if there was a surplus over and above the capital stock, plaintiff might have

been paid out of such surplus; but I think the law is clear that plaintiff's claim cannot be preferred over that of the stockholders. The terms of the contract show that plaintiff had no intention of making his claim a charge against the corporation. All of the directors realized that they could not bind the corporation in the matter of this claim, and, fearing that they might be held personally responsible, required plaintiff to release them from such liability. \* \* \*

Section 548, Kentucky Statutes, prohibits directors of any incorporated company from declaring or paying any dividend, when the corporation is insolvent or when the payment of such dividend would render it insolvent or diminish the amount of its capital stock, and makes them jointly and severally individually liable for all debts of the corporation then existing or that may thereafter be incurred while they, or a majority of them, continue in office; and section 550 provides: "If the directors or officers of any corporation shall fail or refuse to comply with, or shall violate any of the provisions of, this article, those so failing, refusing or violating shall be jointly and severally individually liable for any loss or damage resulting to any person from such failure, refusal or violation, and, in addition thereto, the persons so liable shall be each punished by a fine of not less than one hundred nor more than one thousand dollars." Thus, it will be seen that appellant, in view of his being a director and treasurer of appellee, stands in an attitude altogether different from that of an outsider. If, under the circumstances here presented, the contract upon which he relies had been made with an outsider who, by reason thereof, advanced money to the corporation, as appellant claims to have done, he as a director would have been individually liable to such outsider for the money paid out for the corporation by the latter; in view of which it stands to reason that the appellant cannot recover a debt against the corporation which it would not have been bound to pay if some one else had been concerned. Besides, the language of the written agreement which appellant signed shows that he had full knowledge of this fact, because of which he therein released the other directors of the corporation from any and all liability for the sums it obligated him to advance for the benefit of the corporation. It is manifest therefore that this is not a case in which the corporation, representing the injured stockholders, is estopped, but one in which the estoppel applies to the appellant alone.

In *Randolph v. Ballard County Bank*, 142 Ky. 145, 134 S. W. 165, the Ballard County News Printing Company, which was an incorporated company under the laws of this state with a limit of indebtedness fixed by its articles of incorporation at \$5,000, was, together with its directors, sued by the bank upon two

notes, one for \$300 and the other for \$1,429.31. The corporation had made an assignment for the benefit of creditors, and its assets amounted to only \$200. The petition sought to recover on the notes against the corporation to the extent of \$500 and against the directors to recover the balance of the notes, because of their violation of section 550, Kentucky Statutes. The directors, save one Purdy who was cashier of the bank, by answer, contested their liability, alleging that the indebtedness on behalf of the printing company to the bank was created by Purdy alone and without their consent or knowledge, admitting, however, that they consented to the execution of the larger note, which was for an overdraft, on the assurance of Purdy that it was desired for appearance's sake to prevent trouble with the bank examiner, who was shortly expected, and under the promise by Purdy to finally cancel and return the note. The court sustained a demurrer to the answer and rendered judgment against the corporation in behalf of the bank for \$500, subject to credit by the amount paid by the assignee, and against each of the directors for the excess of the bank's two notes above \$500. On the appeal of the directors, the judgment was affirmed. In the opinion, among other things, it is said: "The law now as before creates the corporate being, endows it with power, and sets upon it limitations. It may not exceed either. \* \* \* To engage in the business as a corporation without becoming incorporated under the statute is to violate the provisions of the article on corporations. To exceed that which the statute allows is not less a violation of the same. So, when the articles of incorporation place a limit on the indebtedness which the corporation may incur, to exceed the limit is to violate the chapter on incorporations, as it would be to engage in a business not authorized by its charter, or the statute. \* \* \* The aim of this advanced legislation could not have been to curtail the duty of corporate directors, or even to preserve the immunity that they enjoyed at the common law. It was intended, we think, to enlarge duty by extending responsibility. Stockholders have little or no direct control of the corporation's affairs; the public dealing with it have none. Directors alone have the power of control. If directors allow managing officers of the corporation to exceed, or otherwise violate the charter of the company, or any provision of the statute regulating corporations (which are to be regarded as being read into the charter of each corporation doing business under the statute), it is intended by section 550, supra, to hold them personally liable for the defection. They are immune from personal liability when they do their duty imposed by the statute; when they neglect that duty, or willfully violate it, they are made liable for the consequences. \* \* \*

In *Haldeman v. Ainslie*, 82 Ky. 395, will be found a more elaborate discussion of the doctrine under consideration. The action was instituted in the Louisville chancery court by Edwin Thompson and a number of banks of the city and by Ainslie, Cochran & Co. against Haldeman and others. During the pendency of the action, Mrs. George Ainslie, as the executrix of her husband, having paid off the debts asserted by the banks and Thompson against the defendants, was made the real plaintiff in interest, and the litigation resulted in a judgment in her favor against the defendants (appellants), and also a judgment in favor of Ainslie, Cochran & Co., surviving partners of the firm, of which Mrs. Ainslie's deceased husband was a member. The matters in litigation arose out of the settlement of the assets and liabilities of the corporation known as the Great American Fire Extinguisher Company. The article of incorporation under which the corporation was formed was executed in October, 1878. The business of the corporation was the manufacturing and selling of a patent fire extinguisher. Its capital stock was \$1,200,000, and each subscriber upon executing his note for \$1,000, payable in bank, and paying \$500 in money, as provided in the fifth section of the articles of incorporation, became entitled to paid-up stock of 400 shares valued at \$100 per share. In other words, he became entitled to \$40,000 of stock in the corporation. By section 6 of the articles of incorporation, it was provided that the highest amount of indebtedness or liability, to which the corporation might at any time subject itself, should be the sum of \$15,000; and by section 7 it was provided that the private property of stockholders should be exempt from liability for the debts of the corporation. The company was organized with B. F. D. Fitch as president, and George Ainslie, J. F. Bullitt, D. Du Pont, and others, directors. After remaining in business about two years, the corporation, becoming financially embarrassed, by resolution of the stockholders and board of directors, transferred the assets of the corporation to the Babcock Fire Extinguisher Company and required the directors to wind up the affairs of the defunct corporation. When the corporation was dissolved, it was found that its indebtedness amounted to over \$33,000 and on the paper of the banks, which constituted the greater part of same, George Ainslie, deceased, had made himself personally liable except for \$3,070, the amount of a debt incurred by the corporation with the firm of Ainslie, Cochran & Co., of which George Ainslie was an active member. The defense made in the court below by the appellants to the claims of the executrix was that the president of the corporation, Fitch, and George Ainslie, the decedent, a director, without the consent of the stockholders of the corporation and without any authority from

the board of directors, created this large indebtedness in direct violation of the terms of the charter. To what extent the directors, or any member of the corporation, participated in the creation of these debts, was not made manifest by the record, and the only parties to the original agreement, who seemed to have incurred the liability, were George Ainslie, the decedent, and Fitch, the president.

In the opinion, it is said: "The effect of the limitation upon the amount to be paid by the subscribers for their stock would not exempt them from liability to a creditor who had dealt with the corporation in ignorance of the articles of association, limiting the amount of the indebtedness to be created by the corporation of those conducting it. \* \* \*

In this case we think it clear that the banks could have recovered of the stockholders for the reason that those conducting the business of the corporation had created these debts for the benefit of the corporation. The banks could have pursued any of the parties to the bills, and required the individual members of the corporation, by a proceeding in equity, to pay up their stock in order that the debts might be satisfied.

\* \* \*

The question presented in this case is: How, or by whom, were these debts contracted? If by Fitch or Ainslie, in violation of the charter, and they, or either of them, subsequently paid off the debts, then it is maintained by the appellants that no right to contribution exists. It is plain that the parties to this association were endeavoring to protect themselves from liability when they inserted section 6, providing that 'the highest amount of indebtedness or liability to which this corporation is at any time to subject itself, shall be the sum of \$15,000.' This section is certainly not meaningless, and when the board of directors or any member of the corporation violates this provision of the charter, and seeks to make the stockholder personally liable, the consent of the stockholder must be shown or the liability will not attach. As between the stockholders, it cannot be said to be a corporate act, and neither the board of directors nor a majority of the members can make the individual stockholders liable in such a case, although they may remove the limit by a majority vote. It is a contract between them that no member, or a majority of the members, can repudiate so as to create a personal liability as between each other in excess of what they have agreed to pay. The restriction as to the liability for an amount less than the stock is binding between the parties. \* \* \*

The president and secretary of the corporation have both testified in this case, and there is neither a statement from them nor an exhibit filed with the books of the company, showing any direction or authority from the board of directors or from the individual stockholders to Fitch and Ainslie to create these debts. Nor had the board of directors

or a majority of the stockholders the power to increase the liability of the corporation beyond the limit of the charter. If so, we see but little necessity in having a charter as the organic law of such associations; to adjudge otherwise would leave the shareholders at the mercy of the board of directors, who, if not controlled by the charter, could exercise unlimited power. In this case, if the board of directors had authorized the creation of the debts in express terms, it would not be a corporate act because in excess of the authority conferred by the charter. The unanimous vote of the stockholders could alone authorize the act so as to bind the corporation or the shareholders. \* \* \* As the case is presented, the equities of the banks will not protect Ainslie or his personal representative, as, but for Ainslie's action, no such equities would have existed. His being a member of the association, with full knowledge of the protection to the shareholders by the charter under which they all derived their power, will preclude him or his representative from asking contribution, either on account of the moneys paid to the banks, or on the claim of Ainslie, Cochran & Co., of which Ainslie was an active member."

For the reason indicated in the opinion, the judgment was reversed and cause remanded for a dismissal of the petition of Ainslie's executrix.

We regard the opinion in the case supra decisive of the instant case, for, if the executrix of Ainslie was estopped in that case to recover of the stockholders of the corporation to the extent of their unpaid subscriptions, the moneys which he, as an officer and director thereof, had advanced in payment of its debts, on the ground that they were created by himself and another officer, in violation of the provisions of the charter of the corporation, for a greater reason is the appellant in this case estopped to claim repayment, from a fund belonging to the stockholders of the corporation, of moneys which he had paid out for it under an illegal contract creating an indebtedness against the corporation in excess of the limit fixed by its articles of incorporation, and with knowledge on his part that there would be no surplus of corporate earnings until the debts of the corporation for which it was legally liable should be paid and the stockholders restored the stock subscriptions paid by them.

It would unduly extend the opinion to comment, in detail, upon the authorities cited by appellant in support of his contentions. It is sufficient to say that none of them presents a state of case in which a stockholder, director, or other officer of a corporation attempted to enforce a contract made with the corporation which, upon its face, was admittedly ultra vires.

As, in our opinion, the rights of the parties to this litigation were properly determined by the court below, the judgment is affirmed.

## SOUTHERN RY. CO. IN KENTUCKY v. THACKER'S ADM'X.

(Court of Appeals of Kentucky. Dec. 16, 1913.)

### 1. RAILROADS (§ 350\*)—CROSSING ACCIDENTS—ACTIONS—QUESTIONS FOR JURY.

In an action for the death of a person struck by a train at a crossing, where there was evidence that because of obstructions travelers could not see approaching trains, and those operating the engines could not see travelers in time to avert accidents by the usual precautions, the court properly did not confine the jury to a consideration of whether the statutory signals were given, but allowed them to determine whether the statutory signals were sufficient, or whether it was the company's duty to use some reasonably effective means other than such signals to warn travelers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

### 2. APPEAL AND ERROR (§ 882\*)—REVIEW—INVITED ERROR.

In an action for the death of a person struck by a train at a crossing, the company could not complain of an instruction that it was the duty of its agents in charge of its engine to give reasonable and timely notice and warning of the approach of the engine to the crossing, and to exercise such care to avoid injuring decedent as ordinarily prudent persons in the operation of an engine would exercise under similar circumstances, and that, if they negligently failed to observe any of such duties, by reason of which decedent was struck and killed, his wagon destroyed, and one of his horses killed, to find for plaintiff, where it requested the converse instruction which was given, that, unless those in charge of its engine negligently failed to give reasonable and timely notice or warning of the approach of the engine, and to exercise such care to avoid injuring decedent as ordinarily prudent persons in the operation of an engine would exercise under similar circumstances, by reason of which negligence the accident occurred, to find for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

### 3. APPEAL AND ERROR (§ 688\*)—BILL OF EXCEPTIONS—MATTERS WHICH MUST BE INCLUDED.

Alleged improper remarks of counsel in his closing argument could not be reviewed on appeal, where, though the bill of exceptions showed the filing of an affidavit by opposing counsel that such improper argument was used, which affidavit was before the court, the bill of exceptions did not authenticate the fact that such improper language was used.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894-2896; Dec. Dig. § 688.\*]

Appeal from Circuit Court, Anderson County.

Action by R. E. Thacker's Administratrix against the Southern Railway Company in Kentucky. Judgment for plaintiff, and defendant appeals. Affirmed.

Willis, Todd & Bond, of Shelbyville, and Alex P. Humphrey and Edward P. Humphrey, both of Louisville, for appellant. Edwards, Ogden & Peak, of Louisville, J. W. Gaines, W. H. Morgan, and L. W. McKee, all of Lawrenceburg, for appellee.



NUNN, J. Appellee's intestate, while driving a heavily loaded wagon across the railroad at what is known as Duncan's Crossing, was killed by one of appellant's fast passenger trains. His wagon was demolished, and one of his horses killed. The administratrix recovered \$5,000 in damages. The train was running 45 or 50 miles per hour. The engineer was keeping a lookout, and when the engine was 264 feet from the crossing he discovered Thacker, and his horses were just coming upon the track. Thacker seemed to be jerking and whipping his team at the time. He immediately gave the alarm whistle, threw on the emergency brakes, and it is clear that he did all he could after Thacker's peril was discovered to stop the train, and when he did stop it the engine was about 1,200 feet on the other side of the road crossing. These facts are not controverted.

[1] The proof also shows that the public road was not frequently traveled, and appellant claims that there was not any evidence that it was a dangerous crossing. If appellant merely means by this that it was in a good state of repair, the conclusion is correct. There is, however, abundant proof that at this point the view was so obstructed that travelers on the public road could not see approaching trains, and those operating the engine could not see those on the highway in time to avert accident by the usual precautions. The public road came to the railroad up a rather steep hill, and, on account of the conformation of the country, the curve in the railroad track, and the brush and vines along the public road, and the cattle guard adjacent thereto, the jury had a right to believe that the railroad company owed more to travelers over this crossing than the sounding of the statutory signals. There is scarcely any conflict in the proof as to these physical facts, and the testimony of appellant's engineer, Muir, illustrates the dangerous character of the crossing. He was the engineer on the train that killed Thacker, and before the trial went to the spot with another train of similar character for the purpose of testing out and demonstrating disputed points in the case. He said the first view of the crossing was given the engineer when his engine came to a point 264 feet from it, and at no point further than that could any one be seen on the public road until they got within 48 feet of the railroad track on the road.

As to whether the statutory signals were sounded, quite a lot of testimony was heard, and the evidence preponderates in showing that they were sounded. Appellant's witnesses showing this fact were more numerous, and their opportunities for observation were better, than the witnesses offered by appellee to the contrary. But there was enough evidence on the question to justify the lower court in submitting the case to the jury.

[2] Appellant especially objects to instruction No. 2, which is as follows: "It was the

duty of defendant's agents in charge of its engine at the time and place referred to in the evidence to give reasonable and timely notice and warning of the approach of said engine to the public highway crossing known as Duncan's Crossing, and to exercise such care to avoid injuring decedent R. E. Thacker while using said crossing as ordinarily prudent persons in the operation of an engine would exercise under circumstances similar to those proven in this case, and, if the jury believe from the evidence that defendant's agents in charge of said engine negligently failed to observe any of the duties incumbent on them as herein set out, by reason of which said Thacker was struck and killed, his wagon destroyed, and one of his horses killed, the law is for the plaintiff, and the jury should so find."

Appellant, however, is in no position to criticize the court for giving this instruction, for it asked the court to give, and the court did give, an instruction which was the converse exactly of instruction No. 2, and is as follows: "Unless the jury believe from the evidence that those in charge of defendant's engine at the time and place referred to in the evidence negligently failed to give reasonable and timely notice or warning of the approach of the engine to the public highway crossing known as Duncan's Crossing, and to exercise such care to avoid injuring decedent, R. E. Thacker, while using said crossing as ordinarily prudent persons in the operation of an engine would exercise under circumstances similar to those proven in this case, and by reason of such negligence said Thacker was struck and killed, his wagon destroyed, and one of his horses killed, the law is for the defendant, and the jury should so find."

The court just as properly gave the jury instruction No. 2 as the one offered by appellant, and the questions submitted in both instructions were triable ones, for issues were joined on all these propositions. The court very properly did not confine the jury to a consideration of whether or not the statutory signals were given, but allowed them also to determine whether, in view of the character of this crossing, statutory signals were sufficient.

The case of C. & O. R. Co. v. Gunter, 108 Ky. 362, 56 S. W. 527, was very similar to this, and the lower court there instructed the jury that, if they believed from the evidence the crossing was an unusually dangerous one, it was the duty of the defendant to use some *effective* means other than statutory signals to warn travelers of the approach of trains, and its failure to do so was negligence. This court was of the opinion that, while the law did not require the railroad company to use *absolutely effective* means for this purpose, still it was held that it was a question for the jury to decide, under proper instructions, whether the

means employed were reasonably sufficient, under the circumstances of the case, and considering the nature of the crossing and the physical conformation of the country surrounding it.

To the same effect is the ruling of the court in the case of *C., N. O. & T. P. Ry. Co. v. Champ*, 104 S. W. 991, 31 Ky. Law Rep. 1057, where we held: "In the numerous cases involving crossing accidents that have come before this court, the central idea in all of them is that the company must use such care and precautions for the safety of travelers as the character of the crossing makes reasonably necessary for their safety and protection. What this degree of care is must depend upon the facts of each case, and is a question for the jury. At one crossing ringing the bell and sounding the whistle might be amply sufficient; at another it would be wholly inadequate, and a flagman or other safety device be necessary."

[3] Appellant further insists that counsel for appellee, in his closing argument, was guilty of misconduct grossly prejudicial to the railroad company. This misconduct is referred to in the motion for a new trial, and the objectionable language set forth by affidavit of appellant's counsel. The bill of exceptions shows that this affidavit was filed, so we have before us the affidavit of appellant's counsel that counsel for appellee did use certain objectionable language. Under the rule of *Warren v. Nash*, 68 S. W. 658, 24 Ky. Law Rep. 479, such a presentation perhaps would have been sufficient to bring the objectionable matter to us for consideration; but the *Warren v. Nash* Case has been overruled on this point by the more recent case of *Bannon v. Louisville Trust Co.*, Adm'r, 150 Ky. 405, 150 S. W. 510. It is not sufficient that appellant's counsel make affidavit as to the language used, or that the court certify that appellant's counsel did make such an affidavit. The fact that appellee's counsel used the language complained of should be authenticated to us in the bill of exceptions by the lower court before we can consider whether or not it was prejudicial.

The judgment of the lower court is therefore affirmed.

#### MARROWBONE COAL & COKE CO. v. COLEMAN.

(Court of Appeals of Kentucky. Dec. 12, 1913.)

##### 1. VENDOR AND PURCHASER (§ 175\*)—DEDUCTIONS FROM PURCHASE PRICE—RIGHT TO MAKE.

Where plaintiff understood that the purpose of defendant in buying the surface of his land was to enlarge its mining plant already erected on adjoining land, plaintiff should be compelled to consent to an abatement in the purchase price necessary to obtain a quitclaim deed from another mining company, to whom he had granted rights which would be incon-

sistent with the proposed use of the land by defendant.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 360-363; Dec. Dig. § 175.\*]

##### 2. PAYMENT (§ 86\*)—ACTION—RECOVERY.

Plaintiff contracted to convey land to defendant, which he knew it intended to use to enlarge its mining plant situated on adjoining land. Prior thereto defendant had granted rights in the land to another mining company, which would interfere with defendant's use of the land, and plaintiff consented to an abatement in the purchase price to an amount necessary to acquire a quitclaim deed from the second mining company. Held, that where part of the sum abated was paid to the attorney of the second mining company for his influence in obtaining a quitclaim deed, it appearing that defendant dealt through him, and did not pay as much for the deed as it represented would be necessary, the amount of the fee might be recovered by plaintiff from whom the transaction was concealed, defendant by its misrepresentations paying for service rendered to it with plaintiff's money.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 282; Dec. Dig. § 86.\*]

Appeal from Circuit Court, Pike County.

Action by Miles Coleman against the Marrowbone Coal & Coke Company. From the judgment defendant appeals, and plaintiff cross-appeals. Affirmed on both appeals.

J. J. Moore, of Pikeville, for appellant.  
Robert L. Miller, of Pikeville, for appellee.

TURNER, J. In May, 1903, appellee was the owner of a certain tract of land on Marrowbone creek in Pike county, Ky., and at that time conveyed to the Northern Coal & Coke Company the mineral and mining rights and privileges in same. Subsequently he conveyed the surface of a portion of the boundary to his son, Spurlock Coleman, who in turn conveyed same to appellant. Upon the tract of land so conveyed by Spurlock Coleman appellant erected its mining plant, coal tipples, coke ovens, and other improvements. Subsequently, and in October, 1910, appellant, desiring to enlarge its plant, entered into a written contract with appellee by which appellee was to convey it the surface of certain adjoining lands in which he had previously sold the mining rights to the Northern Coal & Coke Company, for the price of \$5,000. Upon investigation of the title it was ascertained by appellant that appellee in his deed to the Consolidated Coal & Coke Company had also granted to that company certain rights to the surface as to building and erecting mining plants, tipples, and coke ovens, and other improvements thereon, as would be inconsistent with the purpose for which appellant desired the property. Thereupon the agents of appellant told appellee that he would have to procure a quitclaim from the Consolidated Coal & Coke Company before they could carry out the trade; but this appellee declined to do, and told them to procure it themselves. After some considerable negotiation the agents of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant finally told appellee that they could procure the quitclaim from the Consolidated people by the expenditure of \$1,500, and to this he finally agreed. The manner in which the agreement between appellant and the Consolidated Company was reached was this: They approached the attorney for the Consolidated Company at Pikeville, and upon his suggestion they agreed with him that they would give him a \$500 fee if he would use his influence with the Consolidated Coal Company to procure a quitclaim deed for \$1,000, all of which was unknown to appellee. He did procure a quitclaim deed from the Consolidated Coal Company for \$1,000, and was paid the \$500 fee. The \$1,500 so paid out by appellant was deducted from the original purchase price of \$5,000, and appellee was paid the balance. Thereafter learning the facts, appellee instituted this action for the twofold purpose of recovering both the \$1,000 paid to the Consolidated Company and the \$500 paid to the attorney. The lower court declined to adjudge appellee the \$1,000 paid to the Consolidated Company, but did adjudge him entitled to recover the \$500 paid the attorney. From that judgment the Marrowbone Company appeals, and appellee prosecutes a cross-appeal.

[1] It is perfectly clear from the record that appellee understood that the purpose of appellant in buying the surface of this land from him was to enlarge its mining plant, which was already on the adjoining land conveyed to it by appellee's son, and appellee having previously granted to the Consolidated Company certain rights and privileges on the surface of the land which would be inconsistent and might interfere with the contemplated improvements by appellant, it was equitable and just that the purchase price should be abated to the extent that it was necessary to perfect the title, in view of the purpose for which the land was to be used. We are therefore of the opinion that, inasmuch as appellee agreed to such abatement in the purchase price, the judgment of the lower court was proper as to the \$1,000 paid the Consolidated Company.

[2] But, the payment of the \$500 fee presents a different question. The attorney was the regular attorney of the Consolidated Coal Company, and when approached by the agents of the Marrowbone Company offered to use his influence with his own client to procure the quitclaim if the Marrowbone Company would pay him \$500. This it agreed to do, but nowhere does it appear in the record that appellee was informed of this purpose; on the contrary he was told that it would cost them \$1,500 to get this release, and while that was technically true, he, not knowing of the arrangement with the attorney, was induced to agree to an abatement of \$1,500 in the purchase price, believing that amount was being demanded by the Consol-

dated Company, when in truth and in fact it was only asking \$1,000. The record is convincing that the transaction as to the \$500 fee was carefully concealed from him at all stages of the negotiations. He was a man 68 years of age, uneducated, and with little experience in business matters. It is not difficult to understand how he was overreached and deceived by these shrewd and calculating business men when they told him that it would cost them \$1,500 to get the release. It is evident that he understood them to mean that the Consolidated Company would not make it for less, and it is plain that when appellant made him pay this exorbitant fee for services rendered to it and for it he was deceived, overreached, and imposed upon. In other words Coleman, not being in possession of all the facts, agreed, without knowing it, to pay the attorney a \$500 fee for rendering appellant, and not himself, a service. It is inconceivable that the manager of the Northern Coal & Coke Company, known to be an upright business man, would not have agreed to this until the attorney was paid \$500 in addition to the \$1,000 which his own company was willing to accept. Plainly this old man was imposed upon, overreached, and deceived to the extent of this attorney's fee. It cannot be for so slight a service the Marrowbone Company would ever have agreed to give the attorney \$500 unless they could make Coleman pay it in the settlement; certainly Coleman would not have paid it if he had known it. When analyzed, it was an agreement between the Marrowbone Company and the attorney of the Consolidated Coal Company that it (the Marrowbone Company) would give him a \$500 fee to be paid by Coleman without his knowledge, if he (the attorney) would procure from his client (the Consolidated Company) a quitclaim deed the Marrowbone Company desired. The element of good faith in its dealings with this old man upon the part of appellant is entirely lacking.

Judgment affirmed on original and cross appeals.

#### LOUISVILLE & N. R. CO. v. STRANGE'S ADM'X.<sup>†</sup>

(Court of Appeals of Kentucky. Dec. 16, 1913.)

#### 1. MASTER AND SERVANT (§ 86\*)—INJURIES TO SERVANT—RAILROADS—EMPLOYERS' LIABILITY ACT—EFFECT.

Where an employé of a carrier is injured or killed while the carrier is engaged in interstate commerce, the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) supersedes all state laws and furnishes the entire basis for recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
<sup>†</sup>Rehearing denied February 5, 1914.

## 2. PLEADING (§ 369\*)—ALTERNATIVE ALLEGATIONS.

Where, in an action for death of a carrier's servant, the petition alleged that, at the time of the injury, intestate was in defendant's service as a brakeman on a train then being operated on one of defendant's highways of interstate commerce, and that the cars and trains were then being used in interstate or intrastate commerce, that one of the two states of facts was true, but plaintiff did not know which, and that her intestate was killed while so engaged as a direct result of one or more of all of the acts without fault on his part, the petition was not sustainable under Civ. Code Prac. § 113, subd. 4, authorizing alternative allegations, since the rights and liabilities of the parties under the state law and the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) were essentially different, and hence defendant was entitled to compel plaintiff to elect on which she would proceed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

## 3. PLEADING (§ 369\*)—ELECTION.

In negligence cases, the cause of action which survives for the physical and mental suffering between the accident and death of the person injured cannot be joined with a cause of action given by the Constitution and statute for loss resulting to decedent's estate from the destruction of decedent's earning capacity; the plaintiff being restricted to the common-law cause of action or the statutory cause and must elect which one he will prosecute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

## 4. PLEADING (§ 369\*)—MOTION TO ELECT—TIME.

Where plaintiff sought to join a cause of action at common law for death of a railroad employé with a cause of action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), a motion by defendant to require plaintiff to elect whether she would proceed under the state law or under the federal statute, made before proceeding to trial, was in time.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

## 5. MASTER AND SERVANT (§ 137\*)—INJURIES TO SERVANT—RAILROADS—BRAKEMAN—ASSUMED RISK.

While a brakeman assumes the risk from such jerks as are usual and ordinarily incident to the prudent operation of his train, and if injured or killed as the result of such a jerk there can be no recovery, yet if he is killed or injured as the result of a jerk that is unusual and unnecessary, and so violent as to show a want of ordinary care on the part of the train operatives, a recovery may be had.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.\*]

## 6. MASTER AND SERVANT (§ 286\*)—DEATH OF SERVANT—UNUSUAL JERK—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of plaintiff's decedent by being thrown from his train by a jerk, whether the jerk was unusual and unnecessary so as to show want of ordinary care on the part of the train operatives held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

## 7. MASTER AND SERVANT (§ 86\*)—DEATH OF SERVANT—RAILROAD EMPLOYEES—FEDERAL EMPLOYERS' LIABILITY ACT.

In determining whether the federal or state law is applicable to an action for the death of a railroad employé, the test is whether the injuries were sustained while the railroad company was engaged and the employé was employed in interstate commerce; if so the federal statute applies, and if not the state law is applicable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.\*]

## 8. COMMERCE (§ 27\*)—INJURIES TO SERVANT—RAILROADS—FEDERAL EMPLOYERS' LIABILITY ACT.

A train on which decedent was working as a flagman at the time of his death consisted of 19 cars, the majority of which were brought from points in Kentucky to R., in that state; a few having been brought from Tennessee. The conductor was directed to take all the cars to R., and no one had orders to carry them any further. When the cars coming from Tennessee reached R., it was the end of their interstate journey, and after reaching such destination new orders were issued with reference to their further destination, and under these and on their new journey each car was destined to a point within the state. Held, that the train after leaving R. was not engaged in interstate commerce, and hence an action for decedent's death was maintainable only under the state law and not under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.\*]

## 9. EVIDENCE (§ 126\*)—RELEVANCY—RES GESTÆ.

Statements made by decedent, that he was jerked from a train on which he was employed, within two minutes after his injuries were received, were admissible as res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 372-376; Dec. Dig. § 126.\*]

## 10. MASTER AND SERVANT (§§ 101, 102\*)—NEGLIGENCE—ORDINARY AND GROSS NEGLIGENCE.

In an action for death, plaintiff may recover for ordinary negligence, and hence it is not necessary that he prove, or the court require the jury to believe, that the negligence of those in charge of the train by which intestate was killed was gross.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

Nunn, J., dissenting.

Appeal from Circuit Court, Logan County.

Action by Claude Strange's administratrix against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Browder & Browder, of Russellville, and Benjamin D. Warfield and O. H. Moorman, both of Louisville, for appellant. S. R. Crewdson, of Russellville, B. F. Procter, of Bowling Green, and Hazelrigg & Hazelrigg, of Frankfort, for appellee.

CLAY, C. On November 22, 1911, Claude Strange, an employé of the Louisville & Nashville Railroad Company, was killed. His administratrix brought this action

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against the railroad company to recover damages for his death. From a verdict and judgment in her favor for the sum of \$15,000, the railroad company appeals.

The accident happened about 5:40 on the morning of November 22, 1911. The decedent was a flagman or rear brakeman on a freight train consisting of an engine, a caboose, and 19 empty coal cars. These cars were all destined to certain coal mines situated in the state of Kentucky on the O. & N. division of the defendant's line of railway. The train was to begin its journey at Russellville and terminate its journey at Central City. None of the cars were destined for points outside of the state. At the time of the accident the train had been made up and was headed north. All that remained to be done was for the conductor and engineer to register out. Before starting, the train was several yards south of the register office. It then began to move slowly towards the office with a view of stopping there in order to enable the conductor and engineer to register out. The caboose was a box car, or ordinary freight car, temporarily equipped as a caboose. It had doors in its sides instead of in the rear and front. On the side near the center of the car was a step and handrail. When last seen, decedent was on the side step on the left-hand side. When the engineer reached a point near the register office, the speed of the train was reduced. The conductor left the train and went into the register room. About a minute later he was joined by the engineer.

The evidence for plaintiff is in substance as follows:

Hal King, who had worked as a brakeman for the Louisville & Nashville Railroad Company for about 2½ years, and for the Illinois Central Railroad Company about 2 months, and who on the occasion of the accident was employed by the defendant, says that he was at a point in the yard about 90 yards from where decedent was killed. Decedent was standing on the side of the caboose as it passed him. The train was then going about four miles an hour. He heard a jerk of the cars and then heard some one halloo. He ran to the point of the accident and found decedent with both legs cut off and his face scarred up. Decedent was lying by the side of the track. The car had pulled over him. This was not over two minutes after the decedent was hurt. He asked decedent how he got hurt, and decedent said he "was jerked off." Decedent was hurt on the Hopkinsville crossing, and the caboose was about 2 car lengths north of that crossing. It was about 14 car lengths from the Hopkinsville crossing to the Memphis line crossing. There is a downgrade from the Hopkinsville crossing to the Memphis line crossing. The jerk that he heard was a hard jerk. "From the sound of these cars it was a very hard jerk." It was not a usual or customary jerk; "from the sound of the cars

it must have been harder" than the customary jerk. He further stated that brakemen know when a train stops and starts that there is going to be some jerk. He himself had been jerked some. Never made a trip without some jerking. Did not know that he had ever heard one harder than that.

Phil Wilson, a section foreman employed by the defendant when decedent was killed, testified that he was down at the shops on the day of the accident. He testified that he heard the train when it moved down. It gave a hard jerk. In a few minutes he heard that a man was killed. Witness had been working around railroads all of his life, and was familiar with the noise of trains. On being asked whether the jerk of the train was a customary one or not, he answered, "It was harder than usual." He testified that the noise of the jerk came from about the Hopkinsville crossing.

H. L. Ryan, the conductor in charge of the train, testified that he told decedent that the train would pull down to the office and get orders, and directed the decedent to couple the air to the caboose. He then rode the train to a point near the office. On leaving the train he went into the office. The train was then flagged across the Memphis line. The train pulled over the crossing while he was in the office. Shortly thereafter the engineer came into the office. Pretty soon a man came in and said Strange was hurt. When they got to the point where Strange was hurt, he was on a cot. He only heard one jerk of the train. Witness' testimony as to the character of the jerk is as follows: "Q. What character of jerk was that? A. It was a tolerably hard jerk, but I have heard lots harder, and some not so hard; but it was a jerk that is liable to occur on any freight train. Q. Hard enough to jerk a man off? A. Very often the case, unless a man is holding on. When a man is not expecting a jerk, sometimes a very small jerk will jerk him off."

When decedent reached the office, he said, "Cap, they jerked me off."

Vernon Gorham testified that he had been in defendant's employ for 4½ years. On the necessity of the jerk he testified as follows: "Q. In your judgment, would you regard it careful and prudent railroading for the engineer to move his engine down there at the rate of four or five miles an hour, and reduce the speed of his train as if he was going to stop, and apply the steam and start suddenly and jerk it? (Objected to.) A. No, sir. Q. Would there be danger in managing the train in that way? A. In the first place, he is liable to hit another train on the crossing. Somebody else might try the same thing, and he is liable to jerk the train in two; or to jerk some one off like it did happen. (Objected to.) \* \* \* Q. In stopping and starting freight trains, is there any way possible for the engineer to avoid the running in and running out of the slack of the

train? A. Of course, he cannot avoid the slack running up in the train, but when he goes to stop he can stop easy. Q. He can reduce that jerk, but he cannot eliminate it entirely? A. No, sir. Q. It is common in the operation of freight trains, more or less jerking? A. Yes, sir. Q. It can't be avoided, can it? A. No, sir; can't avoid some jerking."

It further develops from the evidence of the engineer that when he got near the office the conductor jumped off and went to the office. He then passed the office and got a signal to go ahead. He gave the engine steam and started across the crossing. He never felt any jerk at all. A man on the engine cannot feel a jerk as well as a man on the rear end. He opened up the throttle gradually. As he approached the Memphis line crossing, the slack ran in. When he struck the grade and opened up his engine, the slack ran out. That causes the jerk. He did not open up his throttle violently or unusually. Every movement of the train was controlled by him. He shut the throttle off himself. There was no necessity for an unusual jerk.

Jess Ramsey, head brakeman, testified that he signaled the engineer across the Memphis line. He did this in response to a signal from the rear brakeman. In going across there was no necessity for a hard jerk, though it was impossible to start a freight train without a snatch. Norman Wyatt, the fireman, testified that the train had almost stopped when the signal to go over the Memphis line crossing was received. The engineer opened up his throttle and moved over the crossing. From what the engineer said, it was his understanding to let the engine toll to a certain point. When he reached the throttle, it was not entirely shut off. He pushed the throttle and shut it off.

It is insisted that the court erred in refusing to require plaintiff to elect whether she would proceed under the state law of the federal Employers' Liability Act.

In her petition plaintiff made the following allegation: "She says further that at the time of the injury aforesaid her said intestate was in the service of the defendant as brakeman upon its said train, which was then being used and operated on one of its highways of interstate commerce, and that said cars and trains were then being used in interstate commerce, or were being used in intrastate commerce, and that one of the two states of facts is true, and she does not know and cannot state which is true, and that her said intestate was killed while so engaged, as the direct result of one or more of all of said acts of negligence combined, and without fault on his part."

Before proceeding into trial, defendant made a motion to require plaintiff to elect whether she would proceed under the state law or Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S.

Comp. St. Supp. 1911, p. 1322). This motion was overruled. Thereupon plaintiff's evidence was heard. Plaintiff was permitted to prove the number, ages, and sex of her children, and to show that her husband was a man of good moral character. At the conclusion of plaintiff's evidence the motion to elect was again overruled. Thereupon defendant's evidence was heard. At the conclusion of all the evidence, the court held that the case was controlled by the state law, and directed the jury in arriving at their verdict not to take into consideration any of the evidence in regard to the number, ages, and sex of the decedent's children, or in regard to his moral character. The court then instructed the jury and submitted the case under the state law.

[1] Counsel for plaintiff contend that the method of pleading adopted in their petition is authorized by subsection 4 of section 113 of the Civil Code of Practice, which provides: "But a party may allege, alternatively, the existence of one or another fact, if he state that one of them is true, and that he does not know which of them is true." The case, however, is not one of mere alternative pleading of facts, for the sole purpose of pleading the facts in the alternative was to invoke the application of both the state law and the federal statute. It is well settled that, where the carrier is engaged in interstate commerce and the employé is injured while employed in interstate commerce, the federal statute supersedes all state laws and covers the entire field. *Mondou v. New York, New Haven & Hartford R. Co.*, 223 U. S. 1, 53-55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355; *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 67, 33 Sup. Ct. 192, 57 L. Ed. 417.

[2] Were the parties themselves and the rights and liabilities of the parties precisely the same under both the state law and the federal statute, there would doubtless be no good reason for requiring an election; but such is not the case. Among the points of dissimilarity may be mentioned the following:

(1) Under the federal statute the action is vested in the decedent's personal representative for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next kin dependent upon such employé; while in a case arising under the state law the right of action is vested in the personal representative for the benefit of the decedent's estate.

(2) Under the federal statute the fellow-servant rule is abolished. Under the state law it is still in force, subject to certain modifications which need not be noticed.

(3) Under the federal statute the employé does not assume the risk of his employment in cases where the violation by the carrier

of any statute enacted for the safety of the employes contributes to the death or injury of said employé. Under the state law the doctrine of assumed risk applies and is subject to such modification.

(4) Under the federal statute, the action must be brought within two years from the day the cause of action accrued. Under the state law the action must be brought within one year from the day the cause of action accrued.

(5) Under the federal statute, contributory negligence does not bar a recovery, but the damages are diminished by the jury in proportion to the amount of negligence attributable to such employé. Furthermore, an employé is never guilty of contributory negligence in cases where the violation by the carrier of any statute enacted for the safety of the employé contributed to the death or injury of such employé. Under the state law, contributory negligence bars a recovery.

[3] These points of dissimilarity make it plain not only that the parties and their rights and liabilities are essentially different under the two laws, but that in many cases there will be a material difference in the pleadings and the character of the evidence that may be heard. With such essential differences between the two laws we are unable to perceive how a party may properly proceed under both at the same time. In cases of negligence causing death, we have held in a number of instances that the cause of action which survives for the physical pain and mental anguish suffered during the period between the accident and death cannot be joined with the cause of action given by the Constitution and the statute for the loss resulting to the decedent's estate for the destruction of his earning capacity, and that the party complaining is restricted to the common-law cause of action or the statutory cause, and must elect which one he will pursue. *Connor v. Paul*, 12 Bush, 145; *Hansford v. Payne*, 11 Bush, 385; *Hackett v. Railroad Co.*, 95 Ky. 236, 24 S. W. 871, 15 Ky. Law Rep. 612; *L. & N. R. Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236, 18 Ky. Law Rep. 379, 34 L. R. A. 788, 56 Am. St. Rep. 385; *Thomas v. Maysville Gas Co.*, 108 Ky. 224, 56 S. W. 153, 21 Ky. Law Rep. 1690, 53 L. R. A. 147; *O. & N. R. Co. v. Barclay's Adm'r*, 102 Ky. 16, 43 S. W. 177, 19 Ky. Law Rep. 997; *Louisville Ry. Co. v. Will*, 66 S. W. 628, 23 Ky. Law Rep. 1961; *Lewis v. Taylor Coal Co.*, 112 Ky. 845, 66 S. W. 1044, 23 Ky. Law Rep. 2218, 57 L. R. A. 447. Indeed, the precise question here under consideration was before this court in the case of *South Covington & C. St. Ry. Co. v. Finan's Adm'r*, 153 Ky. 340, 155 S. W. 742. There plaintiff's cause of action was stated in three separate paragraphs. In the first paragraph plaintiff based her right of recovery on the common law. In the second paragraph she pleaded that the defendant was engaged in interstate commerce and her decedent was injured while employed

in interstate commerce, thus invoking the aid of the federal Employers' Liability Act. In the third paragraph she rested her case on the statute of the state of Ohio. Before answer defendant moved the court to require plaintiff to elect which cause of action she would prosecute. This motion was overruled. It was held that the circuit court erred in refusing to require plaintiff to elect under which paragraph of the petition she would prosecute her case. While the precise question involved has not been passed on by the Supreme Court of the United States, its rulings on other questions of a similar character tend, we think, to sustain the views herein announced. The decisions of that court make it reasonably plain that there can be no such thing as an alternative right of action under the federal or state law; for both cannot occupy the same field, and if the federal statute is applicable the state law is excluded by reason of the supremacy of the former under our national Constitution. Thus in the case of *St. Louis, San Francisco & Texas Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, plaintiffs' petition stated a case under the state law. The defendant, by its special exceptions, called attention to the federal statute and suggested that the state statute did not apply. Plaintiffs, with the sanction of the court, stood by their petition. It developed from the evidence that the real case was controlled, not by the state statute, but by the federal statute. It was held that the case proved was not pleaded, and that plaintiffs were not entitled to recover. In the case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Hesterly, Adm'r*, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031, it was held that defendant was not estopped to rely on the federal statute by a plea of contributory negligence under the state law on the ground that the right of election was in the plaintiff, and, as he relied on the state law, defendant had no choice if it was to defend on facts.

[4] In the case under consideration the motion to elect was made in due time. Defendant had the right to know in advance under which law it would be required to defend. The trial court therefore erred in overruling defendant's motion.

[5] Another error relied on is the failure of the trial court to give a peremptory in favor of defendant. In this connection it is insisted that the evidence fails to show that the jerk which resulted in decedent's death was anything more than an ordinary or usual jerk. It is the rule that brakemen on a train assume the risks and hazards arising from such jerks as are usually and ordinarily incident to the prudent operation of the train, and if injured or killed as a result of such a jerk there can be no recovery; but if killed or injured as the result of a jerk which was unusual and unnecessary, and so violent as to show a want of ordinary care on the part of those operating the train, then

a recovery may be had. *Central Kentucky Traction Co. v. Smedley*, 150 Ky. 598, 150 S. W. 658.

[6] As no precise rule can be laid down for determining the amount and character of evidence sufficient to justify a recovery, each case will have to turn on its own peculiar facts. In the present case there was evidence that the decedent was jerked from the train so violently that he rolled under one of the cars and was killed. There is evidence to the effect that the jerk was a very hard one, and harder than usual. Even the conductor, who heard the jerk while in the register office, says that it was a tolerably hard jerk, though he had heard jerks harder than that. One of the witnesses who was a railroad man of several years experience says that he did not know that he had ever heard a harder jerk. Another witness says that the prudent operation of the train did not require a jerk of that character at that time. Indeed, the engineer himself says that there was no necessity for an unusual jerk at the time he opened the throttle and started across the Memphis branch road. Taking into consideration the fact that there was evidence tending to show that the prudent operation of the train did not require a jerk of an unusual character, and that the jerk was not only a very hard one, but unusual and sufficiently violent to throw the decedent from the car and to cause him to roll under the train, it is apparent that the evidence here is much stronger than that in the case of *L. & N. R. R. Co. v. Greenwell's Adm'r*, 144 Ky. 796, 139 S. W. 934, and the cases therein cited, and, in our opinion, was sufficient to justify the submission of the case to the jury. *I. C. R. R. Co. v. Hansbrough's Adm'r*, 151 Ky. 804, 152 S. W. 953; *L. & A. R. Co. v. Phillips' Adm'r*, 151 Ky. 445, 152 S. W. 246.

[7] In determining whether or not the federal or state law is applicable to an action of this character, the test is this: Were the injuries of the employé sustained while the company was engaged and the employé was employed in interstate commerce? If so, the federal statute applies; if not, the state law is applicable. *St. Louis, San Francisco & Texas Ry. Co. v. Seale*, supra; *Second Employers' Liability Cases*, 223 U. S. 1, 53, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Pederson v. Delaware, Lackawanna & Western R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125.

[8] What are the facts of this case? The train on which decedent was working consisted of 19 cars. The majority of those cars were brought from points in Kentucky to Russellville. A few of the cars were brought from points in Tennessee. The conductor was directed to bring all of the cars to Russellville. No one had orders to carry the cars any further. When the cars coming from Tennessee reached Russellville, it was

the end of their interstate journey. After reaching their destination, new orders were issued with reference to their destination. Under these new orders and on their new journey, each car in the train was destined to a point within the state of Kentucky. It is apparent therefore that the carrier was not engaged, nor was the decedent employed, in interstate commerce at the time of the injuries resulting in his death. It follows therefore that the trial court properly held that the case was one arising under the state law, and not under the federal statute.

[9] The statements of the decedent to the effect that he was jerked from the train were made within two minutes after his injuries were received, and were therefore admissible as a part of the *res gestæ*. *C. & T. P. Ry. Co. v. Evans*, 129 Ky. 152, 110 S. W. 844, 33 Ky. Law Rep. 596.

The instructions given by the trial court are not subject to complaint. They are substantially the same as those directed to be given in the case of *C. & T. P. Ry. Co. v. Evans*, 129 Ky. 152, 110 S. W. 844, 33 Ky. Law Rep. 596. Indeed, this is conceded by counsel for defendant; but it is insisted that they should not have been given because the evidence was insufficient to take the case to the jury, a contention which we have heretofore considered and decided adversely to defendant.

[10] Being a death case, it was not necessary for plaintiff to show, or for the court to require the jury to believe, that the negligence of those in charge of the engine was gross. In such a case a recovery may be had for ordinary negligence. *C. & T. P. Ry. Co. v. Cook*, 113 Ky. 161, 67 S. W. 383, 23 Ky. Law Rep. 2410; *I. C. R. R. Co. v. Coleman*, 59 S. W. 13, 22 Ky. Law Rep. 878; *Linck v. L. & N. R. R. Co.*, 107 Ky. 370, 54 S. W. 184, 21 Ky. Law Rep. 1097; *Clarke v. L. & N. R. R. Co.*, 101 Ky. 34, 39 S. W. 840, 18 Ky. Law Rep. 1082, 36 L. R. A. 123; *L. & N. R. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

NUNN, J. (dissenting). In deciding to reverse this case, the other members of the court have reached the conclusion that section 113 of the Code, permitting alternative pleading, is not applicable. My view of this matter is so very different that I feel constrained to dissent from their opinion. The effect of this ruling of the court, in my judgment, will lead to endless confusion, if not disaster, to many deserving litigants, and the facts here bring forcibly to mind this danger.

It was an interstate train until it reached Russellville, and there a train order from the dispatcher was handed to the conductor and engineer in charge. By virtue of this



order, the train, consisting of the same cars, engine, and crew, on the same roadbed which was an interstate highway, became an intrastate train. The delivery of the train order and the accident occurred at the same station, and practically at the same time. It was a telegraphic order, and from its very nature a secret one. Only the railroad company and its officers in charge of the train knew, or could know, of this order that worked such a sudden transition in the character of the train.

It has been adjudged that it is not difficult to determine whether the business of the carrier is intrastate or interstate commerce. Conceding the accuracy of that judgment, it certainly assumes a full knowledge of all the facts, and no judge of discretion would undertake to decide the question until all the proof be in. In advance of the trial, and in a great number of cases, none but the railroad company could or did know what character of commerce a train is engaged in. If one does not know all the facts, there is at least an even chance that he will make the fatal mistake of basing his action upon facts within the purview of the federal law, only to discover, after perhaps a year's litigation, that the state law alone is applicable, a nonsuit results, and a plea of limitations interposed as a bar to any further effort to recovery.

While subsection 4 of section 113 of the Civil Code was enacted long before the federal Employers' Liability Act, and not in contemplation of it, yet its purpose was to meet just such conditions, and it has served that purpose for a great many years. I can see no good reason for taking it out of service now. Trains of common carriers are engaged in interstate or intrastate commerce, one or the other, and an essential fact for recovery in actions of this nature is what kind of commerce the train was engaged in; for, as correctly stated in the opinion of the court, if interstate commerce, the federal law only applies, and the state law alone is applicable if it is intrastate commerce. That fact—that is, the kind of commerce in which it is engaged—like many other facts in all forms of actions, is peculiarly within the knowledge of the adverse party. Even under the common law, and independent of our Code, where the facts to be alleged are peculiarly known, or presumed to be known to the opposite party, less certainty and particularity are required of the pleader than in ordinary cases. 6 Ency. Pld. & Pr. 271. But the Code of Practice, by the section referred to, goes farther than this, and specifically confers upon claimants the right to plead alternatively that the one or the other fact is true, if he does not know which. The reason for this rule of the Code is the same upon which the above-named practice at common law is founded. The adverse party knows which fact is true, and no right of his is prejudic-

ed by the Code provision permitting the alternative statement. And knowing which fact is true, he should disclose it, and not seek to make the other party elect. Analogous is the requirement upon defendant when he seeks to have return of summons quashed because of mistake in the name of party defendant, or upon his special demurrer for defect of parties, he is required to disclose the real name of the defendant, or parties in interest.

To me the Code provision is too plain for misunderstanding. A party may—not in some cases merely, nor except in the case of a railroad company, but may in all cases—against any party allege alternatively the existence of one or the other fact, if he state that he does not know which of them is true. The plaintiff did exactly that in this case, and nothing more. The Code permits it, and that ought to be sufficient. She does not plead a legal conclusion, or say that this law or that is applicable, but she pleads alternatively the fact that the train was either engaged in interstate or intrastate commerce, and she does not know which. It is no answer to say that her purpose was to invoke the application of both the state and federal statutes. Both were enacted for the benefit of litigants, and she had a right to invoke the aid of either if the facts should come within the purview of their provisions. She was not claiming under both laws, but under that law which one fact would make applicable to her case, and that one fact she did not, and could not, know, but which was within the knowledge of the railroad company.

Neither can it be said that there was a misjoinder, or that she was attempting to join two causes of action. She had but the one grievance, and a single cause of action against one party for the same negligent acts. If the negligent acts be proven, the defendant is liable under either the state or federal law.

Neither should her right to plead alternatively be denied by saying that under the two laws there is a difference in the parties for whose benefit a recovery may be had, or that the rights and liabilities of the litigants are different, and for that reason there would be confusion in pleadings, and in the introduction of evidence. There would be more force in this argument if we were permitted to repeal the Code provision. Since that is out of our province, and, as I view it, the Code plainly authorizes it, an objection to the Code of the confusion arising from it should be addressed to the Legislature, which alone has power to repeal or modify it. Moreover, the defendant can save itself and the court from any possible confusion by disclosing the facts bearing upon the question. The only difference in proof required under the two laws is the matter of heirs at law of decedent, and their dependency. The court by hearing proof up-

on this point at the close of the testimony may preserve every right of both parties without any possible detriment to either.

It is true the United States Supreme Court, in the case of *St. L., S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, has held that there can be no alternative right of action under the state or federal law because the federal law supersedes the state law if the injury arises from interstate commerce. For that reason the party cannot choose at his pleasure under which law he will proceed since the facts must choose, or determine for him. But it is one thing to plead and rely alternatively on the state and federal statutes, and quite another thing to plead alternatively the existence of one or another fact when he is entitled to recover if either fact exists.

Moreover, I fail to see in what way the appellant was prejudiced by the court's failure to require an election. In view of the fact that the train causing the death was engaged in intrastate commerce, the only superfluous or hurtful evidence admitted was as to the intestate's heirs at law, and their dependency upon him. When the character of the train was ascertained, the court orally admonished the jury that they should not give any consideration to that evidence, and again in its written instructions reiterated that statement. We are disposed to attribute to a jury Solomon-like wisdom in questions of fact. On a matter of excluded testimony, why should we regard them as controlled and influenced by child-like impressions? We must assume that they are men of intelligence and probity sufficient to feel themselves bound by oath to observe the law of the case as given to them by the court, and therefore I am forced to the conviction that they did disregard the evidence above referred to.

The necessity of dissenting from my Associates of the court is not only unpleasant, but embarrassing. For their ability and their honesty of opinion and sincerity of purpose I have the utmost respect. It may seem a light thing to dissent, because one thereby in a measure escapes responsibility for the effect of the opinion; but, because of my respect for the other members of the court, it is to me a most serious undertaking. But notwithstanding these considerations, I cannot refrain from giving expression to my opinion upon this question.

CINCINNATI, N. O. & T. P. RY. CO. v. GOLDSTON.

(Court of Appeals of Kentucky. Dec. 12, 1913.)

1. MASTER AND SERVANT (§ 265\*)—ACTIONS—FEDERAL EMPLOYERS' LIABILITY ACT—BURDEN OF PROVING NEGLIGENCE.

An employé, suing under the federal Employers' Liability Act (Act April 22, 1908, c.

149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for personal injuries, has the burden of showing that defendant's employés were guilty of negligence causing his injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

2. MASTER AND SERVANT (§ 291\*)—INJURIES—INSTRUCTIONS—CONFORMITY TO ISSUES.

Where the negligence in issue in a railroad conductor's action for injuries while boarding a train was the defective condition of the caboose step and the sudden jerking of the train throwing him under the wheels, an instruction that if the engineer, while part of the train was still on the side track, negligently or without a signal caused the train to go forward with the purpose of leaving the yards with a quick and violent movement, and thereby caused plaintiff to be thrown from the step, the jury should find for plaintiff, was erroneous, being based in part upon negligence by the engineer in starting before he received a signal, when that was not in issue.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

3. MASTER AND SERVANT (§ 293\*)—INJURIES—INSTRUCTIONS—UNNECESSARY JERKING.

Instructions in a railroad conductor's action for injuries by being jerked from the caboose step by the sudden jerking of the train, should have used the terms "violent, unusual, and unnecessary," in characterizing the jerk, instead of "quick, violent, sudden, and unusual."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

4. MASTER AND SERVANT (§ 293\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS—REPETITION OF ISSUES.

Where, in an action for injury to a railroad conductor by being jerked from the caboose step because of a sudden jerk of the train or a defective step, the court submitted in one instruction the issue of the sudden jerk, it was confusing to again submit the same question in a second instruction which also submitted the question of a defective step.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

5. MASTER AND SERVANT (§ 203\*)—ASSUMED RISK—NATURE OF DEFENSE.

The defenses of contributory negligence and assumed risk are distinct, the doctrine of assumed risk resting upon an agreement by the servant that the master shall not be liable for an injury ordinarily incident to the service, or arising from a known and obvious danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 538-543; Dec. Dig. § 203.\*]

6. MASTER AND SERVANT (§§ 206, 217, 226\*)—ASSUMED RISK.

An employé assumes all of the ordinary risks incident to his employment as well as those of which he may know in the exercise of ordinary care, but he does not assume risks created by the master's negligence, or latent risks.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 550, 574-600, 659-667; Dec. Dig. §§ 206, 217, 226.\*]

7. MASTER AND SERVANT (§ 288\*)—INJURIES—JURY QUESTION—ASSUMED RISK.

Evidence, in an action for injuries to a railroad conductor by being jerked from the caboose step by a sudden jerking of the train, held to make it a jury question whether the jerk

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was only the ordinary movement of the train, the risk of injury from which plaintiff assumed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

**8. MASTER AND SERVANT (§ 295\*)—INJURIES—ISSUES—ASSUMED RISK.**

Where there was more evidence, in an action for injuries to a railroad conductor by being jerked from a caboose step, that the jerk was only an ordinary movement of the train, than that it was violent and unnecessary, the court should have instructed upon the question of assumed risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.\*]

Appeal from Circuit Court, Boyle County.

Action by L. S. Goldston against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Charles H. Rodes and Nelson D. Rodes, both of Danville, and John Galvin, of Cincinnati, Ohio, for appellant. Robert Harding, John W. Rawlings, and Emmet Puryear, all of Danville, for appellee.

**MILLER, J.** The appellee, Goldston, was injured on August 10, 1911, while in the service of the appellant as the conductor of a freight train. The train, consisting of 33 cars, was standing on the side track No. 3 in the yards of the appellant in Danville, about 5 o'clock in the afternoon ready to depart upon its trip to Oakdale, Tenn. The engine was within about one car length of the switch which connects the side track with the "lead" track, which leads into several parallel side tracks west of the south-bound main track. From the point where side track No. 3 entered the "lead" track, to the point where the "lead" track joins the south-bound track, is a distance of about ten car lengths. The caboose, which was on the rear end of the train, was a box car caboose, made from what was originally an ordinary box car. The caboose had a door at each end, and also a door in the middle of each of its sides; and under these side doors there was a step of wood and iron eight or ten inches broad, and about six feet long, while there was attached to the caboose, on each side of the two doors, an iron rod known as a "grab-iron." The steps and grabirons were for the use of the trainmen in boarding the caboose. The train crew consisted of Goldston, conductor; Nichols, engineer; Palmer, fireman; and Litton and Singleton, head brakeman and rear brakeman, respectively. A few minutes before the train started, Nichols, the engineer, climbed down from his engine cab and walked back along the east side of the train a few car lengths, where he met Goldston, who gave Nichols the train orders and clearance card, and saying that he would

catch the caboose. Nichols testified that Goldston also said he was ready to start; but Goldston denied this. Nichols immediately walked back to his engine, mounted it, waited a few moments, and then gave two short blasts of the whistle, and began to slowly move the train out of the side track. Goldston says he was about twelve or fifteen car lengths from the caboose when the train began to move; that he walked back toward the caboose, and when he met it the train was moving at the rate of about six miles an hour; that he took firm hold of the two grabirons beside the eastern door of the caboose, and planted both feet firmly on the footboard below the door sill; that he had ridden in that position for about 30 seconds, when the caboose gave a lunge forward, and the step gave way with him, throwing him off the caboose and under the wheels, which ran over his right leg, crushing it in such a manner that amputation was necessary. The caboose carried Silvers, an engineer upon appellant's road, Preston and Hammer, switchmen in appellant's service, who were on their way to other points on the road, and rear brakeman Singleton. Preston and Hammer had boarded the caboose by the step and door on its west side, while Singleton had used the step on the east side.

Singleton, who was standing in the doorway of the caboose watching Goldston while the caboose was approaching him, says Goldston attempted to board the caboose; that he reached for the grabirons with his hands—may have touched them, but did not get a solid hold—and just then the caboose gave the jerk which usually results from taking up the slack in a freight train; that Goldston's feet were not planted on the footboard, though they may have touched it in his attempt to get on the moving caboose; and that he fell on his left side. The other three men who were sitting in the caboose testified, in substance, that they were in positions to see the east door of the caboose, but that they did not see Goldston standing on the step in front of the door; and they further stated that the jerk of the train was the usual and ordinary jerk similar to that experienced by them every day on a railroad train.

Nichols, the engineer, says that, after he had given two short blasts of the whistle, he opened the throttle of the engine from one-sixteenth to one-eighth of an inch, which caused the train to gradually move out from the sidetrack onto the "lead" track, and that, after he had proceeded about four car lengths, he shut off the steam by closing the throttle. The track was slightly downgrade, and the train rolled at the rate of about six miles an hour through the "lead" track and out onto the south-bound main track. The engine being heavier than any freight car, it did not roll as fast as the freight cars, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

they consequently pressed forward, bunching the slack in the couplers forward toward the engine. When the engine had proceeded about four car lengths on the main line, the engineer again opened the throttle from one-sixteenth to one-eighth of an inch, which caused the engine to go forward a little more rapidly than it had been proceeding, and necessarily pulled the slack out of the train which had been bunched forward, and caused the cars to successively jerk forward one after the other. It was this jerk that the caboose received when Goldston was injured, and about which Goldston and the men in the caboose testified, as above recited.

Appellant's rule 119 provided that a train must not start without a signal from the conductor, and Goldston testified that Nichols started the train without a signal; and, further, that it was Nichols' duty, after the entire train had passed through the switch and onto the main track, not to proceed upon the journey to Oakdale until he had received a signal to do so, from Goldston. Usually, the train would be required to stop after it had reached the main track in order for the rear brakeman to close the switch and board his train; but occasionally some other employé would close the switch, and, upon the signal being given, the engineer would proceed upon his journey without bringing his train to a full stop. In this instance Nichols says that, when the engine had gone about four car lengths upon the main track, he received the "high-ball" signal from Litton, which meant that the train could proceed without stopping; and that he then opened the throttle slowly, as above stated, pulling the slack out of the train, and causing the jerk complained of. Litton denies that he gave Nichols the "high-ball" signal, although both Nichols and Palmer, the fireman, says he gave it. The acts of negligence, however, upon which appellee relied, were the defective step and the alleged violent, unusual, and unnecessary jerk of the train after the engine had gotten out on the main track.

[1] The action was brought under the federal Employers' Liability Act, and under that act it is necessary for the plaintiff to show that the employés of the defendant were guilty of negligence which caused the injury complained of. *Helm v. C., N. O. & T. P. Ry. Co.*, 160 S. W. 945. As acts of negligence upon the part of the appellant, the petition alleged the defective condition of the step on the caboose, and the sudden and unusual jerk of the train which threw him under the wheels of the caboose. The answer joined issues upon these allegations, and relied affirmatively upon the contributory negligence of Goldston, and his assumption of the risk, in bar of a recovery. Goldston recovered a verdict and judgment for \$9,000, and the company appeals.

First, it is insisted that the first and sec-

ond instructions were erroneous. They read as follows: "(1) If you believe from the evidence that the defendant company's engineer in charge of the freight train, while any portion of it was on the side track in the yards, and before all of said train had come onto the main track, negligently, or without receiving a signal from the conductor or brakeman Litton to do so, caused said train to go forward with the purpose and intention of leaving the yards on its route to Oakdale, with a quick and violent and sudden and unusual movement, and thereby caused the plaintiff to be thrown from the footboard of the caboose and injured his leg, you will find for the plaintiff under this instruction, and if you do not so believe from the evidence, you will find for the defendant under this instruction. (2) If you believe from the evidence that the defendant company's footboard on its caboose was in a loose, or defective, and unsafe condition, and the plaintiff did not know, or by the use of ordinary care could not have known, of such condition, and the defendant company knew, or by the use of ordinary care could have known, of said condition, and you further believe from the evidence that the plaintiff got upon said footboard while the same was in said condition for the purpose of discharging the duties required of him by the defendant company, and while so engaged the defendant company's engineer in charge of the freight train negligently caused said train and caboose to go forward with a quick and violent and sudden movement, which was unusual or unnecessary, and because of said condition of said caboose and such movement of said train and caboose, or either, the plaintiff was thrown from the footboard of the caboose, and his leg was injured, you will find a verdict for the plaintiff under this instruction, and, if you do not so believe from the evidence, you will find a verdict for the defendant company under this instruction."

[2] The first instruction does not base appellee's right to recover solely upon the appellant's negligence in causing a violent, unusual, and unnecessary jerk in starting the train, but couples with that act of negligence the further question whether the engineer disobeyed orders in starting on his trip before he received a signal to do so. The question being whether the jerk was of a violent, unusual, and unnecessary character, it is unimportant why it was occasioned, or what was the purpose and intention of the engineer in causing it. The appellee was not injured by reason of any failure of the engineer to give him notice of the starting of the train, but by the alleged negligence of the engineer in jerking the train, as it is claimed, in a violent, unusual, and unnecessary manner. The first instruction was erroneous in submitting to the jury, as it did, extraneous questions about

the signal, and the purpose and intent of Nichols in starting on his trip.

[3] Moreover, in describing the negligent movement of the train the instruction should have used the terms "violent, unusual, and unnecessary," which are commonly used in such instructions, instead of the terms "quick and violent and sudden and unusual." A jerk in the operation of a heavy freight train might be violent, and nevertheless necessary and usual in such operation.

In *Yates v. Miller Creek Construction Co.*, 89 S. W. 241, 28 Ky. Law Rep. 332, where it was sought to hold the company liable for the negligence of its engineer in suddenly and violently starting or increasing the speed of the train, as here, we said: "The fact that there was a sudden, or even hard, jerk of the tenders by the engine, does not prove that the engineer or fireman was negligent. The only witness professing to know what caused the jerk was Cotton, and he explained that it was caused by the opening of the throttle. Not being an expert, he was unable to tell whether the opening of the throttle was, or not, at the time necessary. All he could say about it was 'the jerking was caused by the throttle being opened, starting the train again. I do not know how wide the same was opened, but it started the train with a jerk.' The proof wholly failed to show that the jerk which threw appellant from the tender was not such as usually attends the movements of such a train, or that it was of unusual force, or was caused by any unnecessary force applied to the train through the engine or in the manner of operating it." The above language was approved in *L. & N. R. R. Co. v. Greenwell's Adm'r*, 125 S. W. 1066.

[4] The second instruction authorized a recovery if either the jerk of the train or the defective step caused Goldston's injury. The first instruction had, however, submitted the question of the company's liability if the jerk was violent, unusual, or unnecessary; and, that being true, this instruction should have been confined to the question of the appellant's negligence in furnishing the alleged defective step. In giving the first instruction upon one act of negligence, and by repeating it in conjunction with the other act of negligence in the second instruction, in which the jury was told it could find for plaintiff if either ground existed, there was a tendency to confuse the jury, which could have been avoided by a separate and distinct instruction upon each phase of the case, or by a single instruction presenting both phases. Moreover, in departing from the usual instruction approved in such cases, that the jerk must have been "quick and violent and sudden," instead of "violent, unusual, and unnecessary," the court erred as above pointed out.

The court gave an instruction upon contributory negligence; and, in accordance with

its plea, appellant asked an instruction upon the subject of Goldston's assumption of risk, but the court refused to so instruct. This instruction was offered under a plea of assumed risk specifically set up in the answer.

[5] The defenses of assumed risk and contributory negligence have been quite frequently confused, or treated as interchangeable, in some of the older cases. But that these defenses are distinct has been asserted in many of the more recent opinions which are collected in the note in 18 Ann. Cas. 960, and in *Narramore v. C. C. & St. L. R. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68. In the *Narramore* Case, *supra*, decided in 1899, the United States Circuit Court of Appeals, speaking through Judge Taft, said: "Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk, and is well supported by the judgment of Lord Justices Bowen and Fry in the case of *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685, 695. See, also, language of Lord Watson in *Smith v. Baker* [1891] A. C. 325, and *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119 [47 L. R. A. 161]. It makes logical that most frequent exception to the application of doctrine by which the employé who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; *Snow v. Housatonic R. Co.*, 8 Allen [Mass.] 441, 85 Am. Dec. 720; *Gardner v. Michigan C. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107. From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair."

In the late case of *Miller v. White Bronze Monument Co.*, 141 Iowa, 712, 118 N. W. 523, 18 Ann. Cas. 960, the Iowa Supreme Court pointed out the distinction as follows: "It is

well in this connection, perhaps, to discriminate between assumption of risk and contributory negligence. 'Assumption of risk' is in effect a waiver of defects and dangers and a consent on the part of the employé to assume them, no matter whether he be careful or negligent in his conduct. This consent is held to take away the injurious character of defendant's act, and is bottomed on the old maxim, 'Volenti non fit injuria'—that to which a party assents is no wrong. In such cases the injured party may at the time be in the exercise of all the care which the law requires, and still have no right of recovery. This is clearly pointed out in the old case of *Thomas v. Quartermaine*, 18 Q. B. D. (Eng.) 697. Of course, facts showing contributory negligence may also prove assumption of risk; but rarely, if at all, will proof that one did not assume risk also show that at a given time he was in the exercise of ordinary prudence for his own safety. These distinctions have not always been observed, but they are essential to a proper application of the facts to a given case. See *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; *Dempsey v. Sawyer*, 95 Me. 295, 49 Atl. 1035; *Chicago, etc., R. Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Narramore v. Cleveland, etc., R. Co.*, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; *D. H. Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319. As said in the last case, assumption (713) of risk is a matter of contract, express or implied; while contributory negligence is a matter of conduct."

[6] The rule is formulated as follows, in 26 Cyc. 1177: "While a servant does not assume the extraordinary and unusual risks of the employment, the rule is well settled both in England and in this country that on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows, or may, in the exercise of reasonable care, know, to exist, unless there is some agreement to the contrary. He does not, however, assume such risks as are created by the master's negligence, nor such as are latent, or

are only discovered at the time of the injury. The doctrine of assumption of risk is distinct from that of contributory negligence, and rests upon an agreement of the servant with his master, express or implied, from the circumstances of his employment, that his master shall not be liable for any injury incident to the service, resulting from a known or obvious danger arising in the performance of the service." This rule is recognized in this state. *Kentucky Freestone Co. v. McGee*, 118 Ky. 306, 80 S. W. 1113; *C. N. O. & T. P. Ry. Co. v. Evans' Adm'r*, 129 Ky. 165, 110 S. W. 844; *Lexington Ry. Co. v. Cropper*, 142 Ky. 42, 133 S. W. 968.

[7, 8] While there was some evidence in the case at bar tending to show that the jerk of the train was unusual, unnecessary, and so violent as to show a want of ordinary care upon the part of the appellant's employés, there was more evidence tending to show that the jerk was only the usual jerk that necessarily accompanies the movement of trains. If the jerk was only an ordinary jerk, we think the appellant was, under a plea of assumed risk, entitled to an instruction upon that subject. This question was before the court in *C. N. O. & T. P. Ry. Co. v. Evans' Adm'r*, 129 Ky. 165, 110 S. W. 848, where we said: "Evans, when he entered the service of the railroad company as a brakeman, assumed all the risks of the employment as usually conducted, including the negligence of his fellow brakeman and such jerks of the cars as result from the taking up of the slack in the movements of the cars made with ordinary care by the engineer. The instructions given on the trial do not sufficiently present the defendant's side of the case." There being evidence to support this defense, the court should have given an instruction covering it.

It is also insisted that the action should be reversed on account of the misconduct of appellee's counsel in his closing argument to the jury. As the case, however, will have to be reversed upon the points above indicated, and the alleged misconduct is not likely to be repeated, it is not necessary to now pass upon it.

For the errors above indicated, the judgment is reversed for a new trial.

## ARMOR et al. v. LEWIS et al.

(Supreme Court of Missouri. Nov. 24, 1913.)

## 1. EXECUTORS AND ADMINISTRATORS (§ 329\*)—SALE OF LAND TO PAY DEBTS—HOMESTEAD.

Under the Homestead Act of 1895 (Laws 1895, p. 185; Rev. St. 1899, § 3620), providing that on the death of the head of a family, leaving a widow or minor children, his homestead shall vest in the widow or children and continue for their benefit without being subject to the payment of the debts of the deceased until the youngest child attains majority, and until the death or remarriage of the widow, a homestead cannot be sold in course of administration to pay debts of a decedent created subsequent to the acquisition of the homestead and not charged thereon in the lifetime of the deceased householder.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052, 1059, 1342, 1350-1364; Dec. Dig. § 329.\*]

## 2. DESCENT AND DISTRIBUTION (§ 130\*)—DEBTS OF INTESTATE—INCUMBRANCES.

Under the express provisions of the statute of descents and distributions (Rev. St. 1909, § 332), the heir takes subject to the payment of the ancestor's debts, so that the creditor's claim is somewhat in the nature of a lien.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 472, 478-487; Dec. Dig. § 130.\*]

## 3. HOMESTEAD (§ 135\*)—RIGHTS OF HEIRS—STATUTES.

The rights and interests of the widow and heirs of a deceased homesteader are not to be determined by the statute of descents and distributions, but by the homestead statutes which cover the whole ground.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 246-248; Dec. Dig. § 135.\*]

## 4. HOMESTEAD (§ 1\*)—NATURE OF ESTATE.

The homestead and fee are not two separable and divisible interests, but must be kept together.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 5. PARTITION (§ 12\*)—PROPERTY SUBJECT—HOMESTEAD.

On the theory that the homestead and fee must be kept together, partition will not lie while the homestead exists.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 38-51; Dec. Dig. § 12.\*]

## 6. STATUTES (§ 230\*)—CONSTRUCTION—AMENDED STATUTES.

In the interpretation of amended statutes, the state of the old law, the mischiefs arising thereunder, and the remedies provided therefor in the new law are to be considered.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 311; Dec. Dig. § 230.\*]

## 7. HOMESTEAD (§ 185\*)—PROTECTION—LIEN OF CREDITOR.

A homestead is protected against a creditor's judgment lien.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 354; Dec. Dig. § 185.\*]

## 8. FRAUDULENT CONVEYANCES (§ 52\*)—REMEDIES OF CREDITORS—DISPOSITION OF HOMESTEAD.

A creditor cannot complain of the fraudulent disposition of a homestead.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 118-127; Dec. Dig. § 52.\*]

## 9. HOMESTEAD (§ 203\*)—PROTECTION—SALE.

A creditor of the owner cannot sell the homestead tract on fi. fa. subject to the homestead right.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 381, 382, 384-386; Dec. Dig. § 203.\*]

Bond, J., dissenting.

In Banc. Appeal from Circuit Court, Crawford County; L. B. Woodside, Judge.

Suit by Ann Armor and others against J. T. Lewis and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. H. Harrison, of Steelville, and A. S. Cowden and Neville & Gorman, all of Springfield, for appellants. Harry Clymer, of Steelville, for respondents.

LAMM, C. J. Plaintiffs are heirs and descendants and devisees of deceased heirs of S. H. Headlee, deceased. Some of defendants are children and heirs and some husbands of daughters of John W. Lewis, deceased. The suit, one to determine and adjudge title to real estate in Crawford county, is bottomed on former section 650, now section 2535, R. S. 1909.

Attend to the facts and circumstances: In November, 1896, John W. Lewis died seised of the farm in dispute as a homestead, with other land not subject to homestead, leaving a widow and six minor children. In 1899, by a proceeding in the probate court, a homestead was carved out of said lands, appraised and set off to said widow and six minors. From thence on things moved off at a smartish pace; for one year later Sweyers, administrator of Lewis, by a proceeding in the same probate court, got an order to sell and did sell said homestead, "subject to the homestead rights of the widow and minor children," to pay claims allowed against the estate. (Note: The record shows the indebtedness did not accrue before the acquisition of the homestead by decedent.) At that sale S. H. Headlee, one of the creditors, purchased for \$75 and received an administrator's deed. In 1901 the widow died, the children continuing to reside on the homestead. In 1909, the date of the judgment in the instant case, two of them were yet minors and four had attained their majority. Both the proceedings to set off homestead and sell for debts were in form; hence details are unimportant. The issue below hinging on the efficacy of that deed to convey title, the pleadings were appropriate to that issue and need no further attention.

The trial court held that, under the facts stated, the homestead could not be sold in course of administration to pay debts at large not created before the acquisition of the homestead. Plaintiffs appealing, the question is: Under the Homestead Act of 1895 (Laws 1895, p. 185), was the sale valid, and

did the administrator's deed convey title?

Instructions were given for defendants in accord with (and refused for plaintiffs against) the theory of the judgment. We have been inclined to view suits to declare and adjudge title under old section 650 as of an equitable nature, except where the issue was title by limitations, accretions, or the like. *Peniston v. Brick Co.*, 234 Mo. loc. cit. 700, 138 S. W. 532. If, then, the suit was in equity, instructions fill no office. If at law, then the office of instructions was merely to indicate the trial theory of the court. In any event, to determine the cause on appeal we need pay no attention to them, because the facts and judgment sufficiently indicate the trial theory.

We are of opinion the judgment should be affirmed both on authority and reason.

[1] (a) On authority, because the Homestead Act of 1895 has been construed to mean that land subjected to homestead cannot be sold in course of administration to pay debts of a decedent, where such debts were created subsequent to the acquisition of the homestead and not charged thereon in the lifetime of the deceased householder. *Broyles v. Cox*, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714; *In re Estate of Powell*, 157 Mo. 151, 57 S. W. 717; *Balance v. Gordon*, 247 Mo. 119, 152 S. W. 358. That construction has never been departed from; hence those cases must either be overruled or the point be held against appellants.

True it is that a supposition has been indulged (sometimes arising to the dignity of an impression) that the authority of the *Broyles-Cox* and *Powell* Cases has either been shaken or exploded by later cases; but, as held in the *Balance-Gordon* Case, that impression is an airy nothing without substance. This becomes apparent when we consider *Keene v. Wyatt*, 160 Mo. 1, 60 S. W. 1037, 63 S. W. 116, and its per curiam in banc. 160 Mo. 9, 60 S. W. 1037, 63 S. W. 116, quod vide. In *Poland v. Vesper*, 67 Mo. 727, it was held that, because of the peculiar wording of the Homestead Act of 1875 (Laws 1875, p. 60), a homestead might be sold in course of administration to pay debts, subject to existing rights of the widow and minor children. Now, the *Broyles-Cox* and the *Powell* Cases arose on sales made after the act of 1875 was repealed and while the act of 1895 was in force. Therefore the latter act was alone held in judgment in those cases. However, the court in deciding them discussed the act of 1875 and announced obiter doctrines contra to the holding in the *Poland-Vesper* Case. When the *Keene-Wyatt* Case was here, our attention in banc was called to that condition of things, and we repudiated so much of the opinions in the *Broyles-Cox* and *Powell* Cases as construed the act of 1875 contra to the holding in the *Poland-Vesper* Case, returning to and reaf-

firming its doctrine as a sound construction of the act of 1875. *Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746. But, observe, the *banc per curiam* in the *Keene-Wyatt* Case left those cases as authority so far as they construed the act of 1895. We so held in the *Balance-Gordon* Case.

In addition to what is held of set purpose in the *Balance-Gordon* Case in that regard (and after full consideration), the explanatory remarks of Judges Valliant and Marshall in *New Madrid Banking Company v. Brown*, 165 Mo. loc. cit. 39, 65 S. W. 297, throws a clear light on the question and may be consulted with profit.

We shall not leave this branch of the case without a further observation, viz.: It was suggested (in the original opinion of Bond, J., in the instant case, to which this division did not agree) that the *Balance-Gordon* Case may be differentiated or distinguished in principle from the one at bar. But I am unable to agree to the ground of differentiation, running after this fashion, viz.: That case held in judgment the rights of a devisee, whereas this holds in judgment the rights of heirs by descent cast. Suppose that be so, what legal principle is involved in the difference of fact? How can that inconsequential fact take this case out of the doctrine of the maxim, "Concerning similars the judgment is the same"?

When well looked to, in principle it must be certain that, if the case at bar is to be ruled for appellants, then the *Balance-Gordon* Case was badly ruled; for has it ever been held by any respectable court that, as to a creditor, a devisee stands on a better foot than an heir? Does a will, qua will, touch or in aught affect the right of a creditor of the deceased householder, dying testate, to have satisfaction of his debt out of testator's property? Does not a devisee take cum onere precisely as does an heir, under any view of the law? If, then, an administrator's deed under an order of sale by the probate court, made during the existence of a homestead estate, passes no title as to the devisee of the testator, as held in the *Balance-Gordon* Case, how can it pass title as to the heir of an ancestor? The question carries its own answer shining on its face.

We shall not overrule the *Broyles-Cox*, the *Powell*, and the *Balance-Gordon* Cases. *Stare decisis*.

(b) The result reached in paragraph "a" also is reached if we consider the question on the wording of homestead statutes and on the reason of the thing. Thus:

[2] (1) In the first place, it must be admitted that, as a general proposition (absent any modification by homestead acts), an heir takes under the statute of descents and distribution sub modo, i. e., subject to the payment of the ancestor's debts (R. S. 1909, § 332); and that the creditor's claim is some-



what in the nature of a lien (*Higbee v. Billick*, 244 Mo. loc. cit. 425, 148 S. W. 879).

[3] But that concession amounts to no more than saying that such is the general rule of statutory law that would govern unless (as happens) homestead acts cover the whole ground and, as complete legislative thoughts, become codes unto themselves; and, being later enactments, are to be grafted (as also happens) on to the main stem of the statutory rule of descent subject to debts as an exception applicable to homesteads. Now, this is precisely the office of homestead laws in that regard as careful examination will show. Thus: The first homestead act (Laws of 1862-63, p. 22) was of short life and may be passed by; for it never found place in any revision. The next came into force and being in the general statutes of 1865 (chapter 111). *Sperry v. Cook*, 152 S. W. 318, not yet officially reported. That law, in force for ten years, was borrowed from Vermont and received the construction put upon it by Vermont courts. *Skouten v. Wood*, 57 Mo. 380. The force and effect of that decision, contra to the general statutory rule of descent, placed the fee to the homestead in the householder's widow subject to specified and terminable rights of the minor children, and, on the widow's death, the homestead descended to her heirs instead of to the heirs of the husband; this in spite of the general statutory rule of descent. At once when that opinion was handed down the Legislature in 1875 amended the Homestead Act of 1865 by changing it so that, by the very words of the amended act itself, the homestead descended to the husband's heirs. Mark, the act did not leave the statute of descents to control even by implication or construction, but, sufficient unto itself, it dealt with the matter directly and specifically. So, when the Homestead Act of 1895 was passed, it was so worded as to expressly provide for the descent of the homestead tract, and the same peculiarity exists in the two homestead acts of 1907. Laws of 1907, pp. 300, 301. Our conclusion is therefore that our several homestead acts have been codes unto themselves as complete and rounded legislative thoughts. We must look to them, not to the general statute of descent, for a solution of the question in hand, to wit, whether a homestead tract can be sold in course of administration to pay debts.

The pronouncement just made is rendered more sure when we consider the decisions of this court on questions pertaining to homestead acts. It will be found that the trend of the judicial mind in that regard has been to allow homestead questions to break on a construction of homestead acts as distinguished from the statutes of descents. For example: In the *Skouten-Wood Case* the question of descent rode off on the construction of the act of 1865. In the *Poland-Vesper Case* no reference is made to the general

statute of descents, but the case rode off on a construction of the very language of the Homestead Act of 1875. So in the *Keene-Wyatt Case*. When we come to the *Broyles-Cox*, the *Powell*, and the *Balance-Gordon Cases*, it will be found that they broke on a construction of the very language of the Homestead Act of 1895. The same is true of other cases. If the rule of decision heretofore adopted be allowed to obtain in this case, we may not rule it under the provisions of the statute of descent and distribution, but alone on a construction of the homestead act.

With so much determined, we come to another proposition, viz:

[4,5] (2) The reason of the thing lies emphatically with the proposition that the homestead tract should not be sold to pay debts subject to the rights of the widow and minor children as in this case. This because: The vested homestead estate of the children may, with exception of the uncertainty of life be estimated, but that of the widow is wholly in nubibus; for it is darkened by two prime uncertainties of time, to wit, her death and her remarriage. It has been held that the homestead and fee are not "two separable and divisible interests." They must be kept together. *Bank v. Guthrey*, 127 Mo. loc. cit. 196, 29 S. W. 1004, 48 Am. St. Rep. 621. It is on that theory partition will not lie while the homestead exists. *Brewington v. Brewington*, 211 Mo. loc. cit. 64, 109 S. W. 723. Moreover, to sell the fee subject to such uncertain rights is bad public policy; for it attains but one certain end, namely, the sacrifice of the property of those very persons the law holds in tender regard as its wards, viz., the widow and the fatherless, at the very time, too, when they most need protection in their property rights because they are the least able to protect themselves. The case at bar is a typical case in that aspect; for it is stated in respondent's statement, additional abstract, and brief, and not denied by appellants, that this homestead sold for a bagatelle, to wit, \$75. When we consider that on this record it was carved out of a larger estate a year or so before it must be presumed it was either of the value of \$1,500 or else was of a 160 acres in extent; such being the statutory limits of a homestead. We shall recur to the question of sacrifice again.

Since it is true that as the furnace proveth the potter's vessels, so the trial of a judge is his reasoning (see *Eccles. xxvii: 5*, for the idea), under the head of reason, let us look a little deeper and to another phase of the matter, to wit, the *raison d'être* of our homestead acts. What is their underlying motive? Solicitude for creditors? As a ways and means for debt collecting? Does a creditor give credit to a householder on the faith

of his homestead? Certainly not. It will be time enough, then, for this court to be astute to provide ways and means for a creditor to collect his debt from a homestead tract when the lawmaker has first evinced such purpose in his homestead laws—and not before. Those laws face the other way emphatically. They of set purpose show no solicitude for creditors. It was so from the beginning; for, as already pointed out, our second homestead law vested a fee in the widow, except as to debts of a specified and limited character. That law cut the creditor off without the traditional shilling, except he fall in a certain class. True, as said, in 1875 a homestead act was passed permitting administrators under orders of probate courts to sell the homestead tract to pay debts, subject to the rights of the widow and children, or either, as the case might be. That permission ran in the following words: “\* \* \* But all the right, title and interest of the deceased housekeeper or head of a family in the premises, except the estate of the homestead thus continued, shall be subject to the laws relating to devise, descent, dower, partition and sale for the payment of debts against the estate of the deceased, etc.” R. S. 1879, § 2693. It was on the italicized clause that the ruling in the Poland-Vesper Case was put, and not otherwise.

Having tried out that theory in practice, it was found unsatisfactory, so that 20 years later (1895) the homestead act was amended. How? Mark the amendment, for thereby weighty matter hangs—by eliminating the foregoing language and making other material changes aimed at preserving the integrity of the homestead. That act read (R. S. 1899, § 3620): “If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow: that is to say, the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband. \* \* \*”

Closer home, what was the purpose of the Legislature in omitting in the act of 1895 to give probate courts authority to sell the homestead tract, pending the existence of a homestead estate and subject to that estate? For the purpose of paying debts? If so, why were the very words giving that authority in the act of 1875 left out of the amend-

ment? To insert them anew by construction, by reference to the statute of descents? That would be to ignore the prime office of the amendment whereby the power to sell was stricken out. Why was it stricken out at all, if that theory is to be set on foot? The mischief to be avoided by the amendment is obvious. It is set forth by no less authority than Cooley, J. (Showers v. Robinson, 43 Mich. loc. cit. 508, 5 N. W. loc. cit. 993) thus: “But a sale thus made is likely in many cases to be ruinous to the estate, from the great uncertainty attending the continuance of the homestead right, and the consequent impossibility of finding elements of certainty whereby to determine the value of the fee subject to it. Selling the land under such circumstances is something like selling the contingent inheritance of the heir expectant, if that were salable; the one, like the other, depends partly upon the continuance of life, and partly upon the will and discretion of a party having a present interest. A widow entitled with her minor children to a homestead may live and claim the enjoyment of it for 20 or even 50 years, or she may die, leaving no children, in one year, or she may at once abandon the homestead right and remove with her children to a distant state, because she finds it for her interest to reside elsewhere.” (Note: While some of those features may be absent from our statute, yet the remarriage of the widow introduces an equivalent element. Judge Cooley continues:) “The elements of value in the fee, under such circumstances, are so exceedingly uncertain that it is highly improbable there could be any competition in a sale except perhaps of those who would bid for the land only what it would be worth in the contingency most unfavorable to the purchaser. A sale of anything of such uncertain value must almost of necessity be a sale at a great sacrifice. Rottenberry v. Pipes, 53 Ala. 452.”

It must be taken as assumed that it could not be contended for a moment that the probate court had any jurisdiction to order the sale of a homestead in contravention of the homestead statute. Now, the statute of 1875, as construed by this court in the Poland-Vesper Case and in the Keene-Wyatt Case, gave such authority. That of 1895, as construed by this court in the Broyles-Cox, Powell and Balance-Gordon Cases, took it away. And in that ruling we followed the per curiam in the Keene-Wyatt Case.

[8] It is trite learning that the state of the old law, the mischiefs arising thereunder, and the remedies provided therefor in the new law, is the canonized touchstone of interpretation of amended statutes. State ex rel. v. McQuillin, 246 Mo. 517, 152 S. W. loc. cit. 352. How else could a court get at the intentment of the lawgiver? The precept to go by is: “To know properly, is to know a thing in its reason, and by its cause.” Coke,

Litt. 1835. With that rule of interpretation in mind, the mischief of the old law and the remedy provided by the new spring spontaneously into view. The "mischief" was the sacrifice of the homestead tract as pointed out by Judge Cooley in the quoted excerpt from the Showers Case. The "remedy" was to prevent such sacrifice and to make effectual the idea that the homestead is forbidden fruit to the creditor. It is our bounden duty to construe the new law so as to retard the mischief and advance the remedy. We may not, as we are invited to do, overlook both mischief and remedy, and dispose of the question as if there had been no amendment at all. To rule in that way would be to introduce an audacious and disturbing novelty into judicial exposition.

[7-9] As said, in dealing with homesteads there is no legislative solicitude shown for the creditor, either during the life or after the death of the head of the family. Certainly not in life—why, then, in death? Thus, the creditor in the life of the householder cannot nail the homestead tract down and fasten it to one spot by a judgment lien. *Burton v. Cook*, 162 Mo. 502, 63 S. W. 112. Neither can he complain of a fraudulent disposition of it. *Schaffer v. Beldsmeier*, 107 Mo. 314, 17 S. W. 797. Why? Because he is not allowed to meddle with it while the homestead right lasts. Nor (and this is close home) can the creditor sell the homestead tract on *fi. fa.*, subject to the homestead right while the homestead exists. *Moore v. Wilkerson*, 169 Mo. loc. cit. 337, 68 S. W. 1035. If that be so in life, why should the creditor have the right to act in that way after the grizzly King of Terrors has intervened? That would be, indeed, to add a new terror to death by judicial construction. We hold death has enough of its own. On the other hand, the sole purpose of those laws, as now spread on the books, read in the lines and between the lines of the statutes, is to protect the homestead tract from the creditor. They have no other *raison d'être*. But we have pursued the matter far.

The premises all considered, the judgment should be affirmed.

It is so ordered.

WOODSON, GRAVES, BROWN, WALKER, and FARIS, JJ., concur. BOND, J., dissents in an opinion filed.

#### Statement.

BOND, J. (dissenting). Being unable to concur in the learned opinion of the majority of this division of the court, I hereby set forth the grounds of my dissent.

John W. Lewis died on the 22d of November, 1896. At the time of his death he owned the land in controversy and used it as a homestead. He left a widow, Margaret J. Lewis, and six minor children. During the

course of administration of his estate in the probate court of Crawford county and upon the petition of the widow, a homestead was set apart upon this land and due report thereof made by the commissioners appointed for that purpose to the probate court, which was confirmed. At the same term of the court a sale of the land was regularly adjudged, subject to the homestead rights of the widow and minor children, for the payment of debts. Report thereof was made by the administrator, whereupon the court approved the same and directed him to execute a deed conveying the lands in controversy to H. S. Headlee, purchaser, subject to the homestead rights of the widow and minor children. This was done. No appeal was taken from that decree. Whatever title the purchaser acquired has been devolved upon the plaintiffs in this suit, which was brought in February, 1909. The widow of John W. Lewis, deceased, has now died. All of the six children left by him are defendants to this action and were of age at the institution of this suit, except Eugene Lewis, who was then 20 years of age, and John O. Lewis, who was then 18 years of age. Only these two minor children then resided on the lands in controversy.

This action was brought in 1909 by plaintiffs, in virtue of the title acquired by them through the administrator's deed, to fix and determine the conflicting claims of themselves and the heirs of John W. Lewis to the title of the lands in suit. The two heirs who were then minors appeared by their guardian ad litem, and averred that they, together with the other adult defendants, are the owners in fee simple of the said above-described lands, and denied that plaintiffs had any right or title thereto. The four adult heirs appeared and filed a similar answer. The case was tried by the court without the aid of a jury. At the conclusion of the evidence, the court, over the objection and exception taken at the time by plaintiffs (appellants), refused the following instruction requested by them: "The court declares the law that the homestead of the head of a family, under the statutes in force in 1896, was a personal privilege or exemption from levy and sale under execution, and which followed the homestead when converted into money and reinvested; and that on the death of the head of the family the homestead passed by virtue of the provisions of the statute to the widow, or widow and minor children, as the case might be, the widow taking the life estate, contingent on remarriage, and the minors taking an estate for years, that is to say during minority; this homestead estate of the widow and minors being exempted from sale by order of the probate court for the payment of the debts of the decedent, unless legally charged thereon by him during his lifetime, but the fee passed to the heirs of the deceased home-

steadier under the statute of descents and distribution, subject to the homestead rights of the widow and minor children and to payment of the debts of the decedent." The court found the issues for the defendants and rendered judgment accordingly, from which plaintiffs have appealed to this court, assigning for error the refusing of the instruction requested by them.

#### Opinion.

I. The only question presented is the ruling of the trial court in refusing the instruction set out in the statement and adjudging the fee-simple title to the land to be in defendants.

In this case, the rights of the parties are determinable under the provisions of the Homestead Act of 1895 (Session Acts 1895, p. 185; R. S. 1899, § 3620), which section has now been substituted by section 6708 R. S. 1909, but the form in which it originally stood must control the decision of this case, since the death of John W. Lewis took place before the amendment of 1907 (Session Acts 1907, p. 301), whereby the statute contained in the present revision was substituted for that contained in the former revision; and it has been uniformly held in this state that homestead rights and the relations of all parties thereto are governed by the law existing on that subject at the time of the death of the head of the family. *Brewington v. Brewington*, 211 Mo. 48, 109 S. W. 723; *Bushnell v. Loomis*, 234 Mo. loc. cit. 385, 386, 137 S. W. 257, 36 L. R. A. (N. S.) 1029, and cases cited; *Linville v. Hartley*, 130 Mo. 256, 32 S. W. 652.

The important periods of the enactments of homestead laws in Missouri have been 1865, 1875, and 1895. Unimportant variations and changes have been made in such acts in the intervals between those three times, but the distinctive characteristics of the homestead laws and their essential variations from one another have been marked by the enactments made in the years above stated. But it is only necessary, to determine the rights of the parties in this case, to refer to the law on the subject of homesteads as enacted by the Legislature in 1895, since the facts of this case bring it within the application of that statute. In construing that act, this court has held that the right of the husband to a homestead during his life is a mere exemption as to subsequent indebtedness and is not an estate in any sense and may be aliened by the joint deed of the husband and wife (*Snodgrass v. Copple*, 203 Mo. 480, 101 S. W. 1090; Cyc. p. 460), and it is that after the death of the husband a life estate, determinable by her marriage, is vested in his surviving widow, and a right of joint occupancy of the homestead is vested in his minor children until their arrival at the age of 21 years (*Bushnell v. Loomis*,

234 Mo. loc. cit. 386, 137 S. W. 257, 36 L. R. A. [N. S.] 1029).

The statute requiring interpretation in this case is, to wit: "If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow: that is to say, the children shall have the joint right of occupation with the widow until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband; and the probate court having jurisdiction of the estate of the deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto." R. S. 1899, § 3620; Session Acts 1905, p. 185.

The question arising under this statute is whether an indebtedness arising subsequent to his homestead in the land in dispute, after due allowance in the probate court, was a legal basis of the order of sale regularly made by that court of the land of the deceased subject to the rights of homestead of the widow and minor children. The above statute clearly excludes the right of any subsequent creditor to compel a sale through the probate court of the homestead itself, but it does not in terms forbid a sale of the property, subject to the full rights of the homestead therein.

In the case at bar no attempt whatever was made to affect or prejudice the rights of the widow, then alive, or the minor children, to the rights of a homestead in the land in question. Hence the order of the probate court did not contravene the language nor the purpose of the above statute to provide a homestead for the widow and minor children. It simply undertook to afford creditors, having legal demands, the right to satisfy them out of the property left by the deceased after the expiration of all homestead rights therein given by the statute.

The statutes of descents and distribution, which have been a part of our law since the organization of the state, provide that, when the owner of any real estate of inheritance dies, "it shall descend \* \* \* *subject to the payment of his debts*" (*italics ours*) in a prescribed course. R. S. 1909, § 332. As to the meaning of that section, the law is: "But the estate does not vest in them absolutely. It is subject to be divested whenever the land is taken into the custody of the courts and subjected to the payment of the

debts of the deceased. The law appropriates the title to the land, not as that of the heirs, but as it came directly from the ancestor." *Aubuchon v. Aubuchon*, 133 Mo. loc. cit. 265, 34 S. W. 569. Unless that statute is to be abrogated, the creditor in the case at bar had a right to enforce his demand against the estate of John W. Lewis in the land in question, which remained after the extinction of all homestead rights. The homestead act under review does not purport to repeal the general statutes governing the descent of real estate. It simply exempts, during their continuance, the determinable life estate in the widow and the estate for years in the minors.

Clearly, the homestead act, by the utmost stretch, does not protect the vested remainder in the lands which takes effect as a fee when the parties entitled to the homestead have lost that right. To do that a new and different enactment would have to be made by the Legislature. This has not been done. Neither does the homestead act repeal the statutes of descents and distribution by repugnancy. For the homestead act was not enacted and does not purport to exempt a vested remainder which only takes effect after the cessation of the homesteads. Yet it was this remainder alone which the probate court subjected to the allowed demands against the estate of its owner. Its action was therefore in perfect accord with the homestead act and in no wise repugnant or inconsistent therewith. That all estates in remainder are conveyable by the owner and available to his creditors is uncontrovertible. *R. S. 1909, §§ 2787, 2192, 2194*; *White v. McPheeters*, 75 Mo. 286; *Brown v. Fulkerson*, 125 Mo. 400, 28 S. W. 632; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972; *Burk v. Pence*, 206 Mo. 339, 104 S. W. 23. Neither does the homestead act repeal the statutes of descent and distribution of vested remainders therein by furnishing a substitutionary law covering such estates. For the slightest inspection shows that the homestead act does not pretend to deal with the vested remainders in the land upon which the homestead is set apart. It concerns itself solely with the creation of the homestead and its protection as such, and does not undertake in any way to dispose of the ulterior estates in the land.

Now, there is no such thing as a repeal of a statute under the laws of this state, except in one of the ways above referred to. As none of them were employed, it follows that the homestead act did not repeal the statutes of descent governing the devolution of the vested remainder accruing after the lapse of the homestead, and that the plaintiffs, having bought only this remainder, are entitled to its enjoyment after the expiration of the preceding homestead, which was neither bought nor claimed, and which they did not seek to recover. Confusion of thought on

this subject has sometimes occurred from the failure to bear in mind the separate estates of homesteads and the succeeding remainder in fee. The owners of the homestead have the estate for life or years. The remainderman has the subsequent fee. These two complementary interests make up the entire estate in fee. The fee of lands is never in suspension when there is preceding life estate or one for years. The fee cannot be in abeyance, but is always vested coincidentally with the prior estates either in the remaindermen or reversioners by law or by act of the parties. 16 Cyc. p. 646, subsec. 4; 2 Blackstone, 168; 4 Kent, Com. 248. Hence the uniform ruling that, upon the death of the housekeeper or head of a family, the homestead passes to his widow and minor children, and the fee in remainder vests in his heirs, including adults or minors as may happen. The correct interpretation of the homestead act is plain on its face. It simply exempts from sale for subsequent debts the homestead itself, during the life of the husband and wife, and, after the death of the husband, during the life of the wife until marriage and during the minority of the children. It has no other object nor effect. No further purpose can be ascribed to it under the terms used therein, for it cannot be construed as a devolution of the fee remaining when the homestead is gone, except by interpolating words of wholly different meaning from those contained in it. Had the Legislature intended to protect remaindermen entitled as such, after the homestead should fall into the general estate of the decedent, it would have been a most anomalous policy, and contrary to the very scheme upon which homestead laws are framed, which is the protection of widows and minors; and such persons, after the extinction of the homestead, have necessarily ceased to be either widows or minors. Wherefore it is not perceivable why they should be more entitled to inherit the property of their ancestor free from any liability for his debts than any other adult heirs would be so entitled in cases of estates descended to them wherein no homestead had existed. At least, the Legislature have expressed no such discrimination in the above act.

II. The learned opinion of the majority of the court refers to some cases in this state and elsewhere in support of its conclusions that, after the expiration of the homestead in the lands, the title in fee was properly decreed to be in the adult heirs of the deceased, thereby exempting it from his debts. These may be noticed. The earliest case is *Skouten v. Wood*, 57 Mo. 380. Judge Napton ruled, in that case, that perforce the terms of the fifth section of the Vermont homestead act (Gen. St. 1862, c. 68, which has been literally copied into the Missouri act, and hence construed as in Vermont), the widow of the deceased husband, who was

himself seised in fee, took likewise a fee in the homestead because the *act in terms* so provided, to wit: "And such widow and children, respectively, shall take the *same estate* therein of which the deceased died." (Italics ours.) 57 Mo. 381. So strongly and forcefully did Judge Napton show the irrationality of the consequence (which could not be judicially escaped under the very terms of the homestead act which had been imported with the construction given it in the home state) that the Legislature at once repealed and struck out the terms "same estate" descriptive of the character of homestead vested in the widow contained in the act, and adopted what was thenceforth the homestead act of 1875, and, to prevent any further judicial nonconformity with its intent, inserted in the new act a provision that the estate subject to the homestead, when that expired, should go according to the statutes of descents. Session Acts 1875, p. 60. Following the law as thus changed, came the decisions in division 1, *Broyles v. Cox*, 153 Mo. 242, 54 S. W. 488, 77 Am. St. Rep. 714, and *Powell's Estate*, 157 Mo. 151, 57 S. W. 717. The rulings in these two cases were to the effect that the homestead act as amended prevented the sale of the lands subject to it until the homestead expired. Division 2, however, on the next presentation of the question, took it up and in an unanimous decision expressed a contrary view, and after a full review of the authorities referred its opinion to banc in order that the law might be harmonized and clarified on this subject. *Keene v. Wyatt*, 160 Mo. 1, 60 S. W. 1037, 63 S. W. 116. Thereupon the matter was considered in banc, which, in an opinion concurred in by all the judges except Marshall, J., adjudged that the cases of *Broyles v. Cox* and *Powell's Estate*, supra, really turned upon a construction of the Homestead Act of 1895, and hence the observations in those two opinions in reference to the preceding Homestead Act of 1875 were mere obiter dicta, and added: "But the rulings in those cases to the effect that the homestead of a deceased housekeeper or head of a family, within the statutory size and limits, cannot be sold under the Homestead Law of 1875, by an order of the probate court of the proper county, for the payment of the debts allowed against the estate of the deceased, subject to the homestead rights of the widow and minor children, are disapproved. With these suggestions, the foregoing opinion of Burgess, J., is approved, and adopted by the court in banc. Burgess, C. J., Sherwood, Robinson, Brace, Valliant, and Gant, JJ. concur. Marshall, J. dissents."

Hence it must be clear that, except Marshall, J., the entire court adjudged the salability of the remainder in fee, subject to the homestead under the Homestead Act of 1875. The interpretation of the Homestead Act of

1875 having been thus put at rest, the next decision was rendered under the Homestead Act of 1895 (being the one presented for review in the present case). In that case (*Balance v. Gordon*, 247 Mo. 119, 152 S. W. 358 [January 29, 1913]) the opinion was written by the learned writer of the opinion of the majority in the present case. The facts as we gather them are: The householder devised his two lots to his wife for life with remainder to one of his children. He died in 1898. In the course of administration of his estate, it is said "that the lots were sold by an order of the probate court and were sold to pay the Taylor debt and said costs." Administrator's deed was made to the purchasers, who afterwards acquired the widow's interest by deed. A suit was brought by the devisee under the will to establish her title thereunder, when the foregoing facts and others were set up by the defendants, who represented the purchaser under the administrator's deed and the grantee under the deed from the widow. It was held that the sale ordered by the probate court was void, and that the plaintiff was entitled to recover the fee after the expiration of the life estate of the widow. It is not necessary that an attempt should be made to sustain that ruling on the narrow ground that there was technical error in the form of the order of sale made by the probate court, in that it should require the sale of the lands to be made subject to the homestead rights of the widow and minor child. While this was a formal error, yet it did not affect the rights of the parties under that sale, since the administrator's deed should have been held good as to the remainder and not good as to the preceding homestead. Evidently it was the intention of the opinion in *Balance v. Gordon*, supra, to treat the question on the broad ground that the administrator's deed was void both as to the remainder and the homestead estates, and this was the view expressed in the opinion, and to sustain which it construed the Homestead Act of 1895 as constituting a direct legislative repeal of the general statutes of descent and distribution governing the transmission of property upon the death of the owners. And it is that view, so far as it holds the sale was void as to the remainder estate, to which I dissent as wholly untenable from any possible viewpoint of the language and objects of the Homestead Act of 1895, opposed to wise public policy, if not the organic law, and in contravention of the necessary conclusions of reason resting on the foundation principles of the law. The only theory which seems to be advanced in *Balance v. Gordon*, supra, and the present opinion of the majority, against the right of a creditor having an allowed demand to obtain sale in the course of administration of the land upon which a homestead exists subject in all respects to the full rights of

a homestead therein, is that the Homestead Act of 1895, above quoted, does not in *totidem verbis* recite that such right is given as did the act of 1875. The answer is that, unless that right is directly inhibited by the homestead statute of 1895 as it was in the act of 1863, then it must exist perforce the statutes of descent and distribution, which govern and control the transmission of property of every citizen of this state. That it is not directly forbidden by the homestead act in question is apparent from the merest glance at the terms of said homestead act.

This leaves no support for the theory of the case of *Balance v. Gordon*, except the contention that the silence of the Homestead Act of 1895 as to the transmission of the remainder after the lapse of homestead rights operates as a repeal to the general statutes of distribution governing the course of that estate when belonging to any decedent at the date of his death. Neither law nor logic will permit that conclusion to be drawn. It is diametrically opposed to the established law governing all repeals of statutes, which, as has been shown, can only be done in a triform way: (1) By express terms; (2) by repugnancy; (3) by a new substitutional act covering the entire subject. Can it be said that the homestead act in question expressly repeals the general statutes of distribution as to those estates in remainder which arise only after the homestead estate has been fully spent? The answer must be in the negative, for the Homestead Act of 1895 contains no repealing words. Can it be held that the acts are repugnant, and therefore the latter repeals the former? The same answer must be given, because the sole object, scope, purpose, and design of the homestead act was to protect those rights as long as they exist, and not any other or later estate. How then can it be that a disposition of the after estate militates against the full enjoyment of the prior homestead estate, when the very terms of the disposition show that it is subject in all and every respect to the full enjoyment of those rights? If this must be admitted, then the two acts are not repugnant. Again, can it be said with any show of reason or even plausibility that a homestead act which is absolutely silent on the point of transmission or descent of an after estate (i. e., fee in remainder after the homestead) is a substitute act for the full and specific directions contained in the general statutes of descent on that subject, when the alleged substitute act uses no terms whatever in reference to the provision in question? This must be also denied, unless an act with no provision on a particular subject is a full and complete substitute for another which deals fully with the subject. This, of course, cannot be. I hold, therefore, that the conclusion, that the Homestead Act of 1895 contains within itself

a repeal in any mode of the provisions of the general statutes of descent and distribution governing estates in remainder arising after the full enjoyment of the homestead protected by that statute, can only rest from any possible standpoint on demonstrable fallacies forbidden both by law and logic. For these reasons I think the decision in *Balance v. Gordon* was illy considered and should be disapproved and overruled in order that the interpretation by this court of the Homestead Act of 1895 should rest upon the stable basis of its language and terms, and not upon the interpolation therein of a repealatory clause, nor upon legal fictions, in order to annihilate the statutes of descent and distribution relative to a subject plainly beyond the scope of the purpose and object of the homestead act. That this is the sound and true view is apparent from the clear rulings of the decision of division 2 in *Keene v. Wyatt*, *supra*, adopted, as shown above, by the court in banc, and the authorities therein cited; by *Poland v. Vesper*, 67 Mo. 727, as well as the inescapable view of the meaning of the Homestead Act of 1895 arising from the consideration of the words and language of the act itself and its sole purpose to protect the beneficiaries of the exempted estate, and not to protect the heirs or devisees of any other estate.

I doubt whether this has been put with more clearness and force than in the following language of *Poland v. Vesper*, *supra*. In that case, speaking of the Homestead Act of 1875, it is said: "The object of the statute was to secure a home for the widow and minor heirs, and the sale of the land subject to the homestead right could in no manner interfere with them in the enjoyment of that right." The court further held that the instruction requested by plaintiff should have been given which "declared that the administrator's deed conveyed the title to the plaintiff, subject to the homestead right of the widow and the defendant, and that, the widow having died and the defendant attained his majority before the commencement of the suit, plaintiff was entitled to recover." It is no answer to the logic of this opinion to say that the act of 1875 contained a recital that the homestead estate, subject to the rights thereof, should pass by descent. That statute, as has been shown, was passed to me at a decision under the first homestead act taken from Vermont, which act contained terms in itself constituting a repeal of the statute of descent and distribution. But the Legislature struck out those repealatory terms. They have not been reinserted in the act of 1895. And the whole argument of *Balance v. Gordon*, *supra*, in the last analysis rests necessarily on the assumption that, because the act of 1895 did not adopt the precaution of the act of 1875 of making an express provision that the statutes of descent

should control property after the cessation of the homestead, therefore the want of such a provision showed that the Legislature intended in the act of 1895 to repeal and overthrow the statutes of descent and distribution which fully cover and provide for that subject. The bare statement of this view discloses its logical infirmity. The old statute of 1865 cannot be revived in effect or re-enacted by the mere failure of the act of 1895 to include within its terms one of the provisions of the act of 1875, which act also had expressly repealed that provision of the act of 1865, which was the only support while it existed that can be pointed to in the statute law of this state for the view expressed in *Balance v. Gordon*, supra, and the majority opinion, to wit, that the statutes of descent and distribution were repealed as to their governance of subsequent estates by the terms of the homestead act. Repealed statutes are not revived in that way in this state.

III. Some reference is made in the learned opinion of the majority of the division in this case to an eminent lawyer, Judge Cooley, and a quotation from one of his opinions is made. Judge Cooley, as shown by Judge Marshall in his dissenting opinion (*Keene v. Wyatt*, 160 Mo. 1, 60 S. W. 1037, 63 S. W. 116), had already decided the point the other way. However, a careful examination of the subsequent reference to Judge Cooley's latter opinion by the Supreme Court of Michigan will show that the rule quoted from him (43 Mich., supra) in the majority opinion would have no application whatever to a case like the present, which, according to Judge Cooley, would fall within the reasoning and judgment announced by him in the previous case. 38 Mich., supra. For here, as in that case, there was no appeal from the order of the county court directing the sale of the land subject to the homestead rights. Where that is so, Judge Cooley held in both opinions that such a sale was impregnable to a collateral attack, which is exactly the sort of attack defendants make in this case against the validity and enforceability of the judgment of the county court directing the sale to plaintiff's grantors and confirming the deed made to him. But the Supreme Court of Michigan did not stop even there. It distinctly stated, in *Re Emmons' Estate*, 142 Mich. loc. cit. 309, 105 N. W. loc. cit. 762, in referring to the argument that there ought to be no sale of land subject to homestead until after the homestead was ended, as follows: "If the import of this argument is understood, it is that such a homestead—one in value no more than \$1,500—cannot be sold at all, if the statute is followed, unless it falls into the estate before the time otherwise limited by statute for closing the estate, or before the time when the estate is otherwise actually closed. Such a holding would do violence to settled rules of construction. There may be difficulties in fact, but there

is no legal difficulty in saving both the constitutional homestead for those entitled to it, and, ultimately, the value of the fee for creditors of the decedent." It must be noted that in Michigan the homestead exemption is created by the Constitution of that state.

Again, in speaking directly of the two decisions of Judge Cooley, the Supreme Court of Michigan, in *Burkhardt v. Walker & Son*, 132 Mich. loc. cit. 95, 92 N. W. 779, 102 Am. St. Rep. 386, cites the positions of the defendants based on those two cases, and thereafter determines the effect of them in the following language: "In support of the third claim for reversal, defendant says: 'The complainant's homestead right, by virtue of being the wife of the execution defendant, was simply a contingent right of occupancy, not an interest in fee. \* \* \* The fee of the execution defendant, subject to the homestead rights of the wife, \* \* \* and other incumbrances, can be sold on execution. \* \* \* Showers v. Robinson, 43 Mich. 502, 5 N. W. 988; *Drake v. Kinsell*, 38 Mich. 232.' The most that can be claimed for these cases is that they establish the proposition that an administrator's sale, under an order of the probate court, of the homestead of the family of his intestate, subject to their homestead rights, is valid, if the order authorizing such sale is not appealed from." And, again, in discussing the whole subject, and reviewing specially both decisions of Judge Cooley, and in answer to the contention in a case which attacked the validity of a sale of property subject to homestead rights, said in conclusion: "We think it clear that, if this decree is to stand, now that the children have attained their majority (excepting Mrs. Foster, who has a home elsewhere), it must stand upon other grounds than because the sale is void on the ground that the land was a homestead." *Louden v. Martindale*, 109 Mich. loc. cit. 241, 67 N. W. 133; *Carrigan v. Rowell*, 96 Tenn. loc. cit. 192, 34 S. W. 4; *McCaleb v. Burnett*, 55 Miss. 83; *Derr v. Wilson*, 84 Ky. 14; *Thompson on Homesteads*, § 738.

Moreover, the suggestion based on the quotation from Judge Cooley, that a sale of the fee in remainder would cause a sacrifice of the property of the ultimate owners, wherefore the court should make the homestead act read so as to forbid such a sale, cannot have any force whatever: (1) Because it was not the purpose of the homestead act to do other than protect the homestead estate itself, and that estate would have been in no wise diminished nor its full enjoyment impaired even if the one which came after was sold below its value; (2) because the Legislature could not have designed to protect these remainders following homesteads, when it has not protected any other remainders, for the law is unquestionable that all vested or even contingent remainders are salable under execution when the owner is alive or on an administration after his death, before the fall-



ing in of the preceding estates. Clearly, therefore, it could not have been the legislative purpose to create a distinction between some remainders and all others, for it could not thus discriminate between individuals without violating the Constitutions, state and federal, guaranteeing to each citizen the equal protection of the laws as well as the "lawful gains" of his industry. As it is undeniable that any other vested remainder (than that which follows a homestead estate) which might belong to a deceased owner would follow the statutory course of descent and pass to his heirs, subject to the payment of his debts, why should not the same ruling govern the vested remainder which exists in property subject to the homestead estate of the widow and minor child? There can be no difference in reason or principle between the two cases.

It is thus clear that the excerpt from one of the opinions of Judge Cooley quoted in the majority opinion furnishes no support for its conclusion in the present case.

IV. The Homestead Act of 1895 and the general statutes of descent and distribution are entirely harmonious and reconcilable with each other—the one protects homesteads; the other governs remainders thereafter and every other species of property of a decedent. There is no possible antagonism or inconsistency between their respective objects. This is perfectly illustrated in the case at bar. Here the remainder was sold subject in all respects to all the rights of homestead, thus preserving them intact and achieving the full objects of the homestead act. I hold that it is a contradiction in terms to say that such a sale is a destruction of any rights of homestead which are expressly excluded from it in the deed given to the purchaser.

For the foregoing reasons I must dissent to the learned opinion of the majority of the court in this division. I think the judgment of the trial court should be reversed and remanded for its failure to give the instruction requested by plaintiffs—which is an accurate statement of the law of this state—and that a decree should be rendered in accordance with the ruling therein announced. The foregoing opinion is refuted as my dissent to the opinion adopted in this case. In Banc.

# UNION CEMETERY ASS'N et al. v. KANSAS CITY et al.

(Supreme Court of Missouri. Nov. 11, 1913.)

## 1. MUNICIPAL CORPORATIONS (§ 63\*)—ORDINANCES—REASONABLENESS—POWER OF COURTS.

The courts may inquire into the reasonableness of municipal ordinances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. § 63.\*]

## 2. MUNICIPAL CORPORATIONS (§ 609\*)—ORDINANCES—POWER OF CORPORATION.

Under Kansas City Charter 1909, art. 1, § 1, par. 13, providing that the corporation may exercise all powers necessary to maintain the public peace, protect property, and promote the public welfare, and preserve the health of the inhabitants, and article 3, § 1, par. 16, declaring that the mayor and common council shall have authority by ordinance to secure the general health and safety, and abate nuisances, or under paragraph 41 alone, which declares that the council shall have power to pass all ordinances not inconsistent with the laws of the state or the United States as may be necessary to maintain peace, order, good government, health, and welfare, the city has authority to prohibit further burials in a cemetery located within its boundaries where the continued use of the burying ground would be detrimental to the public health and constitute a nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1343; Dec. Dig. § 609.\*]

## 3. MUNICIPAL CORPORATIONS (§ 592\*)—ORDINANCES—HEALTH.

Where a cemetery association was incorporated by a special act of the Legislature, the right of the municipality in which it was located to prohibit the continued use of the burying ground because it was a nuisance and dangerous to public health cannot be denied on the ground that the charter of the municipality giving it authority to pass such ordinances prohibited the passage of ordinances inconsistent with the state laws, for the abating of the nuisance of the burying ground was not a repeal of its charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.\*]

## 4. CONSTITUTIONAL LAW (§ 60\*)—MUNICIPAL CORPORATIONS (§ 591\*)—POLICE POWER.

Neither the city nor the state can surrender or bargain away its police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89, 90, 93; Dec. Dig. § 60.\* Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.\*]

## 5. CEMETERIES (§ 3\*)—CONSTITUTIONAL LAW (§ 129\*)—CHARTERS.

Neither the state nor the municipality can preclude itself by a charter to a cemetery association from enacting laws prohibiting burials in places where they constitute a public nuisance.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 3; Dec. Dig. § 3.\* Constitutional Law, Cent. Dig. §§ 296, 301, 362-413; Dec. Dig. § 129.\*]

## 6. INJUNCTION (§ 128\*)—ENFORCEMENT OF ORDINANCES—CEMETERIES—NUISANCES.

In a suit to enjoin the enforcement of a municipal ordinance prohibiting further burials in a cemetery located within a municipality, evidence held to show that the ordinance was not passed for the benefit of the public health or to abate nuisances, but to benefit land speculators and others who expected to reap a benefit by the disuse of the cemetery.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.\*]

## 7. CEMETERIES (§ 3\*)—ORDINANCES—VALIDITY.

Where the location of a cemetery to a large extent blocked the growth of one part of a city an ordinance, enacted not to protect the public health but to benefit speculators and

landowners in that vicinity, which prohibited subsequent burials in the cemetery and would tend to work the destruction of the cemetery, is unreasonable, tyrannical, and invalid, particularly where it appeared that the increase in the value of the surrounding property would not correspond to the destruction of the value of the cemetery.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. § 3; Dec. Dig. § 3.\*]

#### 8. APPEAL AND ERROR (§ 172\*)—QUESTIONS PRESENTED FOR REVIEW.

In a suit by a cemetery association to enjoin the enforcement of a municipal ordinance prohibiting future burials, lot owners who were not represented in the court below cannot upon appeal obtain a decree requiring the association to do certain work on the lots; that question not being presented by the pleadings or dealt with by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1070–1078; Dec. Dig. § 172.\*]

#### 9. CONSTITUTIONAL LAW (§ 316\*)—DUE PROCESS—WHAT CONSTITUTES.

For the Supreme Court, on appeal in an action to enjoin enforcement of an ordinance forbidding further interments, to render a decree requiring plaintiff, a cemetery association, to perform duties as to care of lots claimed to exist by lot owners, which matters were not raised below, and were solely between plaintiff and the lot owners who were not even parties, would work a deprivation of plaintiff's property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 938; Dec. Dig. § 316.\*]

Bond, J., dissenting in part.

In Banc. Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by the Union Cemetery Association and others against Kansas City and others. From a judgment for defendants, plaintiffs appeal. Reversed.

The plaintiffs, the appellants here, who for convenience will hereafter be designated by the former appellation, instituted this suit in the circuit court of Jackson county to enjoin the respondents, who hereafter will be referred to as "defendants," from enforcing an ordinance of the city, duly enacted by the common council thereof, and approved by the mayor, July 14, 1910, forbidding burials in the grounds of the Union Cemetery, a corporation duly incorporated under the laws of this state, by a special act of the Legislature, approved November 9, 1857.

In order to fully and properly understand the positions of the respective parties to this suit, it will be necessary for us to set forth both the act incorporating the cemetery and the ordinance prohibiting further burials therein.

Said act of the Legislature reads as follows:

"An act to incorporate the Union Cemetery Association.

"1. That James M. Hunter, Edward T. Perry, Joseph C. Ranson, William R. Bernard, Robert J. Lawrence, and Milton J.

Payne, and their successors forever, be, and they are hereby created a body politic and corporate, by the name and style of the 'Union Cemetery Association'; and by that name have perpetual succession; sue and be sued; plead and be impleaded; defend and be defended in all courts in this state; and in like manner to have and use a common seal, which they may alter or change at pleasure; to make such by-laws and regulations for the good government of the corporation, and the efficient management of its affairs, as they may deem necessary; provided, the same are not inconsistent with or repugnant to the public law of the land.

"2. In addition to the tract of land now held or owned by the said corporation for a cemetery or graveyard, they shall have power to buy and hold any number of acres, not exceeding one hundred and sixty, for that purpose; may lay off the same, or any portion thereof, into lots and subdivisions suitable for graves, vaults and monuments; may embellish the same with trees, shrubbery, and flowers, or cause the same to be done by any purchaser thereof, and lay out avenues and walks; and when so laid off and dedicated, shall be forever held by said corporation for the purpose aforesaid, and none other; said corporation may sell and convey any of the lots or subdivisions in said cemetery for the purpose aforesaid, subject to such conditions as may be prescribed by its by-laws; and every right sold and conveyed shall be held and used by the purchasers thereof, for the purposes aforesaid, and none other, and shall not be subject to attachments or sale under execution, nor by order of any court, or be conveyed by the owner out of his family after any interments have been made in said lot.

"3. The officers of said corporation shall be a president, secretary and treasurer, who shall be elected every year, out of the said board of corporators; and said corporators may appoint such other officers as the board may deem needful, and prescribe the duties and terms of office; they shall also keep a faithful record of their proceedings, copies of which, certified under the seal of the corporation, shall be received as evidence in all courts in this state; the first election shall be held on the first Monday in May, A. D. 1858, and every year thereafter, at the city of Kansas. Milton J. Payne, president, and William R. Bernard, secretary and treasurer, who are now the chosen officers of said corporation, shall hold their offices until the first general election, and until their successors are duly elected; and as such officers, are empowered to do and perform all the acts and things imposed on them by this act, and all vacancies that may occur in said board shall be filled in such manner as the board may determine in their by-laws.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"4. The president shall, at the request of any two of the corporators, call together a meeting of the board; shall preside at all meetings, and do all other acts and things imposed on him by the rules and regulations of said corporation.

"5. All deeds for the conveyance of lots or subdivisions, or certificates of shares of stock in said cemetery, shall be signed by the president of said corporation, and attested by the secretary, with the seal of the corporation attached; and the further certificate of the secretary that the president executed the same shall be deemed a sufficient authentication of said deed in all courts and places whatsoever, and may be recorded with like effect of other recorded deeds.

"6. It shall be lawful for said corporation to hold any grant or bequest of money or property, in trust, and to apply the same, or the income thereof, under the direction of said board, for the improvement of said cemetery, or any portion thereof, or in the erection of any tomb or monument, according to the terms of any such grant or bequest.

"7. Any person who shall willfully destroy, injure or remove any tomb or monument, or any gravestone placed in said cemetery, or shall willfully remove, destroy, cut, break or injure any fence around, or railing, fence, tree, shrub or plant within the limits of said cemetery, or shall willfully ride or drive any beast at an immoderate gait, or shall ride or drive over any lot or grave, or shall turn loose any animal in said cemetery, or shall shoot or discharge any gun or other firearms within the said limits, shall be deemed guilty of a misdemeanor; and upon conviction thereof before any justice of the peace, or court having jurisdiction of misdemeanors in the county of Jackson, shall be fined not less than five nor more than fifty dollars; and such offenders shall also be liable to an action of trespass, before a justice of the peace or court of competent jurisdiction, in the name of the corporation, to recover all damages occasioned by such unlawful act or acts; and all money recovered either for a misdemeanor or for trespass, shall be appropriated in the reparation of the property injured or destroyed, and in the embellishment and improvement of the grounds; and in all such suits members of the corporation shall be competent witnesses.

"8. Any person who shall willfully open any vault or grave within the limits of said cemetery, for the purpose of unlawfully taking therefrom anything placed with the corpse therein, or who shall remove any body from said cemetery, for the purpose of dissection or any other unlawful purpose, or who shall knowingly receive any such body after the removal, and also all aiders and abettors, shall be deemed guilty of a felony; and upon conviction shall be punished by imprisonment in the penitentiary not less than one nor exceeding three years.

"9. Said cemetery shall be exempt from all taxes and assessments so long as the same shall remain dedicated to the purposes of a cemetery; and it shall not be lawful for any public road, street or highway to be ever opened through the cemetery grounds, without the consent of the corporators; nor shall the Legislature ever authorize the same.

"10. For the purpose of better effecting the objects contemplated by the seventh and eighth sections of this act, the said corporators shall have power to appoint a bailiff, whose appointment shall be confirmed by the county court of Jackson county; said bailiff shall be authorized, in a summary manner and without process, to arrest and take before any officer or tribunal having cognizance of the offenses mentioned in said sections, any person or persons who shall have perpetrated, or be in the act of perpetrating, or be about to perpetrate any of the acts or offenses intended to be prohibited by said sections, to be dealt with according to law; and for that purpose may summon, peremptorily, any person or persons to his assistance.

"11. This act is hereby declared a public act, and shall take effect from and after its passage."

The ordinance complained of is as follows:

"An ordinance prohibiting burials within certain limits of Kansas City, Missouri, and prohibiting the board of health from issuing any permits for burials within such limits.

"Be it ordained by the common council of Kansas City:

"Section 1. There shall be no burials or interments of any deceased person in Kansas City, Missouri, within the territory or boundaries included within the following limits: 'Beginning at the intersection of Thirty-Ninth street and Woodland avenue; thence west to the state line; thence north to the Missouri river; thence east along said river to Woodland avenue; thence south to Thirty-Ninth street.'

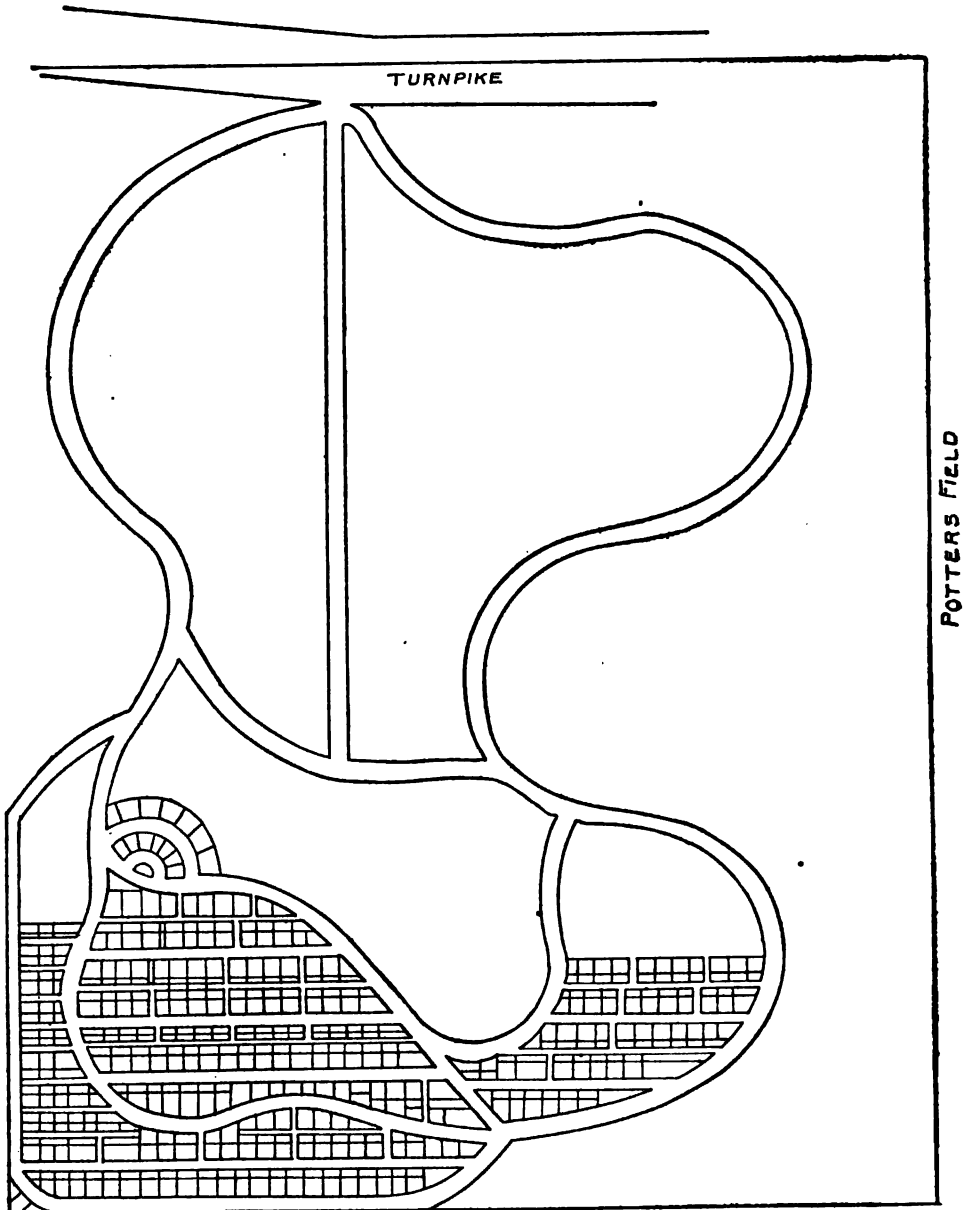
"Sec. 2. No sexton or any other person in charge of any cemetery or burying ground within such limits shall receive the body of any deceased person for burial within such limits nor shall the board of health issue a permit for the burial of any body in any cemetery or burial ground within such limits.

"Sec. 3. All ordinances, or parts of ordinances, in conflict with this ordinance, are, in so far as they so conflict, hereby repealed."

The property and grounds of the cemetery, at the date of its incorporation, were located beyond the limits of Kansas City; but, at the time of the passage of the ordinance in question, the limits of the city had been so extended that they embraced all of said property.

The following plat of the grounds of the cemetery, introduced in evidence, will materially assist the reader in understanding the facts and legal questions discussed and disposed of in this case:

ated within the present limits of Kansas City. Forty acres thereof were purchased May 19, 1857, some six months prior to the incorporation of said cemetery, which subsequently was duly conveyed to that company.



No complaint has been lodged against the sufficiency of the pleadings (except in reference to certain rights claimed by certain of the lot owners, in the cemetery, which will be considered later), and for that reason we will, for the present, put the pleadings aside, with the observation that they sufficiently tender the various issues presented and discussed by the parties to the suit. The evidence for the plaintiffs tended to prove that the cemetery embraces 49 acres of land, situ-

On April 15, 1858, the cemetery, by its president, signed, acknowledged, and filed with the clerk of the circuit court of said county a plat of said 40 acres, entitled "Union Cemetery for the Cities of Kansas City and Westport," which plat, heretofore set forth, shows that only about one-half thereof was laid off into lots and subdivisions suitable for burial purposes at that time. The 15 acres more or less, hereinafter mentioned, as unoccupied and unlaid-off land, fronting on

Main street, is a part of said original 40 acres. Shortly after the incorporation of the cemetery, it purchased two other small pieces of ground aggregating about 9 acres, making its present holdings about 49 acres. Said land is bounded as follows: On the north by Twenty-Seventh street, on the south by Twenty-Ninth street, on the east by ———, and on the west by Main street. That on the date of the institution of this suit, about 50,000 burials had been made in said cemetery; and in the 5 years preceding the trial, there had been about 5,000 interments made therein, or about 85 per month. In the year 1910, 60 per cent. of the burials outside of the potter's field were made in ground newly purchased from the county for that purpose. That many of the old settlers of Kansas City and Jackson county are buried therein, among whom are Gen. George C. Bingham, William Gillis, Judge Samuel H. Woodson, the family of Col. R. T. Van Horn, and many others; also about 1,000 United States soldiers; most all of whose graves are marked by a monument or a marble headstone, some of which are very expensive.

Judging from the evidence introduced, and somewhat from my personal knowledge of the values of lands in that locality, and the expenses of burials, I would say that the present value of the lands of said cemetery is about \$500,000, and were it not for the presence of said cemetery the value thereof would, in all probability, be at least three times that amount; that the cost of the interments therein, including everything necessary thereto, is about \$5,000,000; and that the cost of the monuments and headstones is not much less than one-half of the latter sum—all included equal an outlay of probably \$7,000,000 or \$8,000,000. (This is a rough estimate.)

The Union Cemetery is the only one embraced within the limits of the ordinance complained of, but there are, however, three other cemeteries within the corporate limits of Kansas City, namely, Elmwood, Mount St. Mary's, and St. Peter and St. Paul's. Woodland avenue is the eastern boundary of the territory described in the ordinance complained of, and the Cemetery of St. Peter and St. Paul lies only 520 feet east of that line. Mount St. Mary's Cemetery contains 40 acres and has buried therein 10,000 bodies, with a monthly interment of about 50; Elmwood contains about 44 acres, and has buried therein 12,000, with a monthly interment of about 45; and St. Peter and St. Paul's contains about 10 acres and has about 2,000 burials, and a monthly interment of only five or six. The three latter cemeteries were opened up for burials in the order stated, namely, in the years 1887, 1872, and 1877.

That the comparative density of the population of the territory to those cemeteries was shown.

"In a strip of ground 600 feet wide con-

tiguous to the exterior boundaries of these cemeteries, the number of buildings with the length of the exterior boundary of each cemetery are as follows:

"Union Cemetery: 300 buildings. Length of exterior boundary of cemetery, 5,660 feet. 5.3 buildings to each 100 feet of boundary. 95 per cent. of the buildings are residences.

"Mount St. Mary's Cemetery: 390 buildings. Length of the exterior boundary of the cemetery, 4,320 feet. 7.3 buildings to each 100 feet of boundary. The buildings are practically all residences.

"Elmwood Cemetery: 231 buildings. Length of exterior boundary of cemetery, 5,400 feet. 4.3 buildings to each 100 feet of boundary. 80 per cent. of the buildings are residences.

"St. Peter and St. Paul's Cemetery: 377 buildings. Length of exterior boundary of cemetery, 2,480 feet. 15 buildings to each 100 feet of boundary. The buildings are mostly residences."

There are 12 or 15 acres of the ground not yet encroached upon by graves in the Union Cemetery, which in fact is the bone of contention in this case, and, was it not but for this 15 acres, this case would never have been here. There is also, in different parts of the cemetery where lots have been sold, vacant and unsold ground suitable for graves. There is also, in lots already sold, unoccupied room for 3,600 graves; the vacant spaces in these lots representing, at present prices, a value of \$35,000 or \$40,000.

The inspiring cause for the passage of the ordinance is not difficult to discover. Certain persons living or owning property in the neighborhood of the cemetery, and particularly south of it, deplore its presence there because they regard it as a partial obstruction to the progress of improvement and growth in the direction of their own holdings, and therefore as preventing them from realizing the additional values which they think their own property would possess if the cemetery was not there. They also do not like it because the property is, by the provisions of section 9 of the charter of the association, exempt from taxes and assessments, and because by the same section the opening of any street, road, or highway through the ground is forever prohibited, without the consent of the incorporators. They think streets ought to be opened through the property, and they are also irritated because it has been held by the courts, in obedience to the mandate of a legislative act, that taxes cannot be assessed against the property; these people think that this property ought to be taxed like other property, notwithstanding the Legislature has declared otherwise. Many of the principal witnesses for the defendant were persons of this class. That the ordinance complained of is unreasonable and oppressive, and was not enacted for the health, comfort, or well-being of

the city, but was passed at the instigation of, and for the benefit of, persons residing or owning property in the neighborhood of the Union Cemetery and particularly south of it, who believe and contend that its presence obstructs and impairs the progress of the city, delays improvements, and retards its growth in the direction of their holdings, and thereby prevents them from realizing the additional values which they think their property would bring if the cemetery was not there; also wish the cemetery abated because section 9 of the act incorporating it exempts its real estate from all taxes and assessments, and because the same section forever prohibits the opening of any street, road, or highway through or across said lands without the consent of the incorporators. That they caused the city council to believe that streets should be opened through said property and that the same should be taxed and assessed for benefits received by improvements made by the city, just the same as other property in that vicinity is taxed and assessed, notwithstanding it is expressly exempt therefrom by the act of incorporation.

There were many witnesses who so testified at the trial; also, that they presented petitions to the common council embodying those views and stating that the "continued use" of said property for cemetery purposes was greatly detrimental to the property interests of that section of the city; that "the expansion of Kansas City is injured by the fact that Union Cemetery lies exactly in the path of the city's greatest development. Its continued use as a cemetery, in the heart of the city, is not only against property values, but against public welfare, as recognized in every community." That one of the petitions so presented urged as a reason for the abolition of the cemetery that, "being in the vicinity of the new union depot, it is a drawback to the progress of the Twelfth ward." That Main street, which lies to the west of the cemetery, rises pretty steeply to the south until it reaches Thirtieth street, and from there going south it descends for a distance of two or three blocks, with the result that it makes a long, stiff pull up hill, for loads going south, and this point has become known and designated as the "Main street hump," by persons who are in favor of cutting Main street down at Thirtieth street, and for some distance both north and south thereof. That the ordinance complained of was introduced in the council in response to the importunities of said witnesses and in obedience to said petitions. That during the pending of said ordinance in the council, the press of Kansas City advocated its passage for the reasons mentioned, and not as a public regulation, for the benefit of the health and well-being of the city.

Among the articles so published, the following have been selected from the Star, one of the leading papers of the city, and of the United States: "Eager to Move that Hump.

One Main Street Property Owner is Ready to Pay Thousands." And in the body of the article: "The subject under consideration by the committee was not the hump. It was the ordinance to bar future burials in Union Cemetery. This will make possible the improvement of Main street as a traffic way to the south side, and that is how the discussion drifted to the subject of the hump." And in the article one of the spokesmen is reported as saying: "I am one who believes in doing things the right way. In addition to reducing the grade of the Main street hill, we should widen the street on the side of the cemetery." And others said that the cemetery had become "an impediment to the city's growth and improvement." In the same paper, the day after the ordinance was passed by the upper house of the common council, appeared an article stating that among the reasons given for the passage of the ordinance was the fact "that a large part of the cemetery on the west side is unused and is an impediment to improvements in the vicinity of the new union station." In the same article it also said of the signing of the ordinance by Mayor Brown: "He (Mayor Brown) also was influenced, he (Mayor Brown) said, by the fact that a large part of the cemetery, unused, escapes taxation that falls entirely on abutting property owners." In another article in the same paper, appearing the day after the approval of the ordinance by the mayor, it is said: "It (the cemetery) also is an impediment to improvements in that vicinity because the ground, including that not used for burials, escapes taxation and cannot be used for streets. The enactment of the ordinance will clear the way to widen Main street and to open Grand avenue or Walnut street through the unused ground. This part of the cemetery property will become valuable when put on the market, and will have to bear its share of the cost of improvements in that neighborhood." On the day this action was brought, the same paper, in giving an account of it, said: "The city ordinance prohibiting future burials in a district including Union Cemetery was passed by the council July 14. Its purpose was to make an unoccupied part of the cemetery subject to special taxes and public improvements." And on the evening of March 24, 1911, the day on which the trial of this cause began and while the trial was in progress, the same paper said: "All semblance of reason for the rule falls in such a case as that of the Union Cemetery Association of Kansas City. \* \* \* The powers to tax and exercise the right of eminent domain are powers of sovereignty. The powers to avoid taxation and to block a right of way for a public use are equally sovereign. Sovereignty belongs of right only to the public as a trustee for the public. That land held by a burial association, existing for profit accruing by several avenues of business activity, should be exempt from general taxation and from

assessments for special betterments is an unreasonable and inequitable thing. That the association should be able to block essential public improvements and continue its financial energies in derogation of public welfare, and do these things in the name of a consecrated privilege, would be a yet more unjust anomaly."

The plaintiffs introduced much evidence as to the physical and sanitary condition of the cemetery. Charles Johnson, the superintendent of the cemetery, and, in fact, witnesses for both the plaintiffs and defendants, testified: That from five to twelve men were employed therein; that the grass was cut several times a year in the summer months by scythes, it being impossible, on account of the plat of the cemetery, to use machinery for that purpose; that the monuments were straightened up, sunken graves were filled, and trees and shrubbery were trimmed several times annually; that there were some pools of water located in the north end of the cemetery, caused by excavations of rock which had been made for the purpose of filling with earth, so the ground could be used for burial purposes; that said pools only existed for short periods during the rainy seasons; that blue grass grew there; and that those depressions were being filled with earth and would be completely filled within three months; that for a considerable distance north of the cemetery the land is low and broken, and the water during the rainy seasons sometimes stands there, which is the result of the drainage, principally from causes other than the cemetery land. Johnson, the superintendent, who was a witness for the defendant, testified that he had never seen the cemetery in an unsanitary condition.

Several witnesses whose families are buried in that cemetery testified as to the condition of the same.

Among them was Ex-Mayor J. J. Davenport, who testified that the conditions in the cemetery were good, but on land outside of the cemetery the conditions were bad; that there were no pools of water standing in the cemetery; that this cemetery was not as well kept as some he had seen in other cities, naming them from an artistic point of view, but from a sanitary standpoint nothing was wrong with it; and that there were no hygienic reasons for closing the cemetery.

Dr. Stephen H. Ragan, a practicing physician in the city, who lives not far from the cemetery, 15 or 20 members of whose family are buried there, including his grandfather, his father, and his wife, who has been a visitor there weekly and sometimes two or three times a week for many years, says that, aside from the roads, the cemetery is in a fairly good condition; the ground is hilly, and the rains wash the gravel out of the driveways. He has never seen anything there which was in the least unsanitary or dangerous or deleterious to health.

Mr. J. Lee Porter, whose ancestors for three generations are buried in the cemetery, testified in substantially the same way.

Mr. O. R. Welch, an expert civil engineer of many years' residence in the city, described the topography of the property from actual examination and survey, and testified that: The south part of the cemetery ground is on the highest level. From there it slopes through its entire area to the north and east. There are two small draws in the ground running in a general northerly direction, and they unite near the northern end of the cemetery, that carry off the drainage, and eventually the drainage reaches O. K. creek, which lies about one-half to three-fourths of a mile to the north, runs west, and finally empties into the Kaw river. O. K. creek, although a small natural stream, is virtually nothing more nor less than a sewer, used by the city as such. For part of its distance it is open; for a part, inclosed. It receives the drainage not only from the cemetery, but from the lands between it and the cemetery which slope, on the one side to the east, and on the other towards the west, both slopes terminating in a natural north and south depression with its slope in a general northerly direction toward O. K. creek. The ground north of the cemetery to O. K. creek is rough, ragged, and broken. Much stone has been excavated from it. Because of the jagged and unfavorable character of the territory north of the cemetery, there are many more houses, in proportion, to the south than to the north of the ground. The plaintiff has a 20-inch sewer in the cemetery which carries off the surface water, and the water from a spring in the grounds in the direction of the natural course of drainage. There is no underground system of drainage, neither is there any in any other cemetery in the city. There is no sewer in St. Peter and St. Paul's Cemetery.

The drainage of the cemetery is taken care of in very much the same manner as that of other cemeteries in the city. The drainage from Mount St. Mary's Cemetery and also from Elmwood Cemetery flows into a creek known as Gooseneck creek. Gooseneck creek, like O. K. creek, serves the purpose of a sewer. It is inclosed part of the way. It runs east instead of west and empties its waters into the Blue river near Sheffield, a thickly populated neighborhood within the city limits. In the north part of the cemetery, rock has been excavated to the extent of nearly five acres. The last excavating was about three years before the trial. This was done because the rock came to the surface, or there was so little soil that it was not regarded, in its existing condition, as adapted for burials. The excavating was done for the purpose of fitting it for burial ground, and the company, since the completion of the excavation, has been filling it with clean dirt so as to render it suitable

for graves, and at the time of the trial it was expected that the filling would be finished in about three months. The company sold the rock so excavated. The pools referred to by some of the witnesses were in depressions caused by these excavations, and when the filling of them is completed will cease to exist. The potter's field is in the northeast part of the cemetery; there are about two acres in it. Persons are buried very close there. In the year 1910 there were buried in the cemetery 1,363 persons, of whom 406 were paupers and were interred in the potter's field. The cemetery company receives no pay for the ground occupied by these graves. No paupers are buried either at Elmwood or at Mount St. Mary's.

Maps were exhibited by the plaintiffs, showing from the records of the board of health the location of every case of diphtheria, typhoid, and scarlet fever in the city during the years 1909 and 1910. There was no undue proportion of cases in the neighborhood of Union Cemetery, and much less than in some sections of the city. That the neighborhood in which Mount St. Mary's Cemetery is situated is all built up; almost without exception the buildings are residences, and they are practically all occupied. That neighborhood is better built up than is the one around Union Cemetery. That the territory in the neighborhood and surrounding St. Peter and St. Paul's Cemetery is almost exclusively a residence section; it is densely populated. And the same is true of the neighborhood surrounding Elmwood Cemetery.

As to the contiguity of business houses to Union Cemetery, the evidence showed that there were a few as far south as Twentieth street, but from Twentieth to Thirtieth street on Main and Grand avenue there were scarcely any. On Main, from Thirtieth to Thirty-Third street, there were quite a number of retail houses, and on Thirty-First street there were some. The entrance to one of the public parks of the city is across Main street nearly opposite the northwest corner of the cemetery; it is about 600 feet from the south line of the cemetery before any business houses are reached at Thirtieth street and a half mile from its north line to any considerable number of business houses on Grand avenue. That no complaints were ever made of an unsanitary condition of the cemetery. Dr. Cross, the official city chemist, a witness for the defendants, testified that during the time he had held that official position he had never heard of any complaint relating to the condition of the cemetery. Dr. Carl A. Jackson, a witness for the defendants, a member of the common council, chairman of one of its sanitary committees, and for 3½ years immediately preceding August, 1908, health officer of the city, said that while he was such health officer he never heard any complaint as to the sanitary condition of the cemetery. And Mr. John F. Ward,

the alderman from that ward, although his business and residence for four years had been within a block and a half of the cemetery, testified that he never knew or heard that anything was wrong with it until this ordinance was introduced. This was in June, 1910, and the ordinance passed in less than a month. He said he was simply working for "my people that I am representing," and he regarded the cemetery as "a drawback to that end of Kansas City."

In this connection, the plaintiffs introduced in evidence that provision of the city charter creating the hospital and health department, which places it under the management and control of a hospital and health board composed of three members, who must "be selected with reference to special fitness for the position," with an executive officer known as the health commissioner, who must be a physician. This board is given full power and control over matters relating to the public health of the city, is vested with large powers, and charged with important duties. Among other things, it is within its powers and is its duty to regulate the sanitary condition of cemeteries within the limits of the city, and to recommend to the common council the passage of such ordinances as it may deem necessary for the preservation of the public health. That regarding this cemetery no recommendation was ever made by it or to it, none of its members appeared as a witness in this case; even the health commissioner was not a witness, although he is a defendant in the proceedings. The plaintiffs introduce much more evidence of the same general character as that heretofore mentioned.

The defendants introduced evidence tending to show the unsanitary condition of the cemetery, in order to justify the passage of the ordinance as a police measure in the interest of the public health.

Dr. Horgan, the principal witness for the defendants, testified: That he was a physician and owned the property on Main street at the corner of Thirty-First, two blocks south of the Union Cemetery. That he was one of the persons who signed one of the petitions to the common council, asking the passage of the ordinance complained of, for the reason "that the expansion of Kansas City is injured by the fact that Union Cemetery lies exactly in the path of the city's greatest development," and that "its continued use is greatly detrimental to property interests in that section of the city," and is "against property values." That in his opinion "Union Cemetery is in a very unsanitary place." That he had observed pools and ponds of water on the north side of the cemetery, and that in his opinion it was in an unsanitary condition. Disease germs are buried with the dead, and if bodies are not buried deep, or if the watershed is such that water carries the germs and distributes them to the living, sickness and death result.



Germs are usually carried in two ways: Through water supply; or by means of rats, mice, flies, and domestic animals. That the drainage of Union Cemetery into pools and ponds to the north side of the cemetery is unsanitary. That the blue scum over these pools and ponds indicate bacteria and diseased breeding germs, which may be widely scattered. That he selected the ground on the west side of Main street, within 300 feet of Union Cemetery, and there built St. Mary's Hospital, the largest and most modern in the city, in which he keeps and treats his sick patients, about 200 in number. And when asked why he built his hospital there, if it was so unhealthy, he answered that it was convenient for burial purposes in case any of his patients should die. That he did not know that there were actually any germs in the pools mentioned or that any disease had been caused thereby.

S. W. Henderson testified that he owns property on Main street, near the corner of Twenty-Ninth, on which he has run a grocery for 25 years, and who owns property on Twenty-Ninth street immediately opposite the cemetery on which he has lived for several years, and who was also a signer of both the petitions already mentioned, although he had forgotten the fact, and at whose store meetings upon the subject were held, although he had also forgotten that, and who has been trying to get the cemetery closed up in order to get the streets improved, "smelt things." He said: "Why, just the other day I thought I smelled something." "I often question myself where that smell came from." He thought "it must be some sewers, or something like that, or somebody must be opening a vault or something like that." He thought "somebody was opening a vault or cleaning one out." He had been smelling things "for six or seven years." That it did not seem to him like the smell of the packing houses. He said the smell came from the north and northeast.

W. B. Mumford, who kept a drug store for about a year on the corner of Twenty-Ninth and Main streets, also smelt something. He was perfectly satisfied that it came from the cemetery; there was "a sickening, disagreeable odor all the time from that section." But when he went into the cemetery itself, he did not notice that smell.

A. F. Lawrence, who has lived in Union Cemetery for five years and still lives there, and who had a quarrel with the superintendent, worked in the cemetery for a month about four years ago. He has "noticed a smell or scent whenever it is damp." But he still continues to live in the cemetery and proposes to stay there.

L. S. Bender worked in Union Cemetery three years ago for about three months, digging graves. When asked if he observed a stench or smell in the graveyard while he was working there, he said, "Well, it seemed

as though at times I would; yes." When asked if the smell was like the smell of the packing houses, he said he did not "know as it was, something similar to, you might say, in some ways, in some ways it was and in some ways it was not."

"Joe" Johnson, an attorney, also went through the cemetery twice; one time with Mr. Ward and Mr. Jessorich and others, in August before the trial. He says when they went through "there were noxious smells." He lived for 24 years at 2917 Baltimore avenue; this is one street west of Main street. He moved away October 12, 1910. He said his wife was sick all the time they lived there, and since they moved away she had gained 15 pounds, in six months. He said some of his neighbors had been sick for years, and they laid it to the cemetery. He did not know whether that was true or not.

C. K. Bowen, a photographer, took a number of photographs in Union Cemetery as evidenced by Exhibits 22 to 26, inclusive, in evidence. In doing so, he was over the cemetery grounds and knows that the photographs correctly portray conditions in said cemetery. He saw a portion of a coffin in the cemetery grounds, as well as a collection of human bones collected from the surface thereof; saw pools of water, over which there was a scum and green stuff which had a terrible odor, and on two acres of the cemetery the graves and headstones thereof were as close together as could be, seemed to be touching one another. Some headstones were decayed, others down on the ground. Some of the graves were sunken a foot or two, and in at least a half dozen places in the potter's field, rubbish, tombstones, and headboards were piled up. That part of the cemetery in the district of the potter's field and west of it showed no evidence of care. That he took the photographs introduced in evidence showing the physical condition of the cemetery. That he had been a witness for the city in a thousand cases, in which his works of art were used as evidence (and from this I suppose he acquired the name "Artist" Bowen, by which name he is referred to many times throughout the record). That he was instructed "to make the situation the best of my ability," and that he obeyed instructions. That he furnished one of his assistants with a long weed, to resemble a fishing pole, to which he tied a string, and placed said assistant at the edge of one of the pools in the attitude of fishing, which is shown by one of the photographs offered in evidence. That in order to please his employer he arranged the headstones to suit his own notions, which appears in one of the pictures. That he "kicked" out of the ground a piece of a board which was said to have once been part of a casket, which was done to make it appear in the picture. That he gathered together a small collection or what were said to be human bones, which

were offered in evidence. That he picked them out of the ground with a little stick.

Dr. Le Roy Dibble, a physician and surgeon, with 42 years' practice, had been one of the sanitary officers of the state of Michigan, and a prison inspector for nine years, and had been twice through Union Cemetery, saw human bones scattered on top of the ground. He observed the drainage of the cemetery and the pools which, being filled with germs, might be carried by mosquitoes, rats, and mice, and be the cause of disease and distributed over a considerable area, and with conditions as described in the potter's field, if the ground became thoroughly saturated, would be a danger always, and that the existence of stench and smells was a warning of an unsanitary condition and a danger.

Dr. Walter M. Cross, a physician and surgeon and a chemist by profession, is the city chemist of Kansas City. He testified that pools of water covered with a scum might be the cause of the spread of disease; that disease germs might be spread by vermin, flies, rats, etc.; that conditions observed in the potter's field, considering the drainage of the cemetery, is an unsanitary condition and the probable source of the spread of disease; that germs which have once destroyed human life are probably thousands of times more virulent than before.

Dr. Carl A. Jackson, a physician and surgeon, was a member of the lower house of the common council of Kansas City and chairman of the sanitary and hospital committee. He testified that germs are carried by vermin and mosquitoes.

J. D. Bateman lived near the cemetery and had been in the cemetery. A house and barn appeared therein. Hay was stacked within the cemetery. Grass had grown long enough to be cut for hay. He made measurements of distances to top of caskets from the surface of the ground which averaged from 3 feet to 16 inches.

Joseph S. Chick, Jr., whose father came to Kansas City in 1836, and had buried many members of his family in Union Cemetery, assisted in moving bodies of the family from the cemetery, and that the caskets were very muddy.

A. F. Lawrence testified, for defendants, that he had been living in the cemetery for five years and worked there for a time; and that, in digging graves in the potter's field, they sometimes found bones in the bottom of the newly dug graves.

H. A. Close testified, for defendants, that he had been a grave digger in the cemetery for more than five years and still worked there, said that in the potter's field they struck human bones once in a while when digging graves; and in such cases the bones so found were always put in the bottom of the grave before the new coffin was put in. A place was excavated to accommodate them. He never saw any human bones there on the

surface; only saw them where he was digging, and then he put them back.

And L. S. Bender, another witness for the defendants, who worked in the Union Cemetery as grave digger about three years before the trial, testified that when, in digging graves, they found bones, they collected them together, then dug down a little deeper at one end of the grave, and put them in that excavation and put the new box on top. This was in the potter's field. But the pieces of coffin so found are not reburied; they are burned.

Defendants also introduced evidence whose purpose was to prove that the cemetery did not receive from its owners proper attention; that it was not as trim and neat as it should have been; and that its appearance suffered from want of proper care. One witness testified that he was there in March, and the grass looked as if it had not been cut for some time. He had only been in the cemetery twice. Another witness said that in the potter's field the grass looked as though it had not been taken care of through the entire summer. He was one of the party who went into the cemetery and drove a sharp steel rod into the graves to ascertain how deep they were buried.

Henderson, another witness, whose testimony on other points has already been referred to, described everything as "wild looking, in a wild, chaotic condition." "I don't think they spent five cents a day on it." His visit was on the Monday before the trial began. Henderson saw pools of water there, "and weeds and reeds and brush, and everything like that," in the north end of the cemetery; and he saw green scum.

Such additional evidence as may be necessary for a proper presentation of the law and facts of the case will be mentioned in connection therewith, in the opinion which is to follow.

L. C. Slavens, of Kansas City, for appellants Davenport and others. Hunter M. Meriwether, Denham & Denham, Albert R. Strother, and Gage, Ladd & Small, all of Kansas City, for other appellants. A. F. Evans, Francis M. Hayward, John G. Park, and Henry S. Conrad, all of Kansas City, for respondents.

WOODSON, J. (after stating the facts as above). I. There are many questions of fact and propositions of law presented and ably discussed by counsel for the respective parties to this suit; but, after all, when reduced to their final analysis, they tender a simple controverted fact for determination, and that is: Is the ordinance which was duly enacted by the common council and approved by the mayor of Kansas City, on July 14, 1910, prohibiting further burials within the territory embraced within the terms of that ordinance, reasonable or unreasonable?

If that question is to be answered in the

affirmative, then it will become the duty of the court to hold that said ordinance is valid and binding upon all parties concerned, while, upon the other hand, if we should answer that question in the negative, then it would equally become the duty of the court to hold said ordinance invalid and inoperative.

Preliminary to a disposition of that question, it becomes necessary for the court to determine a certain legal proposition interposed by counsel for defendants, as a barrier against the right or authority of the court to inquire into the question of the reasonableness or unreasonableness of the ordinance in question.

[1] Counsel for defendants insist that the law conclusively presumes that the common council of Kansas City, which is the legislative body thereof, fully investigated the conditions that existed in and about the Union Cemetery, and the effect those conditions had upon the public and the health of the city; that it must have found that further burials in said cemetery was detrimental to the public health; and that in the exercise of the police power of the city it enacted said ordinance to preserve the health and well-being of the city.

In support of this insistence we are cited to several provisions of the city charter and adjudged cases from this and other states. Without stopping to review those authorities, it is sufficient to say that whatever may be the rule in other states, in regard to that matter, it is fully settled, and that it is no longer an open question in this state, that the courts hereof have the undoubted right to inquire into the reasonableness of any ordinances, though duly enacted, by any and all cities of this state.

This question was ably presented to this court in banc, in the case of American Tobacco Company et al. v. Missouri Pac. R. Co. et al., 247 Mo. 374, 157 S. W. 502, involving the reasonableness of an ordinance separating the railroad and street crossing at Tower Grove Park and other points in that vicinity. After a careful review of all the authorities, the court unanimously held, in conformity to its previous rulings, that the courts of this state possess the power and authority to investigate and pass upon the reasonableness of any ordinance enacted by any city, town, or village in this state.

Counsel for defendants have not shown or suggested any good reason why the ruling of this court in the case mentioned, which is in harmony with the previous rulings, should be departed from or changed. Nor have we, in the investigation of this question anew, discovered any substantial reason which would justify a departure from that ruling. We therefore rule this insistence against defendants.

[2] II. Counsel for appellants present a counter contention to that presented by counsel for respondents in the preceding para-

graph of this opinion, namely, although it be conceded that the Legislature of the state might have the power and authority to enact a valid law prohibiting the Union Cemetery from burying dead bodies therein, nevertheless Kansas City had no such authority under special provisions of her charter or under the general welfare clause thereof, and therefore the ordinance complained of is null and void.

The special charter provisions, so far as they are material and relied upon by counsel for respondents, are as follows:

"The municipal corporation known as Kansas City \* \* \* may exercise all municipal, incidental and business powers necessary or which may be deemed expedient and necessary to maintain the public peace, protect property and promote the public welfare, and preserve the health of the inhabitants of the city, whether such powers be expressly enumerated herein or not; and may have and exercise within the city limits \* \* \* all governmental and police powers, subject to the limitations prescribed by the Constitution and laws of this state and the United States." Charter of 1909, art. 1, § 1, par. 13.

"\* \* \* The mayor and common council shall have power and authority, by ordinance \* \* \* to secure the general health and safety of the inhabitants by any necessary measure, \* \* \* to declare, prevent and abate nuisances on public or private property, and the causes thereof." Charter 1909, art. 3, § 1, par. 16.

"\* \* \* The common council shall have power to pass, publish, amend and repeal all such ordinances, rules and regulations not inconsistent with the provisions of this charter or contrary to the laws of the state or of the United States as it may deem to be expedient or necessary in maintaining the peace, order, good government, health and welfare of the city, its trade, commerce, manufactures, or that may be necessary and proper to carry into effect the provisions of this charter." Charter of 1909, art. 3, § 1, par. 41.

If it were conceded that Union Cemetery was in point of fact a nuisance and detrimental to public health, then, under the far-reaching grants of power conferred upon Kansas City by these charter provisions, it would be difficult to conceive upon what solid ground this contention could rest. Those provisions in express terms authorized that city to exercise all municipal power "necessary to promote the public welfare, and preserve the health of the inhabitants of the city"; that by ordinance the city shall have authority "\* \* \* to secure the general health and safety of the inhabitants, \* \* \* to declare, prevent and abate nuisances on public or private property," etc.; and the "common council shall have power to pass, publish, amend and repeal all ordinances \* \* \* as it may deem to be expedient or

necessary in maintaining the peace, order, good government, health and welfare of the city," etc. The language of these provisions is so plain and definite in meaning that they are not susceptible of construction. They simply mean what they say, that the city has the power and authority to abate any nuisance or do anything within its corporate capacity to preserve the health and welfare of the city. This would clearly authorize the passage of the ordinance in question, and it has been so held in numerous cases. *Campbell v. City of Kansas*, 102 Mo. 244, 326, 350, 13 S. W. 897, 10 L. R. A. 593; *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 93 Pac. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080, affirmed in *Laurel Hill Cem. v. San Francisco*, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515; *Odd Fellows Cem. v. San Francisco*, 140 Cal. 226, 73 Pac. 987; *Kincald's Appeal*, 66 Pa. 411, 423, 5 Am. Rep. 377; *People ex rel. Cem. Ass'n v. Pratt*, 129 N. Y. 68, 72, 29 N. E. 7; *Coates (Stuyvesant) v. New York*, 7 Cow. (N. Y.) 588, 604; *Young v. Board of Com'rs (C. C.)* 51 Fed. 585, 592. Also, see *Board of Commissioners v. Young*, 59 Fed. 96, loc. cit. 109, 8 C. C. A. 27; *Charleston v. Baptist Church*, 4 Strob. (S. C.) 306, loc. cit. 310; *Commonwealth v. Fahey*, 5 Cush. (Mass.) 408, loc. cit. 411; *Iuszkewicz v. Luther*, 30 R. I. 570, 76 Atl. 829; *Humphrey v. Church*, 109 N. C. 132, 13 S. E. 793; *Page v. Symonds*, 63 N. H. 17, loc. cit. 20, 56 Am. Rep. 481; *Craig v. Pres. Church*, 88 Pa. 42, loc. cit. 52, 32 Am. Rep. 417. In addition to this, the general welfare clause of the charter, which is practically the same in all the charters of the cities of this state, was ample authority to the council to pass said ordinance. *St. Louis Gunning Company v. St. Louis*, 235 Mo. 99, 137 S. W. 929.

[3] Counsel for plaintiffs concede that this ruling might be sound if it was not for the fact that the charter of the Union Cemetery is an act of the Legislature, and that according to the express provisions of paragraph 41 of section 1 of article 3 of the Charter of 1909, before quoted, where it is expressly provided that "the common council shall have power to pass, publish, amend and repeal all such ordinances, rules and regulations not inconsistent with the provisions of this charter or contrary to the laws of the state or of the United States as it may deem to be expedient or necessary in maintaining the peace, order, good government, health and welfare of the city." That being true, it is argued that, in order to repeal the charter of the Union Cemetery, the ordinance in question must of necessity be inconsistent with and contrary to the provisions thereof, which as shown is an act of the Legislature, or a law of the state. And being so inconsistent with and contrary to said law of the state, it is contended that, under said provision of the city charter, the ordinance and not the charter of the Union Cemetery, which is an

act of the Legislature, or a law of the state, must yield and give way.

This argument is more plausible than sound, for, while it is true the charter of the Union Cemetery is a special act of the Legislature, yet it has no more force and effect than if it had been incorporated under the general corporation laws of the state, and, if burials could by ordinance have been prohibited in the latter case, then I am unable to see any good reason for holding that it could not have been prohibited in the former. The courts consider the substance and not the letter of the law, when enforcing its provisions. By abating the nuisance, if one it is, the charter of the cemetery is not repealed; but the further burial of dead bodies therein is prohibited, because of the changed conditions of things; that which was formerly harmless has become dangerous to the public health of the city.

[4] This is but the exercise of the police power which neither the city nor state can surrender or bargain away. All the authorities so hold. *St. Louis Gunning Co. v. St. Louis*, supra; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Slaughter House Cases*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585.

[5] Nor can either of them preclude itself from enacting laws forbidding burials in places when they constitute a public nuisance. *Brick Pres. Church v. New York*, 5 Cow. (N. Y.) 538; *Board of Commissioners v. Young*, 59 Fed. 96, 8 C. C. A. 27.

We are therefore of the opinion that this contention of plaintiffs is not well taken.

III. Returning to the question previously stated: Is the ordinance complained of reasonable? That is, was it enacted for the preservation of the public health of Kansas City?

[6] We have with great care and with much pains read the voluminous record in this case, covering about 550 pages, and have carefully set out the substance of the evidence introduced by both parties bearing upon this question, as well as that touching the manner in which the cemetery was managed and controlled; and, after a careful consideration of the weight thereof, we have reached the conclusion that this ordinance was not enacted for the purpose of preserving the public health of the city, but was passed at the instigation and request of a lot of real estate agents, landowners, and speculators, who think that this cemetery stands in the way of the expansion and development of Kansas City in that direction; and especially is that true since the location of the new union depot has been definitely located in that vicinity.

In the first place, the complaints of the living were as silent as those of the dead, as to the unsanitary condition of the cemetery, until the railroads of the city finally determined to locate the union depot in the vicinity of this cemetery. Since that time, how-

ever, the question has been agitated, not by the citizens generally of Kansas City, by or through their representatives, neither in its municipal capacity, nor by its board of health, which has the most ample authority under the charter of the city to investigate and abate, either by direct action or by appeal to the common council, any and all public or private nuisances or other matters, which do or may affect the public health of the city, but by those citizens who have discovered, in recent years, that this cemetery is and has retarded the growth and expansion of the city in the line of their property, and thereby, and in consequence thereof, the values of their property have not increased in the degree in which they think they would have done had it not been for the presence of the cemetery. That class of citizens, and they alone, for purely commercial purposes, and for anticipated financial advantages, petitioned for and pressed the passage of this ordinance. Not even the board of health or Mr. Ward, the councilman from that ward, whose sworn duty it was to look after and preserve the public health of the city, knew of or ever heard of any deleterious effects the cemetery ever had upon the health and welfare of the city, until the petitions asking for the abolition of this cemetery were by said interested parties filed with the common council. And still more strange, no member of said board appeared or was subpoenaed as a witness in this case, to testify that the cemetery was deleterious to public health, which unquestionably they would have done had that been true. While Mr. Ward, the councilman from that ward, did testify, yet he in express words said he introduced said ordinance in the lower house and voted for its enactment because the citizens of his ward residing in that vicinity petitioned him to do so, and not a word of evidence escaped his lips tending to show that he introduced said ordinance or voted for the same from a sense of duty that it was beneficial to public health, thereby clearly leaving the irresistible inference that he did so because it was for the promotion of the financial and commercial interests of his constituency.

Moreover, there is not a word of testimony preserved in this record which tends to show that this cemetery was in fact deleterious to public health. All of the witnesses who testified as to this question in behalf of the defendants invariably stated that such conditions might produce disease, death, and destruction; but not one of them stated as a fact that this cemetery gave off any bacteria or deadly germs, or that any of the pools or ponds mentioned in the evidence contained a single germ, or that the water, rats, mice, or any domestic animal ever carried or distributed germs of that character over the area of the city. Nor does the evidence show that a single case of sickness, disease, or death was caused by the presence of said

cemetery. In truth, no attempt whatever was made by defendants to show any such facts; but, upon the contrary, what little evidence there was introduced by plaintiffs tended to prove the contrary—that is, there were not so many cases of contagious and infectious diseases reported to the board of health from that vicinity as were done from other localities of the city.

[7] Under this showing, we have no hesitancy whatever in holding that said ordinance is unreasonable, oppressive, and tyrannical; for, in order to financially benefit a few property owners and speculators in that vicinity, they, through the innocent action of the common council, are ready and willing to sacrifice the final resting place of those stalwart men and women who made Kansas City what it is, and without whose efforts the city would not be worth mentioning. They built the city, developed its commerce, and made Kansas City what it is. They also, as a part of their life's work, created and adopted this cemetery as a final resting place for their ashes, which, in anticipation, was as near and dear to them in life as were the residences in which they lived, the stores in which they bartered and sold, the factory in which they labored, and the counting houses in which they exchanged values. This city of the dead, which is honored and revered by all civilized people, including the cost of the interments and expenses of monuments erected to their sacred memory, to say nothing of the cost of preserving and beautifying the graves, I dare say, has cost the deceased and the relatives and friends not less than \$3,000,000 or \$8,000,000, to say nothing of this wholesale, unholy desecration—a financial destruction of values, which would far excel the financial benefits these petitioners could ever hope to receive therefrom, even though their fondest hopes should be crowned with success.

In the case of *American Tobacco Co. v. Missouri Pac. R. Co.*, supra, where the benefits to be derived and the damages which would have been sustained by reason of the enforcement of the ordinance therein mentioned were far greater than the benefits here to be received and far less than the damages that would be here inflicted, yet for those reasons, among others, the court in banc unanimously held the ordinance therein mentioned as unreasonable, oppressive, and void; and by parity of reasoning, and for greater considerations existing in this case, we believe and hold that this ordinance is unreasonable and oppressive and should for that reason be declared and held to be null and void, which is accordingly done.

[8, 9] Judge L. C. Slavens appeared in this court as counsel for certain lot owners in the cemetery, in the capacity of interveners, I suppose, but who were not represented in the court below, and asks that this court find and decree that the cemetery owes certain duties to preserve and beautify the cemetery and

the graves thereof, and that this court require the officers thereof to provide and set apart a fund sufficient, and out of which said cemetery may be preserved, cared for, and with which to beautify the graves therein. In answer to that request, we will state that, while there seems to be much merit in this request, as incidentally appears from this record, yet no such question was presented by the pleading or established by the evidence or considered by the trial court, and for that reason, however desirous we might be to afford the relief thus prayed, yet it is perfectly apparent that, under the present condition of the pleadings (and evidence) in the case, we have no jurisdiction to so do. Such a holding would clearly deprive the cemetery company of its property without due process of law, within the meaning of both the state and federal Constitutions.

Much of the evidence introduced in this case and previously set forth in this opinion bears upon this question, which may and should justify, on the part of the city and lot owners, stricter regulations, better preservation, and more suitable care and attention, both to the grounds and graves therein, than has heretofore been shown them; but in no sense does or should that evidence which constitutes the great bulk of this record warrant the city in abolishing the cemetery outright, which is practically done in this ordinance, if it is to stand. So hold many of the cases cited. For this reason we decline to pass upon this question one way or the other, in order that, if these parties desire to have that question adjudicated, they may do so by instituting in the proper court proper proceedings for that purpose.

We are therefore of the opinion that the judgment of the circuit court should be reversed, with directions to enter judgment in favor of the plaintiffs, enjoining Kansas City and its agents and officers from interfering with burials in said cemetery and from putting in force the provisions of said ordinance; and it is so ordered.

LAMM, C. J., and GRAVES, WALKER, and FARIS, JJ., concur. BROWN, J., concurs in separate opinion. BOND, J., dissents as to paragraph III and as to result.

BROWN, J. I heartily concur in the result of the opinion prepared by my learned Brother WOODSON. While I am sure the ordinance prohibiting all future burials in Union Cemetery is unreasonable and its enforcement should be enjoined, I think the record shows a state of affairs which would justify an ordinance requiring and compelling the plaintiff to abate all pools of water in its cemetery, to provide storm sewers to convey surface water and seepage from the graves to the northern boundary of its property, where such water may be carried away

by a natural water course (or other sewers); to require all graves to be kept filled level with or above the surface, and to make all future interments not less than six feet below the natural surface of the ground.

#### STATE v. GLOGOVER.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

##### 1. CRIMINAL LAW (§ 1130\*) — APPEAL — ASSIGNMENTS OF ERROR.

Although no briefs are filed and there are no assignments of error, it is the duty of the court to examine the record and pass judgment thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965–2970, 3205; Dec. Dig. § 1130.\*]

##### 2. LIBEL AND SLANDER (§ 156\*) — CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for falsely and maliciously stating that another had committed perjury held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 437–441; Dec. Dig. § 156.\*]

Appeal from St. Louis Court of Criminal Correction; Calvin N. Miller, Judge.

Sam Glogover, alias Sam Gold, was convicted of having falsely and maliciously charged another with having committed a felony, and he appeals. Affirmed.

Stern & Haberman, of St. Louis, for appellant. Howard Sidener, of St. Louis, for the State.

ALLEN, J. The defendant was convicted of having falsely and maliciously charged another with having committed a felony, to wit, perjury. His punishment was assessed at a fine of \$15 and costs, and he appeals.

[1] No briefs have been filed, and there are no assignments of error before us. It is our duty under the law, however, to examine the record and pass judgment thereupon.

[2] A bill of exceptions was duly filed, and we have the testimony before us in the record. We have very carefully examined the record, and have been unable to perceive any reversible error therein. The information is in due form. The evidence on behalf of the state, consisting of the testimony of three witnesses, was amply sufficient to make a prima facie case against the defendant. The evidence on behalf of defendant consisted of his own testimony, which went to deny the speaking of the alleged slanderous words. The evidence is ample to sustain the conviction, and the judgment appears to be in due form.

The judgment should be affirmed, and it is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## MARTIN v. HARRINGTON.

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1913.)

## 1. FRAUDS, STATUTE OF (§ 150\*)—BENEFIT—DEMURRER.

The statute of frauds may not be taken advantage of by demurrer, since it is not necessary that the petition should allege that the contract within the statute was in writing, under the presumption that the contract sued on is legal.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 360-362; Dec. Dig. § 150.\*]

## 2. FRAUDS, STATUTE OF (§ 31\*)—DEBT OR DEFAULT OF ANOTHER—CONSIDERATION.

Where a third person agrees to pay the debt of another, his promise must be supported by a consideration which may be made up of either benefit to the promisor or harm to the promisee, but in order to take the case out of the statute of frauds, it must appear that the promise was such as to relieve the original debtor of all liability and create a new obligation in favor of the creditor against a promisor.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 47, 48; Dec. Dig. § 31.\*]

## 3. FRAUDS, STATUTE OF (§ 31\*)—DEBT OF ANOTHER—PROMISE TO PAY.

Plaintiff's petition alleged that, H. being indebted to plaintiff on an account, defendant agreed with plaintiff that, if he would "release and discharge" H. from payment of the debt, defendant would pay the debt as his own; that plaintiff "accepted the agreement and did release" H., wherefor plaintiff demanded judgment against defendant. *Held*, that such allegation sufficiently showed a new promise on defendant's part, based on a sufficient consideration, to wit, the release of H. from liability, and was therefore not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 47, 48; Dec. Dig. § 31.\*]

Appeal from Circuit Court, Clinton County; A. D. Burns, Judge.

Action by Edward D. Martin against W. R. Harrington. Defendant's demurrer to the petition was sustained, and plaintiff appeals. Reversed and remanded.

Darl B. Cross, of Lathrop, and W. S. Herndon, of Plattsburg, for appellant. John A. Cross, of Lathrop, for respondent.

ELLISON, P. J. Plaintiff's action is to recover \$663.70 on account. Defendant demurred to the petition on the ground that it did not state a cause of action. The trial court sustained the demurrer, and plaintiff appealed.

The ground of the demurrer was that the petition stated the original debt was that of another person which defendant had promised to pay, and, that being the verbal promise to pay the debt of another, it was void under the statute of frauds (section 2783, R. S. 1909) providing that: "No action shall be brought to charge \* \* \* any person upon any special promise to answer for the debt, default or miscarriage of another per-

son, \* \* \* unless the agreement upon which the action shall be brought, or some note or memorandum thereof, shall be in writing," etc.

[1] The parties have ignored the law that, when an agreement involving the statute of frauds is alleged in a petition, it is not necessary that it should be alleged to be in writing, since it will be presumed the agreement stated is a legal one. There should have been an answer denying an agreement, and then, if the one proven is not in writing, the statute may be invoked. A demurrer is not the way in which to obtain the benefit of the statute of frauds. *Phillips v. Hardenburg*, 181 Mo. loc. cit. 472, 80 S. W. 891. But, as the same question will arise on a trial, we proceed to an examination of the question involved.

It is alleged in the petition that, J. C. Harrington being then indebted to plaintiff on the account, defendant agreed with plaintiff that, if the latter would "release and discharge" J. C. Harrington from the payment of said debt, he would pay said debt as his own. That plaintiff "accepted the agreement and did release the said debtor, J. C. Harrington."

[2] The case presents a vexed question arising from conflict in the decisions. It is, of course, agreed by all that there must be a consideration to support the third party's promise. Ordinarily a consideration may be made up of either benefit to the promisor or of harm to the promisee; but in cases under this statute it is stoutly maintained that the latter consideration does not avail as a support to a verbal promise to pay the debt of another, in the face of the statute requiring it to be in writing. The ruling is that, in order to make the statute inapplicable, the object of the promise must be some benefit to the promisor; the payment of the original debtor's debt being a mere incident. It is stated in these words in a leading case: "The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 37 Am. Dec. 148. The same rule is announced in *Cowenhoven v. Howell*, 86 N. J. Law, 323; the court emphasizing it in these words: "The consequence is that agreements, which will have the effect to discharge the debt of another, must be founded in a motive of interest, selfish in the promisor. The distinction is between a promise, the object of which is to promote the interest of another, and one in which the object is to promote the interest of the party making the promise. The former is within

the operation of the statute. The latter is unaffected by it."

Chancellor Kent divided the cases into three classes, and this was his statement of the third class: "When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317. That statement has been questioned on the ground that it includes harm to the creditor as constituting a sufficient consideration. In *Farley v. Cleveland*, 4 Cow. (N. Y.) 432, page 439 (15 Am. Dec. 387), the statement of Chancellor Kent is approved, but it is restated in language which we take to be an intimation of the way in which the rule, as stated by the chancellor, should be interpreted, thus: "In all these cases, founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery." Thus, though the court approved of what Kent had said, it takes the pains to say that the consideration of harm to the creditor must be such character of harm as moves to or benefits the promisor. And this, we think, is the interpretation put upon it in *Nelson v. Boynton*, *supra*, and *Mallory v. Gillett*, 21 N. Y. 412, 419. So we may regard the effect of the rule to be that the consideration which will withdraw the protection of the statute from the defendant's verbal promisor is a consideration which moves to or is of benefit to him; and, when it is said that the consideration may consist of harm to the promisee plaintiff, it means a harm that has benefited the promisor. To say that any consideration will take a promise based thereon out of the statute is to make the statute useless. For, if there is no consideration, the promise is invalid without the statute. The statute is aimed at what were valid contracts; that is to say, it makes invalid contracts not in writing which would otherwise have been valid. So the St. Louis Court of Appeals has said that the main object of the verbal promisor must not be to pay the debt but to benefit himself. *Walther v. Merrell*, 6 Mo. App. 370. And this, in effect, is the view of the Supreme Court. *Besshears v. Rowe*, 46 Mo. 501.

But in numberless instances cases arise thought to be within the statute and which are so confusingly near to it as to require close scrutiny to discover the dividing line. The statute invalidates a verbal promise to pay the debt of *another*, and it is frequently the hardest matter to determine whose debt is a given obligation. Although one party may be the cause of the debt, he may not be the debtor, for the original obligation may rest upon a third party. As if the latter takes a person to a merchant and says, "Let

this man have certain goods and I will pay for them," there is an original indebtedness by the promisor, and the contract is not to pay the debt of the man who gets the goods but his own. Many illustrations might be given. In this illustration the debt never existed against the party getting the goods. But there are instances where the debt may exist against the debtor and a third party, in consideration that the creditor releases it, verbally promises to pay it. That is the case now before us. Now in such instance, the debt, being discharged, no longer exists, and the third party's promise to the creditor is not to pay the debt of another, but he has created a debt of his own to the creditor; and, though the effect is to wipe out the debt of the debtor, the fact is that he has substituted himself in the debtor's place (the latter being no further concerned), the consideration being the release between the creditor and the original debtor and not a benefit to the promisor. Thus the promise is not to pay the debt of another. And, by an examination of the authorities above cited, it will be found that the courts qualify the rule by the express statement that the debt of the original debtor was still subsisting. Thus in *Cowenhoven v. Howell*, *supra*, the court, after announcing the rule that there must be a consideration moving to the promisor, adds the cautionary qualification "that the rule above adopted is not applicable to that class of affairs where the effect of the new promise is to extinguish the liability of the original party before the obligation of the new promise attaches."

But we need not depend upon the foregoing cases having made that qualification in cases where the question was not directly up for decision. There is abundant authority where the question was directly involved. And, while some may treat the question of consideration for the promise differently from others, all agree that, if the new promise is in fact made on the discharge by the creditor of the original debtor, that debt is gone and a new one created with a substituted debtor. *Underwood v. Lovelace*, 61 Ala. 155; *Whittemore v. Wentworth*, 76 Me. 20; *Brown v. Weber*, 38 N. Y. 187, 191; *Fain v. Turner*, 96 Ky. 634, 638, 29 S. W. 628; *Wood v. Corcoran*, 1 Allen (Mass.) 405; *Packer v. Benton*, 35 Conn. 343, 95 Am. Dec. 246. In the latter case this condition of contract is stated to be necessary to the application of the statute, *viz.* (italics the court's): "An undertaking by a person, *not before liable*, for the purpose of securing or performing the *same* duty for which the party for whom the undertaking is made," *continues* "liable." That is to say, if the original debtor is discharged (does not *continue* liable after the promisor's promise), the statute does not apply. And this is the law as stated in *Browne* on the Statute of Frauds, § 193. And it is in accord with our ruling in *Brown*



v. Croy, 74 Mo. App. 462, and the rule stated in 29 American and English Encyc. of Law, 912.

We find the same interpretation of the statute is given in England. In *Goodman v. Chase*, 1 B. & Ald. 297, there were two arguments, after which Lord Ellenborough stated the opinion of the court as follows: "By the discharge of Chase Junior with the plaintiff's consent, the debt as between those two persons was satisfied. No case can be cited in which such a discharge has not been held quite sufficient. Then, if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase Junior. That being so, it becomes wholly unnecessary to consider the question arising out of the construction of the fourth section of the statute of frauds." In *Sane v. Burghart*, 1 Q. B. 933, the original debtor was discharged by the creditor, in consideration of which Burghart agreed to pay the debt, and it was held to be an original undertaking by him to the creditor to which the statute did not apply.

[3] The foregoing considerations demonstrate that the petition stated a case not within the statute, and that therefore the demurrer should have been overruled.

The judgment is reversed, and the cause remanded. All concur.

McCLASKEY v. QUINCY, O. & K. C. R. CO.  
(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1913.)

1. RAILROADS (§ 439\*)—INJURIES TO STOCK—ACTIONS—PETITION.

In an action against a railroad company for injuries to a horse, where the petition alleged a failure to maintain a lawful fence at the place where the horse went upon the railroad track, and that the company's servants negligently injured the horse in removing it from a trestle bridge into which it had fallen, but there was no proof of the negligence of such servants, the inclusion of the allegation of such negligence did not affect plaintiff's right to recover under the remaining allegation, if it stated a good cause of action.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1551-1569; Dec. Dig. § 439.\*]

2. RAILROADS (§ 411\*)—INJURIES TO STOCK—STATUTORY PROVISIONS.

Under Rev. St. 1909, § 3145, requiring railroad companies to erect and maintain lawful fences on the sides of the railroad, and to construct and maintain cattle guards, and providing that until such fences and cattle guards are made and maintained the corporation shall be liable in double the amount of damages done by its agents, engines, or cars to animals on such road by reason of the failure to construct or maintain such fences or cattle guards, and section 3146, providing that when live stock shall go upon any railroad or its right of way, where the railroad is not inclosed by a good fence, such as is, by law, required, and by being frightened or run by any passing locomotive or train, shall be injured or killed by having run against a fence or into a culvert, bridge, etc., the railroad company shall pay the damage

sustained, the statutory remedy was not available, where a horse went upon the track and fell into a trestle bridge without being injured, frightened, or run by a locomotive or train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

3. RAILROADS (§ 411\*)—INJURIES TO STOCK—STATUTORY PROVISIONS.

Under such sections the owner of such horse was entitled to recover his damages, though the statutory remedy was not available, since the statutory remedies, so far as they relate to compensatory damages, are cumulative and not exclusive, and a common-law action will lie for negligence in the performance of a statutory duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

4. RAILROADS (§ 411\*)—INJURIES TO STOCK—STATUTORY PROVISIONS.

Under Rev. St. 1909, § 3145, requiring railroad companies to erect and maintain lawful fences on the sides of the road where it passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands, and to construct and maintain cattle guards, where fences are required, sufficient to prevent animals from getting on the railroad, the owner of a railroad, crossed by a private road which was open where it entered a public road, owed the owner of a horse living at some distance from the railroad the duty of providing a lawful barrier to prevent the horse, which escaped from its pasture inclosed by a lawful fence, from straying from the public road to the railroad by the way of the private road.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Action by James McClaskey against the Quincy, Omaha & Kansas City Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

D. M. Wilson and J. W. Clapp, both of Milan, and J. G. Trimble, of Kansas City, for appellant. Earl F. Nelson, of Milan, for respondent.

JOHNSON, J. The appeal in this case is from a judgment plaintiff recovered in the circuit court of Sullivan county in an action for a breach by defendant of its duty to maintain lawful fences on the sides of its railroad, where the same passes through the country. A horse owned by plaintiff escaped from a pasture, which was inclosed by a lawful fence, to a public road, traveled a mile or more along that road to a place where an opening in the fence on the north side afforded him access to a private road which ran north to and across defendant's railroad. There were no cattle guards at this crossing, and a fence on the north side of the right of way caused the horse, when he reached that barrier, to turn west and go along defendant's right of way. Finally he took to the track, and then fell into a trestle bridge he attempted to cross. He was afterwards extricated by some section men, but was so badly injured as to be rendered almost, if not entirely, worthless. The farmer who owned the land over which the private

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

road passed maintained a lawful fence along the north side of the public road which ran east and west. There had been a gate at the place where the private road entered the public road, but for some time before the event in question the gate had been down, and as defendant had no fence along the south side of its right of way, which was about 100 yards north of the public road and parallel thereto, there was nothing to prevent the horse from taking the course he pursued to the place of the injury. There is no evidence that the horse was frightened or run by a passing locomotive or train.

[1] The petition contains two allegations of negligence, viz., first, that defendant failed to maintain a good and lawful fence and gate at the place where the horse entered upon the right of way, and, second, that defendant's servants negligently injured the horse in removing it from the bridge. There is no proof of the second charge, and it will be dismissed from our consideration with the observation that its inclusion in the petition could not affect the right of plaintiff to recover on the remaining charge if it states a good cause of action.

[2] The gist of the action is negligence of defendant in the performance of the duty imposed by section 3145, Rev. Stat. 1909, upon railroad companies to maintain lawful fences along the sides of their railroads where they run through the country. The remedy provided in that statute was not available to plaintiff, since his horse was not injured by a locomotive or train, nor could plaintiff have maintained an action under the succeeding section, since the horse was not frightened or run by a passing locomotive or train.

[3] But these statutory remedies, so far as they relate to compensatory damages are cumulative, not exclusive. If a railroad company negligently fails to maintain the kind of inclosure required by law, and in consequence of such negligence an animal strays upon the track and is injured, the owner may recover the damages thus inflicted upon him, though the manner of the injury may be outside the purview of the statutory remedies. An action will lie for the enforcement of a common-law remedy for negligence in the performance of the statutory duty. *Oyler v. Railroad*, 113 Mo. App. 375, 88 S. W. 162; *Gorman v. Railroad*, 26 Mo. 441, 72 Am. Dec. 220; *Hill v. Railroad*, 49 Mo. App. 520; a. c., 121 Mo. 477, 26 S. W. 578.

[4] The point made by defendant that it owed plaintiff no duty to provide a lawful barrier to prevent his horse from straying from the public road to the railroad has been so often ruled adversely to the position of defendant that we do not think its discussion here would be profitable. Reference to the following cases will disclose that the point is not well taken: *Litton v. Railroad*, 111 Mo. App. 140, 85 S. W. 978; *Reed v. Rail-*

*road*, 112 Mo. App. 575, 87 S. W. 65; *Oyler v. Railroad*, supra; *Francis v. Railroad*, 118 Mo. App. 435, 93 S. W. 876; *Smith v. Railroad*, 127 Mo. App. 160, 105 S. W. 10; *Brown v. Railroad*, 127 Mo. App. 614, 106 S. W. 551.

The judgment is affirmed. All concur.

#### REA v. REA.

(Kansas City Court of Appeals. Missouri. Dec. 1, 1913.)

#### 1. DIVORCE (§ 184\*)—APPEAL—FINDINGS—CONCLUSIVENESS.

While findings of the trial court in an action for divorce are not binding on appeal, they will nevertheless be given persuasive influence and deferred to by the appellate court.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 570-573; Dec. Dig. § 184.\*]

#### 2. DIVORCE (§ 104\*)—AMENDMENT—CONFORMITY TO PROOF.

A husband's petition for divorce originally charged adultery, and also indignities, in that defendant sought the society of male companions, other than her husband, while he was absent from home, and without his knowledge, and that she carried on a secret correspondence with B. and permitted him to call on her during plaintiff's absence. At the close of the evidence the court took the case under advisement and afterwards announced that the charge of adultery had not been sustained and ought to be withdrawn, and that the petition should be amended as to the charge of indignities. This was done, making such charge more specific, and including an allegation that defendant permitted her young daughter to have company until late at night, and that B. at one time caressed the daughter. *Held*, that such amendment did no more than to conform the petition to the proof and was properly allowed.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 28, 328-339; Dec. Dig. § 104.\*]

#### 3. DIVORCE (§ 146\*)—TRIAL—AMENDMENT OF PETITION—NEW EVIDENCE.

Where a petition for divorce originally charged adultery and indignities, and at the trial the case was fully tried on the issue of indignities, without any objection on defendant's part as to the scope of the proof, an amendment of the petition after submission so as to eliminate the charge of adultery and make the charge of indignities more specific to conform to the proof did not entitle defendant to an opportunity to introduce further evidence.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 164, 471-473, 477, 488-492; Dec. Dig. § 146.\*]

#### 4. DIVORCE (§ 105\*)—PETITION—AFFIDAVIT.

Where a petition for divorce was properly sworn to originally, it was not essential that it be reverified after an amendment to conform to the proof.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 340-343; Dec. Dig. § 105.\*]

Appeal from Circuit Court, Andrew County; A. D. Burns, Judge.

Action by Claude Rea against Virginia B. Rea. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Hayes and Booher & Williams, all of Savannah, for appellant. Shinabarger, Blagg & Ellison, of Maryville, for respondent.

ELLISON, P. J. Plaintiff's action is for divorce. He obtained a decree in the trial court on the ground of indignities and incompatibility of temper.

The evidence disclosed that plaintiff had a daughter Ruth by a former marriage, who at the period of this controversy was between 14 and 15 years of age. She lived with plaintiff and defendant on a farm in Andrew county. Plaintiff was a traveling salesman of merchandise and was absent perhaps five days in the week; the farm being managed during his absence by defendant and hired men. The indignities charged against defendant are her improper conduct with one of these men (though not amounting to adultery) and the example set to the young daughter, which plaintiff feared might have a corrupting influence as she grew older.

It was shown by a preponderance of the evidence that defendant permitted one Beatty, who was one of the employes on the farm, who lived near by, to visit her and at times to caress her. There was other evidence that she wrote him notes, and that, when finally plaintiff took his daughter away for the reason that he believed she was in danger of evil influences and surroundings, she said to the daughter that, "If you won't tell on me, I won't tell on you." There was also evidence that she admitted in the presence of others to an ungovernable temper which had led her into unjust treatment of her husband.

[1] We can see no good to be accomplished in setting out all this evidence in detail and no good reason for doing more than to say that the preponderance of evidence in plaintiff's behalf has induced the trial judge to find that the indignities charged were sustained, and that, while that finding is not binding on this court, yet it properly has a very persuasive influence and should be deferred to by us. *Herriford v. Herriford*, 160 Mo. App. 641, 155 S. W. 855.

[2] There is, however, a legal question presented which requires our attention. The petition originally contained a charge of adultery and also a charge of indignities in that she sought the companionship and society of male companions while he was absent from home and without his knowledge, and that she carried on a secret correspondence with Beatty and permitted him to call on her during plaintiff's absence. At the close of the evidence the court took the case under advisement and afterwards announced that the charge of adultery had not been sustained and ought to be withdrawn, and that the petition should be amended as to the charges of indignities. This was done by amendment. The charge of indignities was made more specific and included that of defendant permitting the young daughter to have company until late at night, and that Beatty had one time caressed the daughter.

When this amendment was made, defendant asked to be allowed to introduce more evidence, and the court refused the request. We think the amendment to the petition was nothing more than an allowance of an amendment for the purpose of conforming to the proof. It is a common practice in ordinary cases, and no reason exists why it should not be done in an action for divorce. *Rose v. Rose*, 129 Mo. App. 175, 107 S. W. 1089; *Garver v. Garver*, 145 Mo. App. 353, 130 S. W. 369.

[3] As to the introduction of further evidence as requested by defendant, we find no reason to interfere with the trial court. The matters specified in the amendment had all been contested under the original petition; the defendant at no time objecting to the evidence taking the scope it did. So that the refusal to open up what had been already fully contested was not improper.

[4] Another ground of objection is that the petition after the amendment was not again sworn to. That point has also been ruled against defendant. The affidavit is jurisdictional (*Hinkle v. Lovelace*, 204 Mo. 208, 102 S. W. 1015, 11 L. R. A. [N. S.] 730, 120 Am. St. Rep. 698, 11 Ann. Cas. 794; *Stevens v. Stevens*, 170 Mo. App. 822, 156 S. W. 68); but where the cause of action is not changed, and where no new cause of action is introduced, where, as here, the amendment introduces no new cause of divorce but only an amplification of what was already charged, there is no necessity for renewing the affidavit. *Garver v. Garver*, supra; *Tackaberry v. Tackaberry*, 101 Mich. 102, 59 N. W. 400; *Conant v. Jones*, 120 Ga. 568, 570, 48 S. E. 234.

We think the trial court properly found against the defendant's cross-bill, and we affirm the judgment granting plaintiff a divorce. All concur.

#### BRADEN v. CHICAGO, B. & Q. R. CO.

(Kansas City Court of Appeals. Missouri.  
Nov. 3, 1913. Rehearing Denied  
Dec. 1, 1913.)

#### 1. MASTER AND SERVANT (§ 107\*)—SAFE PLACE OF WORK.

A railroad company which employed plaintiff to mow its right of way with a machine and by hand was not required to furnish him with a level surface to mow in order to discharge its duty, as employer, of furnishing a safe place of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

#### 2. MASTER AND SERVANT (§§ 150, 155\*)—ASSUMPTION OF RISK.

If a danger is extraordinary and one not ordinarily incident to the service, and the employer knows it, he is negligent for failing to warn the employe; but if the danger be obvious to one of ordinary intelligence and can be appreciated by him, or is not extraordinary,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the employer is not bound to warn a servant thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307, 310; Dec. Dig. §§ 150, 155.\*]

3. MASTER AND SERVANT (§§ 101, 102\*)—SAFE PLACE OF WORK.

An employer is not bound to furnish an absolutely safe place of work but only one free from the dangers not ordinarily incident to the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

4. MASTER AND SERVANT (§ 206\*)—RISKS ASSUMED.

One employed by a railroad company to mow, with a machine and by hand, a part of its right of way assumed the risk of injury to his team by one of the horses falling into a ditch on the right of way; risks from the contour of the land being ordinary risks of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. § 206.\*]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

Action by Robert E. Braden against the Chicago, Burlington & Quincy Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

O. M. Spencer, of St. Joseph, Frank Sheetz, of Chillicothe, and Maurice Roberts, of St. Joseph, for appellant. Paul D. Kitt, of Chillicothe, for respondent.

JOHNSON, J. Plaintiff, a farmer, was employed by a section foreman of defendant in August, 1910, to cut weeds and grass on defendant's right of way for a distance of about three-quarters of a mile west from Utica station. He was to use his team and mowing machine where it was practicable and to cut the remainder by hand. One of the section men accompanied him. After working with his machine until near the close of the first day, one of the horses fell into a ditch on the right of way and was so injured that he had to be killed. Plaintiff sued in a justice court to recover the value of the horse on the ground that its death was caused by defendant's negligent breach of a duty to warn him of the ditch, the presence of which, plaintiff contends, was concealed by a very thick and rank growth of weeds. The cause was tried in the circuit court without the aid of a jury and resulted in a judgment for plaintiff. Defendant appealed.

The evidence consisted of the testimony of plaintiff and his companion, the section hand who was sent by defendant to help him. While driving the mowing machine westward on the south side of the railroad, they came to a natural drainage ditch that crossed the right of way from southeast to northwest and crossed under the track through a culvert. The track was on an embankment that was perhaps 16 feet high, perpendicular measure, and had sloping sides. The ditch was about 6 feet wide and 6 feet deep. Al-

though, as stated, the weeds were very thick, plaintiff says he observed the ditch when he was 40 feet from it and got off the machine and went forward on foot to see if he could drive the team and mower across it. Another natural drainage ditch about 2½ feet wide and 2½ feet deep, coming from the west on a course parallel to the embankment, emptied into the larger ditch at a point estimated by plaintiff as being 12 or 14 feet and by the helper as being 6 feet south of the culvert. Plaintiff states that he did not discover this small ditch on account of the weeds and drove across the larger one without knowing of its presence. His team crossed at a place just north of the small ditch, and his machine had just reached the top of the west bank when the near horse fell and landed on his back in the small ditch, where he remained until the next morning. His injuries were so severe that plaintiff decided to kill him. Plaintiff testified that he did not know what caused the horse to fall but founds his action on the inference that it stepped or slipped into the concealed ditch. The helper's version of the injury differs materially from plaintiff's and gives a plausible reason for the accident. He states that plaintiff knew of the presence of the small ditch and attempted to drive across to the tongue of land lying between the embankment and the small ditch, and that as the machine was ascending the west bank the off horse shied at the culvert and pushed the near horse over into the small ditch.

If we were sitting as triers of fact, we would accept the statement of the helper as being more in accord with the conceded physical facts than that of plaintiff. It is difficult to believe that plaintiff could not and did not see the mouth of the small ditch and the break in the weeds that must have been plainly marked by its course if, as he states, he could see the large ditch 40 feet away and made a careful inspection to determine whether or not he could cross it in safety; but since all issues of fact were resolved by the trial court in favor of plaintiff, and the judgment before us necessarily was based on the hypothesis that the small ditch was so concealed by vegetation that plaintiff could not detect it from his position on the east side of the large ditch, nor while he was crossing, we shall accept that view of the occurrence, despite its repugnance to plain and conceded physical facts. We do this merely for the purposes of argument and because we are convinced that plaintiff has no cause of action against defendant under any possible view of the facts. The gist of the cause he asserts is the breach of a master's duty to exercise reasonable care to furnish his servant a reasonably safe place in which to work.

[1] He does not claim and would not be heard to claim that such duty compelled de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

fendant to furnish him a smooth and level surface on which to cut weeds (Post v. Railway, 121 Mo. App. 562, 97 S. W. 233), but does contend that defendant was bound to warn him of the presence of natural drainage ditches that were obscured by vegetation and into which he, unawares, might drive his horses, to his injury and damage.

[2, 3] The rules are too well settled to call for discussion or require the citation of authorities that a servant assumes the risks that are ordinarily incident to the service he undertakes; that the master is not an insurer of the safety of his servant; and that the measure of his duty is not to furnish his servant an absolutely safe place in which to work but a place free from all risks and dangers that are not ordinarily incident to the kind of work the servant is employed to perform. As stated in Elliott on Railroads (2d Ed.) § 1283: "The general rule is that where the danger is an extraordinary one (that is, a danger not ordinarily incident to the service), and the employer has knowledge of such danger, he is guilty of negligence if he fails to warn the employe. Where, however, the danger is obvious to a person of ordinary intelligence and one that can be known and appreciated by a person who exercises ordinary prudence and care, or where it is not an extraordinary peril but is one incident to the service, there is no duty to give warning unless the person employed has not reached the years of discretion."

Counsel for plaintiff ask, "How can a servant assume something of which he has no knowledge, actual or constructive?" and answer the question by pointing to the rule that "The assumption of a risk appears to involve the facts of comprehension that a peril is to be encountered and a willingness to encounter it; that is to say, a positive exercise of volition in the form of assent to the risk." *Adolff v. Baking Co.*, 100 Mo. App. loc. cit. 209, 73 S. W. 321; *Roberts v. Tel. Co.*, 166 Mo. loc. cit. 378, 66 S. W. 155.

[4] This is true, but does not a servant hired to mow a field have both actual and constructive knowledge of the topographical features common to all fields? Hills, slopes, vales, water and drainage courses, gullies large and small, stumps, and sometimes stones are general characteristics, and a farmer employed to mow a field covered with rank vegetation knows that he will encounter many such natural obstacles and must be on the lookout for them. If such are not natural risks, it is hard to imagine any that would be. Must a farmer who hires a man to mow his field warn him beforehand of every hidden gully, stump, or stone on pain of being forced to answer in damages for any injury to his servant that may result from such a risk? The suggestion is too absurd to be entertained for a moment. Such risks are natural, incidental to the employment, and are assumed

by the servant. The mere fact that plaintiff was employed by a railroad company to mow its field instead of by a neighboring farmer is immaterial. The same law applies to all classes of employers.

Clearly the injury to the horse was due to a risk assumed by plaintiff and cannot be attributed to any negligence of defendant.

The judgment is reversed. All concur.

### COULTER v. COULTER.

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1913.)

#### 1. PLEADING (§ 433\*)—DEFECTS IN PETITION —AIDER BY VERDICT.

The omission of an essential averment from a petition is not wholly waived by answer to the merits; but a failure to demur brings into play the rule of liberal construction, and, if the omitted fact can be found to be alleged by inference, the petition will not be held bad after verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

#### 2. PLEADING (§ 433\*)—ACTIONS—PETITION.

In an action by a wife under Rev. St. 1909, § 8295, providing that, when a husband, without good cause, shall abandon his wife, and refuse and neglect to provide for her, the court shall order and adjudge such support and maintenance to be provided and paid by the husband, the petition alleged that plaintiff was without fault, and that defendant in leaving her wholly disregarded his duty as husband, but did not expressly aver that his abandonment was without just cause. Held that, as the petition was not challenged until after verdict, it was good as against a motion in arrest; the missing averment being supplied by inference.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

#### 3. HUSBAND AND WIFE (§ 283\*)—ABANDONMENT.

A wife is bound to follow the fortunes of her husband, and to live where he chooses to live, and in the style and manner he may adopt; but the duty of a wife to forsake her family and cleave to her husband is no greater than the corresponding duty of the husband, and neither spouse has the right to demand in mere wantonness and caprice the estrangement of the other from his or her parents.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

#### 4. HUSBAND AND WIFE (§ 283\*)—SEPARATE MAINTENANCE—ABANDONMENT.

Where a wife abandoned her husband, leaving the home that he had provided for her, he condoned her fault by resuming cohabitation with her under a promise to provide as soon as possible a new home more acceptable to her, consenting for her to temporarily remain with her parents.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

#### 5. HUSBAND AND WIFE (§ 283\*)—SEPARATE MAINTENANCE—ABANDONMENT.

Where a wife lives apart from her husband with his consent, she cannot be said to have abandoned him, and he is bound to support her, and will remain bound until she refuses to return to him upon request, and hence the wife is entitled to a decree for separate maintenance under Rev. St. 1909, § 8295, where

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

her husband consented to her living apart from him temporarily, and failed to make any provision for her to return to him or go to his new home in another state.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

Appeal from Circuit Court, Linn County; Fred Lamb, Judge.

Action by Fae Coulter against Gussie J. Coulter. From a judgment for plaintiff, defendant appeals. Affirmed.

A. W. Mullins, of Linneus, for appellant.  
E. B. Fields, of Browning, for respondent.

JOHNSON, J. This is an action under section 8295, Rev. Stat. 1906, which provides that: "When the husband, without good cause, shall abandon his wife, and refuse or neglect to maintain and provide for her, the circuit court, on her petition for that purpose, shall order and adjudge such support and maintenance to be provided and paid by the husband for the wife and her children, or any of them, by that marriage, out of his property, and for such time as the nature of the case and the circumstances of the parties shall require," etc.

The petition alleges that the parties were married July 2, 1911, in this state, and lived together as husband and wife until March 17, 1912; "that during all that time plaintiff faithfully demeaned herself, and discharged all her duties as the wife of defendant, and at all times treated him with kindness and affection; \* \* \* that defendant, wholly disregarding his duties as the husband of plaintiff, did, on or about the 17th day of March, 1912, abandon plaintiff, and has ever since refused, failed, and neglected to provide for her; \* \* \* that there has been born of the marriage aforesaid one child, now of tender years, \* \* \* a girl of the age of 18 months." The prayer is for an order "that defendant pay to her for her support and maintenance of herself and child the sum of \$25 monthly, and that defendant be compelled to give security for such maintenance and for such other and further relief as to the court shall seem meet and just."

The answer, in substance, denies the charge of abandonment, and pleads that plaintiff deserted defendant without just cause or excuse. A jury was waived, and the court, after hearing the evidence, adjudged the issues in favor of plaintiff, and allowed her maintenance in the sum of \$10 per month, commencing July 1, 1913. Defendant filed motions for a new trial and in arrest, which were overruled, and defendant appealed.

At the time of their marriage, which occurred July 2, 1911, both parties were 19 years of age. The defendant was the adopted child of Diana Coulter, an aged widow, who owned and resided upon a well-improv-

ed farm of 240 acres in Linn county. Defendant lived on the farm with her, and had no other means of support than that which she provided. Plaintiff lived with her parents in Browning, but had a married sister living near Mrs. Coulter, whom she often visited. She received the attentions of defendant at her sister's home, and an intimacy ensued under circumstances not creditable to her sister and brother-in-law. A child was born to the young couple November 27, 1911, less than 5 months after their marriage. Mrs. Coulter opposed the marriage, but was persuaded by her son to give her written consent to enable him to obtain a license. Plaintiff knew that her husband was without means or ability to support her without the aid of his foster mother, and before the marriage expressed herself as willing to go with him and abide in his mother's house. They went there two days after the marriage, and were kindly received. Mrs. Coulter offered to turn over the management of the farm to them, giving them all they could make out of it, and stipulating only for her own support. Plaintiff lived there 11 days under this arrangement, and then returned to the home of her parents, where she has since resided.

It appears from the testimony of plaintiff that defendant knew she was returning to her parents with the intention of remaining with them until he could provide a different home for her. Her objection to the home he had provided was that his mother would not allow any of her family to visit her there except her mother.

After the separation, defendant twice besought her to live with him; but she refused, on the ground that she could not live in harmony with his mother. She coupled her refusals with an offer to live with him if he would find her another home. The separation continued until March, 1912, when the parties lived as husband and wife for two days at the home of her parents. According to the testimony of plaintiff and of her mother, they then talked over their affairs, and reached an agreement that plaintiff and their child should remain with her parents; that defendant would return to his foster mother, and live with her until her death, when they would reunite, and live on the farm he would inherit from her. In the meantime he was to help support plaintiff and the child. The parties then separated again, defendant returning to his mother; but he did not contribute anything to the support of his wife and child, and in the following October commenced a suit for divorce against her on the ground of desertion. She employed counsel, who filed an answer, in which it was alleged that "she returned to her father's home, there to remain until such time as he, plaintiff, would provide her a home." Afterward defendant dismissed the suit, and went to Oklahoma to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

live, and under date of March 5, 1913, he wrote his wife an affectionate letter, in which he said: "I want you to come out here and live with me. \* \* \* I know we can live together. \* \* \* Don't tell any one where you are going, for I don't want Ma to know we are living together, or she wont give me anything. She don't know I am writing to you. If she did, she would just rear. You come out here, and we will live out here until we can do better. I wrote home, and told them to sell everything I had, and send me the money. I am going to put it in the gold mine. Bob says, when they get started, it will pay a dollar a day to every hundred. If it does, I wont work much. \* \* \* How is your mother? Tell her hello for me, and Ruth, too [referring to the baby]. I want to hear from you so badly I can hardly wait." Plaintiff did not answer that letter; but she did answer a second letter of the same tenor. She expressed a willingness to go to Oklahoma and live with defendant if he would send her money to defray the expenses of the trip and to pay the lawyer she had employed to defend the divorce suit. Defendant did not comply with this condition, and did not send her any money or offer to send any. He went to Kansas City from Oklahoma, and wrote plaintiff a number of letters, but did not provide a home for her, nor offer her the means with which to rejoin him. Plaintiff stated at the trial: "I will live with Gus at any home he may provide elsewhere from the old lady Coulter, and I have always been ready to do so. I don't think my husband ever insisted on me going back to live with him at the old lady Coulter's since we made our arrangement in March, 1912."

We have stated the facts as they appear from the evidence most favorable to plaintiff, and it is not necessary to refer to the contradictory evidence offered by defendant, since we find the case is in such state that the judgment should be affirmed if it is supported by substantial evidence. No findings of fact or declarations of law were asked or given, and, as this is a law case, the judgment must be regarded as a finding for plaintiff on every contested issue of fact.

[1, 2] Defendant challenged in his motion in arrest the sufficiency of the petition to support the judgment. The point is based on the omission of an express averment that the abandonment of plaintiff was without just cause. A petition in all essential respects the same as the one in hand was before the St. Louis Court of Appeals in *Munchow v. Munchow*, 98 Mo. App. 553, 70 S. W. 386, and, in an able opinion written by Goode, J., it was held to be good after verdict. We approve the reasoning of that opinion, and refer to it for an expression of our own views. The statute expressly states that an abandonment to be actionable must be without good

cause, and it must be conceded that the existence of that elemental fact must be pleaded and proved. Objection to the omission from the petition of an averment of an essential fact is not deemed waived by answer to the merits. But a failure to demur to the petition does bring into play the rule of liberal construction, and, if it be found by a fair analysis of the facts alleged that the existence of the omitted fact must necessarily be inferred from them, the petition will not be held bad after verdict. The petition alleges that plaintiff faithfully demeaned herself as the wife of defendant, and at all times treated him with kindness and affection, and that, wholly disregarding his duties as her husband, he abandoned her, and has refused to support her. If plaintiff was without fault, as she alleges, and defendant in leaving her "wholly disregarded his duties as her husband," how could it possibly be inferred that he had good cause to leave her, or to resist the conclusion that his conduct was culpable? We hold the objection is not well taken.

[3-5] We shall agree with defendant, arguendo, that plaintiff was not justified in leaving the home her husband provided for her. It is still the law in this state "that the wife is bound to follow the fortunes of her husband and to live where he chooses to live and in the style and manner he may adopt." *Droege v. Droege*, 52 Mo. App. 84; *Messenger v. Messenger*, 56 Mo. 329; *Kaster v. Kaster*, 43 Mo. App. 115; *Collett v. Collett*, 170 Mo. App. 590, 157 S. W. 90. But this rule is not intended to make the wife the slave of her husband, nor to give him the right to subject her to avoidable indignities. The duty of a wife to forsake her family and cleave to her husband is no greater nor more sacred than the corresponding duty of the husband. Neither spouse has the right to demand in wantonness or mere caprice the estrangement of the other from his or her parents. For a husband to take his wife where she is unreasonably denied the privilege of seeing members of her own family who are of good repute would be an indignity no faithful husband would visit upon his wife. But, as stated, we are willing to concede, for the purposes of this case, that plaintiff abandoned her husband in the first instance, and thereby deprived herself of the right to be supported by him. That defense cannot now aid defendant, for he condoned it by resuming cohabitation with her. He followed this act with his consent for her to continue living with her parents until he could provide another home for her. It is well settled that, where a wife lives apart from her husband with his consent, she cannot be said to have abandoned him, and he is bound to support her, and will remain bound until she refuses to return to him upon his request. *Lindenschmidt v. Lindenschmidt*, 29 Mo. App. 295; *Dwyer v. Dwyer*, 26 Mo. App. 647.

The letter written by defendant from Oklahoma shows quite clearly that he did not regard plaintiff as recalcitrant. He implored her to resume cohabitation with him, and assured her of his ability to provide a home for her. It appears from what he said that he was not destitute of means and dependent upon his foster mother; but, when plaintiff signified her willingness to rejoin him, and asked him to send her the money to enable her to do so, he either would not or could not comply with that request. Perhaps he would have been justified in refusing to accede to the further condition that he pay her attorney's fee—we express no opinion on that subject—but it was his duty to offer her money to defray her necessary traveling expenses, and his failure to perform that duty deprived his request for her return of any legal force. We think the evidence shows that plaintiff is still living apart from her husband, with his consent, under their agreement made in March, 1912, and that defendant, without good cause, has abandoned her, and refused to support her and their child. She has a good cause of action under the statute.

The judgment is affirmed. All concur.

#### FEATHERSTONE v. KANSAS CITY TERMINAL RY. CO.

(Kansas City Court of Appeals. Missouri.  
June 30, 1913. On Motion for Re-  
hearing Dec. 1, 1913.)

#### 1. APPEAL AND ERROR (§ 927\*)—REVIEW—DEMURRER TO EVIDENCE—PRESUMPTIONS.

In an action by a child injured, while playing under a freight car standing on a side track, by the train crew shoving other cars against it, where the evidence was conflicting, it would be assumed, in determining whether a demurrer to the evidence should have been sustained, that the train was backed into the standing cars intentionally, and without the observance of the usual custom of giving warning of such movement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

#### 2. NEGLIGENCE (§ 2\*)—ELEMENTS—NECESSITY OF DUTY.

Negligence is a breach of duty, and an injury is not caused by negligence when the party charged with the negligence owed no duty to the injured party.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

#### 3. RAILROADS (§ 358\*)—LICENSEES—CHILDREN AT PLAY.

A child who, with other children, had been accustomed, with the knowledge and implied consent of the railroad company, to play about and upon a side track and under cars standing thereon, and who, while so playing, went under a car, at the request of a woman who was picking up coal, for the purpose of procuring a lump of coal under the car, did not by so doing lose

her status as a child at play on the premises with the company's consent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.\*]

#### 4. RAILROADS (§ 359\*)—LIABILITY TO TRESPASSERS FOR INJURIES.

Where a child is a trespasser on railroad property, and is injured in a place where the company has no reason to anticipate its presence, the company is not liable, since an owner of property is not bound to anticipate that his property rights will be invaded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.\*]

#### 5. RAILROADS (§ 356\*)—LIABILITY TO LICENSEES FOR INJURIES.

Where a railroad company suffers its property to be used by the public for the purpose of travel or recreation, knowing that it is being so used, it is bound to exercise reasonable care to avoid injuring such users.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.\*]

#### 6. RAILROADS (§ 358\*)—LIABILITY TO TRESPASSERS, INVITEES, OR LICENSEES FOR INJURIES.

Where, though neither a railroad company nor the owner of property upon which was a side track invited children to play there and around and under cars standing on the track, they had done so for some time, to the knowledge of the railroad company's employes, who customarily warned them before pushing other cars onto the side track, the company owed them the duty to give such warning, since they had reason to expect that children would be there, and hence it was liable for injuries to a child sustained, while playing under a standing car, by the backing of other cars against it without warning, whether she was, technically, a trespasser, a licensee, or an invitee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 358.\*]

Appeal from Circuit Court, Jackson County; W. A. Powell, Judge.

Action by Jewell Featherstone by Hubert A. Curtin, her next friend, against the Kansas City Terminal Railway Company. From an order granting a new trial after a verdict for plaintiff, plaintiff appeals. Reversed and remanded, with directions.

Kimbrell & White, of Kansas City, for appellant. Lathrop, Morrow, Fox & Moore, of Kansas City, for respondent.

JOHNSON, J. Plaintiff, a minor nine years of age, sues by her next friend to recover damages for personal injuries she alleges were caused by negligence of defendant. The answer is a general denial and a plea of contributory negligence. A trial in the circuit court resulted in a verdict for plaintiff in the sum of \$7,500; but on the hearing of a motion for a new trial the court set aside this verdict, and granted a new trial, on the ground of error "in refusing to give instructions offered by defendant, and in refusing to sustain defendant's demurrer to the evidence offered at the close of all the evidence." Plaintiff appealed from this judgment, and contends that the cause was properly submitted to the jury.

The injury occurred in the afternoon of November 25, 1910, on a tract of land owned

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



by a lumber company in Kansas City on the south side of defendant's railroad tracks. The tract extended south from Twelfth street to Fifteenth street, and was a block wide, being bounded on the east by Elmwood avenue and on the west by Cypress avenue. A number of manufacturing and industrial concerns occupied a part of the tract as tenants of the lumber company, and a spur railroad track owned by the lumber company connected these establishments with defendant's main line. This track ran from the main line in a southwesterly direction, and then curved to the south, and continued in a straight course through the middle of the tract to a point a few rods north of Fifteenth street, where it ended. The track was used by defendant for switching and storing cars of freight received and forwarded by the tenants and other patrons of the lumber company. The south end of the property was vacant for a distance of 300 feet or more north of Fifteenth street, and the track in this vacant block was used as an unloading track for cars of coal and other bulky freight. North of this place the track ran through an alley between the various manufacturing plants which, as stated, were tenants of the lumber company. Going out from defendant's main line, the industrial track we have described ran downgrade a short distance, and thence on to the end on an increased upgrade. At the south end the grade was so steep that cars set there for unloading were left with blocked wheels as well as with set brakes. Cars of coal and other freight were being almost constantly unloaded in the vacant block by patrons of the lumber company. These cars came in over the railroad of defendant, and were switched to and from the end of the spur track by defendant's engines and train crews. Necessarily the cars had to be shoved in by the engines, and, whenever it became necessary to back into the end of the track with a string of cars, a brakeman was sent ahead to warn men at work in and about standing cars that the cars were about to be moved. Owing to the curve in the track and the narrowness of the alley this precaution was deemed essential to the protection of men engaged in loading and unloading cars standing at various places along the track. West of Cypress avenue was a thickly settled residence district, and the vacant lot had been used as a common playground by the numerous children of the neighborhood. They played there constantly on and about the track, and frequently went in and under standing freight cars. They were not invited by the lumber company or defendant to make such use of the premises, but were suffered to play about the track, and, according to the evidence of plaintiff, were included in the warnings given by the brakemen sent ahead of approaching trains. Some of the housewives of the neighborhood and

their children were in the habit of gleaning coal that fell from coal cars being unloaded, and sometimes, while following that humble pursuit, went between and under cars to pick up lumps that fell on the track. Plaintiff had lived in the vicinity a year and a half, and, in common with other youthful denizens, had used the vacant lot as her playground, and had become familiar with its customs and rules. She had played in and about standing cars and had often gone under cars to pick up coal at the request of some neighbor gleaner. Just before her injury she was playing "hide and go seek." There were four or five cars standing at the end of the track, among them two coal cars that were being unloaded. A woman not related to her was picking up coal that fell from one of the cars, and asked her to go under the car for a lump that had fallen on the track. She ceased playing to comply with the request, and crawled under the car. Before she could return, a train backed in by defendant violently collided with the stationary cars, and wheels of the car under which she had crawled ran over and crushed her left leg. No warning of any kind was given of the approach of the train to the men at work in the cars or to the children playing around them.

[1] Defendant admits that it had always sent a brakeman ahead of each train to give warning, but its witnesses say that no advance courier was sent in the present instance for the reason that the disturbance of the cars at the end of the track was not intended, but was due to an unavoidable accident; that it was not the purpose of the crew to shove this string of cars being handled by the engine into the vacant lot; that, owing to the great weight of the load, the engineer had been compelled to back in at high speed; and that, when he attempted to slow down to stop at the required place, the train parted, and the detached cars ran ahead into the standing cars. There are facts and circumstances in evidence brought out by counsel for plaintiff which tend to contradict this version of the injury, and to show that the train was backed into the standing cars intentionally for the purpose of taking away an unloaded car.

The only real questions in the case for our determination are those presented by defendant's demurrer to the evidence, and in the consideration of those questions we shall assume that the train was backed into the standing cars intentionally, and without the observance by the train crew of defendant's usual custom of giving warning of such movement.

[2-5] There is a controversy in the evidence over the issue of whether these warnings were given also to children at play about the track. The trainmen say, in effect that the custom was self-imposed, and not for the benefit of any one except those working in

and about the cars, but admit that, when the advance brakeman observed children on and about the track, he ordered them away, and generally "was rocked" by the children for his pains. The evidence as a whole presents the inference that the custom of giving warning was intended to be used and was used for the benefit of all persons found in the way of the advancing train, and the controlling question in the case is whether or not plaintiff in law was entitled to rely on the observance of the custom as a duty defendant had assumed towards her. The cause of action pleaded in the petition is grounded in negligence, and negligence means a breach of duty. Consequently, if it could not be said that defendant owed plaintiff a duty to be on the lookout for her and to give her warning, then it could not be said that her injury was caused by negligence of defendant. In approaching the question of plaintiff's status at the time of her injury, we dismiss as relatively unimportant the incident of her going under the car at the request of the woman who was picking up coal. Plaintiff's relation to defendant was not that of an uninvited but tolerated gleaner of coal, but was that of a young child at play on defendant's premises, with the knowledge and implied consent of defendant. In their play the children went between and under the standing cars, and any child of an obliging disposition would have turned aside from play a moment to comply with the request of an adult for a small service that would be as much play as work. The child was at play when injured, and we pass to the question of whether she was in a place where the servants of defendant were required to anticipate she might be. The cases in this state which deal with various phases of the subject of children playing about railroad tracks are numerous, and it would serve no useful purpose to review them. The general rule is that, where a child is a trespasser on railroad property, and is injured in a place where the company has no reason to anticipate its presence, there can be no liability to respond in damages imposed upon the company, for the reason that no owner of property is bound to anticipate that his property rights will be invaded. But where a railroad company suffers its property to be used by the public either for the purpose of travel or of recreation, and knows that it is being so used, it becomes charged with the performance of a duty towards such users to exercise reasonable care to avoid injuring them. As is said in *Conley v. Railroad*, 89 Ky. 402, 12 S. W. 764: "Where one is injured as the result \* \* \* of a plain and manifest duty for the protection of human life or safety, the party thus causing the injury will not be heard to say, in justification, that he was dealing with his own property, and that the person injured was, technically, a trespasser."

[8] It makes no difference whether, technically, plaintiff was a trespasser, a licensee, or an invitee; her evidence shows she was at a place where defendant's servants had every reason to expect her or some other child, to be. Such knowledge was enough, of itself, to impose a duty on them to give her warning, and a negligent breach of such duty, resulting in injury, would be actionable negligence. To hold that defendant's servants, knowing that little children, in all reasonable probability, would be in and about the stationary cars, still owed them no duty of reasonable care would be to declare a rule of conduct abhorrent to the most common instinct of humanity. The court did right in overruling the demurrer to the evidence, and erred in granting a new trial.

The judgment is reversed, and the cause remanded, with directions to enter judgment for plaintiff in accordance with the verdict. All concur.

#### On Motion for Rehearing.

We are asked by defendant to grant a rehearing, and, if this is not done, to certify the cause to the Supreme Court, on the ground that the foregoing opinion is in conflict with the following cases decided by the Supreme Court: *Rushenberg v. Railroad*, 109 Mo. 112, 19 S. W. 216; *Barney v. Railroad*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; *Ostertag v. Railroad*, 64 Mo. 421; *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557, 20 L. R. A. (N. S.) 903. These decisions were considered in the preparation of our opinion, and we thought, and still think, their doctrine is not inconsistent with the view that the peculiar and differentiating facts and circumstances of the instant case presented issues for the triers of fact to determine. The rule that circumstances alter cases obtains in jurisprudence as well as in ethics, and its proper application in comparing the cases cited by defendant with the case in hand discloses striking and, we think, vital dissimilarities.

The motions for a rehearing and to certify are overruled. All concur.

#### J. I. CASE THRESHING MACH. CO. v. TOMLIN et al.

(Kansas City Court of Appeals. Missouri. Nov. 17, 1913.)

##### 1. USURY (§ 80\*)—CHATTEL MORTGAGES.

Under the express provisions of Rev. St. 1909, §§ 7180, 7182, 7184, a chattel mortgage securing a note bearing more than 8 per cent. interest is void for usury.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 158-160; Dec. Dig. § 80.\*]

##### 2. USURY (§ 48\*)—"INTEREST" AFTER MATURITY—STATUTES—CONSTRUCTION.

Under Rev. St. 1909, § 7182, providing that "interest" includes any sum taken directly or indirectly for forbearance, as well as for the use of money, a note bearing a lawful rate before maturity and an unlawful rate after that time

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is usurious, if forbearance is exercised and the unlawful rate is charged or exacted.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 101, 102; Dec. Dig. § 48.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3692-3709; vol. 8, p. 7691.]

### 3. USURY (§ 2\*)—CONTRACT—WHAT LAW GOVERNS—PLACE OF PERFORMANCE.

A contract for the sale of a threshing machine on time, a part of the purchase price to be secured by notes and a chattel mortgage on the machine, was made and signed in Missouri, where the machine was to be shipped, delivered, and used. Defendants, who were the purchasers, however, resided in Kansas, and the notes and mortgage were sent there for their signature, but were payable at a bank in Missouri, and all acts connected with the transaction except the signing of the notes and mortgage were performed in Missouri, and the contract did not contain any provision that it was to be construed according to the law of any particular state. *Held*, that the validity of the notes and mortgage should be construed according to the law of Missouri, the place of performance, and, being void for usury under that law, they were unenforceable.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 2-15, 418; Dec. Dig. § 2.\*]

### 4. CONTRACTS (§ 101\*)—CONSTRUCTION—WHAT LAW GOVERNS—PRESUMPTIONS.

Where the circumstances surrounding the making of a contract indicate that the parties intended that it should be governed by the law of a particular state, the rule that it will be presumed that the contract was made with reference to the law which recognizes it as valid does not obtain.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 455-460; Dec. Dig. § 101.\*]

### 5. CONTRACTS (§ 142\*)—WHAT LAW GOVERNS—QUESTION FOR COURT OR JURY.

Where the intent of parties shown by their outward acts indicated that they intended a contract to be governed by the law of Missouri and not of Kansas, and there was no conflict in the testimony as to such acts, the question whether the contract was governed by the law of Missouri or Kansas was for the court.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1826; Dec. Dig. § 142.\*]

Appeal from Circuit Court, Platte County; Alonzo D. Burnes, Judge.

Action by the J. I. Case Threshing Machine Company against W. E. Tomlin and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Kirkpatrick, McCollum & Kirkpatrick, of Kansas City, and James H. Hull, of Platte City, for appellant. Wilson & Wilson and Guy B. Park, all of Platte City, for respondents.

TRIMBLE, J. Appellant sold respondents a threshing machine and took an old one in part payment of the purchase price and, for the remainder, took eight notes, aggregating \$1,500, secured by a chattel mortgage on the new machine. These notes bore 6 per cent. interest until due and 10 per cent. after maturity. The first note was not paid until some time after it was due, and, when it was paid, the company exacted and received the full amount of interest thereon including the 10 per cent. from maturity. Defendants complained that the machine did not work

according to warranty, and, after appellant had spent some time in endeavoring to make it work and had failed according to defendants' view, the latter refused to pay the remaining notes. There was a provision in the mortgage rendering all the notes due and payable in case any one of them became due and remained unpaid. And when this occurred, the company brought this suit in replevin, under its chattel mortgage to recover the machine. It was taken from defendants by the sheriff under the writ, and, upon appellant giving bond, the machine was delivered to it. The defendants set up, among other defenses, that appellant had charged and exacted usurious interest on the first note, and that the chattel mortgage was invalid by reason of usury in the notes secured thereby. Appellant, in reply, pleaded that the chattel mortgage and notes constituted a Kansas contract, and that, under the pleaded statutes of that state, 10 per cent. interest was a lawful rate. After all the testimony bearing upon the question of usury had been offered, agreed to, and admitted by both sides to be true, the court ruled that under the admitted facts the mortgage was invalid because of usury, and sustained defendants' demurrer to the evidence. Thereupon, without waiving any point on either side, it was agreed that the value of the machine was \$1,000 and that the damages for its taking and detention were \$125. The jury was then directed to find for defendants and against plaintiff, which was done, and plaintiff appealed.

[1] The law in Missouri is that a greater rate of interest than 8 per cent. is usurious (sections 7180, 7182, Rev. St. 1909), and a mortgage securing an usurious rate is invalid. Section 7184, R. S. Mo. 1909. Therefore, if the mortgage fails, plaintiff's replevin suit, based thereon, must also fail.

[2] Our statute, section 7182, makes interest include any sum taken, directly or indirectly, for "forbearance" as well as for the "use" of money. Consequently a note, bearing a lawful rate before maturity and an unlawful rate after that time, becomes usurious if forbearance is exercised and the unlawful rate is charged or exacted. *White v. Anderson*, 164 Mo. App. 132, 147 S. W. 1122. "If the sum charged or exacted for the use of money loaned exceed the legal interest, it is usury, no matter what words it may be clothed in." *Coleman v. Cole*, 158 Mo. 253, loc. cit. 260, 59 S. W. 108. The case of *Taylor v. Buzzard*, 114 Mo. App. 622, 90 S. W. 126, does not conflict with this rule. In that case the test of usury in a contract is said to be "whether it would, if performed, result in securing a greater rate of profit on the subject-matter than is allowed by law." There is a difference between a penalty or forfeiture for not performing a contract according to its terms, and the exaction of interest as a part of its terms. But 10 per

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cent. interest is a legal rate under Kansas law. Hence, if the contract claimed to be usurious is a Kansas and not a Missouri contract, it has no taint of usury in it.

[3] The facts bearing on this question are admitted, so that if, as a matter of law, it is a Missouri contract, there was no error in directing a verdict. Those facts are as follows: The chattel mortgage and notes grew out of, and were provided for in, a contract for the sale of the machine which was drawn up in Kansas City, Mo., by appellant's agent, and there signed by respondents. In form, it was an order, dated Kansas City, Mo., June 13, 1911, addressed to appellant, requesting it to ship, or deliver, to Beverly, or other convenient station in the state of Missouri, in care of appellant, for purchaser, the machine in question. In consideration of which, purchaser agreed to receive same on cars on arrival, subject to warranty thereinafter stated, and to pay freight and charges, and to execute eight notes, bearing 6 per cent. until maturity and 10 per cent. after that date, and secured by chattel mortgage on the machine. The contract further provided that, if purchaser failed to execute the notes and mortgage, the contract should, at the company's option, have the same force and effect as a mortgage for all sums not paid in cash, and the whole amount of purchase money should be due and payable. The warranty in the contract provided what the machine should do, and, if it failed to fulfill the warranty, purchaser was to give the company written notice, and the company was to send a man to remedy the difficulty; the purchasers to render friendly assistance. If the company failed to send a man, or if, after sending him, he failed to make the machine fill the warranty, the part failing to work was to be returned by the purchaser to the place where the machine was received and the company notified, whereupon the company had the option to either furnish another machine, or part, or return the notes or money received for the machine or part so returned. If crops in purchaser's vicinity were a failure, and written notice thereof was given before shipment, the delivery of the machine could be deferred one year. If purchaser refused to accept said machinery, or if he canceled the order, he agreed to pay the company the freight and charges on the machinery from the factory to the place of delivery.

The foregoing provisions of the contract are stated here, not as bearing on the warranty, but as throwing light on the question: What was the situs of the contract in the minds of the contracting parties? In addition to these provisions, there was indorsed on the contract a statement signed by the agent that the machine was to be located in Platte county, Mo., and that the makers of the notes wanted them sent to Platte City, Mo., for collection. This statement gave the

post office address of the purchasers as Leavenworth, Kan.

It was admitted that, at the time this order was given, the defendants requested that the notes be sent to Platte City, Mo., for collection as more convenient for them, since the machine was to be sent to that county and they would be threshing wheat therein near Platte City. Upon a property statement attached to the contract was a statement by the defendant W. E. Tomlin that his wife owned a 230-acre farm in Platte county, Mo., worth \$50 per acre, and also a similar statement by the defendant Elbert Cecil that he owned a farm of 230 acres in Platte county, Mo. The chattel mortgage was drawn up to be and was executed by W. E. Tomlin and Belle Tomlin, his wife; but the notes were signed by W. E. Tomlin and Elbert Cecil, and the suit is against all three of them. Indorsed on this contract is the following: "For account of local sales at Kansas City, state of Missouri." Pursuant to the contract the company shipped the machine to Beverly in Platte county, Mo., and defendants received it there; and the old machine, taken by the company in lieu of a \$1,000 cash payment above the \$1,500 in notes provided for, was delivered to, and received by, the company, in Platte county, Mo. As the statement attached to the contract gave defendants' post office address at Leavenworth, Kan., the chattel mortgage and notes were sent to a bank there and defendants executed them in Leavenworth. The notes, by their terms, were payable at the Wells Banking Company's Bank in Platte City, Mo. The defendants immediately began threshing with the new machine in Platte county, Mo.; but, as the machine did not work to defendants' satisfaction, the company was notified pursuant to the contract, and it sent men to Platte county, Mo., who endeavored for some time to make the machine work properly. These men were sent three or four times. The notes were sent to Platte City for collection; or at least the one that first became due was, which was the one defendants paid with 10 per cent. interest from maturity. At the time of doing so, defendants objected to paying 10 per cent. interest, but the company exacted and received it.

It can be seen, from the uncontroverted facts above set forth, that all the important elements of the transaction had their situs in Missouri. It originated in Missouri; the contract for the purchase of the machine and the execution of the notes and mortgage was signed in Missouri, at least by defendants; the machine was to be shipped to and delivered in Missouri and used in that state, and was in fact delivered to, and received by, defendants and used by them in said state; the old machine was delivered to the company in Missouri; the company sent the notes for collection to Missouri, and one of

them was paid in this state; the company agreed to, and did, send men to the machine, who worked upon it in endeavoring to make it run satisfactorily, and this was done in Missouri. In fact, everything about the transaction took place in Missouri, except the act of signing the chattel mortgage, which was done at the bank in Leavenworth. And the only possible reason for sending it there for execution was that, inasmuch as the statement attached to the contract gave Leavenworth as the defendants' post office, that was the most convenient place to send it for execution. The obligation to give the mortgage was not entered into in Kansas. The contract signed in Missouri already provided for the mortgage, and obligated defendants to execute the notes and mortgage; and, if they should refuse, the contract itself became a mortgage securing the debt past due and unpaid. The property, under the contract, was intended for use in Platte county, Mo., was actually there when the mortgage was signed, and, in case of default, the mortgage provided that the company should take it wherever found and sell it with or without notice. Presumably, this would be in Platte county, since the machine was for use therein. So that there is nothing in the evidence tending to show that the parties regarded it as a Kansas contract, or as anything other than a Missouri contract.

There is nothing in the contract or mortgage expressing the intention of the parties as to what state it should be considered a contract of, except the provision in the notes making them payable in Missouri. When this "is not specifically expressed in the contract, it may be inferred from all the terms of the contract taken in connection with all the circumstances surrounding the transactions." 39 Cyc. 898. "When all of the important elements of a loan transaction have their situs in the same state—that is, when the contract is made, the consideration is given, and payment is to be made all in the same place—it is evident that such state must give the law to the transaction wherever suit may be brought, even though the result of applying such law will be to render the obligation usurious as against the law of the creditor's residence." 39 Cyc. 899. The mere fact that the mortgage and notes were signed in Kansas does not make them Kansas contracts. Because, although the residence of a party to a contract is, or rather may be, a significant fact in determining the law applicable, yet it is only a fact to be taken into consideration with other facts in determining what law the parties had in view, and will readily yield to a manifest intent to contract with reference to the law of some other place. 39 Cyc. 904. It is true usury inheres in the loan and not in the property given to secure its payment. "But since the intent of the parties largely determines to what law the contract is referable, the situs of the property mortgaged to

secure the debt, taken in connection with other elements of the transaction, frequently enables the court to determine that the parties had in mind the same situs for the whole transaction." 39 Cyc. 906. It must be remembered that, if any inferences are to be drawn in this case, they must come from the contract agreeing to purchase a machine and give a mortgage therefor, and not from the act of signing the mortgage, since its execution was only a mere compliance with the contract theretofore entered into. But when we turn to the contract and look at all the circumstances surrounding the transaction, we find nothing from which can be drawn an inference that a Kansas contract was in contemplation.

In the absence of an attempt to evade the laws, the place of performance of a contract furnishes the law governing its terms. *Smoot v. Judd*, 161 Mo. 673, loc. cit. 684, 61 S. W. 854, 84 Am. St. Rep. 738; *Central National Bank v. Cooper*, 85 Mo. App. 383; *Trower Bros. v. Hamilton*, 179 Mo. 205, 77 S. W. 1081; *Vennum v. Mertens*, 119 Mo. App. 461, 95 S. W. 292; *Johnson v. Noble Machine Co.*, 144 Mo. App. 436, 129 S. W. 271. In this last case the notes were signed in Missouri but payable in Indiana, and they were held Indiana contracts. In *Bank v. Cooper*, supra, the note was signed in Missouri but was payable in Kansas. It was held a Kansas contract. So that, even if the notes be considered without reference to any other contract or to the transaction out of which they grew, yet, as the notes were payable in Missouri, the laws of that state should govern. The case of *Davis v. Tandy*, 107 Mo. App. 437, 81 S. W. 457, does not hold to the contrary. On page 448 of 107 Mo. App., on page 460 of 81 S. W., it says: "The rule is that the law of the place of performance (that is, in this case, the place where the note was to be paid), governs the contract."

[4] It is true, in the absence of any express stipulation of the parties as to which law shall govern, and in the absence of any evidence showing what law should govern, it will be presumed that the contract was made with reference to that law which recognizes it as valid. But when that evidence is present and shows which law was intended, then such presumption vanishes.

As usury taints a transaction from inception to close, the case cannot be confined merely to the signing of the notes and the place of their execution; but the whole matter may be considered. At the time the contract was made, it was agreed that the notes should be made payable at Wells Banking Company, Platte City, Mo., and they were made payable there, and were sent there for collection. Every act to be done, and which was done, by either party in reference to the subject of the contract, had its situs in Missouri, and no reference was made to Kansas,

except that defendants' post office address was there.

[5] It is urged that the question as to what law should govern the contract depends upon the intent of the parties, and hence the question whether it was a Kansas or Missouri contract should have been submitted to the jury by appropriate instructions. But intent is shown by outward acts, by what was done, the nature of the contract, and when and where it is to be performed. All these things were admitted. There was no issue of fact to be submitted. Hence the court did not err in directing a verdict.

The judgment is affirmed. All concur.

### COBY v. QUINCY, O. & K. C. R. CO.

(Kansas City Court of Appeals. Missouri.  
Nov. 17, 1913. Rehearing Denied  
Dec. 1, 1913.)

#### 1. RAILROADS (§ 348\*)—CROSSING ACCIDENT—SUFFICIENCY OF EVIDENCE—APPROACH OF TRAIN.

Evidence, in an action for injuries in a collision between an automobile in which plaintiff was riding and a freight train, *held* to show that the train was within sight and hearing when the automobile approached the crossing and attempted to cross.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\*]

#### 2. RAILROADS (§ 330\*)—CROSSING ACCIDENTS—DUTY OF TRAVELER.

While a traveler approaching a railroad crossing in a city may assume that a train will not cross at a speed greater than permitted by ordinance, he must nevertheless use his senses for his own protection, and be careful until out of danger.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.\*]

#### 3. RAILROADS (§ 333\*)—CROSSING ACCIDENTS—NEGLIGENCE.

Where plaintiff and the driver of an automobile, when they were only 60 or 70 feet from a railroad crossing, saw and heard a freight train about 400 feet away, which was obviously running at an excessive speed, but did not check the speed of the automobile, and attempted to cross ahead of the train, they were guilty of negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1080-1083; Dec. Dig. § 333.\*]

#### 4. RAILROADS (§ 348\*)—CROSSING ACCIDENTS—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for injuries in a collision between an automobile in which plaintiff was riding and a freight train, *held* not to show that plaintiff's peril was known and apparent to the engineer in time to stop so as to avoid the collision.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\*]

#### 5. RAILROADS (§ 338\*)—CROSSING ACCIDENT—LAST CLEAR CHANCE RULE.

To make the last clear chance doctrine applicable to injuries at a crossing, the traveler's peril must be apparent to the trainmen.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.\*]

Appeal from Circuit Court, Adair County;  
Nat M. Shelton, Judge.

Action by Pearl Coby against the Quincy, Omaha & Kansas City Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. E. Murrell and A. Deneghy, both of Kirksville, for appellant. J. G. Trimble, of Kansas City, and Campbell & Ellison, of Kirksville, for respondent.

JOHNSON, J. Plaintiff was injured in a collision between an automobile, in which he was riding as a guest and a train running on defendant's railroad. The place of the collision was where the railroad crosses Franklin street in the city of Kirksville. This street runs north and south, and is much traveled. Defendant's passenger station is just west of the street, and is on the south side of the main railroad track. Three switch tracks diverge from the main track at a point about 150 feet east of the street, and run westward across and beyond it. The first of these tracks is about 30 feet south of the main track, and the last about 30 feet further south. The railroad runs over a long trestle bridge, the west end of which is from 350 to 400 feet east of Franklin street. A west-bound train, consisting of a locomotive, nine freight cars, and two passenger coaches, struck the automobile which was running north on Franklin street, and plaintiff, who was riding in the seat with the driver, was thrown out and severely injured. For some reason plaintiff did not offer himself as a witness, and we must look to the testimony of the driver for the principal facts on which he relies for a recovery. The petition charges that the injury was caused by negligence of defendant in failing to give statutory signals as the train approached the crossing, in failing to provide the locomotive with a proper headlight, in running the train in excess of seven miles per hour, the maximum speed allowed by a city ordinance, and that the injury was caused by a negligent breach of the duty defendant owed plaintiff under the humanitarian or "last chance" rule. The answer contains a general denial, and the allegation that plaintiff was a minor at the time of the commencement of this suit, and therefore was not competent to maintain the action. At the conclusion of the evidence introduced by plaintiff, defendant asked a peremptory instruction, which was refused. Defendant offered no evidence, the case was submitted to the jury on the evidence of plaintiff, and the jury returned a verdict for defendant. Plaintiff appealed, and complains of the instructions given at the request of defendant as being equivalent to a demurrer to the evidence. The answer of counsel for defendant is that the evidence of plaintiff failed to make a case to go to the jury, and that its request for a demurrer to the evidence should not have been overruled, for the reason that

plaintiff is shown to have been guilty in law of negligence that contributed to his injury.

Plaintiff, a young negro of no particular vocation, was invited by the driver of an automobile, a liveryman, to accompany him on a trip to a nearby town. The invitation was prompted partly by the selfish motive of having a willing and able helper should tire or other troubles be encountered on the trip. They left the public square at 9:40 in the evening and drove north on Franklin street to the crossing in question, which is seven blocks from the public square. They knew the west-bound train was overdue and might arrive at any moment. Hacks, express wagons, and other vehicles were standing at the station just west of the street, waiting for the arrival of the train. As it approached the crossing the speed of the car was reduced to four or five miles per hour, and, without stopping it proceeded over the crossing at that speed. Houses and other obstacles on the east side of the street shut off their vision in that direction until they came to a point 10 or 15 feet south of the south switch track, and about 70 feet south of the main track on which the train approached. There was a break in the obstructions at that point for a distance of 15 feet or more that afforded a clear view of the track for a distance estimated by Carothers, the driver, as being 700 or 800 feet east of Franklin street, and about 100 feet east of the long trestle bridge. The driver states he looked eastward while traveling by that open space and listened, but saw and heard nothing of the train. Then his view was shut off by two freight cars standing on the first switch track, a telephone pole, and a pile of lumber, and he could not see eastward until he reached a point 10 or 12 feet south of the main track. Then he saw the locomotive about 60 feet away, advancing at a speed of 20 miles per hour. The front end of his car at that moment was from four to six feet from the track, and as the car could not be stopped in a place of safety, the driver swerved to the left in the hope of being able to avoid the on-coming engine. The movement was unsuccessful, and the collision followed. During all this time plaintiff sat in the front seat without making an effort to escape, though there was no door or other obstacle to prevent him from stepping to the street and the speed of the car would not have been a serious hindrance to such attempt. The locomotive carried a headlight, but the driver and another witness say that it was dim and cast no glare along the track. There is some evidence to the effect that, aside from giving the station whistle, the engine gave no signal by bell or whistle of its approach. A witness who lived southeast of the crossing and about five blocks from the railroad testified that she plainly saw and heard the train, did not see a headlight, and heard no bell. We quote from her testi-

mony: "Q. What part of the train did you see? A. Well, I saw all of it, where the headlight ought to be, but I didn't see no light there. Q. You could see the engine? A. I could, and the coal car and all of the freight and passenger, too. Q. Was that a very dark night? A. It wasn't so very dark I didn't think. Q. It was light enough that four blocks you could see, and did see, the engine? A. I sure did. Q. Did you hear it running? A. I heard it running before I knowed it was coming; I didn't hear any whistle or bell. Q. You could hear it running before you saw it? A. Yes, sir. Q. How far away were you from the train at the time you heard it running? A. I suppose about five blocks. Q. You heard it for about a block before it came in your sight? A. Yes, sir. Q. Did you hear it when it ran over that trestle just east of Franklin street crossing? A. I heard it till it got to town."

[1] The night was an ordinary summer night, unmarked by any unusual weather conditions. The train was about 500 feet long. There is no direct evidence that it ran faster than 20 miles per hour within the distance of 700 or 800 feet from Franklin street. The engineer may have begun to slacken speed preparatory to stopping at the station, and we shall concede for argument, though there is no evidence of the fact, that the train was running faster than 20 miles per hour at the time the automobile passed the open space near the south switch track. But had it been running at 30 miles per hour, which is as fast as one would think a mixed train would be running under all the circumstances disclosed, the locomotive could not have been more than 400 feet from the crossing, and it and nearly all of the train were within the range of vision afforded the occupants of the automobile by the open space, and certainly within their hearing. It will not do for plaintiff to contend that the train was not within sight and hearing. The indisputable facts show that it was, and we are not bound to accord any weight to testimony that is opposed by evidence so conclusive.

There were other lights in the engine and train besides the headlight, and the occupants of the car occupied a position as advantageous as that of plaintiff's witness who saw the train at a much greater distance, and who heard it before it came into sight. This heavy freight train, rumbling over a trestle, and only 400 feet away, made a noise that could not have escaped the hearing of an attentive person in the position of plaintiff. We shall assume that both occupants of the car saw it and heard it when they were 60 or 70 feet from the main track and in a place of safety.

[2, 3] It is true, as argued by counsel for plaintiff, that a traveler approaching a railway crossing in a city has a right to presume that a train will not be run to and over the crossing at a speed in excess of that

allowed by the city ordinances, but it does not follow that the occupants of the automobile were justified in shutting their eyes and ears after discovering that the train was approaching, and in blindly assuming that it would not be run faster than seven miles per hour, and at such speed would give them ample time to cross in safety. The duty of a traveler about to cross a railway to use his senses for his own protection is a continuing duty. To be reasonably careful he must be attentive until he has passed through the zone of danger. Presumptions must give way to actual facts, and, knowing, as they did, that a train was coming, was near the crossing, and, obviously, running at an excessive rate of speed—for its appearance and noise proclaimed that fact—the occupants of the automobile indisputably appear to have proceeded to the crossing in a manner clearly negligent. They neither stopped nor checked speed, but after passing the open space ran on behind obstructions to sight and sound into the very teeth of danger, blindly relying on the chance that they would beat the train to the crossing. Their negligence is so apparent that we must declare as a matter of law that plaintiff, who was in a position to avoid the injury, even if the driver had refused to stop at his request, was as negligent as the driver, and that his negligence must defeat his action, unless the evidence discloses that defendant was guilty of a breach of a duty it owed plaintiff under the humanitarian rule. Obviously the peril of plaintiff did not and could not have become known to the enginemen until the automobile emerged from behind the pile of lumber, and nothing then could have been done by them to avert a collision.

[4] The weakness of plaintiff's position under the last chance rule has led counsel to urge that the strong light cast ahead by the automobile must have been visible to the engineer at a distance that would have enabled him to prevent a collision. Considering the fact that the engineer had other lights before him, the headlight of his locomotive, street lamps and lights in and about the station, it would be speculative in the extreme to say that he could have distinguished the light from the automobile. But if he could have done so, it would be absurd to hold that he should have anticipated that the light emanated from a vehicle that was on the point of being negligently run from a place of safety in front of the train. Cabs, wagons, motor cars, and other vehicles brought to the station to meet trains generally came from the south on Franklin street almost to the crossing, and were there turned in or backed in to the station. A vehicle light thrown across the track suggested nothing more than the approach of the vehicle from the south, and carried no warning or intimation that its driver was in any sort of peril.

[5] To bring the last chance rule into play the traveler must not only be in actual peril, but his peril must be apparent to one in the position of the operator of the threatening instrumentality while in the exercise of ordinary care and diligence. We hold that the injury was the result, in part at least, of plaintiff's own negligence, and that the evidence affords no ground for the application of the humanitarian doctrine.

The learned trial judge would have been justified in sustaining the demurrer to the evidence; and, in this view of the case, the errors assigned by plaintiff are immaterial.

The judgment is affirmed. All concur.

#### PONTIUS v. CHICAGO, R. I. & P. RY. CO.

(Kansas City Court of Appeals. Missouri.

Nov. 3, 1913. Rehearing Denied

Dec. 1, 1913.)

#### 1. RAILROADS (§ 441\*)—ACTIONS FOR INJURIES—BURDEN OF PROOF.

In an action against a railroad company for negligently blowing the whistle of an engine frightening plaintiff's horse, the burden of pleading and proving a negligent breach of duty was on plaintiff and remained with him to the end of the case.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.\*]

#### 2. NEGLIGENCE (§ 136\*)—QUESTION OF LAW OR FACT.

If an act resulting in an injury is of such a nature that all reasonable minds would pronounce it a culpable breach of duty, it is negligence in law; but, when there is any doubt as to the facts or the inferences to be drawn therefrom, negligence is always a question for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

#### 3. RAILROADS (§ 407\*)—OPERATION—FRIGHTENING HORSE.

The engineer of a freight train standing near an overhead crossing while waiting for a clear track, and which with a switch engine was causing noise and smoke, making it unsafe and dangerous to drive over the bridge, as a matter of law, was not negligent in sounding five blasts of the whistle, the customary signal, to the rear brakeman who had gone back to warn other trains, where no one was on the bridge, and he had no reason to anticipate that any one would be surprised there by the blowing of the signal, though the horse of a person who was waiting for the train to move before crossing the bridge was thereby frightened, causing it to jump over an embankment, since, where a railroad crosses or runs parallel to a public road or street, the trainmen owe no duty of refraining from making necessary or unusual noises incident to the proper and safe operation of the train, being only bound not to operate it in an unusual or unnecessary way, thereby endangering the safety of travelers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1402, 1403; Dec. Dig. § 407.\*]

Appeal from Circuit Court, Grundy County; Geo. W. Wannamaker, Judge.

Action by Daniel Pontius against the Chicago, Rock Island & Pacific Railway Company, which after plaintiff's death was revived in the name of Matilda Pontius, his ad-



ministratrix. From a judgment for defendant, plaintiff appeals. Affirmed.

Platt Hubbell and George Hubbell, both of Trenton, for appellant. E. M. Harber, of Trenton, for respondent.

JOHNSON, J. Daniel Pontius began this action in 1905, in the circuit court of Grundy county, to recover damages for personal injuries he alleged were caused by negligence of defendant in frightening a mare he was driving on one of the public streets of the city of Trenton and causing her to run away. Defendant demurred to the petition on the ground that it failed to state a cause of action, but the demurrer was overruled, and defendant answered with a general traverse and a plea of contributory negligence. The trial occurred in June, 1906, and resulted in a verdict and judgment for defendant. Pontius filed a motion for a new trial in proper time, but the cause was continued from term to term, and the motion was not heard until February, 1911, when it was overruled. In the meantime Pontius died, and at the September, 1910, term the court entered an order reviving the action in the name of the administratrix of his estate. She filed a motion in arrest of judgment, which was heard with the motion for a new trial and overruled. An appeal was allowed, but, on account of delay in preparing and filing the bill of exceptions, the cause could not be heard in this court until the present term. The administratrix died in January, 1913, and was succeeded by Jacob Pontius, who was appointed administrator de bonis non of the estate of Daniel Pontius and by stipulation of the parties was substituted as party plaintiff.

At the time of his injury, which occurred in the afternoon of September 27, 1905, Pontius was driving westward on Bridge street in a single buggy drawn by his mare, which was accompanied by her young colt. Defendant's railroad crosses this street in a cut 22 feet deep which is spanned by a bridge 70 feet long and 40 feet wide. Trenton is a division station, and defendant's railroad yards at that place are extensive and have their north terminal near the overhead bridge described. A south-bound freight train, consisting of a locomotive, 33 cars, and a caboose, had stopped at a place in the cut where smoke from the locomotive came up through the bridge. The engineer had been compelled to stop the train to wait for a clear track into the yards and had signaled the rear brakeman to go back along the track a sufficient distance to flag any train that might be following. There is a sharp controversy in the evidence over the position of the locomotive while the train was stationary. Pontius testified that it stood under the bridge, while the trainmen stated that it was about 100 feet north of the bridge. In our view of the case the exact location

of the engine in the cut is not a fact of vital importance. It was either under the bridge or so close to it that blasts upon its whistle would be, and in fact were, terrifying to horses which had been stopped by their drivers at or near the bridge awaiting the removal of the locomotive which, on account of the noise and ascending smoke, made driving over the bridge unsafe and dangerous. While the train was standing, a switch engine came from the south and was attached to the freight engine to help pull the train into the yards. This operation of the switch engine added to the noise and increased the volume of smoke that ascended through the bridge. When the engineer of the freight engine received a signal to proceed into the yards, he sounded five blasts of the whistle as the customary signal to recall the rear brakeman, who found it necessary, in order to prevent a possible collision, to go back on the track three-quarters of a mile. Pontius came from the east while the train was standing in the cut and, in common with other drivers of teams and horses going in the same direction, stopped near the east end of the bridge and waited ten minutes or more for the train to go on. His mare, which was gentle and well broken, but somewhat spirited, became uneasy and restive at the sights and sounds coming from the engines in the cut, but he had no difficulty in controlling her until the whistle sounded the signal recalling the rear brakeman. At the second blast she became unmanageable and ran away, inflicting the injuries of present concern.

The petition alleges: "The plaintiff then and there approached the said overhead bridge of said street and stopped on the east side and within several feet of said overhead bridge, where one of the defendant's locomotive engines was under and passing under said bridge. The defendant, through its servants and agents, then and there negligently caused the steam whistle of said engine to blow and emit several loud, shrill blasts, which blasts of said steam whistle instantly frightened the plaintiff's horse, and said horse thereby became suddenly terror stricken and unmanageable and ran away, jumped down a rock embankment, turned the buggy over, threw the plaintiff out of the buggy onto a brick pavement, thereby inflicting grievous personal injuries to plaintiff," etc.

Counsel for defendant, in answer to the contention of their opponents that numerous errors prejudicial to plaintiff were committed at the trial, argue that, since the petition omits to allege that the act of sounding the whistle under the bridge was unnecessary, it fails to include an essential element of a good cause of action and is so vitally defective that the court erred in overruling the demurrer and in overruling the subsequent objection offered at the trial against the in-

roduction of any evidence. And on the hypothesis that the evidence, when considered in its phase most favorable to plaintiff, fails to show that the whistling was unnecessary to the proper operation of the train, counsel further insist that the demurrer to the evidence asked by defendant should have been given. On the other hand, the sufficiency of the petition and of plaintiff's evidence to take the case to the jury are predicated by counsel for plaintiff upon the theory that the pleaded and proved fact of whistling under the bridge of itself bespeaks a negligent breach by defendant of a duty it owed travelers on the public highway, of which the bridge was a part, and imposed the burden upon defendant of showing that such an act was indispensable to the proper operation of the train.

[1, 2] The gist of the action is a negligent breach of duty defendant owed to Pontius, and the burden of pleading and proving such actionable negligence remained with the plaintiff to the end of the case. If an act resulting in an injury is of such a nature that all reasonable minds would unite in pronouncing it a culpable breach of duty, it is negligence in law. "Negligence is always a question for the jury, when there is any doubt as to the facts or as to the inferences to be drawn from them" (*Railroad v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346), but is a question of law where no such doubt appears and where, as stated, the established facts leave no room for an honest difference of opinion among reasonable minds. If the mere act of sounding the whistle under the bridge in any event and under any circumstances was per se negligence (i. e., negligence in law), plaintiff discharged his burden of proof in showing that such act was the proximate cause of the injury of Pontius, and the court did not err in overruling the demurrer to the evidence; but, if such act was prompted by a necessity for its performance in the proper operation of the train, plaintiff has failed to make out a case to go to the jury, since he has failed to show one of the constitutive facts of a good cause, viz., that the act was unnecessary.

[3] It does not appear and is not charged that the train was stopped at an improper place. It was seeking admittance to the yards and could not go on until a clear track was prepared for it. The rules of the company, as well as the obvious and most peremptory necessities of the situation, required the engineer to signal the rear brakeman to go back on the track for the protection of life and property. That signal consisted of four blasts of the whistle, which were given before Pontius arrived at the east end of the bridge. It was just as necessary to the proper operation of the train to call back the brakeman when the train was ready to proceed as it was to send him out, and, if the engineer was negligent in giving one signal, he was negligent in giving the other. That

both signals were necessary is a fact about which there can be no dispute. They were the only adequate means the engineer had for communicating with trainmen and others connected with the operation of the train, and to hold that he had to refrain from using them because of his duty towards travelers waiting to use the bridge would be to place that duty above the duty to properly operate and protect his train and to prevent it from coming into collision with other trains. The law in this state gives superiority to the latter duty. Where a railroad crosses or runs parallel to a public road or street, the trainmen owe no duty of refraining from making usual and necessary noises incident to the proper and safe operation of a train but to be within the bounds of reasonable care, which is the test of duty, must not operate it in an unusual or unnecessary way and thereby endanger the safety of travelers on the highway. *Brown v. Railway*, 89 Mo. App. 192; *Feeney v. Railroad*, 123 Mo. App. 420, 99 S. W. 477; *Phelan v. Paving Co.*, 227 Mo. loc. cit. 708, 127 S. W. 318, 137 Am. St. Rep. 582. The controlling question, therefore, in every case of this character is whether the injury was caused by an unusual or unnecessary manipulation of the train, and the burden is on the plaintiff to show by proof that the injurious act was unusual or unnecessary. As is well said by the Supreme Court of Pennsylvania in *Farley v. Harris*, 186 Pa. loc. cit. 442, 40 Atl. 798: "An act in itself lawful, and which may have been prompted by the exercise of care, yet which incidentally results in injury to another, does not justify an inference of negligence. To hold otherwise would cast on every steam railroad and factory the burden of proving in every case, where a horse was startled by a steam whistle, that the use of it at that particular juncture was not negligent but for a proper purpose; thus in effect raising a presumption of negligence against a defendant from the mere use of an entirely lawful appliance. Concede, as we do concede, in all its force, the principle that an act in itself lawful may be negligently performed, nevertheless, if negligent performance be averred, it must be proved. It will not be presumed from the mere fact of injury to another." In that case it was held that it is not negligence per se for the whistle of a running locomotive to be sounded under a highway bridge.

In *Brown v. Railway*, supra, we observed by way of illustration that engineers should not sound the whistle "when passing under a bridge where horses and vehicles are likely to be passing over at any time"; and the Supreme Court of Tennessee expressed the same view in *Mitchell v. Railroad*, 100 Tenn. 329, 332, 45 S. W. 337, 338 (40 L. R. A. 426), in a case where the whistle of a running train was sounded under a bridge and frightened a team that was being driven across. We quote from the opinion: "Ordinarily the

use of a whistle is of machinery and appliance necessary for many practical purposes, and where used under ordinary circumstances, no inference of negligence could be drawn, but it is obvious that a blowing under a bridge is, in the absence of some special necessity therefor, an unnatural and reckless act, liable to cause great damage, and the circumstances and surroundings call, therefore, for proof of its necessity when the act occasions the damage to be anticipated. The proof of such a blowing under such circumstances is sufficient to authorize the presumption of negligence. The onus is shifted, to explain and justify or excuse it, upon him who does it. This burden may be successfully carried, but it cannot be avoided by demurrer to plaintiff's evidence establishing the act."

In effect the rule announced in these two cases is that an inference of negligence may be indulged by the triers of fact from the act of an engineer of a running train in surprising teams crossing an overhead bridge with terrifying blasts from the locomotive whistle emitted under the bridge. On the face of it such an act ordinarily would seem to be unnecessary and to denote a disregard for the rights of others, though there might be some sudden emergency, such as the discovery of animals on the track, that would make its performance imperative, in which event it could not be regarded as negligence under our ruling in the Brown Case. However this may be, the present case does not fall within the scope of that rule, and there is nothing in its facts from which an inference of negligence may be indulged. This heavy freight train had been stationary for more than ten minutes. There was no one on the bridge, nor had the engineer any reason to anticipate that any one would be surprised there by the blowing of a signal which was necessary to be given. To say that the engineer might not use the whistle, the only means available, to send out and call back the rear brakeman without being guilty of negligence would be to deny the existence of his duty to properly protect his train and any other that might be following it. The injury of Pontius is shown conclusively to have been caused by one of the ordinary risks of a proper operation of a train over a road crossing, which he should have anticipated and might have avoided.

It is not necessary to decide whether or not the petition would be sufficient to support a verdict. The evidence shows plaintiff has no case, and the learned trial judge would not have erred had he sustained the demurrer to the evidence. With the case in such posture, the errors assigned by plaintiff are immaterial, as is also the point made by counsel for defendant against the order reviving the cause.

The judgment is affirmed. All concur.

## PRICE v. CITY OF MARYVILLE.

(Kansas City Court of Appeals. Missouri.  
October Term, 1913.)

### 1. PLEADING (§ 428\*)—OBJECTIONS — OBJECTION TO EVIDENCE.

An objection to a petition, first made at the trial by objecting to the admission of evidence because the petition fails to state a cause of action, can prevail only in case the petition, construed with every reasonable intendment in its favor which the allegations will justify, wholly fails to state a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433-1436; Dec. Dig. § 428.\*]

### 2. MUNICIPAL CORPORATIONS (§ 768\*)—DEFECTIVE STREETS—SIDEWALKS—NATURE OF DEFECT.

Cities are not required to make their sidewalks level and without incline or grade regardless of the topography; and, where a sidewalk is not negligently constructed, nor allowed to become unsafe or dangerous, an injury caused by mere slant in the walk is not actionable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.\*]

### 3. MUNICIPAL CORPORATIONS (§ 768\*) — STREETS—DEFECTS—STEP-OFF.

A city is not liable for a step-off in a sidewalk rendered necessary in the construction of the walk, and which is maintained in a reasonably and ordinarily safe condition; the plan of construction not being manifestly unsafe.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.\*]

### 4. MUNICIPAL CORPORATIONS (§ 768\*)—SIDEWALKS—DEFECTS.

Where plaintiff was injured by stepping on a low place in a sidewalk at night, which was the result of a defect in the walk, and not a mere step-off, resulting from the plan of construction made necessary by surrounding topographical conditions, and the city had notice of the defect, but had failed to repair the same, the city was liable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.\*]

### 5. MUNICIPAL CORPORATIONS (§ 816\*)—VARIANCE—ISSUES AND PROOF.

Where, in an action for injuries to plaintiff on a defective sidewalk, the petition alleged a defect in the walk and a fall thereon, evidence held not to constitute a variance as showing that plaintiff walked into a ditch instead of into a low place in the walk.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. § 816.\*]

### 6. MUNICIPAL CORPORATIONS (§ 821\*)—DEFECTIVE SIDEWALKS—NEGLIGENCE — QUESTION FOR JURY.

In an action for injuries to plaintiff by stepping off of a low place on the center stone of a flag walk, whether the city was negligent in permitting such defect to remain held for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

### 7. TRIAL (§ 260\*)—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

Where the court in four instructions charged that plaintiff could recover only in case she exercised the care and caution that an ordinarily prudent person would exercise under like conditions and circumstances, and could not recover if she walked over the crossing in a negli-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gent manner, it was not error to refuse a request to charge, declaring the care required of a person in walking over such walk.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 280.\*]

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Action by Laura Price against the City of Maryville. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Wiles of Cherokee, Okl., for appellant. Cook, Cummins & Dawson, of Maryville, for respondent.

TRIMBLE, J. An action for damages from a fall caused by an alleged defect in a street crossing. The petition charges that the walk or crossing at the point in question, was in an unsafe and dangerous condition in that the earth under said crossing or walk at said point had washed away, allowing the walk to sink so as to leave a depression or sunken place which would cause persons stepping into same to fall and injure themselves; that this condition had existed for such a length of time prior to the injury that the city knew of it, or, by the exercise of ordinary care might have discovered it, and by ordinary diligence might have repaired said walk before plaintiff got hurt, and that the city was negligent in permitting the walk to remain in such condition; that plaintiff, while walking on said walk after dark, and using due care, stepped into said sunken place, and was thrown down and thereby injured. The answer was a general denial and a plea of contributory negligence.

It is admitted that plaintiff was seriously injured as a result of her fall; that the walk or crossing had been in a more or less defective condition for a long time prior to the injury, and the city treasurer had notified the mayor of such condition about a week or 10 days before plaintiff fell. There are but two questions of fact left in dispute, to wit: Was the walk reasonably safe for travel; and was plaintiff in the exercise of due care?

The walk extended north across an east and west street, and lay on the west side of the intersection of this street with another running north and south. Along the south side of this intersection, and running east and west, a 12-inch drain tile had been laid three feet under ground. It extended west to the west line of the north and south crossing walk in question. The ditch in which the drain tile lay was filled, and the tile of course covered, but, from the west edge of the walk on west, the ditch was open. The walk was made of brick where it crossed the central or wagon traveled portion of the street, but from thence south across the parking of the street, and over this drain tile, a distance of about 15 feet, to the sidewalk running east and west, the crossing walk was made of flagstones. These were about four

feet long and two feet wide, and, were laid lengthwise east and west, making the walk four feet wide. Two of these flagstones lay over this filled ditch, one of them directly over the drain tile. The west end of the tile was under them, or stopped flush with the west end of said stones. Thus there was an open unprotected ditch three feet deep extending west from the west edge of said walk, or crossing over this drain tile. The space over the tile and underneath the stones had been filled with rock, sand, and gravel, to the depth required to maintain the flagstones over the drain tile in proper place. A 12-inch board had been set up edgewise at the west end of and flush with the edge and surface of said flagstones to hold this filling material under the stones in proper place. A long time prior to plaintiff's fall the filling under the two flagstones had washed out, and this caused the two stones to settle down at their west end. This left a sudden step-off or depression in the walk, the depth of which was disputed. But, as there was evidence from which the jury could find that it was from six to eight inches in depth, and, as the verdict was for plaintiff, we must accept the depth of the step-off as being six or eight inches, and the walk as dangerous and unsafe.

On a November night, after dark, the plaintiff, in going to call on a friend, was walking south on the walk in question, when her right foot stepped into what she termed "some low place," causing her to lose her balance and fall into the ditch. She testified that she was on the walk over the tiling at the time she stepped into the depression, and that she did not fall face foremost into the ditch, but lengthwise thereof. She was not acquainted with the crossing, not having occasion to travel it; she had been down in that locality about a month before that in the daytime, but did not know that she crossed on that walk, and at any rate did not know of its condition. The board located at the west edge of the walk extended above the flagstones, and on cross-examination, when asked if she struck said board when she fell into the ditch, she said she did not know, as it happened so quickly.

[1] The objection is made that the petition fails to state a cause of action. No demurrer was filed, nor motion to have the petition made more definite and certain. The objection was merely to the introduction of any evidence under the petition because it failed to state a cause of action. An objection made in this manner is not effective against a petition which states a cause of action, however defectively. Such an objection can prevail only when the petition wholly fails to state any cause of action. Against such an objection every reasonable intentment which the allegations of the petition will justify must be made in favor of the petition.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Smith v. Wabash Railroad Co., 129 Mo. App. 413, loc. cit. 422, 107 S. W. 22; State ex rel. v. Delaney, 122 Mo. App. 239, loc. cit. 243, 99 S. W. 1.

[2-4] The point is made, however, that the petition wholly failed to state any cause of action because "a mere sinking down of the crossing or unevenness in it does not constitute an actionable defect." The cases cited do not sustain such a broad proposition. It is true cities are not required to make their sidewalks level, and without incline or grade, regardless of the topography. And where a sidewalk is not negligently constructed, nor allowed to become unsafe or dangerous, an injury caused by a mere *slant* in the walk is not actionable. Neither is a city liable for a step-off rendered necessary in the construction of a walk, and which is maintained in a reasonably and ordinarily safe condition, and the plan of construction is not manifestly unsafe. But the defect complained of here is not a step-off resulting from the plan of construction and made necessary by the surrounding conditions or topography, nor was it a mere slant in the walk, as was the fact in the cases cited in support of the proposition contended for. Nor was it a mere rounded depression so slight as not to suggest to the mind of an ordinarily prudent and careful man that it was dangerous, as was the case in *Hamilton v. Buffalo*, 173 N. Y. 72, 65 N. E. 944. In said case, also, the fall occurred in the daytime, and the person falling knew of the depression but it was not sufficient to cause him to think of it as dangerous. In the case at bar, the fall occurred at night, the plaintiff did not know of the "low place" or step-off, and it was of such extent and character as to cause the treasurer of said city to report its existence to the mayor. And other persons in the vicinity had avoided crossing on the walk because of its condition.

[5, 6] It is next urged that the demurrer to plaintiff's evidence should have been sustained because there was a fatal variance between the allegations of the petition and the proof. This is on the theory that the petition alleged a defect in the walk and a fall thereon, while the evidence shows that plaintiff did not fall by reason of stepping into a defect in the walk, but that she fell because she carelessly walked into the ditch. A careful examination of the evidence in plaintiff's behalf discloses that she was not only on the walk, but that she stepped into a "low place" on the walk just over the drain tile and opposite the end of the open ditch. And while some of the witnesses say the depression was "not more than an inch or two," their evidence discloses that what they really testified to was that the rock over the drain tile had sunk down at the west end some six or eight inches, and that the middle rock had sunk down until there was a drop of two inches at the edges thereof; that is,

that the middle rock over the drain tile had sunk two inches lower than the flagstones on either side of the center stone. Under these circumstances, and in view of the jury's verdict, we cannot say that, as matter of law, the defect in the walk was not an actionable one, nor can it be said that there was a variance in the proof, or that the evidence conclusively shows that plaintiff merely walked into the ditch instead of falling from the walk into the ditch as a result of stepping into the depression. A step-off of only two inches at the center rock in *this particular place*, and under the surroundings shown herein, would be sufficient to cause one walking in the dark, and not expecting it, to lose his balance and fall. At least it would be sufficient to require the question of the reasonable safety of the walk to be submitted to a jury.

[7] Complaint is made of the refusal of defendant's instruction No. 5. This instruction bore on the question of the care required of plaintiff in walking over said walk. In four given instructions, three for the plaintiff and one for the defendant, the jury was told that plaintiff could recover only in case she was in the exercise of the care and caution that an ordinarily prudent person would exercise under like conditions and circumstances, and that she could not recover if she walked over the crossing in a negligent manner. Instruction No. 5 could therefore have been properly refused as being already covered by other given instructions. While it is true an instruction in perhaps similar terms was held not to be erroneous in *Ryan v. Kansas City*, 232 Mo. 471, 134 S. W. 566, 985, and the court refused to reverse the case because it was given, yet this is not a holding that a case should be reversed for failure to give such instruction when the question of the care required of plaintiff has been fully covered by other instructions. A close study of the language used by Graves, J., in the *Ryan Case* discloses that what is really decided is that the necessity of a citizen to use reasonable diligence to discover defects is a part of and is included in the ordinary care always required, and not that the citizen must travel with his eyes glued to the sidewalk in order to discover defects not readily nor easily discernible; hence, as the instruction covered no more than ordinary care, it was not error to give it. And as such an instruction covers no more than the ordinary care required of persons using the streets, it is also not error to refuse it when other instructions have been given covering that point.

The other assignments of error are but amplifications of those hereinbefore considered.

The case was properly tried and we are unable to find any substantial reason for disturbing the verdict. The judgment is therefore affirmed. All concur.

**EXCELSIOR STOVE MFG. CO. v.  
MILLION.**

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1913.)

**1. SALES (§ 425\*)—WARRANTY—BREACH—REMEDIES.**

On a breach of warranty, the buyer may keep the chattel and sue for damages and recover the difference in value between the chattel as warranted and its actual value in its defective condition, or he may within a reasonable time reject and return the chattel to the seller and sue for the full amount paid on the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1207, 1208; Dec. Dig. § 425.\*]

**2. SALES (§ 428\*)—WARRANTY—BREACH—BUYER'S ELECTION.**

Where, in an action for the price of certain stoves, the buyer elected to keep the stoves and have recourse on the seller for damages sustained by breach of warranty, he was bound to pay the contract price, and was entitled to set up his damages by way of counterclaim.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214-1223; Dec. Dig. § 428.\*]

**3. JUSTICES OF THE PEACE (§ 174\*)—SET-OFF AND COUNTERCLAIM—INCREASED ON APPEAL.**

Under Rev. St. 1909, § 7598, providing that no set-off or counterclaim shall be pleaded in the appellate court that was not pleaded before the justice of the peace before whom the action was instituted, defendant cannot amend a counterclaim before a justice so as to enlarge the demand on appeal to the circuit court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

Appeal from Circuit Court, Buchanan County; William D. Rusk, Judge.

Action by the Excelsior Stove Manufacturing Company against Mark M. Million. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Street & Rogers, of St. Joseph, for appellant. A. Bowers, of St. Joseph, for respondent.

\* **JOHNSON, J.** In July, 1912, plaintiff, a manufacturer of stoves in Quincy, Ill., sued defendant in a justice court upon an account for stoves delivered in March, 1908, to defendant, who at that time was a retail merchant in Sheridan, Mo. The total value of the stoves as shown by the itemized account attached to plaintiff's statement was \$245.97, and the suit was for the recovery of that amount less a credit of \$48.55, paid on the account June 19, 1909.

Defendant appeared in answer to the summons and filed the following counterclaim: "The defendant for his counterclaim and cause of action against said plaintiff alleges and says that said plaintiff sold defendant several cook stoves upon a warranty that said stoves were good stoves and would give good satisfaction; that the defendant relying upon said warranty sold one of said stoves to Jesse Grace; that said stove was not a good stove and did not give satisfaction, and after said Grace had tried said stove and it failed, defendant notified

said company, and they undertook to put said stove in order and undertook to make it do good work, and could not; that said Grace sued said Million in the justice court at Sheridan, Mo., for the purchase price to wit, \$45, and in said court in Sheridan, Mo., recovered judgment for said purchase price for \$45 and costs \$19.55, all of which defendant paid; that defendant paid \$50 for attorney fees to defend said suit; that by reason of plaintiff's breach of contract and warranty as aforesaid defendant was damaged in loss of business in the sum of \$200. Wherefore defendant asks judgment against plaintiff for costs paid, \$19.55, attorney fees paid, \$50, and for damages, \$200, in the total sum of \$269.55 and costs."

After the cause was appealed to the circuit court, defendant, over the objection of plaintiff, was permitted, to amend his counterclaim by striking out the item for damages resulting from loss of business, and by inserting a new demand for \$25, the amount defendant had paid for freight and drayage on the arrival of the stoves at Sheridan.

At the trial in the circuit court, counsel for defendant admitted the account and assumed the burden of proof. Defendant was the only witness introduced by either party, and his testimony discloses the following facts: He gave an oral order for the stoves to a traveling salesman of plaintiff, who warranted that they would be well made and would give good service. A similar printed warranty was placed by plaintiff in the oven of each stove for the benefit of defendant's customers. Defendant paid the freight and drayage on the stoves and placed them on sale in his store, but did not make a sale until almost a year later when he sold one to Jesse Grace, a fellow townsman, who paid the purchase price of \$45. The stove did not give good service, and Grace complained to defendant, who, in turn, complained to plaintiff.

This stove, in common with the others, appeared to be in good condition and serviceable, but "it would not draw." A representative of plaintiff visited Sheridan in response to defendant's complaint and attempted to put the stove in serviceable shape, but without success. Grace became importunate and demanded that the stove be taken back and his money refunded. Defendant referred the demand to plaintiff's agent, who instructed him to refuse to rescind the sale, and agreed that plaintiff would reimburse him for any outlay he might be compelled to make in defense of his customer's demand. Grace sued defendant as upon a rescinded sale, and recovered a judgment for the purchase price and costs in the sum of \$19.55. Defendant paid the judgment and also paid a fee of \$50 to an attorney he employed to defend the suit. The total loss he sustained on account of that suit was \$69.55.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

He did not ask plaintiff to repay him, made no complaint that the other stoves were defective, and did not offer to rescind the contract until more than a year after the termination of the Grace suit. He testified on cross-examination: "After that suit was over, I never heard anything from them for a long while; they did not take it up. About a year after I sold out they notified a couple of attorneys, Kelso and some one from Grant City, who came over and talked to me. I told them I would not pay it and told them why. \* \* \* Q. Now, did you tell them that their traveling man had agreed to pay costs of suit or anything of that kind? A. Well, as I say, in writing to them I do not know whether I mentioned what he said or not." On direct examination (referring as we understand to the conversation he had with the attorney plaintiff employed to collect the account), defendant said "I told him there was his stoves now, that since the company had refused to pay this bill and would not stand back of their guaranty, I did not want them and absolutely refused to pay them a nickel."

At the request of defendant the court instructed the jury as follows:

"(1) If you find from the evidence in this case that the plaintiff sold defendant some cook stoves, for which this suit is brought, upon a contract to warrant the said stoves to give satisfaction to defendant's trade; that the defendant sold one of said stoves only; that said stoves were all alike in construction, and were worthless; that the stove so sold did not give satisfaction, by reason thereof the purchaser sued the defendant, and recovered judgment against him for the purchase price and costs; that the plaintiff knew about the suit, and agreed to pay all costs and judgment that might be recovered against the defendant; and that in said suit said purchaser recovered a judgment against the defendant for the purchase price and for costs amounting to \$19; that the defendant paid said costs, and \$50 for attorney fees in said case, then your verdict should be for the defendant for the amount of said costs and attorney fees, said fees not to exceed \$20, and also for such further sum, if any, as you may find that the defendant paid out for freight and drayage upon said stoves.

"(2) If you find from the evidence in this case that plaintiff sold the stoves upon a warranty to give satisfaction to defendant's trade; that defendant sold only one of the cook stoves, and that the one sold did not give satisfaction to such customer, then plaintiff was not bound to take any of said stoves, and that the plaintiff cannot recover from the defendant on said contract of sale.

"(3) The court instructs the jury that, if you find from the evidence in this case that plaintiff sold defendant stoves upon a warranty that the stoves should give satisfaction to defendant's customers; that the defendant

sold only one of said stoves, and that the same did not give satisfaction, then the defendant was not bound by his contract to take any of said stoves, and if you find that the defendant repudiated such contract, and tendered back to plaintiff the stoves, then your verdict will be for the defendant on the account."

Thus instructed, the jury returned a verdict for defendant on the account, and also for defendant on the counterclaim in the sum of \$69.55. Afterwards defendant filed a remittitur of \$25, and judgment was entered for the amount of the verdict less the sum remitted. Plaintiff appealed.

[1] The cause pleaded in the counterclaim filed in the justice court was not founded on a sale rescinded by the vendee on the ground of a breach of warranty by the vendor, but was for the recovery of the damages the vendee sustained in consequence of a breach of an express warranty. The rule is that where the vendor has been guilty of a breach of warranty the vendee has two remedies, viz.: He may take and keep the chattel and sue for damages growing out of the breach of warranty, in which case he may recover the difference in value between the chattel as warranted and its actual value in its defective condition; or he may, within a reasonable time, reject and return the chattel to the vendor, and maintain an action for the recovery of the full amount paid on the purchase price. *Laumeier v. Dolph*, 145 Mo. App. loc. cit. 84, 130 S. W. 360, and cases cited.

[2] Defendant did not attempt to rescind the contract on account of finding a defective stove in the number delivered by plaintiff, but elected, as his counterclaim clearly shows, to keep the stoves, and have recourse on plaintiff for the damages he sustained from the breach of warranty. In such case he became bound to pay plaintiff the contract price of the stoves, and became entitled to set up his damages by way of counterclaim. *Brown v. Weldon*, 27 Mo. App. 251.

[3] In the counterclaim he filed in the justice court, he restricted his damages to those resulting to him from the defective stove he sold to Grace, and he should not have been allowed to enlarge his demand by amendment in the circuit court, and certainly should not have been allowed to go to the jury on the issue of a rescinded contract which was repugnant to the issues tendered by his pleading and evidence. The statute reads that "no set-off nor counterclaim shall be pleaded in the appellate court that was not pleaded before the justice." Section 7586, Rev. St. 1909. A counterclaim may be amended in the circuit court, but not to change the cause of action, nor add a new cause to that originally pleaded. Manifestly defendant would have been entitled to set up his whole damage resulting from the alleged breach, but he chose to plead only a single item, and must be held to the ground of his own selection.

Under the admission of defendant that the account was correct, the jury should have been instructed to return a verdict for plaintiff in the amount of the account, and the only issues submitted under the counterclaim should have been those relating to the damages, if any, defendant sustained on account of the stove sold to Grace.

The judgment is reversed and the cause remanded. All concur.

**FIFE v. CHICAGO & A. R. CO.**  
(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1913. Rehearing Denied,  
Dec. 12, 1913.)

**1. RAILROADS (§ 304\*)—CROSSINGS—OBSTRUCTION—STATUTES.**

While it would be negligence per se for trainmen to allow a crossing to be blocked a longer time than that specified in Laws 1911, p. 153, forbidding a railroad company to occupy a public crossing for a longer period than five minutes, yet the statute allowed trainmen a reasonable exercise of the privilege to obstruct a crossing for a time within that specified as the maximum limit, but the statute did not supersede or impair the common-law duty of train operatives to exercise reasonable care at public road crossings, which means care commensurate with the danger peculiar to a given crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 964; Dec. Dig. § 304.\*]

**2. RAILROADS (§ 310\*)—CROSSINGS—CARE REQUIRED.**

The degree of care required by railroads at public crossings depends on the facts and circumstances of each particular case, and the fact that a statute may prescribe certain precautions does not relieve the railroad company from adopting others which may be dictated by common prudence so as to safeguard the public using the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 982-987; Dec. Dig. § 310.\*]

**3. RAILROADS (§ 304\*)—CROSSINGS—OBSTRUCTION—REASONABLE CARE.**

A freight train, having gone on a passing track over a country road to permit the passage of a passenger train, was cut at a highway crossing, and remained so until the operatives saw the approach of the passenger train when the crossing was closed preparatory to moving the train. In the meantime, plaintiff's horse drawing a buggy in which was an intoxicated and unconscious driver passed onto the main track, and being unable to proceed was struck by the coming passenger train. *Held*, that such facts did not authorize a finding of negligence on the part of the railroad employees in closing the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 964; Dec. Dig. § 304.\*]

**4. TRIAL (§ 234\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

Where, in an action for killing plaintiff's horse at a railroad crossing by its being struck by a passenger train, it was proved that the statutory crossing signals were given by the engineer of the passenger train, the court properly charged that there was no evidence that the crossing signals were not given, and restricted the jury's consideration of the case to evidentiary issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.\*]

**5. RAILROADS (§ 316\*)—COUNTRY CROSSINGS—SPEED.**

It is not negligence to run passenger trains at a high rate of speed over road crossings in the country.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1006-1008, 1011, 1012; Dec. Dig. § 316.\*]

**6. TRIAL (§ 191\*)—INSTRUCTIONS—REQUEST TO CHARGE—ASSUMED FACTS.**

Where plaintiff's horse at the time he was struck and killed at a railroad crossing was being driven by S. to whom plaintiff had loaned him, a request to charge that if the property destroyed had been loaned by plaintiff to S. and was in his exclusive control, then the fact that the property was destroyed on account of the joint or concurrent negligence would not absolve defendant from liability, but each would be jointly and separately liable, was properly refused as assuming as a proved fact that the damage to plaintiff was caused by negligence of defendant equally concurrent with that of plaintiff's servant, which was a controverted issue in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

Appeal from Circuit Court, Howard County; A. H. Waller, Judge.

Action by Leon F. Fife against The Chicago & Alton Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Sam C. Major, of Fayette, and J. H. Denny, of Glasgow, for appellant. A. W. Walker, of Fayette, and Scarritt, Scarritt, Jones & Miller, of Kansas City, for respondent.

**JOHNSON, J.** A passenger train operated by defendant collided at a public road crossing in Howard county with a horse and buggy owned by plaintiff, and this action is to recover the resultant damages on the ground that they were caused by negligence of defendant. The petition alleges "that the tracks of defendant, consisting of main track and a side track, are laid across a certain traveled public highway in said county, leading from the city of Glasgow to the town of Armstrong in said county, near defendant's station at Steinmetz station on said railroad; the tracks at said crossing being on the same grade as said highway; that on the 18th day of August, 1911, while a certain horse and buggy belonging to plaintiff was lawfully passing along and upon said highway at the point of crossing of defendant's tracks as aforesaid, the agents and servants of defendant managing said railroad and in charge of its trains thereon, so negligently, carelessly, and unskillfully conducted themselves that a certain locomotive and train of cars then and there in charge of the agents and servants of defendant were, by reason of the negligence, unskillfulness, and want of care of the agents and servants of defendant, with great force and violence driven and run upon and against said horse and buggy of plaintiff, and plaintiff's horse, buggy, and harness, of the value of three hundred and sixty dollars, were thereby wholly destroyed."

The answer interposes a general denial and



a plea that negligence of the agent of plaintiff in charge of the horse and vehicle contributed to the injury. A trial of the issues in the circuit court resulted in a verdict and judgment for defendant. Plaintiff appealed.

The facts of the case are as follows: Plaintiff, a farmer living about two and one-half miles north of the crossing in question, and about twelve miles from Fayette, lent a horse and buggy to one of his servants, a young man named Schafer, who desired to spend the day at a county fair being held at Fayette. On his way to the fair Schafer stopped at an intermediate town and had a tire reset at his own expense, but did this voluntarily and not at the request of plaintiff. Aside from this incident, the evidence shows conclusively that the use of the property by the servant was for his own pleasure and not on his master's business. After spending the day and the first half of the night at Fayette, Schafer started to return home, with two companions he had found at the fair and had agreed to take to their homes three or four miles east of plaintiff's farm. All three being intoxicated fell asleep in the buggy, and the horse, allowed to take his course, followed the nearest road home. Some time before reaching the crossing Schafer awoke, discovered that the horse had left the road to the homes of his companions, decided that the young men should spend the night with him, and then relapsed into slumber. The next time he regained consciousness he was in Glasgow, one of his companions was dead, and the other severely injured. It appears that the horse, being pointed homeward, traveled on, keeping in the road which runs north and south until he reached the crossing which is in the country a short distance east of the station at Steinmetz. The railroad which runs east and west has two tracks at this place, the main track and the passing track, which is six feet north. Just east of the crossing the tracks curve towards the north. A west-bound freight train had been standing on the passing track for several hours before the injury, but had been cut in two at the crossing to allow the free use of the public road. Its crew had orders to follow a west-bound passenger train due to pass Steinmetz at about three o'clock in the morning, and when they saw from the glare cast by its light that the passenger train was coming, they closed the gap in their train preparatory to following it. The movement, of course, obstructed the crossing, and when the unguided horse arrived he found his further progress blocked by the freight train. There is a controversy between the parties over the length of time this blockade continued. The brakeman who coupled the two parts of the train states that the passenger train arrived not more than two or three minutes after the crossing was closed, and that the horse and buggy were not at the crossing when he coupled the cars. On the other hand, witnesses introduced by

plaintiff, who examined the place after day-break, testified to finding a multitude of hoof prints and buggy tracks from which it well might be inferred that the horse had been at the crossing a long time and had restively worked his way over towards the west side. As to the character of the crossing the evidence shows that the railroad is on a lower level than the wagon road which slopes down to the crossing on each side. The facts are not disputed that the passenger train was late, was running from 40 to 50 miles per hour, and that its engine whistled for the station and again for the crossing. The engine carried a powerful electric headlight, but the engineer testified that on account of the curve he could not see the crossing, and did not become aware of the presence of the horse (he did not see the buggy) until the engine was not over 60 feet from the crossing. A collision was unavoidable, but, fearing the horse might be thrown back under his train by rebounding from the freight train, he immediately applied the brakes and stopped the train in a space of about 600 feet. The three occupants of the buggy were found between the main and passing tracks 30 or 35 feet west of the crossing. The body of the horse was also between the two tracks a few feet west of the bodies of the men. The wreckage of the buggy was scattered along both sides of the main track. It was a starlit summer night, too dark, the engineer states, for him to see anything out of the narrow path of the electric headlight which, because of the curve, did not touch the crossing until the engine was about 60 feet from it. Witnesses introduced by plaintiff who made tests afterwards contradict this statement, and say that the curve was not so sharp and that the crossing came within the path of the light at a distance of 600 feet.

The instructions given at the request of plaintiff directed a verdict for him on the finding that his property was destroyed "by an engine and train of cars running on said main track, and that the agents and servants of defendant in charge of said trains, or either of them, failed to exercise that degree of care for the safety of the animals or property at said crossing, which persons of ordinary care and prudence would exercise under like circumstances, and that in direct consequence of such neglect, plaintiff's said property was destroyed."

The court refused the second instruction asked by plaintiff, which is as follows: "If the jury find from the evidence that the property destroyed had been loaned by plaintiff to Schafer, and was in the exclusive control of Schafer, then the fact that the property was destroyed on account of the joint or concurrent negligence of both defendant and Schafer will not absolve defendant from liability, but each would be jointly and separately liable."

On behalf of defendant the court gave an instruction similar to that designated as "D. 1," in the case of *Schmitt v. Trans. Co.*, 115 Mo. App. 445, which the St. Louis Court of Appeals approved as "an admirable admonitory charge to the jurors about the spirit in which their duties should be performed, and warning them to permit no sympathy or prejudice to influence them." We share this view of instructions of that character, and do not agree with counsel for plaintiff that they have a tendency to prejudice or mislead the jury. Other instructions, given at the request of defendant, against which objections are urged by plaintiff, told the jury (2) "that defendant had a right to couple up the freight train at the time the evidence discloses it did, and you cannot find defendant guilty of any negligence in this respect unless you further find from the greater weight of the evidence that it thereafter blocked the road crossing for a period of five minutes or more before the passenger train collided with the horse and buggy; (3) "that there is no evidence that the crossing signals were not given;" and (4) "that defendant had the right to run the passenger train at the rate of speed as disclosed by the evidence." The court refused defendant's instruction withdrawing from the consideration of the jury the issue of negligence under the "last chance" rule.

[1, 2] Plaintiff complains of defendant's second instruction on the ground that it erroneously curtailed the duty the law imposed on the operators of the freight train to exercise reasonable care to avoid injuring persons and animals lawfully on the public crossing. In 1911 the Legislature enacted a statute (see *Laws 1911*, p. 153) forbidding the occupation of a public crossing by a railroad train or cars for a longer period than five minutes. Under this statute, it would be negligence per se for trainmen to allow a crossing to be blocked a longer time, and it may be conceded, on the other hand, that one of the purposes of the statute was to allow to trainmen the reasonable exercise of the privilege to obstruct a crossing for a time within that specified as the maximum limit, and that no negligence could be predicated of a reasonable exercise of such lawful right. The statute, however, was not intended to supersede or impair the common-law duty of the operators of trains to exercise reasonable care at public road crossings, which means care commensurate with the dangers peculiar to a given crossing. As is said in one case, "Where a railroad crossing is especially dangerous, it is incumbent on the company to exercise care commensurate with the danger." *Railroad v. Gardner*, 140 Ky. 772, 131 S. W. 787. In another, that the degree of care required of railroads at public crossings depends upon the facts and circumstances of each particular case, and in others that "the fact that a statute may prescribe one precaution will not relieve the railroad company

from adopting others, which may be dictated by common prudence so as to safeguard the public using the crossing over its tracks." *White, Personal Injuries on Railroads*, § 887, p. 1297.

If the facts and circumstances in the instant case would justify a reasonable inference that peculiar danger lurked at this crossing which should have been known to the crew of the freight train, and that the likelihood of such danger, being enhanced by any but the shortest possible obstruction of the crossing, should have been anticipated, we would hold that the court erred in declaring, as a matter of law, that the crew had a right to block the crossing for five minutes or for any other time than would be reasonable in view of all the circumstances of the situation.

[3] But on the hypothesis that the obstruction had not continued five minutes, we perceive nothing in the facts and circumstances disclosed to support an inference of a lack of reasonable care on the part of the crew of the freight train. This was an ordinary country road crossing, and there was no apparent reason for the crew to refrain from coupling the train together until after the passenger train, which was known to be at hand, had passed. It would be unreasonable to think they should have anticipated the possibility of a driverless horse straying into a place of danger on the crossing in that brief period. It may be true, as suggested by plaintiff, that when the horse reached the obstruction he was in a trap, but the controlling fact is that he reached that place through the negligence of his intoxicated and unconscious driver after the train had been coupled, and under circumstances which reasonable care on the part of the trainmen would not have anticipated. They were entitled, until the contrary fact appeared, to indulge in the presumption that the driver of a horse and vehicle would act with reasonable care in approaching the crossing and would not fall asleep and allow his horse to stand on the crossing in the path of danger. Had the driver been in possession of his senses, the crossing signal given by the approaching engine would have given him ample opportunity either to remain in or drive to a place of safety. The horse would not and could not have become entrapped if the driver had performed his duty. Under the facts hypostatized in the instruction we have no hesitation in saying as a matter of law that defendant was not negligent in the occupation of the crossing, and it was not error for the court so to declare to the jury.

[4] Defendant's third instruction was not prejudicial to any right of plaintiff. The fact was indisputably established that the statutory crossing signals were given by the engineer of the passenger train, and it was not error to restrict the jury's consideration of the case to evidentiary issues.

[5] Nor do we find error in defendant's

fourth instruction. The argument of plaintiff against this instruction is answered in the following quotation from the opinion of Lamm, J., in *McGee v. Railroad*, 214 Mo. loc. cit. 541, 114 S. W. loc. cit. 35: "It has always been held by this court that in the country, between stations, away from congested populations, it is not negligence for passenger trains to run at a rapid speed over road-crossings. If this long-established and well-known interpretation of the law was not satisfactory to the Legislature, it must be conclusively presumed that it would have taken up the question of rapid transit under the modern demands of commerce and established a legislative rule regulating train speed at country crossings."

[8] There is some question as to whether the court did refuse to give the second instruction asked by plaintiff, but, assuming that it was refused, the ruling was proper, since the instruction assumes as a proved fact that the damage to plaintiff was caused by negligence of defendant concurring with negligence of the servant of plaintiff. The existence of such negligence was controverted by defendant and is shown by the evidence to be a question about which there is room for an honest and reasonable difference of opinion. The rule always has been observed in this state that the court cannot assume in instructions to the jury the existence of controverted facts. *Matthews v. Railway*, 26 Mo. App. loc. cit. 89; *Dulaney v. Sugar Refining Co.*, 42 Mo. App. loc. cit. 662; *Dodd v. Guisseffe*, 100 Mo. App. 311, 73 S. W. 304.

The evidence of plaintiff tends to accuse defendant of negligence in only one particular, viz., that the engineer saw, or should have seen, the horse and buggy on the track in time to have avoided the collision with the exercise of reasonable care. There is a serious question as to the sufficiency of the petition to tender the issue of such negligence, but it is not necessary to discuss that question and we express no opinion upon it. A careful examination of the whole record discloses no error prejudicial to plaintiff at the trial, and the judgment will be affirmed. It is so ordered. All concur.

# TRIPPENSEE v. CITY OF JEFFERSON.

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1913.)

## 1. MUNICIPAL CORPORATIONS (§ 766\*) — STREETS—DEFECTS—PLAN OF CONSTRUCTION.

Where an injury results from a danger inherent in the plan adopted by a city for the improvement of a street, it is not liable, but if the danger has arisen from negligent construction or maintenance of the place, it will be liable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1621, 1622; Dec. Dig. § 766.\*]

## 2. MUNICIPAL CORPORATIONS (§ 784\*) — STREETS—CONSTRUCTION—SEWER COVER.

Where plaintiff was injured by the movement of a defective sewer cover as he stepped on it, the act of the city engineer in allowing hooks, designed to hold the cover in position, to be so placed that the cover might move was in opposition to the general plan of construction adopted by the city acting in its governmental capacity, and sufficient to show actionable negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1636, 1637; Dec. Dig. § 784.\*]

## 3. MUNICIPAL CORPORATIONS (§ 791\*) — STREETS—DEFECTS—SEWER COVER—DISPLACEMENT—NEGLIGENCE—NOTICE.

Where the displacement of a sewer cover by which a pedestrian was injured was not the result of an accidental or wrongful act of another, but rather the natural consequence of the city's negligence in the original construction of the cover, the city was charged with notice of the defect from the beginning.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1647–1651; Dec. Dig. § 791.\*]

Appeal from Circuit Court, Cole County; J. G. Slate, Judge.

Action by Gus Trippensee against the City of Jefferson. Judgment for plaintiff, and defendant appeals. Affirmed.

James H. Lay and A. T. Dumm, both of Jefferson City, for appellant. Irwin & Peters, of Jefferson City, for respondent.

JOHNSON, J. Plaintiff sued defendant, a city of the third class, to recover damages for personal injuries he sustained from falling into a sewer inlet in one of the public streets. A sheet iron cover for the inlet became slightly and dangerously but not noticeably displaced in such manner that when plaintiff, who was following the ordinary course of pedestrian travel, stepped upon it, the cover gave way, causing his foot and leg to slip down into the sewer opening. The petition alleges that defendant was negligent in the construction, emplacement, and maintenance of the cover in a position where it would be subjected to displacements that would make it unsafe to pedestrians.

The answer, in addition to a general denial, alleges contributory negligence, and that the injury of plaintiff was due to a danger inherent in a general plan adopted by the city for the construction of such inlets and their covers.

A trial in the circuit court resulted in a verdict and judgment for plaintiff in the sum of two thousand dollars. Defendant appealed, and contends that the court erred in refusing its request for a peremptory instruction. The injury occurred January 23, 1912, at the northeast corner of Broadway and High streets. Plaintiff and a companion walked west on the sidewalk on the north side of High street until they came to the corner just mentioned, when they turned south, intending to cross High street and walk along the east sidewalk on Broadway.

There is evidence tending to show that the sewer opening was in High street near the corner, and in the way of pedestrians. It was three feet long by two feet wide, and was constructed of cement. The sheet iron cover was three feet long and two feet one inch wide. The end which came to the top of the curbstone was provided with two iron straps bent down at the ends in the form of hooks which were placed over the inside of the curb to prevent the cover from slipping forward or falling down into the opening. The other end of the cover rested in the gutter at the outer edge of the opening. There is no space between the curb and sidewalk as a general rule in the defendant city, but in this instance there was a washed-out place inside the curb that left it isolated, with the result that there was nothing to prevent the cover from being pushed backward by the wheels of vehicles passing over its outer end, since the hooks were left without the resistance to such pressure usually offered by the sidewalk between which and the curb they were designed to be inserted. The lack of this back wall also had the effect of making the cover more susceptible to lateral displacements resulting from side collisions with the wheels of passing vehicles. There is evidence tending to show that the cover had been slightly moved both backward and laterally, with the result that one corner of its outer end was in the air over the concavity, so that the cover gave way at that side under the weight of plaintiff, causing his foot and leg to slide down into the sewer opening. It appears that covers of this type were in use at some other inlets in the city, and we are willing to concede (though the proof of the fact is most unsatisfactory and unconvincing) that the employment of such covers was pursuant to a general plan of construction adopted by the city. But the evidence of plaintiff strongly tends to show that his injury was not caused by a defect or risk common to all covers of this type, but to a defect caused by the negligent manner in which the top end of the cover was attached to the curb—a defect peculiar to this particular structure.

[1] The rule is well settled in this state that "if an injury results from a danger inherent in the plan adopted, the city is not liable, but if the danger has arisen from negligent construction or maintenance of the place, it is liable." *Gallagher v. Tipton*, 133 Mo. App. 557, 113 S. W. 674; same case, 152 Mo. App. 412, 133 S. W. 135; *Hays v. City*, 159 Mo. App. 431, 141 S. W. 3; *Nelson v. Kansas City*, 170 Mo. App. 546, 157 S. W. 94; *Ely v. St. Louis*, 181 Mo. loc. cit. 729, 81 S. W. 168.

[2] The act of the engineer in allowing hooks which were designed and intended to hold the cover in a fixed position to be placed

where they could be freely moved backward or to either side was clearly ministerial, and was in opposition to the obvious purposes of the general plan of construction adopted by the city while acting in its governmental capacity. The evidence does not show, nor does the defendant contend here that plaintiff was guilty in law of contributory negligence. The court did not err in overruling the demurrer to the evidence.

[3] Point is made that the court erred in refusing to instruct the jury that defendant was entitled to actual or constructive notice of the displacement of the cover. The displacement in issue appears from the evidence of plaintiff to have been not the result of an accidental or wrongful act of another, but the natural consequence of negligence "in the original construction by the city, of which it was charged with notice from the beginning, and which it was under a continuing duty to repair." *Barr v. City*, 105 Mo. loc. cit. 557, 16 S. W. 485. The evidence of defendant tends to show that the displacement was due to a cause inhering in a general plan of construction. If plaintiff is right (and the jury so decided), defendant had notice of the defect from the beginning. Under the hypothesis of defendant's evidence, notice of a defect due to adherence to a general plan could not have served to create a duty on the part of the city to remedy such defect. So it appears there could be no proper issue of notice in this case.

The objection to the instruction on the measure of damages is found to be not well taken. Nor do we find evidentiary support for the point of excessive verdict. The case was tried without prejudicial error.

Affirmed. All concur.

#### LIVINGSTON v. CITY OF ST. JOSEPH et al.

(Kansas City Court of Appeals. Missouri. Nov. 17, 1913. Rehearing Denied Dec. 12, 1913.)

##### 1. MUNICIPAL CORPORATIONS (§ 772\*)—SIDEWALKS—INJURIES—DEFENSES.

Where a city allowed a hydrant to leak so that the water ran over the sidewalk and formed slush with newly fallen snow, which froze unevenly and caused plaintiff to fall, it cannot escape liability on the ground that the snow was a condition caused by the elements existing over a large territory, the injury being caused by the leak of the water.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1628; Dec. Dig. § 772.\*]

##### 2. APPEAL AND ERROR (§ 882\*)—INVITED ERROR—INSTRUCTIONS.

Where defendant in its own requested charge used the same language as in an instruction given for plaintiff, it cannot complain of errors in such language.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. MUNICIPAL CORPORATIONS (§ 821\*)—SIDE-WALKS—INJURIES—ACTIONS.**

In an action against a city for injuries suffered by a fall upon uneven ice on the sidewalk, the question of the city's negligence in permitting water to run onto the sidewalk from a hydrant forming slush with the snow held for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

**4. TRIAL (§ 139\*)—QUESTIONS FOR JURY.**

In an action against several defendants, where the evidence wholly failed to show the liability of some of them, their demurrer to the evidence should be sustained.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

Appeal from Circuit Court, Buchanan County; C. H. Mayer, Judge.

Action by Emma Livingston against the City of St. Joseph and one James and wife. From a judgment for plaintiff, defendants appeal. Affirmed as to the city and reversed as to James and wife.

Frank B. Fulkerson, L. E. Thompson, and Herman Hess, all of St. Joseph, for appellants. Gabbert & Mitchell, of St. Joseph, for respondent.

ELLISON, J. Plaintiff received personal injury by falling on one of the sidewalks in St. Joseph, in front of property owned by that city's codefendants, James and wife. She obtained judgment against all the defendants, and they appeal.

[1] The evidence tended to show that plaintiff fell on the sidewalk on Faraon street between Twelfth and Thirteenth at about noon, on the 3d of January, 1912, and that her fall was caused by ice formed from a combination of water and snow, the water coming from a hydrant on the premises occupied by James and wife. Four or five days preceding her fall, a three-inch snow had fallen, and on the morning of the day she fell one inch more was added. The water escaping from the hydrant ran off the adjoining premises onto the sidewalk, making a slush at that place and the weather being cold it froze unevenly; some spots being from two to four inches higher than others. The evidence tended to show it was one of those abruptly higher places that caused plaintiff to slip and fall.

Defendant city likens the case to those where the fall of snow, being general over the city and freezing and thawing going on, together with the passing of pedestrians, caused foot prints to be made in the slush, which, when frozen, would make a rough and uneven surface. But those are cases where the condition caused by the elements existed over

all or large parts of the city, a condition which the city is powerless to prevent and necessarily slow to remedy. The case made by plaintiff is not of that kind. Her case is not where melting snow flowed and froze on the walk from terraces or sloping ground. Nor did she fall in consequence of a dangerous condition arising from the elements and which extended over large areas. It is true that falling snow and freezing weather appear as facts in the case, but the controlling feature condemning the city is that there was an additional cause—a special cause—confined to a small and definite place, which was in the power of the city to remove. That was the flowing hydrant. That fact had a controlling influence in bringing about plaintiff's misfortune. The distinction to be made in these cases is fully considered by the Supreme Court in *Reedy v. St. Louis Brewing Association*, 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805, approved in *Vonkey v. St. Louis*, 219 Mo. 38, 117 S. W. 733, and we need say no more than to refer to those decisions. While there was evidence tending to show that plaintiff knew of the conditions of the walk at the place she fell, yet the question of due care on her part, in these circumstances, was properly submitted to the jury. It is not a case which would have justified the court in declaring plaintiff guilty of want of care, as a matter of law.

[2] Complaint is made of the instruction for plaintiff using the term unsafe and dangerous in describing the sidewalk instead of its being "reasonably safe." Whatever inaccuracy or error there is in this was cured by defendant city adopting it in instructions in its behalf.

[3] There was evidence sufficient to submit to the jury the question of the city's knowledge of the dangerous place. The hydrant was shown to have been running water across the walk for a considerable period of time. The season was winter, and the city authorities must have known the danger of allowing water, which could have been stopped with slight effort, to flow across a walk, especially after a snow had fallen and laid upon the walk for four or five days.

[4] We are, however, of the opinion that there was no evidence to support the allegation of the petition as to the defendants James and wife. The hydrant was one which was opened by turning a valve with a small metal wheel, and to open it took the active agency of a person. The evidence wholly failed to sustain the charge, and their demurrer to the evidence as against them should have been sustained.

The judgment will therefore be affirmed as to the defendant city, but reversed as to them. All concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—20

**MALLORY v. PATTERSON.**

(Kansas City Court of Appeals. Missouri.  
Nov. 3, 1913. Rehearing Denied  
Dec. 12, 1913.)

**1. JUDGMENT (§ 715\*)—CONCLUSIVENESS—DEFENSES CONCLUDED.**

Defendant sold land to plaintiff under an agreement that plaintiff should give a mortgage for \$2,800 for the unpaid purchase money, but, through defendant's fraud, plaintiff was induced to sign a mortgage and notes aggregating \$3,800. After discovering the fraud, plaintiff sued defendant and recovered judgment, and thereafter defendant paid a deficiency judgment recovered against plaintiff and himself by the purchaser of the mortgage and notes. *Held*, that the defense that defendant in paying the deficiency judgment had more than paid the difference between the agreed amount of the mortgage and the amount for which it was given, having been urged in a second suit in the nature of a creditor's bill brought against defendant and his wife to subject his property to the payment of the judgment cannot be set up in a subsequent action on the judgment, the matter being res adjudicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1246; Dec. Dig. § 715.\*]

**2. JUDGMENT (§ 713\*)—CONCLUSIVENESS—MATTERS CONCLUDED.**

As a judgment concludes not only all the defenses urged but all those that might be urged, defendant, against whom a judgment was recovered for his fraud in obtaining plaintiff's signature to a mortgage and notes for a greater amount than was agreed upon, cannot, in a subsequent action on the judgment, set up as a partial defense his possession of one of the mortgage notes, where that defense was not urged either in the original action or in a suit in the nature of a creditor's bill brought to enforce the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.\*]

**3. JUDGMENT (§ 622\*)—CONCLUSIVENESS—SET-OFF.**

Where a defendant urged a set-off, the judgment is an adjudication of the right to set-off, and that matter cannot be urged in a subsequent action on the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. § 622.\*]

**4. JUDGMENT (§ 713\*)—CONCLUSIVENESS—JUDGMENT OF REVIVOR.**

A judgment of revivor is res adjudicata as to all matters which were or might have been set up in the proceedings to revive, and hence a defense raised in a proceeding to revive a judgment, cannot be raised in a subsequent action on the judgment revived.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.\*]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Action by William Mallory against R. O. Patterson. From a judgment for plaintiff, defendant appeals. Affirmed.

Joseph P. Fontrom, of Kansas City, and Henry P. Leavitt, of Omaha, Neb., for appellant. McCune, Harding, Brown & Murphy, of Kansas City, for respondent.

TRIMBLE, J. Plaintiff sued the defendant upon a judgment obtained by the former

against the latter in the district court of Douglass county, Neb., November 7, 1902. The answer denied the allegations of the petition, alleged a payment of the judgment sued on, and also set up certain things as matters of equitable defense. As there was no evidence on the part of defendant to controvert the allegations of the petition, or to show that the judgment sued on was paid, the only question is as to the availability or nonavailability, at this time, of the things alleged in the answer as matters of equitable defense. The trial court held that these matters, having been once adjudicated in a suit between the same parties in Nebraska, are no longer available as defense to this suit on the Mallory judgment but are res adjudicata. A proper understanding of such ruling requires a statement of the facts underlying the judgment sued on and the defense sought to be interposed.

Some time in 1887, Mallory was induced by Patterson to buy certain property in Omaha, and to give a mortgage thereon for the unpaid purchase money. He did so thinking he was signing notes and giving a mortgage for \$2,800, but, through the fraud and deceit of Patterson, the notes were for \$3,500 and \$350 and secured by mortgage aggregating \$3,850, which fraud was not discovered by Mallory until some time afterward, by reason of which fraud Mallory not only lost the property he had bought, but also all that he had paid thereon. Upon discovery of the fraud, he brought suit in the district court of Douglass county, Neb., against Patterson, who by this time had indorsed the \$3,500 note before maturity to an innocent purchaser for value without notice. Patterson appeared and answered, and a trial was had, resulting in a judgment in favor of Mallory and against Patterson for \$3,300, rendered October 29, 1892. During the pendency of this suit between Mallory and Patterson, the owner and holder of the note which had been indorsed by Patterson began foreclosure proceedings on the mortgage securing it, and in this suit a judgment was rendered for the full face of the note and interest, and the mortgaged property was ordered sold. This was done and the proceeds were applied upon the foreclosure judgment, and the court on December 20, 1893, rendered a deficiency judgment against Mallory and Patterson for \$2,519.87. On May 1, 1894, Patterson paid the holder of this judgment the amount thereof, but, instead of having it released, had an assignment of the judgment made to his wife, M. B. Patterson. He says he did this so Mallory could not contend the judgment had been paid.

On April 27, 1896, Mallory brought a suit in the district court of Douglass county, Neb., in the nature of a creditor's bill, seeking to have certain deeds which Patterson had made to his wife set aside as being in

fraud of creditors, and asking that the property be sold and the proceeds applied toward the payment of the judgment held by Mallory. To this Patterson appeared and filed an answer in which he set up the deficiency judgment in foreclosure heretofore referred to, and asked that it be offset against Mallory's judgment. At this time he was still the holder of the \$350 note above mentioned, and could have pleaded that Mallory had not paid it, and could have asked to have the amount due Mallory credited with the amount of said note. Upon the issues raised a trial was had, and the court found that the deficiency judgment rendered against Mallory and Patterson, had been paid by Patterson, that the same was discharged and did not constitute a set-off and was not a claim against Mallory. The court also found that the deed from Patterson to his wife was without consideration, and was made to hinder and defraud his creditors, and thereupon set the deed aside and ordered the property sold and the proceeds applied on the Mallory judgment. This was done, and the Mallory judgment was credited with the sum of \$2,480.74. This still left an unpaid balance on the Mallory judgment. And on July 14, 1902, just before it would have been outlawed, Mallory brought a suit to revise same in the district court of Douglass county, Neb. Patterson appeared and *filed answer asking that it be not revived for the reason that it was procured by fraud.* On July 24, 1902, the court heard the case and revived the judgment against Patterson for \$2,964.03. It is upon this judgment that Mallory now sues.

Patterson's defense is that, as the original judgment obtained by Mallory included the sum of \$700 (by which amount the \$3,500 note he was fraudulently induced to sign exceeded the \$2,800 he really owed), which sum of \$700 Mallory has never paid and never will have to pay, therefore, said sum of \$700, with interest from August 10, 1888, should be credited on said judgment now held by Mallory; that said original judgment in Mallory's favor also included the \$350 note he was fraudulently induced to sign, and that as he has never paid and will not now have to pay said note, therefore, it, with interest from September 19, 1892, should be credited on said judgment now held by Mallory; and that the deficiency judgment rendered against Mallory and Patterson in the foreclosure of the mortgage given by Mallory, which deficiency judgment was assigned to Patterson's wife, should be enforced against Mallory and offset against any judgment held by him.

To this defense Mallory replied, setting up the fact that, in the suit in the nature of a creditor's bill brought by Mallory against Patterson and his wife hereinabove referred to, the identical matters as to the deficiency judgment were set up by them and litigated

and were decided adversely to them, the court finding that said deficiency judgment had been paid and that it was not a valid claim against Mallory. This deficiency judgment covered the \$700 contended for by Patterson. The reply also stated that as to the \$350 note, all facts relating thereto were known to defendant prior to the rendition of the judgment sued on, and that by said judgment all such matters or claims, if any, were fully adjudicated against defendant. As heretofore stated, the trial court held that they were res adjudicata, and rendered judgment for the full amount of the balance due on the judgment sued on. The defendant, Patterson, has appealed.

[1, 2] It will be observed that the issues sought to be raised now by Patterson, as to the \$700 and the deficiency judgment (which are really one and the same, since the deficiency judgment includes the \$700), are the same issues raised and litigated by him in defending the creditor's bill brought by Mallory in Nebraska; and that all the issues now sought to be raised by him, as to fraud in obtaining the original judgment, were raised by him and litigated in the suit in Nebraska to revive the former judgment. And that while Patterson did not say anything then about the \$350 note, yet, as it was in his possession and he knew all the alleged facts in reference thereto, it was within the issues involved between the parties, and he could have pleaded it as a defense. And having failed to do so, the judgment rendered against him is conclusive not only as to the matters of defense pleaded but also as to every matter properly belonging to the subject in litigation, and which he might, by exercising reasonable diligence, have brought forward at the time. *Donnell v. Wright*, 147 Mo. 639, 49 S. W. 874; *Spratt v. Early*, 199 Mo. 491, loc. cit. 501, 97 S. W. 925. As to the \$350 note, defendant could have returned or offered to cancel it when he was first sued by Mallory. He had it then and has always had it, and so stated in his testimony. Having failed to set it up then as a defense, it has become an adjudicated matter. If it was not adjudicated then, it could have been set up as a defense to the creditor's bill suit brought by Mallory, and being available as a defense thereto, was then adjudicated if it was not before. Again, when Mallory brought suit in Nebraska to revive the judgment he had obtained, all the matters relied upon here could have been raised then, and were in fact raised, since the defense was made that the original judgment had been obtained by fraud, and the fraud alleged was that Mallory had secured the judgment by falsely making the court believe he would have to pay the full \$3,850 of the notes he had been induced to sign, when as a matter of fact he did not pay them and would never have to pay them. This is precisely the basis on which rests the defenses now sought

to be raised. So that the judgments rendered in Mallory's favor necessarily negative the facts on which Patterson would have to rely in order to succeed in establishing his defense. For this reason, the \$350 note is not available as a defense here on the ground that it was an independent claim against plaintiff, and, if omitted to be set up in one case, could be used as such in another.

The creditor's bill brought by Mallory resulted in a decree in equity in his favor, and was conclusive of all defenses available to defendant, whether they were presented and litigated or not. 23 Cyc. 1200. When one fails to make all the defenses he is called upon by the nature of the proceedings to make, such failure is as effective in a subsequent suit to prevent him from insisting upon them as if they had in the former suit been pleaded and been adjudged adversely to him. *O'Day v. Meadows*, 194 Mo. 588, loc. cit. 628, 92 S. W. 637, 112 Am. St. Rep. 542.

[3] A defendant, having pleaded a demand as a set-off or counterclaim to an action brought against him, is prevented by the judgment from afterward using the same matter or any part of it as a defense or counterclaim in any subsequent action between them; and if a judgment is found against defendant in his plea of set-off, it finally disposes of the matters so pleaded for the purposes of all future actions between the same parties. 23 Cyc. 1201. Where a matter, even though not properly pleadable as a set-off, has been nevertheless pleaded as such, and no objection thereto was made by the adversary, the adjudication thereon is final. *Thompson v. Wineland*, 11 Mo. 243.

[4] An adjudication of revivor is *res adjudicata* as to all matters which were or might have been set up in the proceedings to revive. *Witherspoon v. Twitty*, 43 S. C. 348, 21 S. E. 256; *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277; *Greer v. Major*, 114 Mo. 145, 21 S. W. 481. If a defense exists at the time judgment was rendered and could with reasonable diligence have been set up at that time, then even equity will not interfere to stay or destroy the judgment. *Carolus v. Koch*, 72 Mo. 645.

Defendant cites us to *Loy v. Alston*, 172 Fed. 90, 96 C. C. A. 578, but the case is not in point. There a judgment obtained by one was set off against a judgment obtained by another, where the one seeking to enforce his judgment was insolvent. But in that case both judgments were alive and subsisting. There was no question of *res adjudicata* in the case. In the case before us, there is a prior adjudication of the matters between the parties in which the deficiency judgment set up by defendant was not set aside by the Nebraska court, but was found to be no longer a valid claim

against Mallory, having been paid and discharged.

The case of *Lashmett v. Prall*, 83 Neb. 732, 120 N. W. 206, is cited in support of the view that defendant's deficiency judgment was not available as a defense in Mallory's Nebraska suit to revive, and the claim is made that, for this reason, the judgment in that revivor suit is not *res adjudicata* now. We do not think this case is in point, because the defendant therein did not plead any demand as a set-off or counterclaim to the creditor's bill, and hence the judgment of the court therein was not *res adjudicata*. Besides, as pointed out above, in addition to pleading the deficiency judgment to the creditor's bill and receiving an adverse judgment thereon, the defendant in the revivor suit set up fraud in procuring the original judgment, and the fraud alleged was that Mallory had obtained the judgment on the false assumption and promise that he would pay the full face of the notes, but did not, and knew that he could not, which is precisely the reasons relied upon by defendant now. Which only goes to show that the issues attempted to be revived now are precisely the same as were raised before and adjudicated adversely to defendant.

The case of *Quick v. Lemon*, 105 Ill. 578, is also cited in defendant's behalf. It is not deemed applicable to the facts in this case. There it was decided that a set-off to a judgment, which might have been pleaded as a defense in the proceeding resulting in the judgment, but which was not set up or pleaded, was not adjudicated, but could be raised in a subsequent suit brought by the judgment creditor against stockholders of the debtor corporation to enforce the judgment against them on their unpaid stock subscriptions. The court held that, in the original suit, the defendant corporation was not bound to plead its set-off, and as it did not, it could do so when the judgment creditor, by a suit in equity, attempted to enforce the collection of his judgment against its stockholders, and at that time, the corporation's claim became a proper subject of set-off, if there was equitable ground for relief. But in the case at bar, the defendant not only pleaded his alleged set-off and defense in the creditor's bill, but also again raised practically the same issue in a different form, namely, by pleading fraud in the procurement of the original judgment when sued in the revivor suit.

Other cases are cited, but they do not cover or affect the case presented. When defendant appeared and answered to the plaintiff's suit in equity on his creditor's bill, the alleged claims of defendant were properly within the issues involved between the parties, and were raised by him, or could have been raised, and the judgment therein rendered became conclusive. To allow him now



in this case to set up the defenses he is here seeking to make is to allow him to again litigate not only the questions and issues litigated in the creditor's bill, but also to again attack the judgment rendered in Mallory's favor, upon precisely the same grounds it was attacked in the suit to revive. Defendant contends with much earnestness that it is a great injustice to him not to allow him to again raise these defenses. We cannot tell whether an injustice has been done him or not since we do not know how much loss plaintiff suffered by reason of defendant's original fraud, for which plaintiff's original judgment was rendered. But if an injustice has been done defendant, it was in the Nebraska litigation and not here. The defenses he seeks here to raise are not merely offsets or counterclaims against Mallory's judgment; they go directly to the heart of that judgment and seek to destroy it. But whether they be considered as offsets and counterclaims or as attacks upon the honesty and validity of the judgment, they have been heretofore adjudicated, and are no longer available to prevent recovery in a suit upon that judgment.

The judgment of the learned trial court is affirmed. All concur.

#### BONER v. NICHOLSON.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

PHYSICIANS AND SURGEONS (§ 24\*)—MALPRACTICE—JURY QUESTION.

In an action against a surgeon for damages for negligence in performing an operation, evidence held insufficient to go to the jury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 53-62; Dec. Dig. § 24.\*]

Norton, J., dissenting.

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Elizabeth Boner against Clarence M. Nicholson. From a judgment for plaintiff, defendant appeals. Reversed.

Watts, Gentry & Lee, of St. Louis, for appellant. Carter, Collins, Jones & Barker, of St. Louis, and Casper M. Edwards, of Malden, for respondent.

REYNOLDS, P. J. Action by plaintiff, respondent here, against appellant, for damages. The petition in the case, after averring that plaintiff's husband had employed defendant, a physician and surgeon, to remove an abscess or tumor from plaintiff's abdomen and attend and care for her thereafter for compensation to be paid therefor, avers that defendant entered upon the employment but failed to use due and proper care or skill in the operation and care of plaintiff in this: "That defendant negligently and with gross negligence, unskill-

fully and unprofessionally closed the wound made by said operation without first removing therefrom a piece of cloth known as gauze, folded compactly and with a tape attached thereto, said gauze being approximately eight inches square; that by reason of defendant's gross negligence, plaintiff was compelled to undergo numerous operations known as probings, until on or about the 21st day of October, 1909, when said gauze was removed by a final operation." Averring that plaintiff was confined to her room and bed for approximately five months and put to additional expense for physicians, surgeons and medicines in the sum of \$800, and caused to suffer great bodily pain and mental anguish, and that she is now and will continue for a great period of time so to suffer, \$10,000 are demanded as compensatory and \$10,000 as punitive damages, with costs.

The answer was a general denial; the trial before the court and a jury.

At the close of the evidence in the case for plaintiff, defendant interposed a demurrer, which was overruled. Thereafter he introduced his testimony, and all of the evidence being in, defendant again interposed a demurrer, which was overruled and, the court instructing the jury, a verdict was returned in favor of plaintiff in the sum of \$1,000. Filing a motion for new trial and excepting to that being overruled, defendant duly perfected his appeal to this court.

The learned counsel for appellant make seven assignments of error. First, to the action of the court in overruling the demurrer to the evidence. Second, to the admission of improper evidence. Third, the allowance of improper questions by plaintiff's counsel which suggested that defendant was insured against liability in actions for damages. Fourth, to the overruling of motions made by defendant to discharge the jury and continue the cause because of these improper questions. Fifth, to the exclusion of evidence offered by defendant. Sixth, the making of improper remarks and the asking of improper questions by the trial court. Seventh, the giving of improper instructions by the court at plaintiff's request. In the view we take of the case, it is only necessary to consider the first of these assignments. We hold, on the testimony of plaintiff herself, and on the petition in the case, that the demurrers should have been given. We might rest on plaintiff's own evidence, for her case was in no manner helped out by that of the defendant. In point of fact, the evidence for defendant showed that his treatment of the case while in his hands was highly skillful, and very successful.

First, as to the petition, the negligence charged is, "that defendant negligently and with gross negligence, unskillfully and unprofessionally closed the wound made by said operation, without first removing therefrom" a piece of gauze, etc. We have

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

italicized the words, "defendant" and "closed." They are not only very significant, but controlling. It is not charged that nature closed the wound; not charged that in the ordinary course of things the wound became closed; it is distinctly and specifically charged that defendant closed the wound, without first removing the gauze from it, and that this was negligence. To paraphrase it, that this sponge was put into the wound when the surgical operation was first performed and that with this sponge in the wound, "defendant negligently and with gross negligence, unskillfully and unprofessionally closed the wound." That is the charge, gathered not only from the petition but from the testimony of plaintiff, and the theory upon which her counsel tried the case.

Turning to the testimony given by plaintiff herself, it appears that, living at Malden, this state, suffering from an abscess or tumor which had formed in her abdomen, her family physician insisted on her going to St. Louis for treatment, that physician recommending that she place herself under the care of defendant, who was at the time chief surgeon of the Rebekah Hospital in St. Louis. Accompanied by her husband and family physician, she went to St. Louis on the 27th of May, 1909, going directly to the hospital, and placed herself in charge of defendant for the operation. She was operated upon the next day, May 28th. Without going into detail, it is sufficient to say that a large gash, six, eight or ten inches long was cut in her abdomen. The operation—designated laparotomy—was performed by defendant, assisted by another surgeon and one or more nurses. During this operation plaintiff was under the influence of an anæsthetic. That, says plaintiff, was the only time while she was at the hospital, that, so far as she knew, she was under the influence of an anæsthetic.

Plaintiff testifies that she knew nothing of the operation itself, as she was unconscious while it was being performed; that she regained consciousness about half past four o'clock on the afternoon of the 28th of May, and found her husband and Dr. Mitchell sitting in the room, with others, possibly, but not defendant. It would seem, from what plaintiff testified to as occurring afterward, that when the operation was performed, the opening was packed with gauze strips or sponges, as they are called, the edges of the cut sewed together and a bandage put around her body to hold the dressing in place. That condition remained until the ninth day after the operation had been performed. On this ninth day, says plaintiff, and we here follow her testimony, placing in quotation marks portions of it just as she gave it, the bandage was undone and the stitches and packing taken out. She then for the first time saw the wound, which, she says, had not been opened between the day of the operation and

this ninth day. When the packing was taken out on this ninth day, the wound was washed out and strips of packing, of gauze—plaintiff indicating the length by her hands—put "up and down the gash." The first time this dressing occurred the gash had come open after the stitches had been removed, and Dr. Axline, the surgeon who acted as assistant to defendant in handling the case, "taken strips of adhesive, the nurse held that together, and Dr. Axline put strips of adhesive over it to keep it from coming further apart," that is, put this adhesive plaster on the outside, and "then he would take strips of gauze with an instrument about that long (indicating) he had, and slip it under that adhesive and fill up that place." The gauze was in long strips, plaintiff indicating the size. Plaintiff continues: "They would get that just about full, then they would take pieces of gauze doubled backwards and forwards, they put a great pile of that over the place, and then put cotton on and bandaged me up. \* \* \* I was dressed every day while I was there after they taken the stitches out." The treatment continued in the hospital until August 20th. Asked by her counsel whether during that time the wound was getting smaller all the time, she said it was, so that on the 20th of August, "it had very near closed up, only where the drain tube was, they had a drain tube in there." This drain tube apparently emptied through the vagina, "and," says plaintiff, "every morning whenever they would dress that place they would have to draw them drain tubes out; it was very painful." That was done every morning while plaintiff was at the hospital, the drain tube not being dispensed with until a week before she left the hospital. In the meantime they continued to dress the wound which kept getting smaller every day, until, when plaintiff finally left the hospital, as she says, the wound in her abdomen was not larger than the end of her thumb. Plaintiff said that at the last they were not putting any more gauze in the wound—"I don't know how long they hadn't used no gauze, only just enough for covering, just put in a big wide piece, as wide as your hand." That was put right over the wound, on the outside, next to the flesh. They gradually kept putting in less gauze. Asked up to what time they had quit putting in gauze, plaintiff said: "I don't know how long before I left there, that had healed up only where the tube was; of course they couldn't put no gauze there, only just to lay it over there;" knows they started in on that sort of treatment on the ninth day after she had been in the hospital and that they quit before she went home. Asked if she remembered about when they put the last gauze in the wound, plaintiff said she did not; did not remember about what time between the nine days and before she left the hospital it was that the wound became so small that they

could not, or did not, put in any more gauze. Plaintiff said what she did know was, that a week before she left the hospital, the wound was healed up to the size of the end of her thumb. When plaintiff was about to leave the hospital defendant gave her no instructions about herself nor about the wound, nor did he tell her whether or not there was a piece of gauze left in her abdomen; said nothing about her condition one way or the other.

This is practically all of the testimony in chief of the plaintiff touching her treatment in the hospital. As to what occurred afterwards, it is sufficient now to say that when plaintiff reached home about the 21st of August, she again placed herself under the care of her own physician, Dr. Mitchell. On October 21st, 1909, he found a tape protruding from the opening in the wound and pulling on it brought out a piece of gauze, called a sponge. That "sponge" was in evidence and it is described as a piece of gauze, rolled into a cylindrical shape, about six or eight inches long and about an inch and a quarter in diameter, with a tape some four inches long attached to one end. It was rolled up in its present shape to get it out; originally, it is claimed, it was flat but was rolled into its present shape in extracting it.

On cross-examination plaintiff repeated that she first saw the wound when the dressing was removed on the ninth day after the operation had been performed; was lying flat on her back, but by elevating her head slightly and looking along down the line of her body, she could see into her abdomen. The gash was a long one, could see a cavity in the abdomen "about as big around as the top of a medium size teacup. It didn't look deep when I saw it." Asked, "You couldn't see the bottom of it, could you?" Plaintiff answered, "I saw my bowels after they taken the packing out." This follows: "Ques. Now, from time to time they dressed it and you didn't attempt to count the sponges they put in or took out? Ans. They never put no sponges in. Ques. Never did? Ans. No, sir; not after they taken the stitches out; they put in long pieces of gauze, longer than my arm, never put no sponges in there. Ques. How could you tell? Ans. I could see whenever they would lay them in there a piece at a time. Ques. Did you attempt to count every piece that they put in every day? Ans. No, I didn't. \* \* \* Ques. You left it to the doctors to decide what to put in and what to take out? Ans. They put in and taken out what they wanted to, but didn't take out nary sponge. Ques. How did you know, weren't their arms between your eyes and the opening when they were dressing? Ans. No, sir; Dr. Axline stood on this side and dressed it (indicating). Ques. Didn't he have his arm between your eyes and the wound? Ans. When he would take up a piece of gauze to put in there he would take it out of the pan that had medicine in it, raise

it up long, lay it down there back and forth. Ques. They also put in a drainage tube? Ans. That was done when I didn't know nothing about it; \* \* \* knew it was there. Ques. When they took that (the drainage tube) out, could you not see whether they put anything in place of it? Ans. No, sir; they never put nothing in there when they taken the drainage tube out. Ques. You never did see anybody put in that piece of gauze that finally came out? Ans. No, sir, I didn't; I seen Dr. Mitchell take it out;" did not see anybody put it in, and does not know who put it in, says plaintiff in answer to questions. To resume: "Ques. \* \* \* Now when they treated you from time to time, as the treatment progressed, this long cut, eight or ten inches long in the skin, gradually healed, didn't it? Ans. Yes, sir. Ques. You could notice each day it had healed a little bit more than it had the day before? Ans. Some days it looked like it was healing all right; looked to me that way, but the doctor would take an instrument and rip it loose where it had healed at the top, it seemed like he didn't want it to heal up; that is what I thought. Ques. That is what he said, he didn't want it to heal up? Ans. Yes, sir. Ques. And you knew all the time from the course of that treatment what they were trying to accomplish was to prevent the wound from closing on the outside of the abdomen until it had closed on the inside? Ans. Yes, sir. \* \* \* Ques. You saw from the way they were ripping it loose from the outside they were trying to keep it from healing on the outside first? Ans. Yes, sir. Ques. You also saw they were packing stuff inside? Ans. Yes, sir; just laying it along in the gash, that was all the place they packed."

Plaintiff repeated that when she left the hospital, the opening in the skin had been reduced to about the size of her thumb and the cut had all healed but that; that the last treatment given her at the hospital was the evening of the 20th of August. On the evening of that day, the assistant to defendant, who was then attending her, "washed the wound all out good, washed it off good, and put a piece of gauze over it, put new cotton on it, and got adhesive and put a bandage plumb from one side to the other just as tight as he could draw it," around her body; used a syringe with liquid in it to clean out the wound, inserting the end of the syringe into the wound to about the depth of half of her little finger. Continuing, plaintiff was asked: "Ques. Now you don't know when was the last day that any gauze was put into the wound? Ans. How is that? Ques. You don't know when was the last day that any gauze was put into the wound? Ans. No, sir. Ques. You stated on your direct examination you didn't know when the last time was they put gauze in there? Ans. No, sir; I don't; it had been healed up quite a while before I left the hospital, all only that opening."

Plaintiff further testified that after she went home she suffered greatly; her physician treated the wound, opened the edges when it closed and "washed out this place here in my side where the opening was, and he put in his medicine—I don't know what kind of medicine he used, but the treatment was a good deal the same as Dr. Nicholson's." The wound was still open and running. That continued, she says, not only until October 21st, but until February 3, 1910. On the 21st of October, 1909, Dr. Mitchell pulled out the piece of gauze offered in evidence and she was greatly relieved, going about her work in about two weeks. The secretion of pus, however, continued, discharges occurring. The wound in the skin had healed up twice between then and January, but it would break out again and run, meaning by that, as she said, it would come open again. Plaintiff was then asked: "How soon after the sponge was taken out was it that the wound healed completely? Ans. Why, it never healed entirely up for I guess eight weeks;" did not stay healed but a few days and broke open of its own accord, watery looking matter being discharged from it which was very offensive. Dr. Mitchell would take a probe, run it into the wound and burn or cauterize it; that was before he removed the gauze; after the gauze had been removed about eight weeks the skin healed but it broke open again, and Dr. Mitchell again cleansed it and it would heal over again in a few days and remain that way for about a week before it would break open again. Between October and January it healed up and broke open twice, then healed up the third time and a large break, discharging watery matter, occurred. Dr. Mitchell again cauterized it and it gave her no more trouble. It finally healed the 3rd of February. On redirect examination plaintiff testified that she had never been operated on surgically before the time when defendant operated. There was no wound or cut in her body until the day he operated. Continuing, her counsel asked her: "Ques. And you saw all the gauze that went into there after that? Ans. Yes, sir. Ques. And such a sponge as this did not go into that wound? Ans. Did not; no, sir." Question by the court: "What is that?" Mr. Barker, counsel for plaintiff: "She doesn't know what happened on the date of the operation; she was never operated on before; her wound wasn't opened until nine days afterwards; she saw it opened every time after that and after that no such sponge as this was inserted in that wound." By the Court: "Ques. Did Dr. Mitchell, after you returned to your home, ever take out any gauze prior to this day you speak of? Ans. No, sir; that is the only piece of gauze taken out. Ques. He never put in any gauze? Ans. No, sir." By Mr. Barker: "Ques. You didn't know this gauze was in there? Ans. No, sir; but I did know when it came out."

This is substantially all the testimony of plaintiff as to her treatment in the hospital by defendant, and after she went home and was again in the hands of Dr. Mitchell, her local physician. Testimony of non-professional witnesses was given as to the extent of her suffering which is not necessary to reproduce. A physician and surgeon was introduced by plaintiff as an expert, who was asked this hypothetical question: "Assuming, Doctor, that laparotomy has been performed upon a woman, do you consider the leaving of a sponge such as you have described and such as has just been exhibited to you, in the abdominal cavity for a period of say about one hundred and fifty-six days, proper or skillful treatment?" He answered, "No." Before this hypothetical question for plaintiff finally assumed this form, counsel for defendant objected and excepted to the period being placed at one hundred and fifty-six days, on the ground that defendant was not responsible except for the period while plaintiff was in his care, that is from the 27th of May to the 21st of August, and objected and excepted to the period between the 21st of August and the 21st of October being included, the contention of counsel for defendant being that defendant was responsible, if at all, for only about eighty or eighty-five days, namely, from May 27th to August 21st, and not for one hundred and fifty-six days. On final cross-examination of this same physician a long hypothetical question assuming to cover and, as we find, covering all of the testimony which had been given in the case with reference to the treatment of plaintiff, was put to that same surgeon by counsel for defendant, the conclusion of the question being "whether in his opinion as a surgeon and expert the treatment described for the condition described was proper surgical treatment or not," to which he answered, that it was, and that it was such treatment as is adopted by the leading surgeons of the world. The family physician, Dr. Mitchell, was not put on the stand or examined as a witness by plaintiff but by defendant, and save the physician first above referred to, no expert witnesses were placed upon the stand by plaintiff.

Referring to the testimony and to the petition, we are forced to the conclusion that plaintiff's own testimony fails to make out her case. That case must turn, in the first place, on plaintiff having established by substantial evidence, that this sponge, removed October 21st, had been put into the wound in May and closed up in the wound by defendant at that time; that defendant had then "negligently and with gross negligence unskillfully and unprofessionally closed the wound made by said operation without first removing therefrom a piece of cloth known as gauze, folded compactly and with a tape attached thereto," known surgically as a sponge.

That was the theory upon which the case

was tried by plaintiff. In support of this, it was sought to show that the particular sponge or piece of gauze had been pushed in or became lodged between the intestines and a fatty apron or wall which lies between the intestines and abdominal cavity, or had been inclosed in another and larger piece of gauze, and that it had never been discovered or removed until on October 21st, when Dr. Mitchell, taking hold of the tape attached to it, had drawn it out. It is claimed that to do this was negligence, was an unskillful, negligent and unprofessional act. There is not a scintilla of evidence, even considering that of plaintiff herself, that sustains either of these ideas. The idea that this sponge was inclosed in another and larger one, is a mere supposition, resting on no testimony whatever. That it may have been lodged outside of the wall or curtain of the intestines, describing the situation and not using technical terms—is not only unsupported, but is founded on disregard of natural laws.

Probably the best way to present the situation is to follow the explanation of the operation and of the internal structure of the abdomen as given by defendant; as to this latter he is uncontradicted, and supported in his statement of the operation by those present who saw it. He testified that after removing certain parts and matter from the abdomen, there was left a cavity larger than plaintiff's head, and she was a large woman; this cavity was separated from the intestines, the intestines walled off from it, by a wall of lymph, which nature had thrown out—"a wall of lymph, which effectually separated the abscess cavity from the intestinal cavity. In other words, the intestines are contained in the abdominal cavity. This abscess had formed, lymph had been thrown out. Gradually the lower cavity had enlarged and had shoved the intestines up. There was a perfect wall, or seemed to be, between the abscess cavity and the intestines." After removing an ovary and other organs, and freeing the abdomen of the great mass of pus, defendant packed the cavity with sponges and gauze, stitched the edges of the cut, covered it with adhesive plaster, closed it, and wrapped a bandage around the body. The testimony of plaintiff is that she was unconscious when all this was done, but when she regained consciousness she found herself so bound up and when, on the ninth day, the dressing was removed, she saw the stitches taken out and the gauze removed and then replaced. She insists that she never saw any "sponge," such as produced, put in at any time. Therefore, according to her idea, it must have been put in at the first operation and when the cut and cavity were first treated and packed, and that is the only time "defendant closed the wound." Plaintiff says that she saw the opening, the cavity, cleaned out until it was empty, so empty that she saw her own bowels. So she has shown that there

was no sponge or gauze in sight in the wound or cavity. Then, and to meet this, his own client's testimony, the skillful counsel for plaintiff evolves the two ideas, call them theories, above given. That the first, a concealing of this sponge in a larger piece of gauze and accidentally leaving it in the wound or cavity, is untenable, is clear even according to plaintiff's own testimony. She saw into the cavity and it was empty. That it had been pushed beyond the cavity, outside of the wall or curtain and became lodged in and was concealed by the fatty lining, wall or curtain, is supported by no testimony whatever and would be against the laws of nature, the patient having survived. If it had been pushed or had penetrated through this wall, that it would have caused peritonitis and death, is the uncontradicted testimony of all the witnesses who were examined on this point. Defendant himself knew this. Asked if he had done anything toward preserving that wall, or if he had tried to break it down, he answered that he tried to use every care not to break it down; that if he had broken it down by shoving a sponge through, plaintiff probably would have died in a few hours of peritonitis; that the pus would have gone into the general peritoneal cavity and peritonitis and death would have followed. Defendant further testified that some twelve or fourteen days after the operation, he had personally taken out every vestige of gauze, irrespective of its form, whether in sponges or not, that was either on the abdomen or within the cavity, and cleaned out the abscess cavity thoroughly and repacked it with gauze sponges. That he did clean out this cavity is admitted by plaintiff herself, for she says that she saw her own bowels. Of course, if this sponge was concealed by the fatty wall, as counsel contends, plaintiff could not have seen it; but if that had been its position, says defendant, peritonitis and death would have followed. So that on natural laws, it is impossible to hold that it could have been so concealed. Describing the gauze sponges and that each had a tape, defendant testified that he had removed all of them, "not maybe or probably, but positively, no gauze which was in that abdomen could have been tangled up with anything;" knows he got all the packing out. Of course, the jury were not bound to believe this testimony of defendant, but whether they believed it or not, plaintiff has not brought forward an iota of testimony from which the contrary can be inferred. Her testimony, as we have seen, tends to confirm it. She does not pretend to know what was put in when the wound was first dressed and closed; her idea is that this sponge was then put in and never removed until in October. Her case must depend on establishing this proposition, for if this sponge was put in after May, after defendant had closed the wound, plaintiff's case falls. The hypothetical question put by plain-

tiff rests on the presence of the sponge for 156 days, a period that can only be found by going back to May 28th, and even then until October 21st was but 143 days. It was on the theory that this sponge had been there from May 28th to October 21st, that counsel for plaintiff also cross-examined the expert witnesses produced by defendant. In short, plaintiff's whole case, as pleaded and as tried, rested on the fact that this sponge was placed in the cavity on May 28th, when "the defendant closed the wound." There is not only an entire absence of proof of this, looking to the testimony of plaintiff herself, and she was the only witness on her side of the case who gave any testimony that can be held to bear on this point, but there is not a particle of evidence from which it can be inferred that it was negligent, unskillful or unprofessional to then close the wound with the sponge left in and that is the sole averment of negligence. On the contrary, making the incision, filling the cavity and cut with gauze, with "sponges," and then closing the wound with them in place was the very thing to do, and the only proper treatment, and there is not a scintilla of evidence even tending to show that this was done carelessly or negligently. The burden was on plaintiff to prove that as the crucial fact in her case. She has failed in this.

It is hardly necessary to call attention to the fact that the petition has no reference to a natural closing of the wound; it refers to the closing of it by defendant. That it was not closed by nature until long after plaintiff left the care of defendant, is proved by her own testimony.

Giving the most careful consideration of the evidence for plaintiff, giving her own testimony every possible weight, we are compelled to hold that there is no evidence in the case from which the jury had any right to infer that, even assuming that this sponge or piece of gauze was put in in May, that the wound was then carelessly, negligently and unprofessionally closed by the defendant. Nor is there any substantial evidence that any sponge then placed in the wound remained in it from then until the 21st of October. The most that can be said of plaintiff's testimony is that it shows that she did not know when this particular sponge was put in. Hence there is no substantial evidence that any of the gauze or sponges placed in the wound by defendant in May, remained until October, or that the gauze taken out in October had been put in on May 28th. That there was gauze or a surgical sponge in the wound when plaintiff left the care of defendant, is practically admitted by defendant himself in a letter which he wrote and which is in evidence. But this is far from an admission that it had been there ever since May, nor is it any admission of responsibility of defendant for its continuance in the wound until October.

Another phase of the case relates to the sponge having been left in the wound after plaintiff went from under the care of defendant and until its removal in October by Dr. Mitchell, her family physician. While there is no charge in the petition of negligence in leaving this sponge in the wound until October, the case was tried on the theory that it had been placed in the wound in May and left there until October, and that this was negligence for which defendant is responsible. Counsel for defendant, by his position at the trial, seems to have conceded that a question of negligence in leaving the sponge in, is in the case. It was tried on that theory, even though no such issue is tendered by the pleadings. But while conceding that this was in issue, that counsel insisted that defendant could only be charged for negligence in leaving the sponge in the wound down to the time plaintiff left the care of defendant. That was in August. Without passing upon this, we turn to the more important questions as to whether there is any causal connection between plaintiff's suffering and the presence of this sponge, and whether it was improper, careless and negligent, to leave it there when plaintiff left the hospital. The surgeon placed on the stand by plaintiff as an expert, positively refused to say that a sponge left in a wound of the character described, from May to October, would be responsible for the subsequent suffering or condition of the plaintiff. The most that he would say was that its effect would be problematical; that the proper length of time it should be left in would depend on conditions and the purpose for which it had been left in the wound; that they were often left in for several days. Asked if "several days" was the limit, he answered: "No, not the limit. As I said awhile ago, it might be in some cases you would have some other object in keeping one certain gauze in there, for instance if you are afraid to take it out on account of the position it is in, because you know you can't get it back there again, because you have got it in there for a purpose and you can't get another one back there, therefore your wound is suppurating anyway, it won't do any additional harm."

Dr. Mitchell, who again took charge of the case after plaintiff returned from the hospital, testifies that the wound was then open, the opening about two and a half inches long and an inch and a half wide, and a "seropurulent secretion coming out of it," a discharge of pus. The wound remained open; as it would tend to heal up he destroyed the fine tissue formed at the outer edges with nitrate of silver in order to keep the wound open.

It appears from the testimony of Dr. Mitchell that on October 21st, when he removed the outer gauze, he found the tape of the sponge exposed and, taking hold of

the tape with a pair of light steel tweezers, he pulled out the sponge. He testifies that when he found this sponge had been forced up toward the outer edge of the wound, he felt that the lower cavity was gradually healing and that this operation had forced the sponge to the surface. After taking out the sponge he put in a small drain, but the surface was healing so rapidly that it pushed this drain out and he had to use the nitrate to keep it open. Another abscess formed in a short time and the matter had worked itself through the original opening, discharging quite a large amount of pus. Again an abscess formed and the wound again reopened. This was some time after the sponge had been removed. This occurred several times until about February, when the wound healed. So it is clear that from this evidence, and there was none to the contrary, the presence of the sponge had nothing to do with the formation of these abscesses, for Dr. Mitchell testifies that the suffering plaintiff went through was almost the same after the removal of the sponge as before that. Asked if, from his observation of the case, as he treated plaintiff from August 21st to October 21st, when he removed the sponge, in his opinion the presence of the sponge had been beneficial or detrimental, he answered that it was beneficial, "because, if the sponge hadn't been in her it would have then healed up; I couldn't have kept it open." Asked if he had known that the sponge was in the wound when he took charge of plaintiff, whether he would have removed it, he answered that he would not.

It will be seen that the expert called by plaintiff refused to testify that the presence of the sponge was hurtful or leaving it there showed negligence. In fact there was no evidence whatever, no witness testified that the presence of the sponge had been injurious.

For these reasons we are compelled to hold that the judgment of the circuit court in overruling the demurrers was erroneous.

In this view of the case we do not consider it necessary to take up other assignments further than we have done. The judgment of the circuit court is reversed.

ALLEN, J., concurs. NORTON, J., dissents.

# ST. LOUIS SANITARY CO. v. REED.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

## 1. MONEY RECEIVED (§ 18\*)—EVIDENCE—BURDEN OF PROOF.

In an action for money had and received by defendant to plaintiff's use, where defendant pleaded that such money was paid him by plaintiff as compensation for services, and was not received on any other account whatsoever, it was error to hold that the burden of proof was, at the outset and by the pleadings, upon the defendant; this ruling losing sight of the distinction between the burden of proof and the

preponderance of the evidence.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 70-72; Dec. Dig. § 18.\*]

## 2. MONEY RECEIVED (§ 1\*)—NATURE AND GROUNDS OF ACTION.

An action for money had and received lies for money which, in equity and right, defendant ought to refund, for money paid by mistake, or got through imposition, express or implied, or an undue advantage taken of plaintiff's situation, contrary to laws made for the protection of persons under the circumstances, and is favored.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 3. MONEY RECEIVED (§ 17\*)—PLEADING—PETITION.

The petition in an action for money had and received, unless on an account, must usually be special, setting forth the relation of the parties and the contract or wrong by means of which the money was received; and hence the petition in an action to recover money which defendant claimed was paid him by plaintiff for services should therefore set forth the relation of the parties and the contract or wrong out of which the right of action arose.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 54-61, 64-68; Dec. Dig. § 17.\*]

## 4. PLEADING (§ 367\*)—MOTIONS TO MAKE DEFINITE AND CERTAIN.

The failure of the petition in an action for money had and received to set forth the relation of the parties, the contract, or the wrong out of which the cause of action arose could have been reached by motion to make it more definite and certain, if not by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.\*]

## 5. CORPORATIONS (§ 308\*)—OFFICERS—RIGHT TO COMPENSATION.

One who, though he was known at one time as secretary and treasurer, and at another as treasurer, of a corporation, was neither a director nor a stockholder, but a mere hired employé, could recover the reasonable value of his services, if rendered at the request, by the direction, or with the knowledge of the company's officers, directors, or managers, and accepted by them, and not voluntarily rendered, without expectation of reward, notwithstanding a resolution of the board of directors that all salaries should end with the end of the then current year, since the rule that officers and directors of corporations may not charge for services, unless founded on a resolution of the board or provided for in the articles, constitution, or by-laws, does not apply to one who is neither a director nor stockholder; and hence, though the introduction of such resolution *prima facie* deprived him of any claim to salary, he should have been permitted to show that he did the work with the consent, on the employment, and with the knowledge of the company's officers and directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by the St. Louis Sanitary Company against William F. Reed. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Morton Jourdan, of St. Louis, for appellant. Chester H. Krum, of St. Louis, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

REYNOLDS, P. J. The petition, after averring the incorporation of the plaintiff, charges "that the defendant is justly indebted to the plaintiff in the sum of \$1,600 for so much money had and received to the use of the plaintiff between May 1, 1907, and May 1, 1910, to-wit." Here follows an itemized statement charging \$50 as received May 1, 1907, and on the 1st day of each succeeding month to and including December 1, 1909. The petition continues: "That payment of the said sums and the said aggregate sum of \$1,600 received as aforesaid by the defendant to the plaintiff, has been duly demanded of defendant by the plaintiff and by him refused." Judgment is demanded for that sum and costs.

A demurrer was interposed to this and overruled. As plaintiff answered over, it is not necessary to notice this. The answer, after denying each and every allegation of the petition, "except such as are hereinafter admitted," denies that defendant is indebted to plaintiff in the sum of \$1,600 or in any other sum whatsoever. It admits that on the dates alleged, defendant did receive of plaintiff the sums therein set out, aggregating \$1,600, "which said moneys were paid him by the plaintiff, and received by the defendant, as his compensation for services rendered to the plaintiff, at its instance and request, during the time and period aforesaid, as secretary and treasurer of said plaintiff corporation; and that said sums and compensation were reasonable for the services rendered; and that said sums were not received on any other account whatsoever."

There was a reply which denies that the moneys mentioned in the petition and answer were moneys paid defendant by plaintiff, and "denies that they were received by the defendant as his compensation for services rendered to plaintiff at any time either as secretary or in any other capacity. It alleges that the said moneys were received and had by the defendant as alleged in the petition."

Trial to the court, a jury having been waived. At the outset, counsel for plaintiff asked the court to rule that the burden of proof was on defendant under the pleadings. The court so ruled, defendant excepting.

Thereupon defendant offered himself as a witness and testified that he had been secretary and treasurer of plaintiff corporation from April, 1905. He was such by appointment of the board, but was not a member of its board of directors nor a stockholder in the company. He testified that when he turned over the books and papers and money of plaintiff, after December 31, 1908, he accounted for and paid over to his successor all moneys in his possession other than the \$1,600 here involved. Counsel for defendant offered to introduce evidence tending to prove the reasonable value of the

services defendant had performed for the plaintiff for the period covered, and that the \$1,600 defendant had retained, had been retained with the approval and consent of the president of the company, and was on account of services he had rendered as secretary and treasurer of the plaintiff corporation while its business and affairs were being wound up. This line of testimony was all objected to and excluded on objection of plaintiff's counsel, defendant duly excepting. On cross-examination counsel for plaintiff, identifying the books of the corporation, read from the minutes of the proceedings of the board this: "Special meeting of the board of directors duly called, held April 25th, 1905; present, Messrs. Campbell, Garnett and President Blakely. The minutes of the last meeting were read and approved. \* \* \* Ordered that the superintendent's salary be reduced one-half; that the secretary be laid off and that the treasurer be empowered to act as secretary, his salary for the two offices being fixed for the present at \$100 per month." Defendant testified that he had been elected treasurer on the 24th of March, 1904; that at that time his salary as treasurer commenced April 1, 1904, and was fixed at \$1,500. He also identified an entry in the minutes as in the handwriting of the president, who had signed the minutes, the entry of date November 18, 1906: "It was ordered also that salaries end with the end of the present year, as well as all other expenses that can be controlled." Asked if he was present at that meeting, witness said he was not. On redirect examination, the witness was asked by his counsel, if, after the date of that meeting, he had continued to discharge his duties as secretary and treasurer of the company, up to January 1, 1909. He answered that he had, "the same afterwards as before," and that during that period he had the custody of the books and papers and moneys of the company. He had been paid his salary at the rate of \$100 a month up to the 1st of January, 1907. Asked what compensation he had been paid after the 1st of January, 1907, and prior to May 1, 1907, objection was made on the ground that it assumed compensation had been paid. Objection sustained, counsel excepting. He was then asked if, after the 1st of January, 1907, the directors of the company knew he was continuing the services as secretary and treasurer of the company as before. He answered that they did. Asked if he continued to render those services from January 1, 1907, to January 1, 1909, with the knowledge and consent and approval of the directors of that corporation, he answered, "Yes." This was objected to after the answer had been made and the objection sustained. Finally defendant was asked on what account and for what reason he had retained the \$1,600 when he turned over the



books and papers and moneys of the corporation to his successor in office. This was objected to, objection sustained and counsel duly excepted.

At the conclusion of the hearing and having taken the cause under advisement, the court made a finding and rendered judgment in favor of plaintiff for the amount sued for with interest. From this, interposing a motion for new trial as well as one in arrest of judgment and excepting to these motions being overruled, defendant duly perfected his appeal to this court.

This judgment and the rulings of the trial court, hereinafter referred to, cannot be sustained.

[1, 2] It was error to hold that the burthen of proof was on defendant. The petition undertakes to state an action for money had and received, a form of action of which it has been said by Lord Mansfield in the often quoted case of *Moses v. Macferlan*, 2 Burr. 1005, lying "for money which *ex aequo et bono*, the defendant ought to refund: \* \* \* It lies for money paid by mistake; \* \* \* or for money got through imposition (express, or implied); \* \* \* or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances." It is a form of action favored in our state, as see *Clifford Banking Co. v. Donovan Commission Co.*, 195 Mo. 262, loc. cit. 288, 94 S. W. 527. We have discussed this form of action in *Garnett & Allen Paper Co. v. Midland Publishing Co.*, 156 Mo. App. 187, 136 S. W. 736, and need not go into it fully here.

[3, 4] It is said in *Abbott's Trial Evidence* (2d Ed.), p. 335, that, "The complaint, unless on an account, must usually be special, setting forth the relation of the parties and the contract or wrong by means of which the money was received." This is not an action on an account, in the sense in which that term is used. That it does not set forth the relation of the parties, the contract nor the wrong, is manifest. Failing by his petition to do that however, which failure could have been reached by motion to make the petition more definite and certain, if not by demurrer, did not absolve the plaintiff from its obligation to make out at least a *prima facie* case by proof, proof of the facts essential to a recovery. We have set out the answer of defendant in this case practically in full. That answer admits defendant retained the amount of money and on the dates set out, but it specifically puts in issue the very essential allegation that the money so retained was of the moneys of the plaintiff, or that the defendant had and received that money to the use of plaintiff. That is specifically denied in the answer. The reply repeats the original averment. We might here apply this test: could the plaintiff, with the answer of defendant admitting that he had

retained the \$1,600, have successfully moved for judgment on the answer? The learned counsel for plaintiff made no such motion, does not here make any such contention. The burden of proof was on the plaintiff, notwithstanding the answer. Without going into the question to any great extent, or attempting to compile the authorities governing the matter, we consider it sufficient to refer to two cases, namely, *Glover v. Henderson*, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695, and *Marshall Livery Co. v. McKelvey*, 55 Mo. App. 240. In the former of these cases, it is said (120 Mo. loc. cit. 382, 25 S. W. 179, 41 Am. St. Rep. 695): "The obligation to prove any fact is upon the party who asserts the affirmative of the issue."

In *Marshall Livery Co. v. McKelvey*, *supra*, it is said, passing on an instruction given by the court, to the effect that the burthen of proof is on the plaintiff to establish to the jury's satisfaction by the preponderance of the proof, that the defendant failed to exercise ordinary care in driving and caring for the horse which he had hired from the plaintiff, and of which instruction plaintiff complained, that the objection "loses sight of the distinction between the burden of proof and the burden of evidence. The former remains throughout the trial where the pleadings place it in the first instance, while the latter may shift from side to side according to the state of the proof. \* \* \* It was necessary for the plaintiff to allege and prove that in the use of the horse the defendant was guilty of some negligent act, and that the death of the horse was the result of such act. These were the constitutive facts of the cause of action. A *prima facie* case was made by the introduction of evidence tending to prove that the horse, at the time of the delivery to the defendant, was apparently in good condition. If the evidence had closed at this point, the plaintiff would have been entitled to recover, provided the jurors were satisfied from its evidence that the horse was in a healthy condition at the time of its delivery to the defendant. Therefore, at this stage of the proceeding, the burden of evidence was cast on the defendant to show by some substantial evidence that he exercised ordinary care in the use of the animal." This ruling and the distinction between burden of proof and preponderance of evidence was lost sight of. It was error, in the absence of any showing whatever on the part of the plaintiff, and with the very qualified admission in the answer of defendant, that admission coupled with a denial of the very essential averment in the petition that the money so taken and withheld by defendant was received and retained by him for the use of plaintiff, to hold that the burden of proof was at the outset and by the pleadings, upon the defendant.

[5] Passing that and looking to the rulings

at the trial, by which the trial court refused to allow the introduction of evidence tending to sustain the plea of quantum meruit and excluded evidence offered by defendant to show that he had performed the services at the instance and with the consent and knowledge of the officers and directors of the company, grave error was committed. The resolution introduced in evidence *prima facie* deprived defendant of any claim to salary, but did not conclude him from showing that he was not in fact included in it; from showing that notwithstanding that resolution he had continued in the employ of plaintiff, doing the work usually appertaining to the office of secretary and treasurer, and that he did the work with the consent, on the employment and with the knowledge of the officers and directors of the company. It was within his right, failing a contract fixing the amount, to follow that up with evidence of the reasonable value of those services. The rule invoked by counsel for plaintiff and sustained by the trial court, that no officer of the company is entitled to compensation, or to claim pay for services on quantum meruit, in the absence of a contract, or unless there is an express provision in the by-laws, or by resolution of the board, awarding him salary or pay, has no application whatever to this case. This defendant was neither a director nor stockholder of the company. He was titular secretary and treasurer at one time, treasurer at another, but in point of fact, as the evidence which he offered certainly tended to show, he was a mere hired employé.

The reason of the rule forbidding officers and directors of corporations to charge for services, unless that charge is founded on a resolution of the board, or is provided for in the articles, constitution or by-laws of the corporation, does not apply here. Corporations are, in a way, partnerships; the directors are themselves, under our law, members of the corporation, stockholders. Acting as directors, they are more than mere agents for their fellow stockholders; they are their trustees, in charge of a trust fund. They cannot charge or receive pay for any services rendered their co-stockholders—the *cestui qui trust*—"unless compensation for such services is provided for in its charter or authorized by a by-law, or resolution of the board of directors before the services are rendered." *Taussig v. St. Louis & Kirkwood Ry. Co.*, 166 Mo. 28, loc. cit. 33, 65 S. W. 969, 89 Am. St. Rep. 674; *Watcham v. Inside Inn Co.*, 159 Mo. App. 33, loc. cit. 40, 139 S. W. 228. But as concerns directors, "it is well settled law in this state that the acts of a corporation may be proved in the same manner as the acts of individuals, and that a promise to pay the reasonable value of services rendered and accepted may be implied against corporations as against individ-

uals." *Taussig v. St. Louis & Kirkwood Ry. Co.*, supra, 166 Mo. loc. cit. 32, 65 S. W. 969, 89 Am. St. Rep. 674. If this defendant rendered services at the request, or by the direction, or even with the knowledge of the officers, directors, managers of the company, and they accepted the services, he having no contract fixing his compensation, unless it appears that the services were voluntary and rendered without expectation of reward, defendant is entitled to recover the reasonable value of such services or proof of their value.

The judgment of the circuit court is reversed and the cause remanded for further proceedings.

NORTONI and ALLEN, JJ., concur.

### KINDORF v. KINDORF.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

#### 1. APPEAL AND ERROR (§ 1009\*)—FINDINGS—CONCLUSIVENESS.

Since a suit for separate maintenance by the wife is in the nature of an equitable proceeding, the trial court's findings are not binding on appeal, though they will be largely deferred to, where the evidence sharply conflicts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

#### 2. HUSBAND AND WIFE (§ 297\*)—ACTION FOR SEPARATE MAINTENANCE—SUFFICIENCY OF EVIDENCE.

Evidence in an action for separate maintenance held to sustain a finding that defendant struck his wife and drove her from his home, and afterwards refused to provide for her unless she would return.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090; Dec. Dig. § 297.\*]

#### 3. HUSBAND AND WIFE (§ 283\*)—SEPARATE MAINTENANCE—CRUELTY.

A wife may leave home and sue for separate maintenance under the statute, if her husband's wrongful conduct makes her condition while living with him intolerable.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

#### 4. HUSBAND AND WIFE (§ 283\*)—SEPARATE MAINTENANCE—ABANDONMENT.

There is an abandonment, entitling the wife to separate maintenance, where her husband wrongfully drives her from him, or turns her out of doors.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

#### 5. HUSBAND AND WIFE (§ 283\*)—SEPARATE MAINTENANCE—ABANDONMENT.

To constitute an abandonment, so as to entitle the wife to a separate maintenance, there must be a failure or refusal to provide for her, as well as an abandonment.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

#### 6. HUSBAND AND WIFE (§ 283\*)—SEPARATE MAINTENANCE—FAILURE TO PROVIDE.

A husband cannot, after turning his wife out of his home without cause, relieve himself

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from providing a separate maintenance by offering to support her if she returns home.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

**7. HUSBAND AND WIFE (§ 297\*) — SEPARATE MAINTENANCE—SUFFICIENCY OF EVIDENCE—EXCESSIVE ALLOWANCES.**

Evidence in an action for separate maintenance held not to show that an allowance of \$25 a month was excessive.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090; Dec. Dig. § 297.\*]

Reynolds, P. J., dissenting in part.

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by Dora Kindorf against William E. Kindorf. From a judgment for plaintiff, defendant appeals. Affirmed.

C. J. Anderson, of St. Louis, for appellant. Zachritz & Zachritz, of St. Louis, for respondent.

ALLEN, J. Plaintiff is the wife of defendant and this action is one for her separate maintenance under the statute. The trial court found the issues for plaintiff, and adjudged that the defendant pay her \$25 per month, for the support of plaintiff and a minor child; from which judgment the defendant prosecutes this appeal.

The petition averred that on May 14, 1911, in the city of St. Louis, defendant without cause abandoned plaintiff, and thereafter refused and neglected to maintain and provide for her and two minor children born of the marriage. The answer was a general denial.

Plaintiff and defendant were married in 1894, and lived together as husband and wife until May 14, 1911. Two children were born of the marriage, viz., George Kindorf and William Kindorf, aged respectively 14 and 15 years at the time of the trial below. It appears that defendant is a cigar maker by occupation, and that Saturday evening, May 13, 1911, he returned from his work and asked his younger son, George, to take certain cards and deliver them at a house some 15 city blocks distant; that the boy wanted to change his clothing, for the reason that he had been playing ball that afternoon whereby his clothes had become soiled, and that he did not want to appear upon the street in such condition. It seems that defendant objected to this, and insisted that the boy go on the errand at once. The testimony is conflicting as to just what was said, but this is immaterial here. At any rate the defendant took what is referred to in the testimony as a "cat-o'-nine-tails" and began to whip the boy. This occurred in the kitchen of defendant's home. It seems that the instrument which defendant used to administer this punishment consisted of a piece of leather fastened to the end of a broom handle; and that he proceeded to whip the boy severely with it. The plaintiff testified that while defendant was striking the boy she said to

him, "Will, don't hit him, but talk to him," and that defendant replied, "I am doing this, and if you interfere I will hit you both and put you out," and that defendant did thereupon strike her. Defendant denies that he so struck plaintiff, and testified that plaintiff interfered by catching hold of his arm, saying, "You ain't going to hit him for anything like that."

The difficulty ended by the boy running from the house and going to his grandmother's, where he remained until the next morning. Plaintiff testified that defendant was quarrelsome all that evening. On the following morning he sent his son, William, to get George and bring him home; and when the boys reached home, and George sat down in the kitchen, defendant at once came up to him and began to beat him with a rope that he had in the meantime specially braided and prepared for that purpose. The evidence is quite convincing that the defendant brutally and unmercifully beat the boy with this instrument; the testimony of witnesses, who saw and examined the boy shortly thereafter being to the effect that he was bruised and bleeding about the head, arms, neck, shoulders, and body.

The testimony is highly conflicting as to what took place between plaintiff and defendant at this time. Plaintiff testified that the defendant also struck her with the rope, pushed her and the boy out the kitchen door, saying, "I will put you both out," telling them to "go," and that he offered to pack her clothes and throw them out after her. George testified that, while his father was striking him, his mother came to the door, and the defendant said, "If you want to see me strike him, come on in; I will hit both of you and put you out;" that he did thereupon turn and strike the plaintiff, as well as his son, pushed them both out the door, and told them to go. Several other witnesses, residing in the immediate neighborhood, testified to hearing the beating of the boy, and to have heard defendant tell plaintiff and his son to go or "get out"; that plaintiff asked to have her clothes, and that defendant said that he would help her pack them and throw them out after her. Plaintiff thereupon left, with a bundle of her clothes, her son George going with her, and went to the home of her parents.

Defendant denies that he struck his wife, either upon the day of the separation or the evening before; denies that he told her to go or get out, or that he pushed her out of the door. He says that plaintiff interfered when he was striking the boy, and that, when the latter ran out of the kitchen, plaintiff said she was going to leave, and did so. Defendant's evidence as to what occurred on the Sunday morning in question consisted wholly of his own testimony.

[1] A suit for maintenance by the wife is in the nature of an equitable proceeding.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The findings of the lower court are not binding upon us; but where there is a sharp and irreconcilable conflict in the testimony, such as here appears, we should and do defer very largely to the findings of the trial judge, who had the witnesses before him.

[2-4] It is contended by appellant that the evidence does not show that he abandoned the plaintiff. We cannot accede to this, however; for the evidence in the record is amply sufficient to warrant the lower court in finding that the defendant not only struck the plaintiff, but that he drove her forth from his home. Where a husband's wrongful conduct renders his wife's condition intolerable, she may leave him and maintain her suit for support and maintenance under the statute. *McGrady v. McGrady*, 48 Mo. App. 668; *Kurz v. Kurz*, 119 Mo. App. 53, 96 S. W. 242; *Polster v. Polster*, 145 Mo. App. 606, 123 S. W. 81. And where a husband wrongfully drives his wife from him, and turns her out of doors, such conduct must perforce constitute an abandonment of her.

[5] But it is said that in order to recover, under the statute, plaintiff's evidence must show, not only an abandonment by defendant, but a refusal or neglect on his part to maintain and provide for her; and it is urged that the evidence does not show that defendant failed or refused to provide for plaintiff, but that he was willing to provide for her in his own home. It is true that there must be both an abandonment and a failure or refusal to provide for the wife. *Polster v. Polster*, supra; *Youngs v. Youngs*, 78 Mo. App. 225. But the testimony fails to disclose that the defendant made any effort to have his wife return to him; and it is conceded that he has contributed nothing to her support since May 14, 1911. It does not appear that he thereafter requested her to return, nor did he give her any assurances as to his conduct in the future. The only thing appearing in the record pertinent to this question is testimony to the effect that when defendant was requested to provide for plaintiff he said that he would do so only in their own home.

[6] Defendant cannot strike his wife, drive her from him, and turn her out of doors, without cause, and then, without more, exonerate himself, and relieve himself from his obligation to provide for her, by saying that he will only support her in that home from which he has driven her. There is abundant evidence to support the finding of the trial court. Indeed, the testimony is quite convincing that plaintiff was forcibly driven from her home by defendant, merely because she protested against the latter's cruelty and brutality toward their son; and it does not appear that defendant has sought to make amends or to have plaintiff return to him.

[7] But it is said that the allowance to plaintiff for the support of herself and her minor son, in the sum of \$25 per month, is excessive. Respecting this, the record shows

that the defendant owned the home in which he lived, which he says is worth about \$1,200, and that he owned a lot of ground which he values at \$600, incumbered by a deed of trust for \$200. He testified that his average earnings were about \$14 per week. Plaintiff's testimony was that he earned from \$15 to \$18 per week. A careful examination of the reasons advanced by learned counsel for appellant why we should declare the monthly allowance made by the trial court excessive fails to convince us that we would be justified in reducing the amount thereof.

The judgment should be affirmed. It is so ordered.

NORTON, J., concurs. REYNOLDS, P. J., concurs, except as to the amount of the allowance. Considering the income of the defendant, he thinks the allowance excessive.

#### IROQUOIS MFG. CO. v. ANNAN-BURG MILLING CO. et al.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

##### 1. PLEADING (§ 35\*)—CAPTION—SURPLUSAGE.

The words "a corporation," appearing in the caption of a complaint after the name of the plaintiff, may be disregarded as surplusage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.\*]

##### 2. PARTNERSHIP (§ 197\*)—ACTION BY PARTNERSHIP—PARTIES.

Actions by a partnership should be brought in the names of the individual partners, and if brought in the firm name there is a defect of parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360; Dec. Dig. § 197.\*]

##### 3. CORPORATIONS (§ 514\*)—ACTIONS—DENIAL OF CORPORATE EXISTENCE—ANSWERS—AFFIDAVIT.

In an action by a supposed corporation, Rev. St. 1909, § 1985, declaring that the fact of incorporation need not be proved unless put in issue by affidavit filed with the pleadings, does not make the affidavit part of the answer, so as to render unnecessary a denial of corporate existence in the answer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2052-2081; Dec. Dig. § 514.\*]

##### 4. PARTIES (§ 75\*)—DEFECTS—MODE OF TAKING ADVANTAGE.

Where a defect of parties appears on the face of the petition, it must, under Rev. St. 1909, § 1800, be taken advantage of by demurrer; but, if not so appearing, it must, under section 1804, be taken advantage of by answer, or the defect is waived.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.\*]

##### 5. CORPORATIONS (§ 518\*)—ACTION—ISSUES—CORPORATE EXISTENCE.

In an action by a corporate plaintiff, where there was no issue as to its incorporation, evidence tending to show that it was not incorporated is inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2028, 2086, 2087; Dec. Dig. § 518.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

# 6. JUDGMENT (§ 948\*) — CONCLUSIVENESS — NECESSITY OF PLEADING.

The conclusiveness of a prior adjudication must ordinarily be pleaded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787-1793; Dec. Dig. § 948.\*]

# 7. APPEAL AND ERROR (§ 1241\*)—ACTION ON APPEAL BOND—MATTERS CONCLUDED BY JUDGMENT.

Where defendants gave an appeal bond in favor of a corporate plaintiff, they cannot, after affirmance, raise the issue of the corporate existence of plaintiff in an action on the bond, for that matter could have been raised in the original action, and the judgment is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4792-4794; Dec. Dig. § 1241.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by the Iroquois Manufacturing Company against the Annan-Burg Milling Company and others. From judgment for plaintiff, defendants appeal. Affirmed.

Geo. F. Beck, of St. Louis, for appellants. Russell I. Tolson, of St. Louis, for respondent.

REYNOLDS, P. J. This is an action on a bond given by appellants to respondent on an appeal from a judgment of the circuit court to this court, in a cause in which the respondent here was plaintiff and the Annan-Burg Milling Company defendant, the Annan-Burg Milling Company executing it as principal, and Henry Burg and George F. Beck, as sureties, one the attorney, the other a member of the defendant corporation. It is for the sum of \$200, and after reciting that the Annan-Burg Milling Company has appealed from the judgment rendered against it and in favor of the Iroquois Manufacturing Company in the circuit court, city of St. Louis, for the sum of \$53.80, together with costs, it contains the usual conditions that appellant should prosecute its appeal with diligence to a decision in the appellate court, etc. Averring that the condition has been broken in that the principal had not prosecuted the appeal, but that the appeal had been dismissed and the judgment of the circuit court affirmed, and that execution had issued on the judgment of this court, and had been returned unsatisfied, judgment is asked for the penalty of the bond and damages in \$109.83, and interest and costs.

An answer was filed to this on the 21st of April, 1911, which consists of a general denial, not under oath. On the 21st of May, 1911, George F. Beck filed an affidavit that at the time of the commencement of the action, there was not, nor is there now, any such corporation as the Iroquois Manufacturing Company named as plaintiff herein. The case was tried by the court, a jury being waived, and evidence introduced on the part of plaintiff which included the bond, the

judgment of the circuit court in the case of Iroquois Manufacturing Company v. Annan-Burg Milling Company, the judgment of affirmance by our court, its mandate of affirmance, as also the execution issued out of the circuit court against the Annan-Burg Milling Company in that cause and the nulla bona return of the sheriff on the execution. Defendants demurred to the evidence. That was overruled. Whereupon defendants introduced in evidence, over the objection of respondent, a deposition which tended to prove that the Iroquois Manufacturing Company was a partnership of three individuals carrying on business under that name and was not a corporation. At the conclusion of the testimony the court, refusing a declaration asked by the appellants here, which was in the nature of a demurrer to the evidence, rendered judgment against defendants for the penalty of the bond and awarded execution for the debt, interest and costs. From that defendants have duly prosecuted their appeal to this court.

[1-4] The affidavit interposed was undoubtedly considered by the trial court as ineffective for the purpose of raising an issue. While in the caption of the petition, after the name of the plaintiff, the words, "a corporation," appear, these are mere words of surplusage, disregarded even in a criminal cause. *State v. Murphy*, 49 Mo. App. 270. It has often been decided that the caption or style is no part of the petition. *Pattison*, Code Plead. (2d Ed.) secs. 264-270. In the petition itself there is no averment that plaintiff is a corporation. If a partnership and the members not made plaintiffs, there is a defect of parties. Appellants attempted to raise the issue of corporation by affidavit filed long after the filing of a general denial. It is true that section 1985, Revised Statutes 1909, provides that where the parties to the action sue or are sued as a corporation, it shall not be necessary to prove the fact of such incorporation unless the opposite party put such fact in issue by affidavit filed with the pleadings in the cause. But this does not make the affidavit a part of the answer. It is in aid of the answer but not of the answer. This section is to be construed in connection with other provisions of the statute. Conceding that we have here a defect of parties, that is, it appearing by evidence in the case and outside the pleadings that "Iroquois Manufacturing Company" is the trade name of a partnership, undoubtedly the members of the firm should have been named as parties plaintiff, suing under their firm name. That was not done. A defect of parties, the defect appearing on the face of the petition, must be taken advantage of by demurrer. Section 1800, R. S. 1909; not so appearing, then by answer; failing that the defect is waived, section 1804, Revised Statutes 1909.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—21

[5] While there was evidence by way of deposition that plaintiff's name was that of a partnership and not that of a corporation, the learned trial judge properly disregarded it, for the sufficient reason, as above given, that there was no issue as to defect of parties raised by the answer. So the Kansas City Court of Appeals held in *Farmers' Bank of Dearborn v. Fudge*, 109 Mo. App. 186, 82 S. W. 1112, a case that on this point nearly parallel to that at bar.

[6, 7] Over and above this, there is no merit in this contention first here made, that plaintiff in this case is not a corporation but a partnership. While it is true that the respondent did not plead estoppel, as it might have done, and as is generally necessary to make estoppel available, the defense attempted to be here made is so glaringly unfair when now interposed that we would not hesitate here to apply that doctrine in furtherance of justice. Respondent sued in the name of *Iroquois Manufacturing Company* in the original cause; under that title the case went to trial and judgment before the justice and in the circuit court. No issue as to corporation seems to have been there raised. The *Annan-Burg Milling Company* appealed from that judgment to our court and executed a bond with its own attorney as surety, in favor of respondent in the name, "*Iroquois Manufacturing Company*." The appeal was abandoned and execution duly issued and returned nulla bona. Called upon to respond on the bond voluntarily given to respondent in its trade name, appellants first attempt to raise the issue of corporate existence.

We considered a question somewhat germane to this in *Scientific American Club v. Horchitz et al.*, 168 Mo. App. 35, 151 S. W. 475. While that case is not altogether applicable here, we repeat what is there said (168 Mo. App. loc. cit. 39, 151 S. W. 476) when referring to the attack on an execution which was issued on a judgment rendered: "Whether the right of plaintiff to maintain the action was or was not there in issue or tried, it was an issue which could have been there tried, and 'the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'" The subquote embodied in the above is from 2 *Taylor on Evidence* (8th Ed.) p. 1454, sec. 1702.

Under both these views, legal and equitable, we hold that the defense undertaken to be here interposed is unavailable.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

**PASCHE et al. v. SOUTH ST. JOSEPH TOWN CO. et al.**

(Kansas City Court of Appeals. Missouri. Nov. 8, 1913. Rehearing Denied Dec. 1, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 292\*)—PUBLIC IMPROVEMENTS—PETITION.**

As the statute, authorizing a petition for the paving of streets, does not require the names of the owners to be signed in any particular manner, or the authority of the signers to appear on the face of the petition, the signature of a corporate owner of land is binding on all persons if the officer signing the petition had authority to bind the corporation by signing ordinary corporate contracts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 768-772; Dec. Dig. § 292.\*]

**2. MUNICIPAL CORPORATIONS (§ 325\*)—PUBLIC IMPROVEMENTS—FINDING OF BOARD OF PUBLIC WORKS.**

While a finding of the board of public works that a petition for paving was signed by the owners of the majority of the abutting property is not conclusive, yet such finding establishes prima facie the validity of the signatures to the petition and casts upon one contesting their validity the burden of showing that the signatures were unauthorized.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 847-849; Dec. Dig. § 325.\*]

**3. MUNICIPAL CORPORATIONS (§ 292\*)—PETITION FOR STREET PAVING—ACTS OF CORPORATE OFFICER—AUTHORITY.**

Where a land corporation instructed its president and secretary to attend to all business of the company and placed the practical management of the business in the secretary's hands, the majority of the directors being nonresidents, the signing of the corporation's name to a petition for street paving by the secretary is binding on the corporation; it appearing that it was the general course of business to allow the secretary to sign such petitions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 768-772; Dec. Dig. § 292.\*]

**4. MUNICIPAL CORPORATIONS (§ 292\*)—PETITION FOR STREET PAVING—ACTS OF CORPORATE OFFICERS—RATIFICATION.**

Where the secretary of a corporation, who had general management of its affairs, signed a petition for street paving and at the end of the year the directors by general resolution ratified the acts of the president and secretary, such ratification relates back and validates the signature of the secretary, even if he was unauthorized at the time of the signing; the signing of the petition being an act not foreign to the general purpose of the corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 768-772; Dec. Dig. § 292.\*]

**5. MUNICIPAL CORPORATIONS (§ 292\*)—STREET IMPROVEMENTS—PAVING PETITIONS.**

Though the statute requires a petition for a street improvement, as for a pavement, to be in writing, the authority of an officer of a corporation to sign such petition need not be written.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 768-772; Dec. Dig. § 292.\*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by Charles Pasche and others against the South St. Joseph Town Company

and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded, with directions.

Culver & Phillip, of St. Joseph, for appellants. Broadus & Crow, of Kansas City, for respondents.

TRIMBLE, J. This is a suit upon two special tax bills issued against two lots, respectively, in the South St. Joseph Town Company's Third addition to South St. Joseph for the cost of paving, curbing and guttering Lake avenue from Illinois avenue to Alabama street. The judgment below was for defendants, and plaintiffs appealed.

The two lots are owned by the defendant Ruth E. Brady; and the defendants the South St. Joseph Town Company and A. L. Thompson have some interest in them. It is conceded that plaintiffs are entitled to recover upon both tax bills unless the one defense interposed by the defendants shall prevail. That defense is that the petition presented to the board of public works, praying for the improvement and selecting the materials therefor, was not signed by the resident owners of a majority of the front feet of the property abutting upon the improvement. The strength or weakness of that contention depends upon the sole proposition whether the signature of the South St. Joseph Town Company, by E. M. Lindsay, its secretary and treasurer, was a signing by said company of said petition. If the signature of said company as owner of 1,023.25 feet should be stricken off and that number of feet not be counted, because the signature was not authorized in such way as to bind the company, then said petition was not signed by the owners of a majority of the front feet of the property abutting on the improvement, and the tax bills are, in that event, void, because in such case the city had no jurisdiction or power to authorize the improvement or levy the special tax bills.

The trial court made, among others, the following finding of fact (which is the only one now material to the consideration of this appeal), to wit: "The court further finds that the South St. Joseph Town Company has been incorporated for about 12 years, and shortly after its incorporation, and before Mr. Lindsay signed the petition asking that the improvement be made, the board of directors at a meeting or meetings of the directors instructed and directed John Donovan, president, and Ernest Lindsay, secretary and treasurer, of the South St. Joseph Town Company, to attend to all business of that company; the practical management of all of the company's business being placed in Mr. Lindsay's hands. The directors were nonresidents of the state of Missouri, excepting Mr. Lindsay and Mr. Donovan and Mr. Van Vliet, and for that reason they left the transaction of all business of the company to Mr. Donovan, president, and

Mr. Lindsay, secretary and treasurer. After the property of the South St. Joseph Town Company was taken in the corporate limits of South St. Joseph, and before the petition referred to was signed, there came up before the board of directors a great many matters of business in which the company was interested, sewers, water mains, gas mains, street improvements, sidewalks, grading, water connections, and many other things, and all of these matters were brought to the attention of the directors of the company by Mr. Donovan; and the instructions of the board of directors were that Mr. Donovan, as president, and Mr. Lindsay, as secretary and treasurer, should handle and attend to all of these things for the company, and thereafter they did attend to all of those matters. Mr. Lindsay, as secretary and treasurer, usually, and Mr. Donovan sometimes, signed the petitions asking for the improvements of all the streets abutting upon the property of the company which were improved, and the board of directors knew that Mr. Lindsay was actually transacting all the business of the company, including the business of causing the streets in the addition owned by the company to be improved. Each year the board of directors ratified everything Lindsay and Donovan had done during the preceding year. They handled all of the business of the company of every kind and description with the knowledge of the board of directors. The board of directors met once a year and elected officers. That is about all the business that the board of directors themselves transacted; the entire management and control of the property being left with Mr. Donovan and Mr. Lindsay. When the petition for the improvement of Lake avenue came up, Mr. Donovan and Mr. Lindsay agreed that Mr. Lindsay should sign the petition for the company, and Mr. Donovan directed Mr. Lindsay to sign, and he did sign it for the company."

Thereupon the trial court held that, as the board of directors of the South St. Joseph Town Company had not passed any resolution specially relating to Mr. Lindsay's authority to sign petitions for street improvements, or specially authorizing him to sign this particular petition, the name of said company as owner of 1,023.25 feet should not be counted, and thus the number of feet represented by the owners on the petition fell below the number required to make a majority.

[1] The question thus presented is: Did the secretary, when he signed the town company's name to the petition, have sufficient authority to bind the company? This involves also the question: When a managing officer of a corporation signs the corporation's name to a petition for a street improvement, how must his authority to do so be shown in order to bind the company? The statute authorizing the petition does

not require the names of the owners to be signed in any particular way, nor that the authority to sign shall appear on the face of the petition, nor does it provide that the authority to sign shall be proved or established by any particular kind of evidence. If, therefore, the secretary has such authority to sign the petition as would bind the corporation if it were in any other matter of ordinary contract, then the company should be bound in the improvement proceeding. And, if the corporation itself is bound, certainly Ruth E. Brady, the owner of the particular lots in question, cannot complain, especially, since she, as owner of said two lots, also signed the petition for the improvement; and in said petition it is alleged that the owners constitute a majority of the front feet.

[2] The board of public works found that the petition was signed by the owners of the necessary majority of the front feet. Of course its finding is not conclusive but may be inquired into. However, as the statute does not require the corporation's name to be signed by any particular officer, nor that such officer's authority to sign should appear on the face of, or be attached to, the petition, the finding of the board that the owners of a majority of the front feet had signed it establishes prima facie that the town company's name had been signed so as to bind the company and throws upon the defendants the burden of proving that the company was not so bound. In *Hudson County v. City of Bayonne*, 54 N. J. Law, 293, loc. cit. 296, 23 Atl. 643, the proceeding was attacked upon the ground that a signature on the petition was not authorized, or was not the signature which it purported to be, and the court said: "The circumstance that the body to whom it was presented has acted upon it as genuine is prima facie evidence that it is what it purports to be." In that case the signature disputed was "Elizabeth Wilkinson, per J. W. Heck, Attorney"; and, while the court held that such signature should not be counted, such holding was on the ground that "no authority whatever" was in Heck to sign, as the evidence showed that he had never said anything at all to her about the matter. In *State ex rel. v. Nelson*, 57 Wis. 147, 15 N. W. 14, it was held that as the petition stated that it contained the requisite number of qualified signers, and the board acted upon the petition and disposed of it on the merits, this was sufficient to cast the burden of showing that it was not so signed upon the party who asserts it.

[3] The defendants in this case contend that they maintained that burden of proof by showing that there was no resolution adopted or passed by the board of directors of the town company specifically authorizing Lindsay, the secretary and treasurer, to sign petitions for street improvements, or to sign this particular petition, and by showing that

at the time Lindsay signed the petition the board of directors did not know that the particular street in question, Lake avenue, was being sought to be improved. And the trial court held with defendants on that contention. But does the authority to sign for and thereby bind the company have to be shown in any such way? In the absence of any particular requirement by the statute, cannot the authority of this officer, Lindsay, be shown in any way that would bind the corporation as in the case of any other act done by an agent?

In *Sherman v. Fitch*, 98 Mass. 59, loc. cit. 64, it is said: "Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals."

In the case of *Allen v. City of Portland*, 35 Or. 420, 58 Pac. 509, it was sought to have a special assessment for a street improvement declared void. The ground of the attack was that the petition for the improvement did not contain the names of the owners of one-half of the abutting property. To maintain this charge it was necessary that the name of the Oregonian Publishing Company should be declared not properly signed thereto. The signature in question was thus: "Oregonian Publishing Co., by H. L. Pittock, Sec'y." It was contended that Pittock had no authority to sign the petition for the company. The testimony showed that there was no resolution passed by the board of directors authorizing the signing, and therefore it was contended that the signing was void. But it was shown that Pittock managed the business of the concern and transacted the entire business thereof, except such as arose out of the usual course thereof, and then that it was Pittock's habit to consult with another director, Scott, and whatever they agreed to was carried into execution. Scott was president and Pittock was secretary. At the time of signing the petition, Scott and Pittock had consulted about the matter of the street improvement and had concluded that it would be to the best interest of the company to have the improvement made, and, pursuant to this determination, Pittock signed the name of the company. The court held the company was bound.

It would seem that, close as the facts in the cited case are to the case at bar, the latter is much stronger in favor of the validity of the signature than is the former. In it the company was a publishing company whose general business had nothing to do with the improvements of streets. In the case at bar, the company is a town site company, whose very purpose and business is to lay out and improve additions, build houses upon lots therein, and improve the streets thereof, which, of course, would include the very thing the petition was intended to ac-



comply. In other words, when the secretary and treasurer, Lindsay, signed the petition asking that Lake avenue in the company's addition be improved, he was not doing an act involving the company in something entirely foreign to its purpose and business but was helping to bring about the very object and purpose for which the company was organized. In addition to this, the facts, found to be true by the court in the finding of fact hereinbefore set out, present much stronger reasons for holding the company bound than those in the case just cited, although the facts in the cited case are strikingly similar as far as they go.

The petition for the improvement in the case at bar was signed in 1909; the suit on these tax bills was filed in September, 1910; and the case was tried in October, 1911. The court found that the town company had been incorporated 12 years; that shortly after its incorporation, and before Lindsay signed this particular petition in question, the board of directors, at a meeting or meetings of directors, instructed John Donovan, the president, and Lindsay, the secretary, to attend to all business of the company, and placed the practical management of all the business in Lindsay's hands. The court also found that the directors were nonresidents except three, two of which three were Donovan and Lindsay; that after the company's property was taken into the corporate limits of the city, and before the petition in question was signed, the board of directors had before it a great many matters of business in which the company was interested, such as the construction of sewers, water mains, gas mains, street improvements, sidewalks, grading, etc., and the instructions of the board were that Donovan and Lindsay should attend to such matters, and that they thereafter did attend to them; that Lindsay usually, and Donovan sometimes, signed petitions asking for the improvement of streets abutting upon the company's property, and that the board of directors knew this and at the end of each year ratified everything done during that year; and that, when the petition for the improvement in question came up, Mr. Donovan and Mr. Lindsay agreed that Mr. Lindsay should sign the petition, and at Donovan's direction Lindsay signed it for the company. It would seem that if a corporation can be bound by the acts of an agent, done in the line of the very business for which the corporation is organized and pursuant to a long course of conduct authorized and acquiesced in by the company, then this company was bound by the act of its agent in this case. And, as we have seen, since there is no legislative requirement directing how the authority to sign such a petition shall be manifested, surely the company ought to be bound in this case the same as in any other.

[4] The petition was signed in 1909, and

consequently at the end of that year, as usual, the directors by a general resolution ratified whatever the two men had done during that year. Even if this resolution, owing to its generality, would not have the effect of ratifying an act foreign to the general purpose of the corporation, yet, as this act was in line with the object, purpose, and work of the corporation, it should have such effect. In *Day v. Fairview*, 62 N. J. Law. 621, 43 Atl. 578, the court held that, even if the action of an officer of a church corporation in signing a similar petition was defective, it could be, and was thereafter, ratified by the corporation. In the case cited the petition was dated and presented August 14, 1896, and the signing was not ratified until February 11, 1898, but the court held that the ratification related back to the time of the signing of the petition and rendered it as effectual as if the authority in the first instance had been expressly conferred.

In the case of *Kansas City, Kan., v. Cullinan*, 65 Kan. 68, 68 Pac. 1099, it was contended that a proceeding to pave was void because the petition therefor did not have the signatures of the owners of a majority of the front feet. It did not if the signature, "Kaw Valley Townsite & Bridge Company, by Charles F. Morse, Manager, by authority of the board of directors. Attest: E. E. Richardson, Secretary"—did not bind the corporation. The trial court held that it did not because Morse had no authority to sign such petition for said corporation. And it was agreed that neither the charter nor by-laws nor any record of the Kaw Valley Townsite & Bridge Company expressly conferred upon Morse or any other person specific authority to sign said petition or any petition to pave said street or any street; that the subject had never been considered by the board of directors before the petition was presented. Afterwards, however, and after suit was brought to invalidate the tax bills, the board of directors attempted to ratify Morse's act. The Supreme Court refused to decide the case on the question whether this attempted ratification amounted to anything or would relate back to the time of signing the petition, notwithstanding the intervention of the rights of the plaintiff therein, but said that it was a matter of grave doubt whether such retroactive effect could be accorded to an act of ratification in a case like that one. But the court held that Morse did have authority, and that his act bound the company, because the evidence showed that, as the company was a town site company, its object and purpose was to have its streets improved; that Morse had the actual general management and control of the property; that he had previously signed other petitions for similar improvements without objection by the company; and that such facts were evidence tending to show the existence of authority to sign and were not contradicted or overthrown by proof that the records of the company did not show that

he was ever given any "specific authority" to sign that or any similar petition.

In *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531, loc. cit. 539, 15 S. W. 417, 419 (12 L. R. A. 714, 24 Am. St. Rep. 351), it is said: "It is now well settled that, when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business."

In *Moore v. Gaus & Sons Mfg. Co.*, 118 Mo. 98, loc. cit. 106, 20 S. W. 975, 976, it is said: "The power of an agent or officer of a corporation to bind his principal is governed by the law of agency, and, where an officer has been permitted to manage all the business of a corporation, his authority to bind it will be implied from the apparent power thus conferred upon him."

The case of *City of Sedalia v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014, decided by the St. Louis Court of Appeals, and the same case certified to and approved by the Supreme Court in 227 Mo. 31, 88 S. W. 1014, 127 S. W. 50, is cited in support of the trial court's ruling. In that case the Supreme Court adopted and incorporated the opinion of the St. Louis Court of Appeals in its opinion. The only expression in either of said decisions bearing on the point in controversy here is found in the St. Louis Court of Appeals' opinion and is as follows: "The officers of the corporate landowners, unless specially authorized by the board of directors, were without power to bind the corporations. *Morse v. City of Omaha* [67 Neb. 426] 93 N. W. 734." This, however, is no more than a declaration that the officer of a corporation has no authority, simply by virtue of his office, to bind the corporation by signing the corporate name either to a petition for or a remonstrance against a street improvement. Of course, if the corporation has in no way conferred the authority on an officer to sign, and there is no evidence showing that it did, or that it knew that he had signed and made no objection thereto but acquiesced therein and ratified the act, then such signing would not bind the corporation. In this *Sedalia* Case the suit was to enforce the tax bills. Defendants contended that they were void because a remonstrance of a majority of the property owners had been filed against the proposed improvement. Plaintiff replied, denying that a majority had remonstrated, and showed that some remonstrators had withdrawn from the remonstrance, and that others were not legally entitled to remonstrate. In the course of the trial plaintiff offered to show, in addition to the above facts, that certain of the remonstrators had not authorized any one to sign for them. Defendants did not offer any testimony tending to show that such authority did exist but objected to the want of authority being shown, and contended further that remonstrators could

not withdraw their names after it was once filed. The trial court decided against the tax bills. The St. Louis Court of Appeals reversed the case, and discussed at great length the many other questions involved in the case, but on the point here involved merely made the remark hereinabove quoted, and cited the case of *Morse v. City of Omaha*, 67 Neb. 426, 93 N. W. 734. There was no evidence that there was any authority to sign the names of certain remonstrators, while on the contrary there was at least an offer to prove that such authority in fact was not given. It was under these circumstances that the St. Louis Court of Appeals remarked that a corporation could not be bound by an officer in such cases, unless specially authorized. Of course this is an entirely different proposition from the question whether a corporation could not be held bound by the signature of an officer or agent, if there was evidence to show that in any manner the officer or agent in fact did have such authority. So that neither the decision of St. Louis Court of Appeals nor that of the Supreme Court can be said to decide the point here, where the evidence does show such authority, and the facts disclosing the authority have been established by the finding of the trial court.

In the *Morse v. Omaha* Case, 67 Neb. 426, 93 N. W. loc. cit. 738, the name of the "Omaha Security Company, by Thomas Brennan, President," was claimed to have been signed without authority. The evidence showed clearly that it was signed without authority of any kind. "The president testified that he signed the name of his corporation upon his own responsibility, without consultation with any of the directors;" and there was no countervailing testimony. The trial court held that the corporation was not bound, and that the petition was insufficient. The Supreme Court of Nebraska, after reviewing the evidence bearing upon the question of whether he had authority, said: "It is therefore very clear that the finding of the trial court that the petition in this respect was insufficient is fully sustained by the evidence." If a resolution of the board was required to confer that authority on him, and it could not be shown in any other way, why review the evidence going to show that no authority had been conferred in any way before deciding he had no such authority? The court also held that the signing of a petition for a street improvement was not a conveyance or incumbrance upon real estate. Of course if it were, a resolution of the board might be necessary to make it valid.

In the *Morse v. Omaha* Case, as in the *Sedalia* Case, there was no evidence that the directors had authorized the officer in question to transact all the business of the corporation or, in fact, to transact any of it. Neither of them, therefore, can be said to hold anything more than that the officer signing must have authority to so do, and has no

power, by virtue of his office, to sign petitions for street improvements. That the Morse Case does not hold anything more than this is shown by the decision of the same court in the case of Eddy v. Omaha, 72 Neb. 550, 101 N. W. 25, 102 N. W. 70, 103 N. W. 692. In that case the trial court had held (following, as it thought, Morse v. Omaha, supra) that several corporations, whose names were signed to the petition by their presidents, were not bound thereby because not specially authorized. No express authority was given such officers to sign, but there was evidence showing that as a matter of fact they did have such authority. There was evidence showing they had signed other petitions for similar improvements and that the boards of directors had made no objection thereto and had acquiesced therein until after suit was brought. And because there was such evidence, the Supreme Court of Nebraska held that the corporations were bound, and, in construing the Morse Case, said (72 Neb. 567, 103 N. W. 694): "It is contended that the views above announced are inconsistent with the rule established in Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734. We do not so regard it. In that case it appeared affirmatively that the directors had no knowledge that any action had been taken purporting to authorize the improvement on behalf of the corporation. It did not appear that the circumstances were such that they ought to have taken notice that the president had signed for the corporation. The trial court found that the signature of the corporation by its president was unauthorized, and that finding was not set aside by this court." From this it would seem to clearly appear that the Morse Case is not authority for the broad contention made by defendants. But that if the evidence shows that an officer has been authorized and directed to transact all its business, and he has done so for years, including the signing of petitions for street improvements, with the knowledge of the directors, and year after year all his acts are ratified by the board, then the company is bound by his act and neither it nor any third party can complain.

Cook on Corporations, vol. 3, § 717, speaking of the powers of secretary and treasurer, says: "The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it. \* \* \* The corporation may, of course, expressly authorize the secretary to contract for it, or it may accept and ratify his contracts after they are made. \* \* \* The treasurer of a corporation has no power, merely by reason of his office as treasurer, to contract for the corporation. But if the treasurer has been accustomed to make certain contracts for the corporation, and the corporation has acquiesced in them, it is bound by a new contract of that kind entered into by him."

If it be said that the question of whether authority was thus given then becomes a question of fact for the jury, or the trial court sitting as a jury, the answer is that in this case there is no contention that the signing was against the wishes of the corporation or of its directors, nor was there any evidence that it was. Besides, the trial court found the facts existed showing such authority in the manner heretofore indicated, but held that such authority was not sufficient as a matter of law.

[5] It cannot be urged that, because the statute requires the petition for the improvement to be in writing, therefore authority to sign such petition must also be in writing. The statute makes no such additional requirement and therefore does not change the rule by which an agent may sign the name of his principal to a writing under authority not in writing. Tibbets v. Street Ry. Co., 153 Ill. 147, 38 N. E. 664.

In view, therefore, of the evidence in this case showing that Lindsay had such authority to sign the petition as would bind the corporation, we hold that the case should be reversed and remanded with directions to enter judgment for the plaintiffs upholding and enforcing the lien of the tax bills. All concur.

FARMER v. ST. LOUIS, I. M. & S. RY. CO.  
(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

1. CARRIERS (§ 241\*)—"PASSENGER" — MAIL CLERKS.

A railway postal clerk is a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 977-979; Dec. Dig. § 241.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

2. CARRIERS (§ 280\*) — PASSENGERS — MAIL CLERKS—ASSUMPTION OF RISK.

While a mail clerk is a passenger, he assumes the risk of injuries incident to his transportation in a mail car, although the carrier is required to exercise toward him the same high degree of care generally imposed in favor of passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.\*]

3. CARRIERS (§ 298\*) — CARRIAGE OF PASSENGERS—PASSENGERS ON FREIGHT TRAINS.

A passenger on a freight train necessarily assumes the risk of perils arising from jolts, jars, or lurches ordinarily incident to the operation of such trains.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. § 298.\*]

4. CARRIERS (§ 320\*)—CARRIAGE OF PASSENGERS—ACTIONS—RES IPSA LOQUITUR.

Where a railroad mail clerk was injured by a fall caused by a jar when the engine was coupled to his car, proof that the jar broke the lamps in the car and the glass in the door and threw down other mail clerks is sufficient to raise a presumption of negligence, taking the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case to the jury under the doctrine of *res ipsa loquitur*.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

**5. EVIDENCE (§ 474\*)—OPINIONS—COMPETENCY OF WITNESS.**

In an action by a mail clerk for damages for injuries sustained in a fall caused by a negligent coupling onto his car, other mail clerks present may testify as to the unusual force of the jar; such witnesses, while not necessarily experts, having had so much experience that they may properly testify to their inferences without invading the province of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

**6. EVIDENCE (§ 501\*)—OPINION EVIDENCE — FACTS FORMING BASIS OF OPINION.**

Where witnesses are testifying as to their opinions upon matters within their personal knowledge or observation, the facts upon which the opinion is based should be stated by the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.\*]

**7. TRIAL (§ 296\*)—INSTRUCTIONS — CURE BY OTHERS.**

In an action by a railroad mail clerk, who claimed that he was injured by a fall caused by a negligent coupling onto his car, an instruction to find for plaintiff if defendant's agents ran the engine into the postal car with unusual violence, and that thereby plaintiff was injured, while erroneous in not making the test of liability whether the engine was run into the cars with such great violence as to be negligent, is cured by other instructions requiring a verdict for defendant unless the manner in which the coupling was made was negligent or careless, resulting in an unusual jar or concussion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

Action by James D. Farmer against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

James F. Green, of St. Louis, for appellant. Karl Kimmel and F. A. & L. A. Wind, all of St. Louis, for respondent.

**ALLEN, J.** This is an action for injuries alleged to have been suffered by plaintiff, a railway postal clerk, while being transported as such upon one of defendant's trains and caused by the negligence of defendant. Plaintiff recovered, and the defendant prosecutes the appeal.

The charge of negligence laid against the defendant is that while plaintiff, in pursuit of his duties as a postal clerk, was standing in a mail car, which formed a part of a train of cars of defendant, and which was standing in the train sheds at the St. Louis Union Station, the defendant negligently caused and permitted one of its road engines to come into violent collision with such train, thereby causing the plaintiff to be thrown against a pouch rack in the car in which he was working, and causing him to fall and strike

a letter case therein, whereby it is averred that he was painfully and permanently injured. The answer was a general denial.

The evidence discloses that at the time plaintiff received his injuries he was a railway postal clerk in charge of a mail car which was standing in the train sheds at the Union Station in St. Louis. It appears that this car, another mail car, and a baggage car were standing upon a track, the two mail cars being south of the baggage car, and that the plaintiff was working in the second mail car; i. e., the one next to the baggage car. It appears that these three cars were situated some little distance down the track, south of and detached from the passenger coaches which were to compose the remainder of the train; the distance between the baggage car and the nearest passenger coach being, it is said, something like from 15 to 25 feet.

The injuries which plaintiff received were due to the shock or impact received by the mail cars and baggage car when an engine backed in from the south and coupled onto the mail car immediately in front of the car in which plaintiff was working. It was in making this coupling that the engine is alleged to have come into violent collision with these cars. It seems that this train, consisting of these mail cars, baggage car, and a number of passenger coaches, was shortly due to leave the St. Louis Union Station for the south, and was known as the "Cannonball," and is referred to as being one of the best trains on defendant's road.

When the engine made the coupling to the first mail car, plaintiff, in the second mail car, was standing in the "letter end" or north end of that car and was distributing letters in a case consisting of pigeon holes. It appears that he was on the west side of this end of the car, and that just a few feet behind him was a "pouch rack," made of gas pipe. Plaintiff testified that, when the engine came in contact with the mail car ahead of him, it struck the cars violently, saying: "The engine hit the train and just drove it right under me;" that he fell back against the corner of the pouch rack, the latter striking him in the small of the back; and that he was bent backward over the rack and fell to one side across the car, his hip striking the west side of the car and one of the pigeon holes above mentioned. Plaintiff testified that, as he was in charge of that car, it was his duty to inspect the entire car, and that he did so upon taking charge of it that evening, and that he found everything about it in good order and condition at that time.

A number of railway postal clerks, who were working in the two mail cars in question at the time that the engine coupled on thereto, testified as witnesses for plaintiff. They all testified in substance that in making the coupling the engine was caused to run into the cars with unusual and extraordinary

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

violence; they testified that in making such a coupling the jar is usually slight, and that frequently it is scarcely noticeable, if at all; but that on this occasion the shock was much out of the ordinary. One of these witnesses testified that the impact of the engine threw him against another man in the car, the latter preventing him from falling, but that he received quite a shock from which he did not immediately recover. Another testified that when the coupling was made he was thrown, but grabbed a rack and was thus prevented from falling, and that another man was thrown against him. Another said that the jolt caused him to move several feet, but that he did not fall because he was between the racks. Another testified that the jolt knocked him down, dazed him a little, and gave him a headache; that he fell on a sack of mail which he had in his arms and which protected him, but that his watch crystal was broken and his watch case bent by the fall. Another stated that the jolt threw him, but that he had hold of a heavy mail sack which prevented him from falling. And still another said that he was caused to move several feet, losing his balance, but that he grabbed something to keep from falling.

By some of these witnesses it was shown that, after the making of this coupling and the jar or jolt thereby caused, it was found that lamp globes in the car were broken; that a window was broken in the car in which plaintiff had been working, and in the end thereof in which he was standing at the time he received his injuries; and further that it was found that one of the end doors of this car could be but partly opened because of a bulging in the floor thereabout.

On behalf of defendant, its engineer, who had been in its employ since 1879, testified concerning the coupling which he made with his engine to the cars in question. He stated that in entering the train sheds his movements were controlled by signal lights, and that in approaching the cars in question there was a man stationed with a lamp to signal him. The latter did not testify. The engineer testified that he did not perceive that the coupling was made in any manner out of the ordinary, and said: "We make couplings as hard as that lots of times." This was the only witness offered by defendant who testified concerning the coupling on of the engine. The conductor of the train did not see the coupling made and was not about these cars at the time. He testified, however, as to how such couplings are made, "the slack" that is in a train of this character, and that there is usually some jolt incident to coupling on an engine.

I. Appellant contends that there was no proof of any negligent or improper handling of defendant's train or engine, and that therefore the plaintiff is not entitled to recover.

[1, 2] It cannot be doubted that plaintiff, engaged in working as a railway postal clerk in one of the cars of defendant's train, was a

passenger thereon. See *Magoffin v. Railway Co.*, 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 798; *Mellor v. Railway Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Lasater v. Railway Co.*, 160 S. W. 818, not as yet officially reported. However, it is quite clear that, though plaintiff was a passenger, he, by virtue of his employment as a railway postal clerk, assumed all of the dangers and risks necessarily attendant upon his transportation in a mail car or incident to the work which the duties of his position required him to perform. Though a railway postal clerk is to be regarded as a passenger, the obligation which the carrier assumes toward him is not necessarily the same as that which is owing to ordinary passengers who are being transported in passenger coaches. In this respect his position is somewhat analogous to one who takes passage upon a freight train, where such passenger is held to assume such risks and hazards as are ordinarily incident to the operation of trains of that character. By this it is not meant that the risks and hazards assumed are the same in the two instances, but that in each the obligation imposed upon the carrier is to some extent qualified because of the fact that the passenger must be held to assume certain risks. But in each the carrier is obligated to exercise toward such passenger that high degree of care generally imposed upon it with respect to its patrons, but subject to the limitations or qualifications mentioned.

[3] Where one takes passage upon a freight train, he necessarily assumes the risk of perils arising from such jolts, jars, or lurches as are usually and ordinarily incident to the operation of such trains, though he does not of course assume the risk of any hazards or dangers occasioned by the negligence of the carrier or its agents and servants. See *Allison v. Railroad*, 157 Mo. App. 72, 137 S. W. 896; *Tickell v. Railroad*, 149 Mo. App. 648, 129 S. W. 727; *Ray v. Railroad*, 147 Mo. App. 332, 126 S. W. 543; *Mitchell v. Railroad*, 132 Mo. App. 143, 112 S. W. 291; *Hawk v. Railroad*, 130 Mo. App. 658, 108 S. W. 1119; *Erwin v. Railroad*, 94 Mo. App. 289, 68 S. W. 88; *Wait v. Railroad*, 165 Mo. 612, 65 S. W. 1028; *Hedrick v. Railroad*, 195 Mo. 104, 93 S. W. 268, 6 Ann. Cas. 793. And it cannot be doubted that railway postal clerks must assume the risk of any dangers to which they may be exposed on account of such jolts, jars, or lurches as may be incident to the ordinary and usual handling and operation of mail cars, whether occasioned by the coupling of cars, or of engines to such cars, or otherwise; but they do not assume the risk of extraordinary perils to which they may be subjected by the negligence of the railway company or those in charge of its engine or train.

[4] In the instant case no specific acts of negligence on the part of defendant's agents

and servants in charge of its engine or train were charged or attempted to be proved. On the contrary, plaintiff rested his case upon the evidence adduced by him tending to show that upon the occasion in question, when it was sought to couple the engine to the front mail car, the latter was run into or against these cars with extraordinary violence; the plaintiff relying upon the application of the doctrine of *res ipsa loquitur*, or, in other words, that proof of the so-called collision of the engine with the cars in question raises a presumption of negligence on the part of the defendant in the operation of its engine and train, calling for explanation at its hands, and casting upon it the burden of showing its freedom from negligence in the premises.

We think it cannot be doubted that the doctrine of *res ipsa loquitur* may be invoked and relied upon by the plaintiff, in view of the evidence adduced by him. Such doctrine has been applied in precisely similar instances (i. e., in the case of making car couplings), even where the train in question was a freight train, upon a showing that the jar or jolt occasioned thereby was very extraordinary and the violence or severity thereof quite beyond that ordinarily attendant upon such an operation. The applicability of this doctrine in cases of this character is fully discussed in *Mitchell v. Railroad*, supra, and it is unnecessary for us to attempt to add anything to what is there said upon the subject. And in *Allison v. Railroad*, supra, it was also held that this doctrine may be invoked in such a case.

In the case before us plaintiff's evidence tended to show that the jar or jolt occasioned by the impact of the engine against the front mail car, in making the coupling, was one of such unusual violence as to be entirely out of the ordinary course of things, and such as would not have been present had its agents and servants, who had the management and control of the engine and train, exercised due care in the premises, thereby justifying the presumption, in the absence of explanation by the defendant, that the accident was occasioned by want of care on the part of such agents and servants of defendant.

Aside from the testimony of the mail clerks, in the nature of opinions of these witnesses, to the effect that the collision or impact of the engine with the mail cars was much more violent than is usual in making a coupling, the physical evidences of the violence thereof, as attested by these witnesses, tends very strongly to show that the manner of making this coupling was altogether out of the ordinary, for indeed it would be unreasonable to suppose that people would be violently thrown down, window glass and lamp globes broken, and the car otherwise damaged in coupling on an engine in the usual and ordinary manner. Proof

of such physical facts constitutes very convincing evidence that the jar or impact must have been one of quite unusual violence. And especially is this true in view of the fact that this was not a freight train, but that these cars, as defendant showed, were to constitute a portion of one of the finest passenger trains on defendant's road, and that the coupling was made in passenger train sheds; it being fair to assume that an impact of the violence indicated by the evidence would not be ordinarily incident to making a coupling of this character under such conditions. In this connection appellant refers us to *Tickell v. Railroad*, *Ray v. Railroad*, and *Hawk v. Railroad*, supra; *Portuchek v. Railway Co.*, 101 Mo. App. 52, 74 S. W. 868; *Erwin v. Railway Co.*, supra; *Guffey v. Railroad*, 53 Mo. App. 462; *Saxton v. Railway Co.*, 98 Mo. App. 494, 72 S. W. 717; *Hedrick v. Railway Co.*, supra; *Wait v. Railway Company*, supra; as well as to other cases. However, nearly all of the cases just cited involve the question of liability for injuries received by a passenger upon a freight train, occasioned by a jerk, lurch, or jar of such train. And, whether it be freight or passenger train, liability was denied in each instance because the court held that there was no evidence adduced which tended to prove that the jerk, lurch, or jar was in fact extraordinary and not usually incident to the ordinary, careful, and efficient operation of a train of the character in question in the particular case. An examination of all such cases convinces us that they are not authority for denying a recovery under the facts, circumstances, and conditions here shown in evidence. And other cases cited are not controlling.

[5, 6] II. Appellant assigns as error the rulings of the trial court in permitting plaintiff and other railway postal clerks, who were working in these mail cars at the time of the accident and who appeared as witnesses for plaintiff, to testify, over appellant's objections, as to the effect which the impact or concussion, attendant upon making this coupling, had upon the mail cars and the postal clerks therein, as compared to that ordinarily experienced in such cases, and to compare the jar or jolt on this occasion with that usually incident to such couplings. It is contended that it was error to permit these witnesses to thus testify as to the character of the coupling made on this occasion, as compared with other couplings of mail cars.

In *Guffey v. Railroad*, supra, to which we are referred by appellant in this connection, there was testimony that the jolt or jerk of a freight train was "of an unusual character," "heap harder than usual," and that it was more violent than common on freight trains. The court said: "None of these witnesses showed themselves sufficiently qualified by experience or observation to give an opinion as to what incidents are usual in

the operation of freight trains operated by prudent and careful employes. We do not think these expressions of a witness are of any value whatsoever or constitute so much as a scintilla of evidence."

And in *Hawk v. Railroad*, supra, to which we are likewise referred, plaintiff depicted the jolt accompanying the stopping of a train as being a "terrible shock," "a severe shock, sufficient to knock the breath out of me." The court said: "These expressions of a *nonexpert witness* amount to nothing more than mere conclusions and possess no probative value." (*Italics ours.*)

And in *Ray v. Railroad*, supra, the court said: "Plaintiff attempted to qualify as an expert witness in respect to shocks and jerks of freight trains by saying that he had had 'considerable experience' on such trains, and had shipped stock over this road for seven years, *not testifying how often he accompanied his stock.* \* \* \* This plaintiff said the jerk was an unusual and extraordinary one, but the cases hold such expressions of opinion by a *nonexpert witness* are not of probative value." (*Italics ours.*)

In the cases last above mentioned the witnesses were not qualified to express an opinion as to the matter in hand. But in the instant case the witnesses, whose testimony we now have under consideration, we think showed themselves qualified by experience and observation to express an opinion as to what impact or concussion was usually and ordinarily incident to making couplings of the character here in question. It appears that the plaintiff had been employed as a railway postal clerk for a period of about 21 years, and that the other witnesses, whose testimony we are now considering, were all experienced railway postal clerks. Two of them had been engaged in this occupation for more than 2 years, another more than 6 years, another about 9 years, another about 11 years, another about 12 years, and another more than 17 years. They were necessarily familiar by experience with the operation of mail cars and with the jars or jolts which they experienced ordinarily when couplings were made. They testified as to the force of the jar or impact usually and ordinarily incident thereto, related their experiences on this occasion, and the effect which this jar had upon them and upon the car itself, and said that it was much more violent than was ordinarily incident to effecting a coupling. The testimony of such witnesses is in the nature of expert testimony, or at least is the testimony of witnesses qualified by experience in the particular matter in hand, whose opinions may be received concerning the force of the jar or concussion, especially as the latter is something which could not be specifically described. Such opinions are based, not upon assumed facts, but upon the witness' personal knowledge or observations. It has frequent-

ly been held that, under such circumstances, the facts upon which the opinion is based should be stated by the witness in order that the court and jury may determine whether the conclusions based thereupon are real and whether the facts appear to justify such conclusion. See *Jones on Evidence* (2d Ed.) § 375. Here the witnesses stated such facts, so far as they were susceptible of direct proof; and their opinions, we think, were not inadmissible or lacking in probative force.

These witnesses need not be regarded as experts, in the proper sense of that term; but their previous experience and observation had been such that they might properly testify to their inferences from the sensations experienced and the facts observed by them on the occasion in question, especially where the latter pertained to a matter, viz., the force of the concussion, as compared to that usually experienced, which could not be otherwise fully and adequately communicated to the jury. See 17 Cyc. 185, 208, 209; *Louisville & N. R. R. Co. v. Watson*, 90 Ala. 68, 8 South. 249; *M. P. Ry. Co. v. Martin*, 2 Tex. Civ. App. 634, 18 S. W. 1066, 21 S. W. 781.

And though in cases of this character, where the case turns upon whether the jar or concussion was unusual and extraordinary, such opinions may appear to invade the province of the jury, we think that upon principle and authority, and from the very necessities of the case, they are admissible.

[7] III. A further assignment of error pertains to the giving of an instruction at plaintiff's request, which authorized a verdict for plaintiff if the jury found that the engine, in charge of defendant's servants and agents, ran into the postal cars with *unusual violence*, and that by reason thereof plaintiff was injured, unless the defendant established by a preponderance of the evidence that "such collision" could not have been avoided "by the exercise of the greatest possible care exercised by those engaged in like business." This instruction is assailed upon the ground that the mere fact that the coupling was made with "unusual violence" was insufficient to establish negligence on the part of the defendant. And as to this proposition defendant relies upon *Flucks v. Railroad*, 143 Mo. App. 17, 122 S. W. 348. The latter was a case in which the plaintiff therein was a passenger, and alleged that he was injured by being thrown by a violent and unusual lurch of the car while he was in the act of placing his hat in a rack therein. The negligence charged was that the defendant ran its train into and around a sharp curve at a high and excessive rate of speed, thereby causing the lurch which it was said threw and injured plaintiff. The court gave an instruction authorizing a recovery if the jury found that the lurch was caused by the negligence of defendant's servants operating the train "in running it into and

around a sharp curve at an unusually high rate of speed at said place." This court held that instruction to be erroneous for the reason that it did not leave it to the jury to say whether the speed was an unsafe one, saying: "Defendant's servants were not negligent if they ran around the curve at a higher rate than was usual, provided they kept within the margin of safety; and they were negligent if they ran only at the usual rate, provided it was an unsafe one."

But the court was dealing with quite a different situation in that case from that which is here presented. There the defendant could not be convicted of negligence unless it ran its train into the curve at an excessive rate of speed and one that was unsafe. The mere finding that defendant ran its train at "an unusually high rate of speed at said place" was not sufficient under the pleadings or the theory upon which the case proceeded. In the case before us the charge is that the defendant ran its engine into the postal cars: the plaintiff charging this to have been a collision and resting his case upon the presumption of negligence thereby raised. The evidence developed that the engine ran into these cars in the course of making a coupling thereto, and it then became a question whether the engine struck these cars with greater violence than was usual and ordinary in making such coupling; the plaintiff relying upon such extraordinary violence to raise a presumption of negligence in the handling of the engine and cars.

But, conceding the instruction to be defective for failing to require the jury to find that the violence with which the engine was run into the postal cars was not only unusual but exceeded the margin of safety, we think such omission was cured by other instructions given in the case. Whatever may be said of the holding in the *Flucks Case* to the effect that the instruction there under consideration presented a theory radically wrong, and that the error could not be cured by other instructions, we are satisfied that, under the pleadings and evidence in this case, the most that can be said against this instruction is that it fails to go far enough. Under the theory of the case presented by the pleadings, it was necessary for the jury to find that the violence attending this coupling was unusual. The instruction required the jury to so find, but omitted to require a finding that the violence thereof was such as to be dangerous, whereby it may be said the

jury was not required to find facts sufficient to raise a presumption of negligence on the part of defendant. But at defendant's request an instruction was given requiring a finding for defendant unless the jury found "that the manner in which defendant's employees made the coupling of the engine to the mail cars was negligent or careless, resulting in an unusual, extraordinary jar or concussion." And another instruction for defendant required the jury to find that plaintiff's injury was not only the result of an extraordinary and unusual jar against the mail car but that such jar or concussion was due to some defect or imperfection in the engine, appliances, tracks, or roadbed, or to "the unskillful handling of the engine or cars." And still another instruction authorized a verdict for defendant if the jury found that plaintiff's injury was "the result of mere accident, in consequence of the coupling of an engine to the mail car." It would thus seem that any omission that could be complained of in plaintiff's instruction was fully supplied by those given for the defendant. For at most plaintiff's instruction can only be said to have omitted to require the jury to find sufficient to raise the presumption that the jar was due to defendant's negligence. Defendant's instructions, however, supplied this omission by specifically requiring the jury to find that an unusual or extraordinary jar resulted from a negligent or careless coupling of the engine to the mail cars, and denying a recovery unless such jar was found to be due either to certain defects or imperfections, or to the unskillful handling of the engine and cars, and not the result of mere accident. That such omission in plaintiff's instruction may be supplied by other instructions in the case is in accordance with the decisions of our courts. See *Bliesner v. Reismeyer Distilling Co.*, 157 S. W. loc. cit. 983; *Jackson v. Telegraph Co.*, 156 S. W. 801, and authorities cited.

Error is also assigned with respect to the instruction on the measure of damages, but appellant has pointed out no imperfection therein. We have examined this instruction and think it does not inhere with any reversible error.

As we have found no reversible error in the record the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.



## RUBEY TRUST CO. v. WEIDNER.

(Kansas City Court of Appeals. Missouri.

Dec. 1, 1913.)

## 1. FRAUDS, STATUTE OF (§ 23\*)—CONTRACTS WITHIN STATUTES—DEBTS OF ANOTHER.

If defendant, upon a bank's refusal to honor checks of a club presented by him and signed by him as treasurer, stated that he would himself pay the bank the money used in paying the checks, and the bank paid the money called for, relying upon defendant's agreement, and looking wholly to him for repayment, defendant's promise was original and not within the statute of frauds, though for convenience the checks were charged on the books of the bank to the account of the club.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.\*]

## 2. FRAUDS, STATUTE OF (§ 158\*)—CONTRACTS WITHIN STATUTE—DEBTS OF ANOTHER—JURY QUESTION.

The fact that checks, the money called for by which was paid by a bank on defendant's agreement that he would repay the amount so paid, were kept on the books of the bank as an account of the club by which they were drawn, is a circumstance on the question of whether credit was given to defendant or the club, but is not conclusive; the question being for the jury.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 373-376; Dec. Dig. § 158.\*]

## 3. APPEAL AND ERROR (§ 1001\*)—FINDINGS—CONCLUSIVENESS.

Where there is any evidence at all to support a verdict, it cannot be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

## 4. FRAUDS, STATUTE OF (§ 26\*)—PAYMENT OF ANOTHER'S DEBT — MODIFICATION OF CONTRACT.

Defendant, who agreed with a bank to himself repay money advanced by the bank in honoring checks drawn by a club, upon the bank's refusal to credit the club, could not afterwards limit the effect of his promise by only agreeing to pay in case the club did not do so.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 35-42½; Dec. Dig. § 26.\*]

## 5. FRAUDS, STATUTE OF (§ 158\*)—CONTRACTS WITHIN STATUTE—DEBTS OF ANOTHER — ORIGINAL PROMISE.

In an action by a bank to recover money claimed to have been paid out by it, at defendant's request, in cashing checks drawn by a club, after the bank had refused to honor the checks until defendant agreed to personally pay the amounts advanced, evidence held to show that the bank looked to defendant for repayment and not to the club.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 373-376; Dec. Dig. § 158.\*]

Appeal from Circuit Court, Macon County; B. R. Dysart, Special Judge.

Action by the Rubey Trust Company against Ed. R. Weidner. From a judgment for plaintiff, defendant appeals. Affirmed.

D. L. Dempsey, of Kansas City, and Geo. N. Davis, of Macon, for appellant. Guthrie & Franklin, of Macon, for respondent.

TRIMBLE, J. The respondent, a banking institution in the city of Macon, Mo., sued the appellant to recover a sum of money

paid out by the bank at the instance and request of appellant. The money so paid out, and for which suit is brought, was paid on checks drawn on the respondent bank and signed by appellant as treasurer of the Macon Athletic Club. The suit, however, is not on the checks, nor on a debt claimed to exist against the Macon Athletic Club by reason of the payment of said checks. It is upon an alleged oral promise and agreement said to have been made by appellant to and with respondent that, if it would pay the money on said checks, appellant would repay respondent. Respondent, having thereafter paid the sum sued for, now sues the appellant for reimbursement according to the alleged promise. The Macon Athletic Club was a corporation organized to maintain a baseball club and give baseball games at Macon. This was one of the towns in a baseball circuit established for the purpose of having games in each town in said circuit. The defendant was treasurer of said Macon Athletic Club, and was engaged in running a pool hall in Macon. As the baseball games usually drew large crowds to town, defendant was interested in seeing the club maintained and the games kept up, because the business of the pool hall was thereby increased. To defray the expenses of the club, appellant, as treasurer thereof, drew checks on the respondent bank although the club had no funds in the bank to pay them. When these checks reached the bank, payment on them was refused, and an officer of the bank went to appellant and told him that the respondent would not pay the checks because the club had no funds. The appellant, according to this officer's testimony, told said officer that he had given still other checks which had not come in yet, and that he wanted all of the checks paid and he himself would pay respondent the money used in paying them. Relying upon said agreement and looking wholly to him for the money, respondent then paid out the money called for by said checks, to the amount sued for. The questions whether defendant made the agreement alleged, and whether plaintiff paid the money out in reliance entirely upon said agreement, if any, were submitted to the jury in appropriate instructions. The jury were also instructed that if the defendant only promised that he would pay if the Macon Athletic Club did not, or if the plaintiff relied upon the credit of the Macon Athletic Club and not solely on the alleged promise of defendant, then the finding must be for defendant. The jury returned a verdict for plaintiff in the sum of \$279.50 which was reduced by a remittitur entered by plaintiff to \$244.60, for which sum judgment was rendered. Defendant appealed.

It is urged by defendant that the debt sued for was created by the checks of the Macon Athletic Club, and when the bank paid out

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the money on them it thereby accepted said checks and they became written contracts, and evidence of any prior or contemporaneous agreement cannot be admitted to vary or contradict them. But the debt herein sued for was not created by, nor does it rest upon, the checks. It was created by the agreement of defendant to pay plaintiff the money paid out at defendant's request, and the only function the checks performed was to evidence the amount of such request. The suit was not on the checks, nor was it upon a debt due from the Macon Athletic Club, but upon a debt created by defendant himself by virtue of his agreement to pay plaintiff the money it thereafter advanced.

[1] The questions whether it was upon a debt due from the Macon Athletic Club, and also whether the agreement was merely to pay if the club did not, or whether it was that the defendant himself would pay, and that sole reliance was had thereon, were all submitted to the jury, and it found that the debt created and sued upon was wholly that of the defendant. In such case the statute of frauds does not apply. *Chick v. Frey Coal Co.*, 78 Mo. App. 234. There is a vast difference between telling a merchant, "Let this man have what goods he wants, and I will pay you for them," and telling him, "If this man doesn't pay you for the goods he has bought, I will." In the first statement, the one making it is creating an original undertaking in which he makes the debt entirely his if the merchant relies wholly upon his promise, and the statute of frauds has nothing to do with it. In the second statement, the one making it is agreeing to answer for the debt of another, and, by reason of the statute of frauds, he cannot be bound thereby. In the former case the one so telling the merchant is liable even though the goods are, solely for convenience, charged to the man who receives them, where it appears the merchant did not look to him for pay. *Newton Grain Co. v. Pierce*, 106 Mo. App. 200, 80 S. W. 268, 29 Am. & Eng. Ency. of Law (2d Ed.) 920. If the agreement alleged was an original undertaking and was not a promise to pay the debt of another, and credit was not in fact extended to the club, then the fact that for convenience of bookkeeping the checks paid were kept on the books as an account of the club will not defeat plaintiff's claim, nor will the statute of frauds do so. *Hill Bros. v. Bank of Seneca*, 100 Mo. App. 230, 73 S. W. 307.

[2] Such bookkeeping is a circumstance bearing on the question whether credit was given to the club or not, but it is not conclusive of that fact. 29 Am. & Eng. Ency. of Law (2d Ed.) 925. And it is for the jury to say whether the defendant assumed the attitude of principal or stood merely as a security for the club. *Kansas City, etc., Co. v. Smith*, 86 Mo. App. 608; *Chick v. Frey Coal Co.*, 78 Mo. App. 234.

[3] It is earnestly contended that the evi-

dence is not sufficient to show an original undertaking on the part of defendant to pay respondent, and that, on the contrary, the plaintiff's course of dealing showed it looked to the Macon Athletic Club for its money. As the finding of the jury upon these questions is in favor of plaintiff, we cannot overturn that verdict if there is any evidence at all in support of it. There was sufficient evidence to show that defendant agreed to pay the amount of the checks when they were refused by the bank, and that, upon defendant's agreement to pay, the checks were cashed.

[4] It is true that, after the bank paid out the money on the agreement made with Bank Officer Brown, another of the bank's officers, Harry M. Rubey, saw defendant and asked him about the overdraft, and this officer testified that defendant told him he would pay the overdraft personally if the club did not pay it, and that he would guarantee it himself. But this was after the agreement to pay had been made with Cashier Brown, and defendant could not afterwards change or limit his contract theretofore made by saying then that he would pay only in case the club did not pay. At that time credit had been refused the club and was extended to defendant only upon his promise to pay.

[5] The course of dealing relied upon as showing conclusively that the bank did look to the club for payment is the fact that, more than a month after the money had been paid out by the bank, a deed of trust was executed by the club to the bank on its park and grand stand. But the evidence shows that this deed of trust was not sought by the bank, nor was it accepted as in payment of the debt. The president of the club and the president of the bank both swore that the deed of trust was offered by the club to the bank, and that when this was done both the club and the bank knew that the lien of the deed of trust amounted to little or nothing owing to prior liens, and that the bank finally agreed to take it with the understanding that if anything was realized out of the sale of the club's meager assets under said prior liens, and over and above said liens, the bank would receive and apply it on the debt. This was not an extension of credit to the club, nor did it conclusively show that when the bank paid out the money it was relying on the club, in part or in whole, for repayment instead of on the defendant. At most, it was but a circumstance to be considered by the jury in determining whether credit was extended to the club or not. If the deed of trust was taken upon the terms stated, then it was merely an act in defendant's favor done to assist him in reducing the debt as far as possible. This question of the terms on which the deed of trust was received was also submitted to the jury by proper instructions. Under all the circumstances,

this question and the questions of whether or not the defendant's agreement was an original undertaking, and whether or not credit was extended solely to him were for the jury, and were submitted to the jury by instructions on both sides, and we are not warranted in disturbing its verdict.

The judgment is affirmed. All concur.

#### AVERY CO. v. POWELL.

(Kansas City Court of Appeals. Missouri.  
Nov. 17, 1913. Rehearing Denied  
Dec. 12, 1913.)

##### 1. BILLS AND NOTES (§ 485\*)—ANSWER—VERIFIED DENIALS.

Under Rev. St. 1909, § 1985, providing that, when any petition or other pleading shall be founded on any instrument in writing alleged to have been executed by the other party, the execution shall be adjudged confessed, unless the other party deny it by answer or replication verified by affidavit, the execution of a note which defendant claimed was procured by fraud is admitted unless the answer is verified, and in the absence of verification the fraud in the execution of the instrument in suit cannot be relied on.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1542-1554; Dec. Dig. § 485.\*]

##### 2. FRAUD (§ 50\*)—PRESUMPTIONS AND BURDEN OF PROOF.

Fraud is never presumed, and the burden of proving fraud rests upon him who asserts it; it being presumed, when a transaction under consideration may as well consist with honest and fair dealing as with a fraudulent purpose, that it was the intention of the parties to fairly deal.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.\*]

##### 3. CONTRACTS (§ 94\*) — SETTING ASIDE — FRAUD.

To warrant the setting aside of a written obligation on the ground of fraud there should be real fraud to excuse the signer from the failure to know the contents of the instrument, and he cannot have it set aside merely because the terms were different from his understanding, where he took no precautions to ascertain the terms of the instrument and no actual fraud was practiced upon him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.\*]

##### 4. BILLS AND NOTES (§ 520\*) — ACTIONS — FRAUD.

In a suit against the guarantor of a note, where he set up fraud in the procurement of his guaranty, evidence *held* insufficient to show any fraud on the part of plaintiff's agent.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.\*]

##### 5. BILLS AND NOTES (§ 102\*)—ACTION—CANCELLATION.

Where defendant signed a note as guarantor, without taking any precautions to ascertain its terms, he is not entitled to cancellation on the ground of mistake because the terms were not as he thought they should be.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 241; Dec. Dig. § 102.\*]

Appeal from Circuit Court, Callaway County; David H. Harris, Judge.

Action by the Avery Company against T. A. Powell. From a judgment for defendant, plaintiff appeals. Reversed and remanded with directions.

S. D. Stocks, of Mexico, Mo., C. M. Hay, of St. Louis, and H. N. Eversole, of Fulton, for appellant. A. C. Whitson, of Mexico, Mo., and J. R. Baker, of Fulton, for respondent.

TRIMBLE, J. Plaintiff sued the defendant as guarantor of a note executed by I. D. Kemp, evidencing one of the four deferred payments on a threshing machine sold by plaintiff to Kemp. The price of the machine was \$1,050, and, as Kemp was not able to pay any cash at the time of purchase, the above amount was divided into four notes of \$262.50 each, one due September 1, 1909, another, November 1, 1909, the third, September 1, 1910, and the fourth (the guaranty of which is the subject of this suit) due November 1, 1910; all four of the notes being secured by chattel mortgage on the machine.

Prior to the sale defendant had an arrangement with plaintiff's selling agent that for every sale defendant assisted in making he was to receive a part of the commission. Consequently, when plaintiff's selling agent appeared in defendant's store and asked him if he knew where a machine could be sold, defendant told him of Kemp and went with the agent to see him. On the way, the agent agreed to give defendant \$50 if they succeeded in making a sale of the machine at \$1,050. It was ascertained, however, that Kemp could not pay anything down, and, as the plaintiff company would not sell to him on those terms, as he had no credit, defendant offered to guarantee one half of the purchase price. The dispute is over which particular half defendant agreed to guarantee. The sale was made in July, 1909, and defendant insists that he agreed to guarantee the one half falling due that year, namely, the note falling due September 1, 1909, and the one falling due November 1, 1909. Plaintiff contends that nothing was said about which two of the four notes defendant was to guarantee. The proposition to buy the machine on the terms above indicated, with defendant as guarantor of one-half the purchase price, was mailed to the plaintiff company for its acceptance. Accompanying it went a statement, dated July 1, 1909, of the financial condition of defendant, signed by him; and also a contract bearing his signature, stating that, for value received and in consideration of credit being extended to Kemp, defendant would "guarantee the payment of certain of his notes given for the purchase price thereof to the amount of \$525, as follows: Note for \$262.50, due Nov. 1, 1909; note for \$262.50, due November 1, 1910." The com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pany accepted the proposed contract and sold the machine to Kemp. When it arrived where it was to be set up and delivered, plaintiff's selling agent had Kemp to execute the chattel mortgage on the machine and the four notes above mentioned, and also had defendant to sign a written contract of guaranty on the back of two of said notes. It is defendant's contention that the agent, by fraud, succeeded in getting him to guarantee the second note, due November 1, 1909, and the last note, due November 1, 1910, when the agreement and understanding was that defendant would guarantee only the *first two* notes, falling due the same year and season the machine was purchased. Kemp paid the first note when due, and when the second note fell due, defendant assisted Kemp to the extent of \$200 in paying that off. By reason of the payment of the first two notes, defendant insists the contract of guaranty has been fully performed.

The answer pleaded fraud in the obtaining of defendant's signature to the fourth instead of the first note; and in another count set up a counterclaim for the \$50 commission due him on the sale of the machine. The jury found a verdict for defendant assessing his damages under the counterclaim at \$9.97, this being the balance of defendant's commission which, according to all the evidence, had remained unpaid. However, it had been credited upon the note before suit was instituted. So it was only in the event that defendant's charge of fraud was successful that he would be entitled to this sum on his counterclaim.

[1] There are many points raised and discussed by both sides. In the view which we take of the case, however, it is not necessary to notice more than one or two of them. Stated together as one, they are that under the pleadings and the evidence in the case there was no defense to the cause of action stated in plaintiff's petition. The answer was not verified. The fraud charged pertained to the execution of the contract. Hence the execution of the instrument sued on must be adjudged confessed. Section 1985, R. S. Mo. 1909. And fraud in the execution of the instrument sued on cannot be relied on if the answer is not verified. *Beck v. Obert*, 54 Mo. App. 240. Defendant contends that this rule is not applicable, as no objection nor exception to evidence in support of fraud was made on this ground by plaintiff. The record shows there was, also that such objection and exception was preserved in the motion for new trial. However, even if there were no objection nor exception made and saved by plaintiff in the record, still there was ample evidence offered to affirmatively support plaintiff's cause of action, and defendant's evidence showed that none of the facts were disputed except the sole question as to fraud

in obtaining defendant's guaranty to the note, dated November 1, 1910, instead of to the note dated September 1, 1909. And as to this question of fraud, defendant's evidence is insufficient, as matter of law, to sustain it.

In the agreement of July 1, 1909, by which defendant agreed to guarantee two of the four notes, and upon which plaintiff agreed to sell Kemp the machine, it was stated that defendant would guarantee the note due November 1, 1910, which is the note now in controversy. Defendant does not claim that when he signed this contract he did not have his glasses, nor does he swear that he did not sign the agreement to guarantee. He would not say he did not sign it, but only that one of the letters in his name did not look right. True, he says he did not agree *in writing* that day to guarantee any notes, but only gave a written statement as to his financial ability. But this alone is no evidence of any fact showing fraud in obtaining his signature to the agreement of that date. So that on July 14, 1909, at the time the chattel mortgage and four notes were being presented to Kemp for execution, and two of the notes were to be guaranteed by defendant, there was a *written contract* between plaintiff and defendant *specifying that the latter would guarantee the payment of this particular note in controversy*. And therefore when the agent laid the two notes down on the table, and said to defendant: "Here are your two notes," meaning that they were the two defendant was to guarantee, such statement, in the absence of fraud vitiating the above contract, was true since they were the two notes he had contracted in writing to guarantee. Consequently, in the absence of fraud vitiating the above contract of July 1st, there was no element of fraud in the statement of the agent "Here are your notes." They were the notes called for in the contract of July 1st.

[2] There was no other act from which fraud could be inferred at the time the notes were guaranteed, nor is there any evidence showing fraud at the time the guaranty was signed on the back of the note. Fraud is never presumed. The burden of proving fraud rests on him who asserts it. While fraud may be inferred when it is a legitimate deduction from all the facts and circumstances in evidence, it is never to be presumed, and when a transaction under consideration may as well consist with honest and fair dealing as with a fraudulent purpose, it is to be referred to the better motive. *Garesché v. MacDonald*, 103 Mo. 1, 15 S. W. 379.

[3, 4] We have carefully read over the entire evidence offered in support of the contention of fraud, and find none. Defendant was a business man, a storekeeper, and therefore acquainted with business methods and the means of ascertaining what he was doing when he signed his name on the back of the

notes. There is no evidence of any trick, artifice, or deception practiced by the agent on him at this time. Neither is there any evidence that the agent was in a hurry or hurried defendant. On the contrary, it was defendant who was in a hurry. He was very busy in his store when the agent came for him to sign the guaranty, and told the agent so. To this the agent replied that he wanted to get the whole matter closed up so he could go to the little station where the machine was and unload it. He wanted the defendant to go before the notary then, and told him it would not take long. Defendant went to the notary's office. The agent got out two notes and laid them face down on the table and said: "Here are your notes. You can sign your name and go on back to the store if you are in a hurry." The defendant did not have his glasses, it is true, and probably could not read the fine print on the back of the note in which the guaranty was stated. The date at which the note fell due, however, was on the face of the note, and it is not shown whether he could have read it or not if he had looked. But, assuming that he could not have seen it without his glasses, he did not say anything to the agent about not having his glasses, nor did he ask the agent anything about which note he was guaranteeing. He took absolutely no precaution whatever to ascertain which of the four notes he was writing his name upon, but signed his name twice, and went immediately back to his business. It is thus seen that the guaranteeing of the fourth instead of the first note was a result of defendant's own negligence, and there is an entire absence of any testimony going to show fraud. The agent practiced no fraud upon defendant by which the latter was induced to refrain from reading or having read to him the notes he was guaranteeing. No misrepresentations were made. It cannot be said that the act of laying the notes upon the table and saying: "Here are your notes" was a fraudulent piece of conduct on the part of the agent because the two were the notes he had contracted in writing to guarantee. There should be real fraud in the opposite party to excuse the failure to know the contents of the instrument. 2 Bigelow on Fraud, 526; *Fitzgerald v. Fitzgerald*, 100 Ill. 385. In the absence of any misrepresentation calculated or likely to mislead, negligence in signing an instrument, without knowing or making any effort to know the contents thereof, will prevent one from avoiding the contract. The courts will turn a deaf ear to a man who seeks to get rid of a contract solely on the ground that its terms are not what he supposed them to be. 2 Bigelow on Fraud, 525. A contract cannot be avoided merely because the person who executed it was ignorant of its contents, if no fraud was practiced to induce him to refrain from reading

it or having it read, for in such case his ignorance is due to his own negligence. 14 Am. & Eng. Ency. of Law (2d Ed.) 134. Persons must exercise at least ordinary prudence in their business dealings. 14 Am. & Eng. Ency. of Law (2d Ed.) 117. Giving to defendant's testimony the widest and strongest effect, there is nothing to show fraud for which the contract ought to be avoided. He knew he was going to the notary's to sign the guaranty, and yet did not take his glasses, nor did he mention the fact to the agent that he could not read without them. In a hurry to get back to his own business, he signed the notes on the back without inquiry or investigation. The fact that he guaranteed a note falling due November 1, 1910, instead of one falling due September 1, 1909, resulted from his own negligence, and not from fraud of the other party.

[5] Such negligence would prevent his avoiding the contract on the ground of mistake as well as fraud had mistake been pleaded. 2 Pom. Eq. Jur. (3d Ed.) § 856. Since there was a total failure to establish the defense of fraud, whether it be considered in the pleading for failure to verify or in the evidence adduced to support the charge, and a corresponding admission of the facts upon which plaintiff's cause of action rests, and since defendant is not entitled to recover the \$9.97, unless relieved from the guaranty of said note (as that sum has already been credited thereon), the judgment is reversed and remanded, with directions to set aside the verdict and enter judgment for plaintiff upon the cause of action stated in the petition, and also judgment for plaintiff on defendant's counterclaim.

All concur.

#### HEISLER v. CLYMER.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

##### 1. LIMITATION OF ACTIONS (§ 100\*)—FRAUD.

The petition in an action for the value of certain shares of stock and for an accounting alleged a purchase of 185 shares of stock in a corporation of which defendant and plaintiff were both stockholders, by defendant as agent and trustee, for himself, plaintiff, and three others, which he paid for with borrowed money, for which he gave his note, pledging the shares as security; that thereafter such corporation consolidated with another company; that defendant, acting as such agent and trustee, exchanged such 185 shares for stock in the consolidated company; that he notified plaintiff that his share thereof was 37 shares; that, relying upon this representation, it was agreed that plaintiff would take and pay for 25 shares, as he was not able to take the whole 37 shares; that the 185 shares were exchanged for 277½ shares in the consolidated company, and plaintiff was therefore entitled to 12½ shares additional; that defendant falsely and fraudulently stated to plaintiff that he was giving and transferring to him his full pro rata share; that plaintiff, having been long associated with defendant, reposed implicit faith and confidence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—22

in him, and fully relied upon such representation, and accepted and paid for the 25 shares, believing it to be true; that such representation was false and fraudulent, as defendant then held  $12\frac{1}{2}$  extra shares, which were the property of plaintiff; that defendant fraudulently concealed the truth from plaintiff, held the stock, and converted it to his own use, and thereafter concealed the truth and continued to secretly hold and use the stock or its proceeds; and that plaintiff had no knowledge whatever that defendant had concealed the fact of his having received such  $12\frac{1}{2}$  shares until within eight weeks before the filing of the suit, whereupon he demanded the stock or its value, and defendant again falsely represented that plaintiff had been given his full share of the stock. The transfer of such stock to plaintiff was more than five years before the bringing of the suit. Defendant pleaded limitations, and the cause was submitted on an agreed statement, which did not show acts of concealment with any more particularity than the petition, and on defendant's motion for judgment on the pleadings, which was sustained. *Held*, that the judgment was properly granted, as the petition did not show sufficient facts to bring the case within Rev. St. 1909, § 1889, subd. 5, providing that in actions for relief on the ground of fraud the cause of action is to be deemed not to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.\*]

## 2. LIMITATION OF ACTIONS (§ 100\*)—RELIEF ON THE GROUND OF FRAUD.

Rev. St. 1909, § 1889, specifies the actions which must be commenced within five years. Subdivision 5 specifies an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. *Held*, that such an action must be brought within five years and not within ten years of the discovery of the facts constituting the fraud.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.\*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Antone Heisler against Milton G. Clymer. From a judgment for defendant on the pleadings, plaintiff appeals. Affirmed.

N. P. Zimmer and Marion C. Early, both of St. Louis, for appellant. Schnurmacher & Rasseleur, of St. Louis, for respondent.

**REYNOLDS, P. J.** This is an action to recover the value of certain shares of stock, charged to have been converted by defendant to his own use, July 15, 1902, and for an accounting of the profits received by defendant from time to time as the holder of these shares. The statement of the case by counsel for respondent is brief and fair, so that we adopt it, not literally, but substantially, as a summary of the amended petition on which the case went to trial.

[1] It is alleged in that petition, that in 1896, plaintiff Heisler, defendant Clymer and several others organized the Columbia Preserving Company and agreed with each other that the interest of each should be and al-

ways remain the same; that in January or February, 1900, two of the stockholders, owning 185 shares, wanted to sell their shares and that plaintiff, defendant and three other stockholders then owning all of the stock except the shares so offered for sale, agreed to purchase these 185 shares; that defendant was selected as the agent of the five and, acting as such agent and trustee, but in his own name, he purchased the 185 shares at and for the price of \$15,000, borrowed the money for this purchase, giving his own note for it, and pledged the shares as security for the debt incurred by him in the purchase; that defendant took the title to the stock in his own name, although he was in fact holding it in trust for the five parties; that in March, 1900, the stockholders of the Columbia Preserving Company voted to unite that company with the St. Louis Syrup & Preserving Company, and the latter company agreed to the consolidation, provided defendant and his associates would purchase the 185 shares above referred to from the then holders of those shares; that on the consolidation of the two companies, defendant, acting as such agent and trustee, exchanged the 185 shares of Columbia Preserving Company stock for stock in the St. Louis Syrup & Preserving Company, which stock was issued to defendant but held by him as such agent and trustee for the five original parties. It is then alleged that on or about July 15, 1902, plaintiff was notified by defendant that plaintiff's pro rata of the stock of the St. Louis Syrup & Preserving Company was 37 shares, and that the shares were ready for distribution. [We add here that it appeared by the agreed statement that the note for \$15,000, which defendant had given had matured and that it and its accrued interest had to be paid, and that plaintiff was then, that is in July, 1902, called upon to pay his proportion of the note and accrued interest, upon doing which he would receive his proportionate number of the 185 shares.] It is further averred that relying upon this representation of the defendant, it was agreed between plaintiff and defendant, "that plaintiff would take and plaintiff did take and pay for 25 shares of said stock at and for the sum of \$2,500, for the reason that at that time plaintiff was not able to take all of said 37 shares." It is then charged that defendant had received in exchange for these 185 shares of Columbia Preserving Company stock  $277\frac{1}{2}$  shares of the St. Louis Syrup & Preserving Company stock, therefore plaintiff avers that he (plaintiff) is entitled to have one-half share additional with each of the 25 shares of stock so transferred to him, or  $12\frac{1}{2}$  shares additional. That part of the petition charging fraud is as follows:

"Plaintiff further states that at the time, to-wit, on or about July 15, 1902, said defendant notified this plaintiff that said stock

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was ready for distribution among the persons aforesaid, he falsely and fraudulently stated to this plaintiff that he was giving and transferring to him his full pro rata share of said stock, and plaintiff having been long associated with defendant in business, reposed implicit faith and confidence in said defendant and fully relied upon said representations of defendant, believing the same to be true, accepted and paid for 25 shares of said stock. Plaintiff further says when defendant represented to plaintiff that he was transferring to him all the stock to which he was entitled said representation was false and fraudulent for the reason that in truth and in fact defendant at the time held said extra 12½ shares as aforesaid which was in truth the property of this plaintiff, and he was entitled to have the same. But plaintiff says that defendant so fraudulently concealed the truth from this plaintiff, held said stock, transferred and converted the same to his own use and ever thereafter concealed the truth from this plaintiff and continued to secretly hold, use said stock or its proceeds.

"And plaintiff says that said defendant Clymer held and now holds said 12½ shares of said stock so fraudulently concealed and held back from this plaintiff and converted the same to his own use. Plaintiff further says that he had no knowledge whatever that said defendant had so concealed the fact of his having received said 12½ shares of said stock and so wrongfully converted the same to his own use until within the last eight weeks before the filing of this suit, whereupon he demanded of defendant said stock or its value and accumulated dividends, which was by defendant refused, said defendant at said time again falsely representing to plaintiff that he had already been given his full share of said stock. That said fraud remained and was kept secret and concealed from this plaintiff until it was so discovered by him at the time stated, and this suit is filed within less than ten years after the commission of said secret fraud upon this plaintiff."

Plaintiff further charges that the St. Louis Syrup & Preserving Company stock was transferred by defendant to the Corn Products Company; that defendant had received large dividends on the stock which he had also converted to his own use and that the 12½ shares are now worth \$6,000. Judgment is prayed against defendant for the value of this stock, namely, \$6,000, together with all dividends collected by him from and after the date of the conversion, and that defendant be compelled to account for all profits realized through sales and transfers of the stock and for such other and further relief as to the court might seem just and proper.

Defendant filed a general denial of the allegations of the petition and also pleaded the five-year statute of limitations as a bar to the action.

The cause coming on for hearing before

the court, counsel for plaintiff made a statement to the court of what the evidence would show to be the facts in the case, of which it may be said that it covered, but somewhat more in detail, the facts set out in the petition. It is to be especially noted that this statement went no further into any particularization of acts of concealment than does the petition, all of the averments of which as to that are given in the above quotation from the petition itself. At the conclusion of this statement, by agreement of counsel, the cause was submitted to the court on the statement and pleadings and on a motion of defendant for judgment on the pleadings. This motion was sustained, judgment accordingly being entered in favor of defendant. Saving exception, interposing a motion for a new trial and excepting to that being overruled, plaintiff has brought the case here on appeal, assigning as errors the action of the court in sustaining the demurrer and motion for judgment on the pleadings; that the court erred in holding, under the petition and statement of facts, that the cause of action was barred by the five-year statute of limitations; that the court erred in ruling that plaintiff was barred by the statute of limitations because plaintiff had relied upon representations made by defendant, thus allowing defendant to benefit by his own fraud; that under the admitted facts the court erred in refusing to enter a judgment and decree for plaintiff for the value of the stock in question and for an accounting; that the court erred in denying the contention of plaintiff that he was protected and entitled to recover under the ten-year statute of limitations; that the court erred in entering judgment for defendant on the admitted facts and in overruling plaintiff's motion for a new trial.

It will be apparent from an examination of the averments of the petition, and these confirmed by the statement, that the transaction upon which the cause of action is founded, took place on or about the 15th of July, 1902, that being the date upon which it is alleged that defendant, notifying plaintiff that the stock was ready for distribution among those entitled to it, had falsely and fraudulently stated to plaintiff "that he was giving and transferring to him his full pro rata share of said stock," stating that at 37½ shares, and had transferred and delivered to plaintiff 25 shares at \$2,500, that being all of the shares plaintiff was then able to pay for. The ground of attack upon the petition and the sufficiency of the facts stated is, that neither in the petition nor in the statement of facts plaintiff proposed to prove, is it anywhere alleged that defendant ever stated anything or did anything which would prevent plaintiff, if he had exercised ordinary diligence, from discovering at the time, that is, in July, 1902, the facts which he now alleges to be facts, and that although the statute of limitations had been

pleaded by defendant, plaintiff had not, by reply, set up any facts which would entitle him to the benefit of the fifth clause or subdivision of section 1889, Revised Statutes 1909. This action was commenced March 7, 1910. It is contended that considering the facts pleaded and also stated as the facts which could be proved, plaintiff had not made out a case which brought him outside the operation of the five-year limitation and within the exceptions of this fifth clause of section 1889 (statute of limitations). This section 1889 designates what actions shall be barred in five years, the fifth subdivision, among others, including actions for relief on the ground of fraud, provided that "the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." It is claimed, and this is the theory upon which the learned trial court acted, that the facts which counsel for plaintiff had pleaded and had announced in his opening statement that he expected to prove, were not facts which would take the case out of the operation of the statute; that no explanation whatever was offered to show why plaintiff, who was himself a stockholder of the Columbia Preserving Company, and who claims to have been interested to the extent of one-fifth in the 185 shares purchased by defendant, should not have known that the shares purchased by defendant were exchangeable like all the rest of the stock, on the basis of one share of the old for one and a half shares of the new stock; nor was any explanation made to show why plaintiff did not learn from his three other associates, all interested with him in the purchase of the 185 shares, the disposition defendant had made of the 185 shares and of the shares received from the St. Louis Syrup & Preserving Company in exchange therefor; nor was any explanation made to show why plaintiff did not go to the books of the corporation and there ascertain that defendant had received one and a half shares of the new for each share of the old stock which he turned in, and which plaintiff had received upon his own stock; nor is it claimed that plaintiff ever inquired of defendant as to the number of shares of the new company he had received in exchange for the 185 shares of the old. This is the summary of the statement of the position of defendant in the case. An examination of what transpired before the court when plaintiff was making his statement and when the petition and the facts stated were under consideration by the court, shows that these were the points involved, and that they covered the one point particularly involved, namely, the application of the exception in the fifth subdivision of section 1889. It is evident that the reference by plaintiff, in his assignment of errors, to the ten-year statute of limitations, is to the ten

years mentioned in this subdivision five and not to the ten-year limitation covered by section 1888, as there is no pretence that this action falls within section 1888.

*Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 530, is, so far as we are aware, the first case in which the construction of the statute of limitations and the disabilities and exceptions contained therein, appear to have come before our Supreme Court for full consideration. It is true that a paragraph of the opinion to the effect that parties not barred could not unite in action with those who were, was held no longer to be true, owing to a subsequent change of the statute, *Sutton v. Dameron*, 100 Mo. 141, loc. cit. 154, 13 S. W. 497, but save as to that point the case has often been cited and followed. As applicable to the case at bar, it is to be noted that it is said in this *Keeton Case*, 20 Mo. loc. cit. 542, that where the answer sets up the statute of limitations as a defense and there is no averment in the petition itself, or in the reply, pleading the exceptions contained in the statute, that no evidence could be received in relation to them; "for the evidence to be admissible, must be founded on some allegation in the pleadings."

In *Landis v. Saxton*, 105 Mo. 486, loc. cit. 489, 16 S. W. 912, 24 Am. St. Rep. 403, answering the question as to whether the action of the plaintiff in that case was barred by this fifth subdivision of section 1889, it is said: "The trusts against which the statute will not run 'are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction' of a court of equity, but other trusts which are the ground of an action at law are open to the operation of the statute. *Kane v. Bloodgood*, 7 John. Ch. (N. Y.) 90, 11 Am. Dec. 417. The kind of trusts which fall within the exclusive jurisdiction of a court of equity are direct trusts created by deed or will, or by appointment of law, e. g., executorships or administrations; but cases of constructive or implied trusts, which result from partnerships, agencies and the like, are subject to the operation of the statute. *Farnam v. Brooks*, 9 Pick. (Mass.) 212. The crucial test in all such cases is: Is there a remedy at law? If there is, that is a conclusive answer to the claim that a technical trust as aforesaid has been created. *Murray v. Coster*, 20 Johns. (N. Y.) loc. cit. 583." This same rule was announced in *Shelby County v. Bragg*, 135 Mo. 291, 36 S. W. 600. There at page 296 of 135 Mo., at page 600 of 36 S. W., it is said: "The rule is that in implied trusts which grow out of the facts and circumstances of each case, the statute commences to run as soon as a party has a right to commence a suit to declare and enforce it." *Keeton's Heirs v. Keeton's Adm'r*, supra, is cited for this.

In *Callan v. Callan*, 175 Mo. 346, 74 S. W. 965, referring to *Shelby County v. Bragg* and quoting from *Farnam v. Brooks*, supra, to



the effect that if the aggrieved party knew of the fraud when it was committed, or had full possession of the means of detecting it, which is the same as knowledge, neglect to bring forward the complaint for more than the statutory period, will deprive him of his remedy, and it is there noted that the authorities are all one way upon this question. After citing many of them, it is said (175 Mo. loc. cit. 361, 74 S. W. loc. cit. 969), quoting from Wood on Limitations (3d Ed.) sec. 276: "The bill or complaint should set forth the nature of the transaction fully, and also the acts of concealment, and the time of its discovery. \* \* \* The concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character and must be alleged and proved so as to bring the case clearly within the meaning of the statute." After citing cases, the court continues: "While the petition alleges that the fraud complained of was not discovered by plaintiff until September, 1898, it does not allege what the discovery was, nor does the proof show that it was by reason of anything that defendant said or did that it was not discovered earlier."

State ex rel. v. Yates, 231 Mo. 276, 132 S. W. 672, is to the same effect.

In the recent case of Johnson v. United Railways Co., 243 Mo. 278, 147 S. W. 1077, quoting approvingly from Bent v. Priest, 86 Mo. 475, that this fifth clause of section 1889 applies to equitable as well as legal causes of action, it is further held that the cause of action involved was barred by the five-year statute, whether plaintiff and those from whom he purchased knew of the transaction or not, "for the reason that the facts were open and known, appearing upon the records of the corporation. \* \* \* No act of concealment of the facts is shown." Authorities are cited sustaining the proposition that, "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. \* \* \* A party cannot avail himself of this exception to the statute when the means of discovering the truth were within his power and were not used. \* \* \* Our conclusion is that it (the cause of action) accrued when plaintiff discovered the fraud; or when, by proper diligence as an ordinarily prudent man, he, under the circumstances, should have discovered it." The clause of the statute, it is further held, applies only to technical, express trusts, trusts created by deed or by will; does not cover implied trusts; referring to and quoting from Shelby County v. Bragg, supra. It is further held that to prevent the statute from running, there must be concealment, and mere silence is not concealment; there must be some direct contrivance intended to exclude suspicion and prevent inquiry, and where the

transactions alleged to have been fraudulent were open to plaintiff, no concealment can be said to exist, for the means of knowing are held to be knowledge. The rule as to concealment and knowledge, it is further there held, does not apply to a party sustaining a fiduciary relation to plaintiff in a suit to compel that party to account for trust funds fraudulently converted to his own use, but such a relation of trust exists only where there is an express trust created by deed or will, or by law, and finally that the five-year statute is a bar to a suit to recover moneys converted to his own use by a constructive trustee of an implied trust, unless there has been such concealment of the facts as to defeat discovery. That the acts of concealment must be pleaded and proved, is universally held in all the authorities. Upon a practically unbroken line of authorities, the judgment of the learned trial court is right.

[2] We are unable to find anything in the cases cited by learned counsel for appellant which lends support to the position here taken by them, to the effect that plaintiff was entitled to bring his action at "any time within ten years" of the discovery of the facts constituting the fraud. The authorities all hold, passing on this very clause, that the right of action in a case such as this falls within the five-year limitation.

The judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

# CITIZENS' STATE BANK OF TRENTON v. SHANKLIN.

(Kansas City Court of Appeals. Missouri.  
Nov. 17, 1913. Rehearing Denied  
Dec. 12, 1913.)

## 1. INSANE PERSONS (§§ 13, 26\*)—INQUISITION —NOTICE—STATUTE—COLLATERAL ATTACK.

Rev. St. 1909, § 476, providing for inquisitions as to insanity without notice to or the presence of the alleged insane person, when the probate court shall spread on its records the reason why such notice or attendance was not required is invalid, being in conflict with both the federal and state constitutions, and open to collateral attack.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 21, 35, 36; Dec. Dig. §§ 13, 26.\*]

## 2. INSANE PERSONS (§ 13\*)—INQUISITIONS— VALIDITY—ADMISSIONS.

Where defendant was not notified of an inquisition as to his sanity, his mere presence in court at a subsequent proceeding wherein he was declared sane is not a judicial admission of the validity of the first inquisition; it appearing that the second was not instituted by him.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 21; Dec. Dig. § 13.\*]

## 3. INSANE PERSONS (§ 54\*)—GUARDIANS— RIGHTS OF GUARDIANS.

While the probate court, in handling the estate of an insane person, may authorize ex-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

penditures which it is convinced the insane person would have made if competent, an unauthorized person acting as guardian for a lunatic is not entitled to credits for any expenditures except those for necessities for the insane person or his family.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 76, 86; Dec. Dig. § 54.\*]

**4. INSANE PERSONS (§ 54\*)—GUARDIANS—CREDITS.**

One appointed as guardian of defendant in a void inquisition as to his sanity is not entitled to a credit for moneys furnished defendant's adult son to enable him to move to California; it not appearing how the sums furnished could be considered necessities.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 76, 86; Dec. Dig. § 54.\*]

**5. INSANE PERSONS (§ 65\*)—GUARDIANS—CREDITS.**

Where the guardian of defendant, appointed in an inquisition wherein he was held insane, expended money to keep up life policies previously taken out by defendant, the guardian is entitled to a credit for such expenditures even though his appointment was void.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 108, 110-114; Dec. Dig. § 65.\*]

**6. INSANE PERSONS (§ 54\*)—GUARDIANS—SUPPORT OF FAMILY.**

The duty of a parent to support his children ends when they reach majority, be they male or female, and hence one appointed as guardian of defendant under a void inquisition as to his sanity is not entitled to credits for sums furnished defendant's adult daughter to defray necessary expenses during her last illness.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 76, 86; Dec. Dig. § 54.\*]

**Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.**

Action by the Citizens' State Bank of Trenton against Nathaniel Shanklin. From a judgment for defendant, plaintiff appeals. Affirmed.

Hall & Hall, of Trenton, and D. M. Wilson, of Milan, for appellant. J. W. Bingham, of Milan, O. M. Shanklin, of St. Joseph, Collier & Robinson, of Trenton, and J. P. Butler, of Milan, for respondent.

ELLISON, P. J. Plaintiff's action is set out in a petition containing two counts, and is founded on an itemized account. One of the counts is drawn upon the idea that the items of the account were furnished to defendant himself; while in the other it is stated that the defendant was insane at the time the items accrued, and that they were furnished to his guardian. At the close of the evidence in plaintiff's behalf the trial court gave a peremptory instruction to find for defendant.

The case is presented practically altogether on the second count. The items are payments made by the plaintiff bank to Hughes, as guardian of defendant. These items cover a period of several years, beginning in 1903, and total a sum of \$9,214.20, credited with \$6,710.71, leaving a balance of \$2,503.49,

for which judgment is asked. Counsel have divided this gross balance into four claims, viz.: "Amount paid Jimmie Shanklin, \$195.40; amount paid out for life insurance, \$1,714.47; amount paid out for Ida Shanklin, \$2,585.25; interest at 6 per cent. on the different items paid out, \$1,006.37."

It was admitted at the trial that defendant "was insane and incapable of transacting ordinary business affairs from November, 1895, until July, 1910, and was in that condition continuously between those dates." The evidence shows, and it is practically conceded, that the probate court of Grundy county declared defendant to be insane on the 11th of March, 1896, after a trial had by a jury; the judgment showing the following on its face: "Comes now on to be heard the inquiry into the sanity of Nathaniel Shanklin on the information of C. L. Berry, heretofore filed, and it appearing to the court that said Nathaniel Shanklin is now confined in a hospital in the city of St. Louis and unable to attend and be present at said inquiry or be served with notice thereof, it is ordered that said proceedings be held without his presence and without notice being served upon him of said proceedings."

C. L. Berry was first appointed his guardian, who, after serving until 1898, resigned, and H. J. Hughes was appointed and qualified to succeed him; and, as just stated, he obtained the money from plaintiff bank and expended it in various ways, but the particular expenditures over which this controversy has arisen, with interest thereon, are as stated and set out above. The evidence shows that Berry and Hughes each assumed to act as guardian, and that plaintiff furnished the money to Hughes for the purposes above stated.

[1] But defendant insists that the proceedings in the probate court adjudging the defendant to be insane, and appointing a guardian are void, since they were had without notice to defendant, as is shown upon the face of the judgment we have set out. This objection to the judgment must be sustained. The statute in force when the adjudication was had authorized the proceeding to be instituted and carried on to judgment and the appointment of a guardian without notice, if the court placed upon its record "the reason why such notice" was not required. A similar statute was construed and accepted as being a valid enactment in *Dutcher v. Hill*, 29 Mo. 271, 77 Am. Dec. 572, and other cases since. But in *Hunt v. Searcy*, 167 Mo. 158, 67 S. W. 206, the Supreme Court, in an opinion by Marshall, J., after expressing surprise that the validity of the statute had not theretofore been questioned, declared it to be in conflict with both the federal and state constitutions, and that a proceeding in the probate court without notice to the alleged insane party was void collaterally as well as

directly. This statute has been allowed to stand since such decision, and has been carried into the Revision of 1909, § 476. But it must be treated as a void provision, and the proceedings had under it in this case declaring defendant to be insane and appointing a guardian for him must be held void, unless they are cured by the following further consideration.

[2] Defendant's mind became restored and he was declared to be sane by proceedings instituted in the probate court. Plaintiff claims that he appeared in that proceeding and thereby recognized and validated the original adjudication of his insanity. In this connection counsel say the whole opinion in *Dutcher v. Hill* was not overruled in *Hunt v. Searcy*, and that the latter portion of it, which states that, though the proceedings adjudging insanity were "irregular" for want of notice, yet if, after regaining his mind, the party affected came into court and asked to be relieved from the custody of his guardian for the reason that his mind was restored, it amounted to an admission of record that the proceedings against him were valid. We are relieved from the necessity of saying whether *Hunt v. Searcy* should be held to condemn that part of *Dutcher v. Hill*, from the fact that we do not find the record shows such appearance and admission by the defendant in this case. The proceedings to relieve defendant in this case and to discharge Hughes as guardian were not instituted by defendant, or at his instigation. Nor does it appear that he was served with notice, though the record shows his presence in the courtroom, but not as a participant in the proceedings. His name appears in the way of recitation that he and eight other persons were in court as witnesses. The most that we can make out of the wording of the record is that he was a witness; and it is recited that the court, "after seeing and talking with" him and hearing witnesses, concluded he could manage his own affairs. We do not think such a record shows a recognition of the original proceedings, or that it amounts to a solemn admission that they were valid. But plaintiff insists that granting there was no valid adjudication of insanity and that the appointment of a guardian was void, defendant is yet liable for the account on the ground that it was for necessities furnished for himself and his family; and, in fact, plaintiff's petition is based on the ground that it was necessities which were furnished the guardian.

[3] There being no legal guardian, and the proceeding of the probate court being void from the beginning, and plaintiff's petition being confined to necessities for the defendant and for his family while he was insane has made inapplicable much of the authority cited by him. From these we gather that the probate court, handling a ward's estate through his guardian, is not tied with legal

restraint to the extent that it is when supervising and directing an administrator. It seems the court, if the estate will justify it, may authorize to be done what it is convinced the insane person would have done had he been in his right mind. Thus allowances, in certain circumstances, may be made for support of a bastard child, for collateral kin, for uncles and aunts, for usual contribution to the church; In the *Matter of Willoughby*, 11 Paige (N. Y.) 257; In the *Matter of Heeney*, 2 Barb. Ch. (N. Y.) 326. In *Ex parte Whitbread*, 2 Mer. 89, Lord Eldon stated that, "where the father of a family becomes a lunatic, the court does not look at the mere legal demands which his wife and children may have upon him. \* \* \* The court does nothing wantonly or unnecessarily to alter the lunatic's property, but on the contrary takes care, for his sake, that, if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property in the meantime in such manner as the court thinks it would have been wise and prudent in the lunatic himself to apply it, in case he had been capable. The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the court has, in its allowances to the relations of the lunatic, gone to a further distance than grandchildren—to brothers and other collateral kindred; and if we get to the principle, we find that it is not because the parties are next of kin of the lunatic, or, as such, have any right to an allowance, but because the court will not refuse to do, for the benefit of the lunatic, that which it is probable the lunatic himself would have done." While in *Re Darling*, 39 Ch. D. 208, approves that case, it is said that it is not the duty of the court to deal benevolently or charitably with the property of the lunatic, and that applications for allowances out of the surplus income of his estate to poor relatives who have no legal claim should be discouraged. And that while the court will do what it is convinced the lunatic himself would have done if sane, yet, in making allowances to collateral kindred, it should act "with the utmost jealousy"; that is, with much more circumspection than when dealing with the case of direct heirs, who, it seems, may be required in certain contingencies to give receipts as for sums in the nature of advancements.

But the foregoing cases concern legal guardians duly appointed by the probate court and who have acted by the direction of the probate court. While in this case we have no valid appointment of guardian and no action of a court with jurisdiction. In those cases there was action by courts intrusted by law with the duty to investigate and with a discretion to authorize expenditures, beyond mere necessities. What difference should this make in the rights of the

parties, where the question concerns necessities? In *Gilfillen's Estate*, 170 Pa. 185, 32 Atl. 585, 50 Am. St. Rep. 760, the grandfather of an infant deaf, mute child, conceived himself to be her guardian, though he was never appointed. He expended her whole estate for her education through her sense of sight, and succeeded in giving her great relief against her sore affliction and making her contented in a plight which otherwise would have left her without happiness. The self-constituted guardian died, and an effort was made to have his estate account for the money he had used. The case was taken to the Supreme Court of Pennsylvania, where it was held to be manifest that the expenditure in the behalf it was made would have been entirely proper and would, without doubt, have been sanctioned by the proper court, if a legal guardian had presented his application to such court for permission to so expend it. And that no different rule ought to be applied to a case where there was no appointment of guardian, if one had acted as such in point of fact, and had faithfully discharged his trust. In *Newberg v. Bickerstaffe*, 1 Vern. 296, it was said that "if a man intrudes himself upon an infant, he shall receive the profits, but as guardian; and the infant shall have an account against him, as against a guardian." To the same effect, see *Davis v. Harkness*, 6 Ill. (1 Gilman) 173, 41 Am. Dec. 184; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 64, 25 Am. Dec. 516. Applying the foregoing law to the instance of a guardian of an insane person (and we discover no distinction), we can see where defendant could have demanded an accounting of Hughes, and that the latter could have brought in, as credits, all proper expenditures which he may have made for the preservation of the estate and for necessities for the family. That being true, it would follow that if the balance were in favor of the guardian he would be allowed a judgment for such sum.

[4] Now, assuming that this action is properly brought against defendant as the restored insane person, instead of Hughes, the self-constituted guardian, we will proceed to inquire whether the four items conceded as making up the account are necessities. First is the item of \$195.40, paid to James Shanklin, a son and a man of family over 30 years of age, who was moving to California, and the money was for tickets, clothing, etc. It seems that James owned a piece of property which the guardian bought of him and then sold. And the payment to James when he started West was on that account. It is so involved, or at least is so indefinitely explained that we find it difficult to understand. But however it may be, it is incomprehensible how it could be considered "necessaries" for defendant's family.

[5] The next item is for \$1,714.47. This was for premiums for keeping up life insur-

ance which had been taken out in different companies and insurance orders by defendant while sane, and we think it should be allowed. It can be very well denominated a necessary in the circumstances of defendant's insanity and the complicated and uncertain condition of his estate. It was paid by Hughes in good faith and for a proper and necessary purpose.

[6] The next item is \$2,585.25 for Ida Shanklin, and includes items of expense incurred during a protracted sickness and at her death. But she was past her majority, perhaps 25 years of age, and had been from home earning her own living for several years. Many of the items doubtless would have been necessities as against her and her estate, but not so as against her insane father's estate. The act of Hughes in making these payments was not in discharge of any obligation owing by defendant. In *Rodgers on Domestic Relations*, § 494, it is said that, in the absence of an agreement, "It is the rule, therefore, that when the child arrives at the age of 21 years or other age fixed by law when the majority is attained, the duty of the parent to support, whether the child be male or female, is at an end. The poverty or wealth of the child does not, in any sense, alter the rule. The duty of support by the parent ceases absolutely upon the arrival of the child at majority. So a parent is not liable to a third person who furnishes necessary medical attention to his adult child in sickness, and this is true though the child be sick at the house of the parent at the time, and be actually living with his father as a member of his family. Nor is the father liable for clothing actually necessary, where furnished after the majority of the child." To the same effect is *Brower v. Supreme Lodge*, 87 Mo. App. 614; 2 Kent's Com. 191, 192; *Blachley v. Laba*, 63 Iowa, 22, 18 N. W. 658, 50 Am. Rep. 724. The authorities cited by plaintiff do not controvert these propositions; they are not applicable to the evidence here, which shows the age, occupations, and residences of the persons to whom it is claimed necessities were furnished. The next item is \$1,006.37, charged in gross for interest on the various sums advanced to Hughes through a series of years. No sufficient showing was made by the evidence to justify an allowance of that amount. But we understand the only interest insisted upon now is upon these items of account we have discussed since the institution of this action, and as that could only be allowed on valid claims, there would be no interest under our conclusions, except on the insurance item, and as that would make no difference in the result at which we have arrived, it need not be calculated. By reference to our statement of the account at the outset, it will be seen that by disallowing as charges the three foregoing items aggregating \$3,787.02, we reduce the debtor side of

plaintiff's whole account to \$5,427.22, and as this is less than the credit entered by plaintiff, of course there is nothing owing to it. The judgment is affirmed. All concur.

# KEYS et al. v. NATIONAL COUNCIL, KNIGHTS & LADIES OF SECURITY.

(Kansas City Court of Appeals. Missouri. Dec. 1, 1913.)

## 1. INSURANCE (§ 825\*)—FRATERNAL BENEFIT INSURANCE—WAIVER OF FORFEITURES.

The question whether a fraternal benefit association has followed a course of conduct as might waive a forfeiture of a certificate for nonpayment of dues is usually one for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.\*]

## 2. INSURANCE (§ 755\*)—FRATERNAL BENEFIT INSURANCE—WAIVER OF FORFEITURES.

Waiver of forfeiture of a benefit certificate for nonpayment of dues by the acceptance of a premium is not based on contract or actual intention, but on estoppel to insist on conditions inconsistent with the acceptance or rejection of the premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

## 3. INSURANCE (§ 755\*)—MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURES—REVIVAL.

A forfeiture of a benefit certificate once waived cannot afterwards be revived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

## 4. INSURANCE (§ 755\*)—MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURES.

As between the association and a beneficiary, the rule that actual knowledge of the cause of forfeiture must be shown to work a waiver will not be applied, if it should have known of the facts by proper attention to its business.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

## 5. INSURANCE (§ 819\*)—MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURE—EVIDENCE.

Slight evidence showing an intention to waive a forfeiture of a mutual benefit certificate for nonpayment of premiums will prevent a forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.\*]

## 6. INSURANCE (§ 755\*)—WAIVER OF FORFEITURE.

A waiver of a forfeiture of a mutual benefit certificate may be inferred when the association, after knowledge of the cause of forfeiture, requires insured under the policy to do some act or incur some expense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

## 7. INSURANCE (§ 825\*)—FORFEITURES—WAIVER—JURY QUESTION.

In an action on a mutual benefit certificate defended on the ground of forfeiture by nonpayment of premiums for three months, and offering to pay such arrears while ill, whether the association by accepting such dues, and requesting the appointment of an administrator, waived the forfeiture *held* a jury question.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.\*]

## 8. INSURANCE (§ 755\*)—MUTUAL BENEFIT INSURANCE—KNOWLEDGE OF AGENTS.

Knowledge of the local financial officer of a mutual benefit association that insured was more than 60 days in arrears when she was reinstated charged the association with such knowledge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1910; Dec. Dig. § 755.\*]

## 9. INSURANCE (§ 755\*)—MUTUAL BENEFIT INSURANCE—ACTIONS—ADMISSION OF EVIDENCE.

The conduct of a mutual benefit association in not promptly and unequivocally declaring a forfeiture when it learned of insured's death on the day after paying dues in arrears, and instead, requesting the appointment of an administrator for insured, knowing she had no other property, could be considered in determining whether it had knowledge of her illness while retaining her premiums prior to her death, as well as on the question of waiver of the forfeiture after her death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

## 10. INSURANCE (§ 755\*)—WAIVER OF FORFEITURE.

A forfeiture for nonpayment of premiums is waived where a benefit association, with knowledge of the cause of forfeiture, causes plaintiff to incur additional expense in furnishing proof; that being an implied recognition of the continued validity of the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

## 11. INSURANCE (§ 818\*)—MUTUAL BENEFIT INSURANCE—ACTIONS—ADMISSION OF EVIDENCE—WAIVER.

In an action on a mutual benefit certificate defended on the ground of forfeiture for nonpayment of premiums, evidence of the retention of back premiums paid after actual notice of insured's ill health when paying them, was admissible upon the question of the association's intention in originally receiving the premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.\*]

## 12. INSURANCE (§ 819\*)—MUTUAL BENEFIT INSURANCE—ADMISSION OF EVIDENCE—WAIVER OF FORFEITURE.

In an action on a mutual benefit certificate defended on the ground of forfeiture by nonpayment of premiums until after sickness, evidence that the association retained back premiums after actual notice of insured's ill health when she paid them was admissible, as showing a waiver of forfeiture by ratifying the act of the association's agent in theretofore accepting back premiums without a health certificate, so as to show that insured could rely on such a course.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.\*]

## 13. INSURANCE (§ 825\*)—MUTUAL BENEFIT INSURANCE—ACTIONS—JURY QUESTION—WAIVER OF FORFEITURE.

In an action on a mutual benefit certificate claimed to have been forfeited by nonpayment of premiums, evidence *held* to make it a jury question whether the forfeiture was waived by failing to unequivocally declare a forfeiture on learning that the premiums were paid while insured was sick, and by requesting the appointment of a guardian for the beneficiaries.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.\*]

## 14. INSURANCE (§ 755\*)—WAIVER OF FORFEITURES—ACCEPTANCE OF PREMIUMS.

By accepting and retaining back premiums with knowledge of insured's ill health when they

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were paid, a mutual benefit association waived a forfeiture for nonpayment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

**15. INSURANCE (§ 755\*)—WAIVER OF FORFEITURE—RATIFICATION.**

Though a mutual benefit association did not know that its agent had accepted back premiums after the time within which they could be paid, or while insured was in bad health, it ratified the agent's act by retaining them after learning that she was in bad health when the agent received them, so as to waive the forfeiture as of the time the agent accepted the premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.\*]

**16. INSURANCE (§ 818\*)—MUTUAL BENEFIT INSURANCE—ADMISSION OF EVIDENCE.**

In an action on a mutual benefit certificate defended on the ground of forfeiture by nonpayment of back premiums until insured was ill, evidence that insured's neighbors knew that she was sick was not admissible to show that the company had actual knowledge of her sickness.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.\*]

Appeal from Circuit Court, Buchanan County; W. K. Amick, Judge.

Action by Claudie Keys and another against the National Council, Knights and Ladies of Security. From a judgment for plaintiffs, defendant appeals. Reversed and remanded for new trial.

W. E. Stringfellow, of St. Joseph, for appellant. F. W. Paschal, of St. Joseph, for respondents.

**TRIMBLE, J.** This is a suit on a fraternal beneficiary certificate of insurance issued by the defendant to one of its members, M. M. Keys, whereby it agreed to pay \$2,000 to the beneficiaries therein named, upon the death of said M. M. Keys while a member of said order in good standing. The plaintiffs are the said member's three minor children who were named as beneficiaries in said certificate, and they prosecute this suit through their statutory guardian.

Mrs. Keys died December 28, 1910. It is defendant's contention that, at the time of her death, she had forfeited her rights and was not a member in good standing, but stood suspended by reason of her failure to pay certain monthly premiums, dues, or assessments within the time required. Plaintiff met this contention with the charge that this requirement of prompt payment of said monthly dues, on pain of suspension if they were not so paid, had been waived, and that defendant was estopped to defend the plaintiff's claim. A trial of this issue was had, and the jury found a verdict in favor of plaintiff for the amount due on the certificate. Defendant appeals, and contends that there was no evidence of any waiver.

Mrs. Keys had been a member and the holder of the certificate in the order since October 4, 1901. On May 26, 1904, the plaintiffs were duly named therein as beneficiaries

in place of the former beneficiary. By the rules of the order and the terms of the contract, the member was required to pay a certain premium each month, and if same was not paid on or before the last day thereof, the member, ipso facto, stood suspended at midnight of said last day. During such suspension the member had no rights under his or her beneficiary certificate, and, if death occurred while such member was thus in suspension, nothing could be collected on said certificate. But if at any time within 60 days after suspension a member paid up the assessments which were delinquent, he was reinstated to his full rights, provided that at the time of making such payment he was in good health. When such delinquent dues were thus paid, however, the defendant accepted them without investigating to learn whether such member was in good health or not, and no form or ceremony was required to perfect a reinstatement. The money was received, and the member marked "reinstated" on the books. If the payment of the delinquent dues occurred after the lapse of 60 days from delinquency and consequent suspension, then, according to the written rules and terms of the contract, a medical examination certificate showing good health was required before the member could be reinstated.

The defendant order was composed of various "councils," each located in its respective community and made up of the individual members at that place, and the executive head of the institution, or "National Council" as it was called, was located at Topeka, Kan. Mrs. Keys was a member of the local council at St. Joseph. In each local council there was an officer called the "financier." The individual members of the order paid their assessments or monthly dues to this local officer, and it was his duty to send the money thus collected by him to the National Council each month, together with a detailed statement showing the names of the members who paid, the amount of each payment, the rate, and other items of information. If a member's name did not appear on this report as having paid his assessment, the absence of his name showed that he was delinquent, and his delinquency was apparent in each succeeding monthly report until his name appeared with a credit of the amount paid by him in settlement of the assessments due. It was the custom and general practice of these various local officers or "financiers" to send in their reports of collections for each month about the 20th of the succeeding month, and to include in such report *all collections and payments made up to the time of sending in the report.* This was well known and understood by the head council, and was in fact recognized by its rules.

Deceased failed to pay her assessment for May, 1910, and, at midnight of the 31st of that month, she ipso facto, stood suspended.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The report of the local "financier" to the National Council made June 20th revealed this fact because no payment by her was reported therein. She also failed to pay her assessment for June, 1910, and again the local "financier's" report made about the 20th of July showed her delinquency. It was therefore apparent to the company itself, as well as to the agent, that she was delinquent for both May and June. She did not pay any assessments or premiums during July, but on August 20, 1910, being then delinquent for July also, she paid the three assessments for May, June, and July, and these were sent in by the local "financier" in his report for July, and Mrs. Key's name was thereupon marked "reinstated." The premiums for August and September, 1910, were thereafter paid within the time required for them. At the time the delinquent payments for May, June, and July, were made, that is, on August 20, 1910, Mrs. Keys was not in good health, but no inquiry in regard thereto was made either by the local "financier" or by the head or "National Council," following their usual custom of accepting delinquent premiums and reinstating the member without asking as to health. These payments were made to the local "financier" by Mrs. Keys' son who was directed by her to do it, she not being able to go to the financier's office.

On August 8, 1910, Mrs. Keys went to a hospital in Kansas City suffering with cancer of the uterus, an incurable disease, from which she died in the hospital on December 28, 1910, having remained at the hospital constantly from the time she entered it. On December 27th, the day before she died, Mrs. Keys told her son to pay the premiums for October, November, and December, amounting to \$6.50, and he sent a draft for that amount to Mr. Webb, the local "financier" at St. Joseph, with a letter telling him it was in payment of his mother's premiums. Webb, observing that the money was not sent in Mrs. Keys' name, did not credit it on the books, but wrote to the son that he held it only on condition his mother was in good health. Not receiving any reply to this, and learning on December 30th, of Mrs. Keys' death, Webb, after consulting the president of the company at Topeka, Kan., sent the money to J. B. Hinkle at Kansas City, with minute directions to return it to Mrs. Keys' son, and, if he refused to take it, to make him a formal tender of it. Hinkle could not find young Keys, and finally returned the money to Webb. Young Keys was a minor and one of the beneficiaries named in the certificate of insurance sued on. Hinkle could not find him in Kansas City because he had returned to St. Joseph. Shortly thereafter, an attorney went with a Mr. Brown, who seems to have been a relative or friend of the Keys' children, to Webb's office and asked him if they were going to contest the payment of the Keys' claim. Webb told him he did not know, but

that his instructions were to have a guardian appointed for the children so that the matter could be taken up. The attorney then told him that the children had no other property requiring the appointment of a guardian, and that, if the company intended to refuse payment of the insurance claim, the appointment of a guardian was unnecessary, as suit could be brought by next friend. To which Webb replied that he did not know what the company would do, but that it was necessary to have a guardian appointed, and such were his instructions. Thereupon Bowen was appointed guardian for the three children by the probate court, and duly qualified. When he did so, Webb immediately tendered to him the \$6.50 sent Webb to pay Mrs. Keys' last premiums.

As stated above, the answer set up that Mrs. Keys, by failing to pay the assessment for October on or before the last day of that month, became suspended, and her certificate void, and all her rights thereunder forfeited, inasmuch as she was not in good health when she paid the October assessment on December 27th. (It will be noticed that this assessment was paid within 60 days after the delinquency which occurred at midnight October 31st). Plaintiffs' reply set up that defendant was estopped from setting up the failure to pay said assessment in the time specified by the by-laws, because the course of dealing with Mrs. Keys was such as to waive a strict compliance therewith in that regard; that Bowen, the guardian of the children, was not the legal representative of the estate of Mrs. Keys, and that the tender to him of the \$6.50 paid was not a tender to the proper person; that defendant knew, at the time of Mrs. Keys' death, that she had not paid her premiums in time, but, notwithstanding such knowledge, defendant had requested plaintiff to go to the expense of furnishing proofs of death and of having a guardian and curator appointed, by reason of which fact, defendant was estopped from making any defense to plaintiffs' claim.

It is the contention of defendant that it did not know Mrs. Keys was delinquent for the months of May, June, and July when her premiums for those months were paid on August 20th in the local "financier's" office in St. Joseph; and that it had no knowledge nor means of knowledge of her ill health at that time, and did not learn of such ill health until in the course of the trial. Consequently, after the evidence was in and the parties had rested, defendant asked leave to amend its answer so as to include said assessments for the seven months from March to September, 1910, both inclusive, and to state an offer to return or a tender of said assessments aggregating \$11.20, such amendment being sought to be made in order to conform to the proof. It appeared that on July 5, 1912, about three

months before the trial, the defendant took the deposition of Dr. McCall of the hospital where Mrs. Keys died, and his testimony therein showed that Mrs. Keys was not in good health on August 20, 1910, and yet the company retained the premiums paid on that date, and also those down to and including September, paid thereafter, and did not offer to return them till after the case had closed. The court refused to permit the amendment.

[1] Where the issue is whether or not the company has followed a course of conduct which may be said to indicate waiver, the question of waiver is one for the jury. *Fink v. Ins. Co.*, 60 Mo. App. 673; *Summers v. Ins. Co.*, 45 Mo. App. 46.

It is thus seen that the problem to be first solved in this case is whether there is any substantial evidence from which a waiver can be inferred. If there is, then the verdict of the jury is, in the absence of error in the trial, determinative of that fact. In order to correctly determine whether or not there is any evidence that a waiver was created by the course of dealing adopted by the company, it is necessary to keep clearly in mind just what constitutes a waiver, what are its constituent elements, and how it may be shown.

[2] "Waiver by the acceptance of a premium is not based upon contract, but on estoppel of the company to insist on conditions of the policy inconsistent with the acceptance or retention of the premium." *Monahan v. Ins. Co.*, 103 Md. 145, 161, 63 Atl. 211, loc. cit. 214, 5 L. R. A. (N. S.) 759. While it is sometimes said that waiver is a matter of intention, this does not mean that the one alleged to have waived must have expressly or purposely intended to waive. The waiver arises from the knowingly doing of inconsistent acts. The intention to waive is gathered from what is done, and if a person, with knowledge of the facts, does something inconsistent with a right or of his intention to rely on it, his act will constitute a waiver, even though he may not have had in mind any purpose or intention to waive. *Tobin v. Western Mut. Aid Society*, 72 Iowa, 261, loc. cit. 264, 33 N. W. 663. The test of a waiver is whether the acts and conduct of the insurer are inconsistent with the intention to insist on strict compliance with the terms of the policy. *Lake v. Ins. Co.*, 110 Iowa, 473, 81 N. W. 710, loc. cit. 712.

[3] If a forfeiture has been once waived, it cannot be subsequently revived and relied upon to defeat a recovery after a loss has happened, for a forfeiture that is waived is treated as having been eliminated from the contract. *Baltimore Ins. Co. v. Howard*, 95 Md. 244, 52 Atl. 397, loc. cit. 399; *Burgess v. Mercantile Ins. Co.*, 114 Mo. App. 169, loc. cit. 184, 89 S. W. 568.

[4] As between insurance companies and their beneficiaries, a rigid application of the general rule that there shall be actual knowl-

edge of the forfeiture or of the cause producing the forfeiture before a waiver can be shown, will not be insisted upon in all cases. *Monahan v. Ins. Co.*, supra; *Baltimore Life Ins. Co. v. Howard*, supra. "If the company ought to have known of the facts, or with proper attention to its own business would have been apprised of them, it has no right to set up its ignorance as an excuse." *Knights of Pythias v. Kalinski*, 163 U. S. 259, loc. cit. 298, 16 Sup. Ct. 1047, 1051, 41 L. Ed. 163.

[5] Slight evidence indicating an intention to waive will be sufficient to prevent a forfeiture from taking effect, and thereby defeating valuable rights. *Francis v. A. O. U. W.*, 150 Mo. App. 347, loc. cit. 356, 130 S. W. 500.

[6] A waiver of forfeiture may be inferred when the insurer, after knowledge of the act of forfeiture, requires the assured, by virtue of the requirements in the policy, to do some act or incur some expense. *McCollum v. Niagara Ins. Co.*, 61 Mo. App. 352; *Supreme Tent, Knights of Maccabees of the World v. Volkert*, 25 Ind. App. 627, 57 N. E. 203, loc. cit. 207.

[7] Applying these principles to the facts in the case before us, we find: (1) That the company was in the habit of accepting premiums from suspended members, at least if paid within 60 days from suspension, without inquiry as to whether they were in good health or not; (2) that the company knew whenever a report for a month came in that a member, whose name was not shown as having paid a premium, was delinquent and suspended; (3) that it knew that reports of collections were not sent in until the 20th of each month, and that all collections made up to the day of sending the report in were included in the report; (4) that the local "financier's" office knew on August 20, 1910, that Mrs. Keys was delinquent and stood suspended from May 31st, more than 60 days previous, and yet took the premiums paid at that time without inquiring as to her health and *without demanding the certificate of medical examination showing good health*. She was marked "reinstated" although the by-laws provided that she could not be reinstated without the aforesaid certificate. It seems to the writer that the acceptance of the premiums paid on August 20th, when a certificate of good health was necessary, and Mrs. Keys' reinstatement without such certificate was a reinstatement of her *without regard to the question of her health*. But it is said the company itself did not know Mrs. Keys was more than 60 days in arrears when she was reinstated.

[8] But the local financier's office knew it, and this knowledge was knowledge of the company. It knew that reports for preceding months were not sent in until the 20th of each succeeding month, and that this report was not sent in until after the 20th of August; and it knew also that the local "financiers" sent in all moneys collected up



to the date of sending in their reports. The blanks used in sending in such reports had no provision therein for showing the date when moneys were actually paid to the "financier." Hence, if the company did not know from the report that the premiums were paid after the lapse of 60 days from the date they were due, its ignorance was not the result of any deception practiced by Mrs. Keys, but was the result of the act of the company's agent in reporting it, and of the method of sending in all collections received up to the date of the report. Nor was it the result of any conspiracy on the part of Mrs. Keys and the agent to defraud the company. If the company, by its method of obtaining reports and allowing them to be made without showing when the money was actually paid to its agent, could not tell whether payments were made on time, or, if not on time, whether they were within the 60 days, it would appear to the writer that the company ought not to be permitted to set up its own ignorance, resulting from its own negligent system and method of transacting business, as a valid reason for the nonapplication of the doctrine of waiver. *Monahan v. Mut. Life Ins. Co.*, 103 Md. 145, 63 Atl. 211, loc. cit. 213, 5 L. R. A. (N. S.) 759. In the absence of fraud on the part of Mrs. Keys, it is difficult to see why a different rule should be applied to a company of this character from that applied to any other. But, even if it be true that a mutual, fraternal company of this kind should be permitted to indulge in the presumption that, when the agent sent Mrs. Keys' name in as having been reinstated, he did so because she paid her premiums inside and not outside of the 60 days, and to indulge in the further presumption that, if she did pay it within the 60 days, she was in good health, and therefore the company's reception and retention of such premiums would not constitute a waiver, in the absence of knowledge that it was so paid out of time, still, evidence of all such facts is admissible where there is other evidence tending to show that the company did have knowledge of the situation, and manifested an intention to receive said premiums and retain them regardless of her health or ill health. That is to say, if, in addition to all the facts above set out showing the habit of the agent to send in all collections actually required up to the 20th and defendant's method of keeping the accounts, there is evidence of defendant's conduct from which it may be inferred that defendant did know of such ill health, or that it knew that the premiums were not paid within the 60 days, or that, after learning that the agent had received premiums from the member without regard to the latter's health or ill health, the company ratified such act by retaining premiums thus paid, then the question of waiver was still one for the jury. In our opinion there was such other evidence as we shall presently show.

After Mrs. Keys' death, when the company was undoubtedly well aware of the facts concerning Mrs. Keys' being in arrears for the dues of October and November and of her ill health at the time they were paid, the company, when asked if it intended to insist on the forfeiture, failed to assert such defense, but requested plaintiff to go to the expense of having a guardian appointed for the beneficiaries, and insisted upon it, although told by plaintiffs that they had no other property and that the appointment of a guardian was unnecessary unless the claim was going to be paid. There was no absolute denial of liability. The company knew then perfectly well the facts constituting forfeiture by reason of the failure to pay the October and November dues. Webb had consulted the president and had been told what to do. And when the question was asked whether the company was going to contest or not, Webb, instead of frankly telling plaintiffs that it was going to insist on a forfeiture, told them he didn't know but that his instructions were to have a guardian appointed. The only function or duty a guardian could possibly have in the premises would be to receive the money when it was paid. No guardian was necessary in order to furnish proofs of death or of facts bearing on the question of forfeiture. The blanks furnished by the company did not require any affidavit from the guardian. Those were to be furnished by other persons. The only possible reason the company could have for insisting upon a guardian was to have in existence some one to whom it could legally and safely pay the money. The fact that the company did not at once openly and unequivocally announce that there was a forfeiture which would be insisted upon, but shuffled, and evaded the question, and wanted proofs of death and a guardian appointed was some evidence tending to show that the company knew that Mrs. Keys had made former payments while in ill health, and that a waiver could be established if plaintiffs had sufficient evidence of the company's knowledge; and that the company intended to hold on to such former payments so long as it appeared certain that its right to declare a forfeiture for nonpayment of the October dues was not thereby jeopardized. In other words, even though the reception and retention of such former premiums may not constitute a waiver, as matter of law, yet such reception and retention and the attendant circumstances can be taken into consideration by the jury, along with all other evidence throwing light upon the conduct of the company, in determining the question whether or not a waiver was created during Mrs. Keys' lifetime. This is strengthened by the fact that on July 5, 1912, defendant took the deposition of Dr. McCall, and from his testimony received actual knowledge that Mrs. Keys was in bad health on the 20th of August, 1910, and yet retained the May, June,

July, August, and September premiums for nearly three months thereafter, and never did offer to return said premiums until after the evidence at the trial was all in and the case had been closed. True, this knowledge came after suit was brought, but the retention of the money thereafter could be considered as a circumstance bearing upon the question of the previous intention of the company, and its consequent knowledge at the time it received said former premiums on August 20th, and of its conduct in thereafter accepting the premiums for August and September which Mrs. Keys paid after the company had received the former dues without asking as to her health or requiring a certificate. In other words, the retention of premiums, after Mrs. Keys' death and after actual knowledge of all the facts as to her ill health, could be considered by the jury along with all the evidence of the company's prior course of dealing with Mrs. Keys and its subsequent course of dealing with the plaintiffs, in determining whether or not there had or had not been a waiver during her lifetime. Or, to state it in still smaller compass, the subsequent retention of premiums after actual knowledge would tend to throw some light on the true nature of the company's intention prior to Mrs. Keys' death, and of its probable knowledge of her ill health before that event, and for that reason could be considered for that purpose. At any rate the retention of premiums, after learning that Mrs. Keys was in bad health when they were paid, could be considered as a ratification of the agent's act in accepting them in the first place. The agent did not have to actually know she was sick. He knew that she was more than 60 days overdue and that, if ill health was going to cut any figure, a certificate of good health was required. Consequently, when the agent took the premiums without the certificate, this was a waiver, on his part at least, of any question as to health, and when the company, after learning that she was in bad health, continued to retain the premiums she had paid, was not this a ratification of the agent's act? And do not all these facts tend to create a situation from which a jury could infer that the company at the time it took the premiums was doing so without regard to the health or ill health of the member? And if its purpose was to get the premiums regardless of conditions, then the forfeiture was waived. So that, taking all these things into consideration, it cannot be said that, as matter of law, there was no evidence of waiver in the case.

[8] The conduct of the company in not promptly, openly, and emphatically declaring a forfeiture is not only admissible and can be considered in determining what was in its knowledge while retaining Mrs. Keys' premiums prior to her death, but such conduct can also be considered as creating a waiver of its defense of forfeiture after her

death, if the company required the appointment of a guardian, and plaintiffs were thereby induced to go to the extra trouble and expense of having one appointed. In this case the company did not merely sit closemouthed, letting plaintiffs choose their own course, and then, when the proper time came, raise the defense of forfeiture. It did more than this. While it endeavored, it is true, to place itself where it could insist on a forfeiture if it chose to do so, still it did not unequivocally declare that it would insist on a forfeiture. Even when asked what it was going to do, an evasive answer was given, and the appointment of a guardian was required. And this, too, in the face of the fact that the company knew the children had no property and would need no guardian if the claim were not paid; that the proofs of death and of the facts bearing upon the forfeiture now relied upon could be presented without the appointment of a guardian; and that all a guardian could possibly do in the premises, which could not be done without him, would be to receive payment of the policy. It is true the rules of the company required that, where the beneficiaries were minors, proof of the appointment of a guardian must be made. This, however, was not to establish the death of the insured or any facts showing forfeiture or nonforfeiture, but was necessary only in case the company was going to pay. The appointment of a guardian was not necessary, therefore, to enable the company to inform itself as to any of the facts or to put it in a position where it could assert a forfeiture of the policy. It was incumbent upon the company, therefore, to assert its right of forfeiture then and there, and let plaintiffs take any course they may have seen fit to pursue.

[10] The authorities are very strict in holding a defense waived where the company, with knowledge of the facts, causes the plaintiff to go to extra trouble and expense in furnishing proof, since such is, by implication, a recognition of the continued validity of the policy. In *Titus v. Ins. Co.*, 81 N. Y. 410, the company, with knowledge of the facts constituting a forfeiture, required the insured to appear before an examiner and submit to an examination. It was held that this constituted a waiver. At page 419, the court says: "When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced

therefor, allege the forfeiture. But it may be asserted broadly that if, in any negotiations or transactions with the insured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." It was contended in that case that the act relied upon to constitute waiver must be attended with such equitable circumstances as would constitute estoppel, and that as the plaintiff was not induced to in any manner change his position, as the acts were done after the forfeiture occurred, they did not create an estoppel. The court, however, said this position was untenable; that it is not true that such waiver can be created only by such acts or conduct as would create a technical estoppel. In *Cannon v. Home Ins. Co.*, 53 Wis. 585, 11 N. W. 11, there was a breach of conditions out of which a forfeiture arose. The company was asked if it was going to insist on the forfeiture. Without saying whether it was or not, it requested proofs of loss which the insured furnished at a cost of about \$25. The court held that the forfeiture was waived. It was argued in that case that, as the company did not say it would pay, there was no misleading of plaintiff to his injury. But the court asks, why did not the company say that it would insist upon the forfeiture? It further held that the requiring of proofs of loss was a treating of the policy as still in force, and the question therefore arose: Was the plaintiff, in relying upon such conduct, misled to his injury or prejudice?

In *Traders', etc., Ins. Co. v. Johnson*, 200 Ill. 359, 65 N. E. 634, it is held that if a company has knowledge of its right to declare a forfeiture, but did not then insist upon it, but recognized the continued validity of the policy by requiring the beneficiary to go to the expense and trouble, if any, of preparing proofs of death and other facts connected with the loss, an intention to waive the forfeiture follows as a legal result. In *Granger v. Manchester Ins. Co.*, 119 Mich. 177, 77 N. W. 693, it was held that where the company, with knowledge of the forfeiture, called for additional proofs, the forfeiture was waived although in the letter calling for the proofs there was a general statement that the company did not thereby waive any defense it might have. This was certainly as strong as the stipulation in the rules of the company in the case at bar that the requirement of proofs would not waive any defense. In *Bowen v. Ins. Co.*, 69 Mo. App. 272, the forfeiture relied on was the violation of the "iron safe" clause. The company did not discover the violation of

this clause until the adjusters were on the ground. The evidence tended to show that, with this knowledge, the adjusters requested Bowen to assist in going over the books with them. He did so for six or eight hours, and then they notified him that the company denied all liability by reason of the violation aforesaid. It was held that the court properly submitted the question of waiver to the jury. In *Dolan v. Missouri Town Mut. Ins. Co.*, 88 Mo. App. 666, loc. cit. 674, it is said: "If a defendant, through its agents, after becoming aware of its defenses, have led plaintiff into additional expense and trouble in preparing proofs of loss, it would be considered as having waived such defenses of which it was aware at the time." In *New York Ins. Co. v. Baker*, 83 Fed. 647, loc. cit. 652, 27 C. C. A. 658, 662, it is said that after the company "became aware that the policy was invalid, it was not entitled to exact from the plaintiff a technical compliance with the provisions of the policy relative to proofs of loss, which would involve her in trouble and expense, unless, on its part, it had resolved to pay the loss when such proofs were supplied."

But it is contended by defendant that this rule has no application here because plaintiffs knew from the refusal to accept the premiums, and the endeavor to return them, that the company was going to insist on the forfeiture, and consequently they were not misled to their injury or prejudice. But no one told plaintiffs positively that the company was going to deny liability. The plaintiffs knew, and all they knew was, that the local agent had taken certain steps to preserve the company's right to a forfeiture if it chose to insist upon it. And while the mere furnishing of blanks at plaintiffs' request, with the notice contained in said blanks that furnishing them did not waive any of the company's rights, may not, of itself, constitute a waiver (which we do not decide), yet in this case there was much more than this. The company was told that the children had no other property, and that the proofs of death could be made and the question of the company's liability could be litigated without the appointment of a guardian if the company was going to refuse payment. To this the agent replied he did not know what the company would do, but that its instructions were to have a guardian appointed. It would seem that under these circumstances the question whether the plaintiffs were thereby induced to go to the trouble and expense of having a guardian appointed, in such manner as to constitute a waiver, should have been submitted to the jury.

[11] To sum it all up, on the question of whether a demurrer to the evidence should have been sustained, we think that the company, through its agent, Webb, knew that Mrs. Keys was more than 60 days in arrears when she paid her May, June, and July

dues on August 20th, and, by the receipt and retention of such dues *without requiring a certificate of health*, the company waived the forfeiture arising out of those facts; or, at least, to state it more accurately, evidence of the stated and attendant facts was sufficient to send the question of waiver to the jury, and evidence of the subsequent retention of the premiums, after actual notice, through Dr. McCall's testimony, of her ill health, was admissible as throwing light upon the intention disclosed by the prior receipt and retention of such sums.

[12] It was also admissible as showing a waiver by way of ratifying the agent's act in accepting the premiums of August 20th, regardless of the question of health.

[13] We think also that there was sufficient evidence requiring the submission to the jury of the question whether or not the company, by failing to state positively and definitely that the forfeiture would be insisted upon, and by requesting the appointment of a guardian, induced plaintiffs to go to the extra trouble and expense of obtaining a guardian, thereby resulting in the waiver by the company of the defense of forfeiture. So much for the question of the propriety of the court's ruling upon the defendant's demurrer to the evidence. It was properly overruled.

We are next to inquire whether the question of waiver was properly submitted to the jury. The question whether the company, on August 20th, waived the forfeiture on account of Mrs. Keys being delinquent and in ill health would depend upon whether the company took her payment of that date with knowledge of her ill health, or with knowledge that she was more than 60 days overdue, and without requiring a health certificate, which was the same as taking it without regard to her health or ill health, or would depend upon whether the company, after receiving actual knowledge of her ill health through Dr. McCall's testimony, ratified the agent's act in receiving her premiums on August 20th without a certificate, by retaining said premiums and failing to return them. Whether there was such prior knowledge or subsequent ratification was for the jury to say.

[14, 15] If the company took and kept the premiums of August 20th, with knowledge, then it waived the forfeiture at that time; or if, without knowledge that the agent had accepted her premiums out of time, or while she was in bad health, the company nevertheless retained such premiums after learning that she was in bad health at the time the agent received them, such retention by the company would amount to a ratification of such agent's act and relate back to and effect a waiver of the forfeiture as of the time when the agent accepted said premiums. In this view of the matter, such subsequent

retention would not be a revival of a cause of action already dead but would be merely the election to keep alive that which would live or die according to the choice of the company. If plaintiffs' instruction No. 2, means to rely upon the retention of the premiums paid August 20th, after having actual knowledge of the facts, to constitute a waiver by way of ratification of the agent's act, then it would be correct provided it clearly and unmistakably expressed that idea, and left it to the jury to say whether or not all those things occurred. The instruction is somewhat involved and therefore not as clear as it might be. In addition to this, a few words were evidently omitted, so that its meaning is still more obscure. As it was the only instruction defining waiver caused by the reception and retention of premiums; and as the court modified defendant's instruction, and, in such modification, referred to plaintiffs' instruction No. 2 for a definition of waiver, the omission in said last-named instruction became doubly important. As the instruction reads with the omission unsupplied, it is meaningless. We cannot say that the jury understood its meaning from the argument made in the case. It is much better to require instructions to say what they mean than to allow important omissions to be made therein and then attempt to ascertain whether or not the jury understood what was left out. It is difficult enough to understand the average instruction without making it a still greater puzzle by requiring the jury or the court to guess at what was intended to be said.

[16] With reference to the evidence showing that Mrs. Keys' neighbors knew she was sick, we think it was error to admit such testimony. The purpose was to show that the company had actual knowledge of her sickness. It was not shown that knowledge of the neighbors was of such a character as to show or even raise an inference that it was communicated to the company or reached the ears of the agent. Hence it had no efficacy in showing knowledge of either the company or the agent.

For the reasons given the judgment is reversed and the cause remanded for a new trial. All concur.

#### JOHN H. SCHROEDER WINE & LIQUOR CO. v. WILLIS COAL & MINING CO.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

#### 1. GARNISHMENT (§ 131\*)—EXEMPTIONS—PERSON ENTITLED TO PLEAD.

Under Hurd's Rev. St. Ill. 1912, c. 62, § 14, providing that the wages of a wage-earner who is the head of a family, to the amount of \$15 a week, shall be exempt from garnishment, and requiring every employer to pay such exempt wages to the employé when due, upon his affidavit that he is the head of a family, etc.,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

notwithstanding any garnishment proceedings, an employer, with notice of such exemption by affidavit, may set up the exemption when garnished, though the employé does not interplead and set it up.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 260; Dec. Dig. § 131.\*]

## 2. GARNISHMENT (§ 131\*)—EXEMPTIONS—WHAT LAW GOVERNS.

In proceedings to garnish wages earned by an employé in Illinois, the employer may set up, under the doctrine of comity, the Illinois statute exempting wages, to the amount of \$15 a week, from garnishment, and requiring every employer, upon affidavit by the employé that he is head of a family, etc., to pay over such wages, notwithstanding garnishment proceedings; a similar policy being adopted by Rev. St. 1906, § 2415, providing that no one shall be charged as garnishee for more than 10 per cent. of any wages.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 260; Dec. Dig. § 131.\*]

## 3. EXEMPTIONS (§ 2\*)—COMITY.

There is a comity between the several states in enforcing their laws, particularly with reference to exemptions.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 2; Dec. Dig. § 2.\*]

## 4. COURTS (§ 511\*)—COMITY IN ENFORCING.

The courts of one state commonly recognize the laws of another state, where the general policy of the states on the subject is the same.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1432; Dec. Dig. § 511.\*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by the John H. Schroeder Wine & Liquor Company against the Willis Coal & Mining Company, garnishee of Marion Perrina and others. From a judgment for plaintiff for a less amount than claimed, it appeals. Affirmed.

Frank Landwehr and Gardner & Pickett, all of St. Louis, for appellant. Dawson & Garvin, of St. Louis, for respondent.

REYNOLDS, P. J. Appellant, plaintiff below, brought its action before a justice of the peace in the city of St. Louis against one Perrina and another, to recover a balance alleged to be due it on an account, the balance claimed being \$127.33. A writ of attachment was sued out against the defendants and the Willis Coal & Mining Company summoned as garnishee, notice of attachment of any sum or sums due by it to defendants being duly served upon the garnishee. There was no personal service upon defendants, whatever service was had on them being by publication, nor did they appear or answer, but judgment went against them by default on due proof of publication of notice. The garnishee appeared and in March, 1910, answered before the justice, denying any indebtedness to one of the defendants but admitting that it owed Perrina \$86.30; that Perrina was the head of a family and a resident of Illinois, working for the garnishee in that state, and that the amount due him by the garnishee is for wages

earned in the state of Illinois during the month of March, 1910, payable in Illinois; that defendant served upon the garnishee in the state of Illinois, an affidavit purporting to be made by him, a copy of which was attached, and had also made a demand in writing upon the garnishee, a copy of which was also attached to the answer. Judgment was rendered by the justice in favor of plaintiff against defendants for the debt, and against the garnishee for \$85.30. In due time the garnishee prosecuted its appeal to the circuit court. In that court it filed an amended answer in which it was set out, in substance, that it is a corporation duly organized by virtue of the laws of the state of Missouri, and a citizen of this state, and that it has also complied with the laws of the state of Illinois permitting foreign corporations to do business in that state; that on the dates hereinafter mentioned it owned and operated coal mines in the state of Illinois; that it did not owe one of the defendants named anything, either due or to become due, but that the other defendant, Perrina, was employed by it as a laborer and labored in its mines in the state of Illinois; that at the time of the service of the garnishment, it owed Perrina as wages for labor in the mines in Illinois, done during the month of March, 1910, the sum of \$86.30, which sum was due and payable to Perrina in the state of Illinois; that the garnishee had duly notified both defendants of the fact that it had been summoned as garnishee in the proceedings begun before the justice before mentioned; that those defendants did not appear; that no service had been had upon them or either of them, otherwise than by publication, and no jurisdiction had been acquired by the justice over the person of either of the defendants; that the defendant Perrina had made and delivered to the garnishee his affidavit that he was the head of a family living in Illinois, with him and dependent upon him for support and that he desired to avail himself of the provision of the law of Illinois which allowed him \$15 a week as exempt from garnishment; and that Perrina had afterwards made demand upon the garnishee for payment of the amount due him for his labor, under penalty of being sued in the state of Illinois by him (Perrina), to recover the amount of wages if payment was refused.

This answer further avers, on information and belief that Perrina is the head of a family and a resident of the state of Illinois, and that the claim in suit by plaintiff was for the price of liquors sold by plaintiff to Perrina and his partner, the other defendant, in the state of Illinois. It further pleaded the law of the state of Illinois, to-wit, Act May 11, 1901, now section 14, p. 1252, "Hurd's Revised Statutes of Illinois, 1912," setting out that law; that the wages owing by the garnishee to Perrina at the

time this garnishment was attempted to be made were the earnings for four weeks from March 1st to March 31st, 1910, and exceeded the amount exempted as aforesaid by \$26.30. Averring that the garnishee has at all times been willing to pay to plaintiff and into court for it this excess but that plaintiff has refused to release the garnishee except upon payment of the full amount sued for, it is further averred that pursuant to Perrina's notice and demand above referred to, he had brought suit against the garnishee for his wages before a justice of the peace in the proper town in the state of Illinois and that the garnishee had been summoned therein and was without any defense under the law of Illinois except as to the \$26.30, and being prevented by plaintiff here from paying Perrina's exemption given to him under the laws of Illinois, judgment for \$86.30 was rendered against the garnishee and in favor of Perrina in his said suit, from which judgment the garnishee has appealed to the Illinois Circuit Court, where the case is now pending. The garnishee, therefore, the premises considered, avers that the justice of the peace before whom the present suit had been pending and the circuit court now, in natural justice and equity, should, as a matter of comity, give effect to the Illinois exemption law and enjoin plaintiff from further prosecuting these proceedings and discharge the garnishee upon payment into court of the sum of \$26.30, less a proper allowance by the court for attorney's charges.

Along with this amended answer, the garnishee filed a motion to dismiss the cause as to it. This motion was overruled. It is unnecessary to consider it here. The cause thereupon went to trial on the 5th of June, 1911, before the court, a jury having been waived. The evidence tended to establish the averments of the amended answer, it being conceded that respondent owed Perrina \$86.30 for wages for labor done in March, 1910.

The law of Illinois above referred to was also put in evidence. Under a finding that the evidence established the above facts, the trial court found that \$60 of the indebtedness of \$86.30 were, under the laws of Illinois referred to, exempt from attachment under garnishment proceedings; that the garnishee had duly tendered and offered to pay into court the \$26.30; that plaintiff had refused to release the garnishee or dismiss the garnishment except upon payment of the full sum of \$86.30. Whereupon the court found that only this sum of \$26.30 was subject to garnishment; that the garnishee had duly tendered and offered to pay it into court and plaintiff had refused it, and the court adjudged that the garnishee pay that sum into the registry of the court within five days from the date thereof, for the use of plaintiff, and that plaintiff pay the cost of the proceedings. From this judgment, after interposing a motion for new trial and saving exception to the action of the court in over-

ruling it, plaintiff has duly perfected its appeal to this court.

While a number of points are made by the learned and industrious counsel for the respective parties, there are but two which we deem it necessary to consider and determine. First, whether the garnishee could set up the wage exemption, the defendant not appearing or interpleading. Second, whether the courts of our state will recognize the statute of Illinois covering exemption of wages for labor performed in that state.

[1] It is urged by the learned counsel for appellant that the right to exemption of this \$15 is a personal privilege which can only be interposed by the debtor himself, and that he not having done so by way of interpleader or otherwise before the justice of the peace or the circuit court of our state, the garnishee cannot assert it for him. Counsel cites several cases which are supposed to be in support of this contention, among them *Osborne v. Schutt*, 67 Mo. 712 and *Howland v. Chicago, R. I. & Pac. Ry. Co.*, 134 Mo. 474, 36 S. W. 29, which cases may be said to be typical of the others. On consideration of these cases, it does not appear that they are applicable here. In those cases and the like it is said that the claim to exemption is a personal privilege, but the exemption claimed was not alone wages, but exemptions given, for instance, under section 2180, Revised Statutes 1909. In such cases the matter of selection was largely with the debtor and is a personal privilege, the officer being required to apprise him of his right. It is then for the debtor to elect most of the articles he desires to have exempt. See sections 2183, 2184, Revised Statutes 1909. We think there is a marked difference between the law giving such exemptions and our own law (section 2415, Revised Statutes 1909), exempting a certain amount of wages from process of garnishment. It is there expressly provided that "no one shall be charged as garnishee for more than ten per cent of any wages," etc. Under the Illinois statute pleaded and in evidence, "the wages for services of a wage earner who is the head of a family and residing with the same to the amount of \$15 per week," is not only declared to be exempt from garnishment but the law further provides: "Every employer shall pay to such wage earner such exempt wages not to exceed the sum of \$15 per week of each week's wages earned by him, when due, upon such wage earner making and delivering to his employer, his affidavit that he is such head of a family and residing with the same, notwithstanding the service of any writ of garnishment upon such employer, and the surplus only above such exempt wages shall be held by such employer to abide the event of the garnishment suit." So that by our law, the garnishee is given an affirmative defense, and by the Illinois law he is required to pay the wages to the wage earner, "notwithstanding the service of any writ of

garnishment." No personal privilege of the debtor is here involved as in the Osborne and Howland Cases, supra, and the like. The statutes of each state forbid the seizure of the wages by the process of garnishment and declare that no process of garnishment shall reach them. Our court has recognized this as a true interpretation of our law. Thus in *Cooper v. Scyoc*, 104 Mo. App. 414, loc. cit. 432, 79 S. W. 751, loc. cit. 756, after setting out that the plaintiff, who was defendant in the action under which the garnishment had been sued out, had claimed his exemption at the beginning of the action and had continued to make his claim of exemption of his wages, it is said: "Even if he had made no claim to his exempt wages, there is no evidence that he waived his right, and without a waiver they could not be subject to the process of garnishment," referring to what is now section 2415, Revised Statutes 1909.

Again, in *Barnes v. William Waltke & Co.*, 135 Mo. App. 488, 116 S. W. 7, our court, answering the proposition that the debtor's salary exemption had not been mentioned in the garnishee's answer and therefore was waived, has said (135 Mo. App. loc. cit. 491, 116 S. W. loc. cit. 8): "No doubt it would be better to call attention to such a fact in answering, even though the interrogatories make no inquiry about it, as those before us made none; but we decline to hold the omission rendered the exemption unavailable to the garnishee as a defense, since the record contains proof of the essential facts that Mathias was head of a family and resident of the state and this evidence was palpably introduced to prove the immunity of all but ten per cent of his wages from levy. The immunity was asserted by the testimony and in the motion for new trial, which alleged an excessive judgment." The correctness of this rule is fully recognized in the decision of our Supreme Court in *Davis et al. v. Meredith et al.*, 48 Mo. 263, where the claim to the wage exemption was made by the garnishee in their answer and sustained by our Supreme Court.

The law of Illinois not only gives this exemption to the laborer whenever it appears that he is the head of a family and resides with it, but exempts wages up to a certain amount from the process of garnishment and expressly requires the employer to pay such wage earner the exempt wages. So, in effect, does our own statute. The exemption, therefore, is more than a mere personal privilege to be exercised by the judgment debtor. It is a positive prohibition against the employer paying over the wages specified under any process of garnishment and an affirmative defense for the garnishee as against that proceeding.

The evidence in the case amply sustains the finding of the trial judge that Perrina was not only a citizen of the state of Illinois, resident and domiciled therein, but that he was the head of a family for the whole pe-

riod covered in this action, and that he had made the statutory demand required. If, then, we are to recognize this law of the state of Illinois as applicable here, there can be no question but that the garnishee, even without the interposition of the debtor in the action, had a right, as a matter of defense in the garnishment proceedings, under the law of the state of Illinois, to set up this exemption of wages.

[2] That brings us to the other question remaining for determination. That is, whether we are to recognize the above-mentioned statute of the state of Illinois. It was duly pleaded and given in evidence.

[3] Comity between the several states and the courts thereof has been almost universally exercised throughout this country and recognized as a sound principle, particularly so in the administration of exemption laws. How far it shall go is often in question. The injustice of forcing one who is summoned as garnishee in the courts of one state to pay over moneys of the debtor in his hands and leaving him liable to be compelled, in another state by its courts, to again pay over the moneys on the same debt, is often assigned as a reason for its recognition. Our courts have distinctly recognized it in several cases, as see *Bancher v. Gregory*, 9 Mo. App. 102; *Stoeckman v. Terre Haute & Indianapolis R. R. Co.*, 15 Mo. App. 503; *Zuppann v. Bauer*, 17 Mo. App. 678; *Hurley v. Mo. Pac. Ry. Co.*, 57 Mo. App. 675; *Carey v. Schmeltz*, 221 Mo. 132, 119 S. W. 946. In *Stoeckman v. Railroad Co.*, supra, our court, recognizing the rule as adopted by courts of high authority, adds (15 Mo. App. loc. cit. 508, referring to the New York court): "And the courts are careful to say that it is not necessary that the foreign statute should resemble the New York statute in all its details. It is sufficient that the policy of the legislation of two states upon the subject of the right of action for such an injury is the same."

In *Zuppann v. Bauer*, supra, after calling attention to the homogeneity of our people and the nature of the federal union and the relations of the states of the Union to each other, it is said (17 Mo. App. loc. cit. 678): "Such being our situation and relations inter sese, the doctrine which assigns to the statutes of a sister state of the Union no greater credit or comity than would be assigned to the laws of a foreign state, seems to be narrow, barbarous, and tribal." In *Carey v. Schmeltz*, supra (221 Mo. loc. cit. 136 and 139, 119 S. W. 946), recognizing the rule of comity, it is said that it is applicable when the law of the sister state is not contrary to the policy of our own state.

[4] As will appear by examination of the authorities referred to, the courts of one state commonly recognize the laws of another state when the general policy of the two states on the subject is alike. That this is the case with respect to the statutes of Illi-

nois and those of our own state on the matter of exemption of wages from garnishment proceedings, is clear. There is a difference in the amount of exemption; there is no difference whatsoever in policy.

Nor is recognition of the spirit of comity confined to the courts. Our lawmakers have not only recognized it, but enforced it by the Act of our General Assembly, approved April 18, 1911 (Laws 1911, p. 141). This act consists of three sections. By the first, the garnishment of wages, the attachment of wages, either in an original action by attachment or under garnishment proceedings, is prohibited unless personal service has been had upon the defendant, and unless the suit be brought in the county where the defendant resides or in the county where the debt is contracted and the cause of action arose or accrued, and the statement filed in the cause and the writ or summons of attachment or garnishment "shall affirmatively show the place where the defendant resides and the place where the debt is contracted and the cause of action arose." The second section is distinctly founded on comity. It provides that wages earned and payable out of this state "shall be exempt from attachment or garnishment in all cases where the cause of action arose or accrued out of this state, unless the defendant in the attachment or garnishment suit is personally served with process; and if the writ of attachment or garnishment is not personally served on the defendant, the court issuing the writ of attachment or garnishment shall not entertain jurisdiction of the cause, but shall dismiss the suit at the cost of the plaintiff. In all actions commenced in this state in which it is sought to garnish or attach wages, the petition or statement filed in such case and the summons or writ of garnishment or attachment shall affirmatively show the place where the defendant resides and the place where the debt is contracted and the cause of action arose." By the third section of this act, all acts or parts of acts inconsistent or in conflict with it in so far as they are so inconsistent and are in conflict, are repealed. It is true that this act of April 18, 1911, did not go into effect until the 19th of June, 1911, and that before the last named date the action before us had been instituted and the judgment rendered, the latter occurring June 5th, 1911. It will be observed that there is no clause in this act saving actions then pending. Whether this act applies to this action, even its scope, need not now be determined. We refer to it solely as an emphatic recognition by the General Assembly of our state of the law of comity to as full an extent, nearly, certainly in line with, what had before then been held by the courts.

Under the Illinois law these wages up to \$15 a week are exempt from process of garnishment there. Shall we, applying the Illinois law by comity, hold them exempt in

our jurisdiction? We answer this in the affirmative.

We are not here considering the question of where the debt of the principal debtor was contracted; we confine ourselves to a construction of the laws of Illinois, governing the matter of garnishment for wages earned in Illinois by one of its residents, payable there and attempted to be impounded here, and whether we will recognize and give effect to that law in our courts.

In recognizing the Illinois law under the rule of comity, the learned trial judge committed no error. The judgment is affirmed.

NORTONI and ALLEN, JJ., concur.

#### JOHN H. SCHROEDER WINE & LIQUOR CO. v. WILLIS COAL & MINING CO.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by the John H. Schroeder Wine & Liquor Company against the Willis Coal & Mining Company, garnishee of James Killian. From an adverse judgment, plaintiff appeals. Affirmed.

Frank Landwehr and Gardner & Pickett, all of St. Louis, for appellant. Dawson & Garvin, of St. Louis, for respondent.

REYNOLDS, P. J. While there are some differences as to the amount of the wages due and the debts, and on other minor points, the substantial points presented for determination are the same as those which arose and are considered in the case of John H. Schroeder Wine & Liquor Co., Appellant, v. Willis Coal & Mining Co., Garnishee of Perrina et al., Respondents, 161 S. W. 352. For the reasons stated in the opinion in that, the judgment of the circuit court in this cause is affirmed.

NORTONI and ALLEN, JJ., concur.

#### JOHN H. SCHROEDER WINE & LIQUOR CO. v. WILLIS COAL & MINING CO.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by the John H. Schroeder Wine & Liquor Company against the Willis Coal & Mining Company, garnishee of Antone Cina. From an adverse judgment, plaintiff appeals. Affirmed.

Frank Landwehr and Gardner & Pickett, all of St. Louis, for appellant. Dawson & Garvin, of St. Louis, for respondent.

REYNOLDS, P. J. While there are some differences as to the amount of the wages due and the debts, and on other minor points, the substantial points presented for determination are the same as those which arose and are considered in the case of John H. Schroeder Wine & Liquor Co., Appellant, v. Willis Coal & Mining Co., Garnishee of Perrina et al., Respondents, 161 S. W. 352. For the reasons stated in the opinion in that, the judgment of the circuit court in this cause is affirmed.

NORTONI and ALLEN, JJ., concur.



**SCHROEDER v. WILLIS COAL & MINING CO.**

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Jos. C. Schroeder, assignee, against the Willis Coal & Mining Company, garnishee of Morris Wright. From an adverse judgment, plaintiff appeals. Affirmed.

Frank Landwehr and Gardner & Pickett, all of St. Louis, for appellant. Dawson & Garvin, of St. Louis, for respondent.

**REYNOLDS, P. J.** While there are some differences as to the amount of the wages due and the debts, and on other minor points, the substantial points presented for determination are the same as those which arose and are considered in the case of John H. Schroeder Wine & Liquor Co., Appellant, v. Willis Coal & Mining Co., Garnishee of Perrina et al., Respondents, 161 S. W. 352. For the reasons stated in the opinion in that, the judgment of the circuit court in this cause is affirmed.

**NORTONI and ALLEN, JJ.,** concur.

**BARTON LUMBER CO. v. GIBSON.**

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

**1. JUSTICES OF THE PEACE (§ 174\*)—ACTIONS—STATEMENT OF ACCOUNT—WAIVER.**

Rev. St. 1909, § 7413, provides that, in a suit on an account in a justice's court, a bill of items shall be filed, and in all other cases a statement of the facts stating the cause of action, but that no suit shall be dismissed or discontinued for want of any such statement, if the plaintiff shall file a statement of account before the jury is sworn or the trial commenced, or when required by the justice. An action was tried in justice's court on the theory that an account had in fact been filed; but on appeal the record did not show that a bill of items of account had been filed, and the defendant consented to the introduction of a duplicate. Held that, not having raised the objection by timely motion in the circuit court, the error was waived.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

**2. PLEADING (§ 424\*)—COMPLAINT—STATEMENT OF ACCOUNT.**

A defendant may waive his right to insist upon the filing of an account, in accordance with Rev. St. 1909, § 1832, in an action begun in the circuit court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1421, 1422; Dec. Dig. § 424.\*]

**3. APPEAL AND ERROR (§ 1008\*)—FINDING OF FACTS—EFFECT.**

A finding of facts has the same force on appeal whether requested below or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

**4. ACCOUNT, ACTION ON (§ 4\*)—DEFENSES—WAIVER.**

Where plaintiff accepted a note in payment of an account, and defendant's counsel agreed not to set up the giving of a note as a defense in case it was returned, and plaintiff

failed to return the note, defendant did not waive his right to interpose that defense.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 9; Dec. Dig. § 4.\*]

**5. ACCOUNT, ACTION ON (§ 4\*)—DEFENSES—PAYMENT.**

Where defendant, who purchased a bill of goods from plaintiff, gave a note in payment thereof, the acceptance of the note suspended the right to sue for the indebtedness during the time the note had to run, although it did not, in the absence of an express agreement, extinguish the indebtedness, and hence a suit brought before the maturity of the note was premature.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 9; Dec. Dig. § 4.\*]

**6. APPEAL AND ERROR (§ 1028\*)—REVERSAL—COSTS.**

Where an action on account was prematurely brought, a judgment against defendant will be reversed, even though he admitted he either owed the account or a note given in payment, for the matter of costs alone is a substantial right involved in litigation, for a violation of which judgment should be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.\*]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by the Barton Lumber Company against Peter B. Gibson. From a judgment for plaintiff in the circuit court on appeal from a justice's court, defendant appeals. Reversed and remanded.

Bishop & Cobbs, of St. Louis, for appellant. Johnson, Rutledge & Lashly, of St. Louis, for respondent.

**ALLEN, J.** This is an action to recover \$496.72, being the sale price of certain lumber sold and delivered by plaintiff to defendant. The suit was begun before a justice of the peace. Plaintiff had judgment, and the defendant appealed to the circuit court, where the cause was tried before the court alone, a jury having been waived, resulting again in a judgment for plaintiff, from which defendant prosecutes this appeal.

I. A statement was filed with the justice of the peace, setting up briefly plaintiff's cause of action, and referring to an itemized statement stated to be thereto annexed and marked "Exhibit A." The latter is not preserved in the record. At the trial in the circuit court it developed that it was not among the papers certified by the justice; plaintiff's counsel stating, in response to a query by the court, "The justice's transcript has left it behind; it is not here." In lieu thereof, however, plaintiff caused to be identified and introduced in evidence a paper shown to have been prepared by defendant, and sent to plaintiff as and for a statement of the account. The latter showed that the claim was for two car loads of lumber, giving the car numbers, and for which, after deducting certain charges and allowances, a balance of \$496.72 was shown to be due plaintiff.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] One point raised by appellant pertains to the sufficiency of the statement filed before the justice. This is upon the ground that the record does not show that "a bill of items of the account" was filed, in compliance with section 7413, Revised Statutes 1909. But this point we think is not well taken. There was sufficient before the justice of the peace to give him jurisdiction of the cause, and, if the defendant wished to avail himself of the failure on the part of plaintiff to file the bill of items of the account, if there was any such failure, he should have interposed a timely motion or objection in the circuit court. In this particular a defendant may waive his right to insist upon the filing of an account even in a suit begun in the circuit court, as required by section 1832, Rev. Stat. 1909. See *Schneider v. Johnson*, 164 Mo. App. loc. cit. 646, 147 S. W. 538.

Here the statement filed before the justice referred to an account alleged to have been thereto annexed and filed with the justice. At the trial in the circuit court it was not contended by defendant that such account had not been in fact filed, and no point respecting the same was made. No motion was made or objection interposed on this score. On the contrary, the account which plaintiff introduced in evidence appears to have been treated by the court and by both parties as having been substituted for the original account referred to in the statement on file and therein alleged to have been annexed thereto. It was upon this theory that the case was tried below, and appellant did not in any manner complain thereof except in its motions for a new trial and in arrest. Such being the case, we think that appellant is now in no position to urge any error in this regard as ground for a reversal in this court.

II. The only defense interposed below pertains to a note shown to have been executed by the defendant to the plaintiff for the amount of the indebtedness on account of the sale of the lumber in question. The record discloses that this note was dated September 21, 1910, and was for the amount of the account sued upon, and payable on or before 60 days after that date. It was mailed to plaintiff, with the request that the latter accept it in settlement of the account. Plaintiff received it on September 24, 1910, accepted and retained it. Upon presentation of the note to defendant at its maturity, payment thereof was refused, and plaintiff thereupon caused the note to be protested. This action, however, had in the meantime been begun, on September 27, 1910, by a representative of the plaintiff; it appearing that this step was taken without the knowledge of the plaintiff at the time, but in the course of the business of plaintiff's representative who was acting for it.

It appears that the suit was continued from time to time in the justice court, and

that counsel for plaintiff and defendant, respectively, came to an understanding, whereby it was agreed that the suit might proceed to judgment before the justice of the peace upon the account, provided plaintiff's counsel would deliver to defendant's counsel the note in question, so that the same might not be an outstanding obligation against defendant; the indebtedness represented by the account and the note being admitted to be due from plaintiff to defendant.

The circuit court made a finding of facts, though not thereto requested, in which the court found that the note had not in fact been delivered to defendant's counsel, though counsel for plaintiff believed that the same had been done. The court further found, from the letters and testimony respecting the giving of the note, that the latter was accepted by the defendant in "settlement of said account," that the agreement later entered into by defendant's counsel respecting the surrender of the note was a waiver of defendant's right to plead the acceptance of the note by plaintiff, as being in settlement and payment of the account, as a defense to this action on the account itself, finding, however, that the condition upon which such waiver had been made had not been performed by plaintiff.

The court then proceeded apparently to treat the action as one upon a lost note, entered judgment for the plaintiff for the amount of the indebtedness and accrued interest, and ordered that execution be stayed until the plaintiff executed and delivered to defendant a bond in the sum of \$1,000, with a surety or sureties to be approved by the court, conditioned that plaintiff would save the defendant harmless from any loss or damage which might thereafter accrue by reason of any claim or claims by any other person on account of such note. The record discloses that such bond was given and approved.

[3] So far as concerns the facts, we are concluded by the findings of the trial court. It is true that the court was not requested to make a finding of facts; but this court has expressly held that, where such finding is made, though without request, it is as binding upon the appellate court as if made in compliance with a request therefor. See *Lesan Advertising Co. v. Castleman*, 165 Mo. App. 575, 148 S. W. 433. And in support of the conclusion reached in that case are cited cases from other states holding likewise, decided under statutes similar to ours, viz.: *Jennings v. Jennings*, 56 Iowa, 288, 9 N. W. 222; *Farwell Co. v. Lykins*, 59 Kan. 96, 52 Pac. 99; *Harner v. Batdorf*, 35 Ohio St. 113—and reference is made to the language used in the opinion in *Shipp v. Snyder*, 121 Mo. 155, 25 S. W. 900, wherein our Supreme Court said: "The court in this case, sitting as a jury, was under no obligations to make a special finding of facts; but, as was his privilege, he did so. The facts as found by

him are responsive to the issues upon which a judgment could have been rendered, and his functions as a jury then ceased. \* \* \* And it became his duty as a court to render judgment on the finding, or, if dissatisfied with it for any valid reason, to set it aside."

[4] The court found that the note was given in settlement of the account, that the agreement made by defendant's counsel respecting its return was such as to operate as a waiver by defendant of the defense respecting the note; but the court then expressly found that such waiver was only upon condition that the note be returned, and found that such condition had not been performed, i. e., that the note had not in fact been returned. Hence such waiver did not attach, and defendant was entitled to interpose his defense on this score.

[5] The giving of a note under such circumstances "suspends the right to sue upon the indebtedness during the time the note has to run, and it is treated as a payment thereof to the extent that the party to whom the note has been given cannot recover upon the original cause of action without producing the note on the trial for cancellation or properly accounting for its nonproduction. But in the absence of an express agreement to that effect, the note does not operate to extinguish the indebtedness." *Harvesting Co. v. Blair*, 146 Mo. App. 374, 124 S. W. 49, and cases cited.

It is urged that, inasmuch as the transaction attending the giving of the note by defendant and its acceptance by plaintiff was had by correspondence between the parties, and as the record contains the letters passing between them, the question as to whether the note was taken in "settlement" of the account, as found by the trial court, is one of law to be determined by the language employed in such letters, and that therefore we are not bound by the court's finding in the premises. But, however this may be, it is quite clear that, when the note, bearing date September 21, 1910, was accepted by plaintiff on September 24, 1910, it operated to suspend the right to sue upon the indebtedness for the time which the note had to run, to wit, 60 days from its date. See *Harvesting Co. v. Blair*, supra. Hence plaintiff had no cause of action against the defendant on September 27, 1910, when it instituted this action. It is not disputed that defendant was then and is now indebted to plaintiff in the sum for which the action is prosecuted; however, it is quite clear that defendant was entitled not to be sued thereon until the maturity of the note, at which time he might have paid the same without suit and the costs attending the same. The facts as found by the trial court were such as to prevent the waiver of this defense which would otherwise have later attached. And as such finding is conclusive upon us, it seems altogether clear that we are bound to hold that

the plaintiff was without right to institute the action when it did, and that it was error for the trial court to treat the action as one upon a lost note, and render judgment for plaintiff upon the giving of a bond as required in such cases.

[6] Respondents earnestly insist that substantial justice has been done by the judgment of the trial court, and hence such judgment should not be reversed. This argument would appear to inhere with much force were it not for the fact that defendant must be deemed to be prejudiced thereby as for a violation of his substantial right to have and recover the costs. It has been frequently held that the matter of costs alone is a substantial right involved in litigation, for violation of which a judgment should be reversed. See *State ex rel. v. Dickmann*, 146 Mo. App. 396, 124 S. W. 29, and cases cited. It is true that defendant here admits that he owes "either the account or the note." Nevertheless, under the facts as found by the lower court, it appears that defendant's substantial rights were violated by the institution of the suit prior to the maturity of the note, and that, in the absence of a waiver of its defense on this score, the court was without authority to enter judgment against him in this proceeding. In this view we feel compelled to hold that the judgment should be reversed, and the cause remanded.

It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

### HATFIELD v. SWIFT.

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1913.)

#### 1. TRIAL (§ 191\*) — INSTRUCTIONS — PROVINCE OF JURY.

Where, in an action for services under a contract of employment, there was evidence that defendant personally employed plaintiff at \$100 per month, a request to charge that, though defendant told plaintiff to take charge of certain mules, that statement in itself would not constitute a contract on defendant's part individually was properly refused as characterizing such acts as a matter of law, instead of charging that the acts would constitute a contract if accepted by plaintiff, unless plaintiff knew defendant was acting for other parties.

[Ed. Note.—For other cases, see *Trial, Cent. Dig.* §§ 420-431, 435; *Dec. Dig.* § 191.\*]

#### 2. TRIAL (§ 244\*) — INSTRUCTIONS — PARTICULARIZING EVIDENCE.

A request to charge that a certain statement made by defendant to plaintiff would not constitute a contract of employment on defendant's part individually was improper as commenting on or particularizing certain evidence.

[Ed. Note.—For other cases, see *Trial, Cent. Dig.* §§ 577-581; *Dec. Dig.* § 244.\*]

#### 3. TRIAL (§ 260\*) — INSTRUCTIONS — REQUEST TO CHARGE.

Defendant was not entitled to the giving of a request to charge where the subject was amply

\*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes*

covered by another instruction given as modified, though complaint was made of the modification which, however, could not have misled the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Circuit Court, Buchanan County; W. K. Amick, Judge.

Action by James A. Hatfield against L. A. Swift. Judgment for plaintiff, and defendant appeals. Affirmed.

John E. Dolman and Joseph McDonald, both of St. Joseph, for appellant. Mytton & Parkinson, of St. Joseph, for respondent.

ELLISON, P. J. This is an action on an account for services alleged to have been rendered to defendant at his request. The judgment in the trial court was for plaintiff.

In view of our obligation to stand by the verdict of a jury when it is supported by any substantial evidence, we do not discover any good reason upon which to base this appeal. Defendant makes a statement in detail of the connection which he had with the St. Joseph Stockyards and of the doings of the Blair Horse & Mule Company and the Ben Miller Mule Company, showing the latter quit business in debt to the former, etc., and that plaintiff had been its employé up to the time it ceased business.

Plaintiff's statement sets out that defendant was a large stockholder in the Stockyards Bank in St. Joseph, which "financed" the above companies.

[1] While these matters may have had their proper place in giving a right understanding to the jury, and enabling it the better to judge between the conflicting statements of the parties as appeared in their testimony, the important fact controlling us is that there was abundant evidence in plaintiff's behalf that defendant personally employed him, and agreed to pay him \$100 per month, and the jury so found. We must sustain the judgment rendered on the verdict, unless there is error in refusing two instructions offered by defendant.

[2] Of these, the first starts out with the erroneous statement that, although defendant "told plaintiff to take charge of or look after what was known as the Ben Miller mules, that statement of itself will not constitute a contract on the part of defendant individually." To have so characterized such acts, as a matter of law, would have been improper. It should have stated that such acts would constitute a contract if accepted by plaintiff, unless plaintiff knew he was acting for other parties. The instruction was likewise improper in the latter part in commenting or particularizing certain evidence.

[3] Besides this, all that defendant was entitled to on the subject of whether he was acting for himself or for others was embodied in the instruction which the court

modified. It is true that complaint is made of that modification; but it is apparent to us that it was proper enough, and could not have misled the jury. Furthermore, since these instructions are bottomed on the concession that defendant did employ plaintiff, the hypothesis that he must have made the employment for himself was improper unaccompanied by the qualification that plaintiff knew he was not acting for himself. This fault would have justified the court in refusing entirely both instructions.

The judgment was manifestly for the right party, and is affirmed. All concur.

### SHULL v. CUMMINGS.

(Kansas City Court of Appeals. Missouri.  
Nov. 3, 1913. Rehearing Denied  
Dec. 1, 1913.)

#### 1. PARTITION (§ 9\*)—VOLUNTARY PARTITION—INTEREST OF HUSBAND OF GRANTEE.

Where land belonged to a married woman and her brother as tenants in common, a partition deed from the brother to her and her husband was not a conveyance of any title to her husband, or even to her, but was a mere setting off of the boundaries to the land she owned by inheritance.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 28-32; Dec. Dig. § 9.\*]

#### 2. HUSBAND AND WIFE (§ 25\*)—LEASE—RECOGNITION.

Where a husband leased property of his wife in which he had no interest, and the lessee took and held possession for nearly four years during which the wife knew of the lease, and that her husband was collecting the rent, up to the time of their divorce, in her petition for which she stated that her husband had taken control of the property and asked that he be required to account to her, and where she afterwards sold the land to an uncle discounting the consideration on account of the lease and again inherited it from the uncle, there was such a recognition of the lease that the lessee became her tenant.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 148-151, 153, 154, 525; Dec. Dig. § 25.\*]

#### 3. HUSBAND AND WIFE (§ 138\*)—WIFE'S SEPARATE PROPERTY—CONSENT TO USE BY HUSBAND.

Though a husband, who leased his wife's property, did not have her consent in writing as the statute requires, there is no reason why, after her husband's death, or after divorce, she may not ratify the lease.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 524-537; Dec. Dig. § 138.\*]

#### 4. LANDLORD AND TENANT (§ 120\*)—TENANT AT WILL—NOTICE TO QUIT.

Under the express provisions of R. S. 1909, § 7883, a tenant at will is entitled to 30 days' notice to quit.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 416-426, 432, 433; Dec. Dig. § 120.\*]

#### 5. LANDLORD AND TENANT (§ 306\*)—LEASE—NOTICE TO QUIT.

Where the petition alleged merely a right to possession in plaintiff, an answer of general denial was merely a denial of such right of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

possession, and was sustained by a failure to give notice to quit.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1313; Dec. Dig. § 306.\*]

#### 6. APPEAL AND ERROR (§ 837\*)—RECORD—FINDINGS OF FACT.

Where the bill of exceptions did not contain the evidence taken, but did contain finding of facts, made by the court at the request of the parties without objection, such findings might be considered to determine whether the conclusions of law drawn therefrom were proper.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.\*]

Appeal from Circuit Court, Buchanan County; W. K. Amick, Judge.

Action by Katherine Shull against Claude E. Cummings. Judgment for plaintiff, and defendant appeals. Reversed.

C. V. Hickman, of St. Joseph, and H. K. White, of St. Joseph, for appellant. W. S. Herndon, of Plattsburg, for respondent.

ELLISON, J. This is an action for the possession of certain farm lands in Buchanan county and rents thereof. The judgment in the trial court was for the plaintiff for the possession and for \$256.82 as damages and \$33.50 monthly value of rents. The title to the property is not questioned; the controversy relates to defendant's rights as a tenant under a certain lease. At the inception of the controversy, plaintiff was the wife of A. P. Shull, but before its close she was divorced from him in the year 1909. The land formerly belonged to plaintiff's father, and at his death was inherited by her and her brother John. When the father's land was partitioned, the part now in controversy was allotted to plaintiff. Then she, in January, 1910, sold it to her uncle Francis R. Allen, and he, in the following December, brought this action against defendant; but before it was reached for trial he died, leaving plaintiff and her brother John as his sole heirs, and they divided the lands by their respective deeds, John's deed being made to her and her husband. But notwithstanding such joinder of the husband as a grantee, the land in controversy by force of the law (as we shall presently see) again became plaintiff's. Then she was substituted for her deceased uncle as party plaintiff and filed an amended petition, to which defendant filed a general denial by way of answer, upon which pleadings the case went to trial by the court without a jury.

[1] It seems the plaintiff's husband, before they were divorced, thought he had an interest in the land, perhaps an estate by the entirety, and he made the lease to defendant for five years by reason of which the latter claims he has yet a right to possession. But this idea of the husband's was ill founded. Though the deed was made to him and plaintiff, he took no interest, as the land deeded was already hers as tenant in com-

mon with her brother and coheir, and the deed from him was not a conveyance of title even to her, much less to her husband. It was merely setting off the boundaries to land she owned by title through inheritance from her uncle. *Whitsett v. Wamack*, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339; *Starr v. Bartz*, 219 Mo. 47, 58, 117 S. W. 1125.

[2, 3] However erroneous the view was as to the husband's right to make the lease, he did it, and defendant took and held possession under it from August, 1906, without molestation, near four years, and during this time plaintiff knew of the lease and that her husband was collecting the rent up to the time of the divorce. And when she afterwards sold the land to her uncle, the lease was known to him and recognized by both; the consideration money was discounted or lessened on account of the lease. In addition to this, plaintiff stated in her petition for divorce that her husband had taken control of the property and was collecting the rents thereof, and she asked that he be required to account to her.

In our opinion there was a distinct recognition of the lease by both plaintiff and her uncle. The uncle being charged with notice and recognition of the lease when he bought the land from plaintiff (*Martin v. Jones*, 72 Mo. 23; *Drey v. Doyle*, 99 Mo. 459, 12 S. W. 287; *Freeman v. Moffitt*, 119 Mo. 280, 25 S. W. 87), she, as his heir and substitute for him in carrying on this action after his death, would be bound by the notice to him and by his recognition of the lease, even if she had no other notice. Suppose that Francis had not died after beginning this action, but, instead, had deeded the land to another in the way plaintiff deeded it to him, and that other had had himself substituted as party plaintiff; could it be doubted that such other stood in the shoes of Francis? Plaintiff is in the same position such a purchaser would have been; she is chargeable with the same notice that bound her uncle.

Nothing is gained for plaintiff by the fact that she never gave her husband her consent in writing that he might lease her land and collect the rent. For it is enough that her uncle, through whom she claims, was chargeable with a recognition of the lease as above shown. But if more than this were required, it is found in her conveyance to her uncle, which was after she became sole. We think plaintiff is in error in her contention that what we are terming a recognition by plaintiff was a ratification and to be effective must have been in writing because original consent had to be in that form. Though a married woman's consent to her husband's use of her property must be in writing as the statute requires, yet there is no reason why she may not deal with the property as any other person, after death or divorce has separated her from him.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[4] In view of the foregoing, it must be admitted that defendant was not a trespasser in his occupancy of the land. He was an occupant under a claim as tenant. He regularly paid his rent. Plaintiff sought in her divorce action to have such rent diverted to her and that her husband be enjoined from collecting more of it. In all the circumstances which we have stated, he became plaintiff's tenant. And whether a tenant from year to year, or at will, is of no consequence, since, if the former, he was entitled to 60 days' notice to quit, and, if the latter, 30 days, and he has had neither. Sections 7882, 7883, R. S. 1909.

[5] But plaintiff insists that defendant denied her title, and therefore is in the position of a tenant denying title, which makes notice to quit unnecessary. The pleadings do not bear this out. The answer is merely a general denial of the allegations of the petition, and the latter does not plead title in the plaintiff, but merely a right to the possession. The denial was merely a denial of such right, and it is sustained by a failure to give notice to quit.

[6] The bill of exceptions does not contain the evidence taken, but does contain a finding of facts made by the court at the request of the parties, and after being made was not objected to by either party. On these facts we have concluded the conclusion of law was erroneous. We will say that the trial court concluded from the facts that defendant was a tenant at will, but seems to have overlooked the statute above cited requiring 30 days' notice to quit in such character of tenancy.

The judgment is reversed. All concur.

#### MITCHELL v. GERMAN COMMERCIAL ACCIDENT CO.

(St. Louis Court of Appeals. Missouri.  
Dec. 2, 1913.)

#### 1. INSURANCE (§ 452\*)—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—RISK.

Under policy against loss of life from injuries caused exclusively by external, violent, and accidental means, resulting in death within 30 days therefrom, received while riding as a passenger in a place regularly provided for the transportation of passengers within a surface car or other public conveyance, in consequence of accident causing actual and material damage to the conveyance, the beneficiary of one killed while attempting to board a street car, but who had not become a passenger, could not recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1164, 1173, 1174; Dec. Dig. § 452.\*]

#### 2. INSURANCE (§ 146\*)—POLICY—LIBERAL CONSTRUCTION.

Language employed in insurance policy is to be construed so as to effectuate the insurance, and not so as to defeat it, for the insurance is the very object and purpose of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

#### 3. INSURANCE (§ 146\*)—POLICY—CONSTRUCTION AGAINST INSURER.

Where the language employed in a policy is in the least doubtful, it is to be more strictly construed against the insurer who selects it and incorporates it into the policy, and in such a way as to protect the insured, and hence, where words are susceptible of the interpretation given them by the insured to afford indemnity, they will be so construed, although the insurer in fact intended otherwise.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

Appeal from St. Louis Circuit Court; Charles Claffin Allen, Judge.

Action by Katherine Mitchell against the German Commercial Accident Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Barclay, Fauntleroy, Cullen & Orthwein, Igoe & Carroll, and Wm. R. Gilbert, all of St. Louis, for appellant. Jones, Jones, Hocker & Davis, of St. Louis, for respondent.

NORTONI, J. This is a suit on a policy of accident insurance. At the conclusion of the evidence the court gave judgment for defendant as a conclusion of law, and plaintiff prosecutes the appeal.

It appears that plaintiff is the widow of Charles C. Mitchell, the insured, and as such she is the beneficiary in the policy. Charles C. Mitchell, plaintiff's insured husband, came to his death from injuries received while attempting to board a moving street car in the city of St. Louis, but before he had entered the same. The suit is for \$1,000, the death benefit specified in the policy, provided death occur from accidental cause while the insured is riding as a passenger in a place regularly provided for the transportation of passengers within a car.

It is argued for plaintiff that the \$1,000 death benefit vouchsafed in the policy obtains in favor of plaintiff if the death shall be caused from any external or violent injury occasioned through accident, and the question for consideration relates alone to an interpretation of the policy provision touching this subject-matter. So much of the policy as is relevant will be copied here. After preliminary recitals, the policy stipulates insurance as follows:

"A. In the sum of \$1,000 for loss of life, or special features—

Loss of both entire eyes, meaning total, permanent, and irrecoverable loss of the sight of both eyes .....	\$500
Loss of both entire hands, by actual and complete severance at or above the wrists.....	\$500
Loss of both entire feet, by actual and complete severance at or above the ankles.....	\$500
Loss of one entire hand and one entire foot, by actual and complete severance at or above the wrist and ankle.....	\$250
Loss of one entire hand, by actual and complete severance at or above the wrist.....	\$100
Loss of one entire foot, by actual and complete severance at or above the ankle.....	\$100
Loss of one entire eye, meaning total, permanent, and irrecoverable loss of the sight of one eye .....	\$50

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Provided such injuries are effected exclusively by external, violent, and accidental means, which shall, independently of all other causes, immediately, continuously, and wholly disable the insured, or be the sole cause of the death, or dismemberment, or loss of sight of the insured, within thirty days from the date of the event causing such injury, and said injuries to the insured shall occur while riding as a passenger in a place regularly provided for the transportation of passengers, within a surface or elevated railroad car, steamboat, or other public conveyance provided by a common carrier for passenger service only, including a passenger elevator, and in consequence of a collision or other accident causing actual and material damage to the conveyance in which the insured is so riding."

[1-3] By way of condensation, we may eliminate, for the moment, the several specifications for loss of eyes, hands, feet, etc., and consider that alone which pertains to the loss of life, for such is the case in judgment. In such circumstances the policy provides insurance: "A. In the sum of \$1,000 for loss of life \* \* \* provided such injuries are effected exclusively by external, violent, and accidental means which shall, independently of all other causes \* \* \* be the sole cause of the death \* \* \* within thirty days from the date of the event causing such injury, and said injuries to the insured shall occur while riding as a passenger in a place regularly provided for the transportation of passengers within a surface or elevated railroad car, steamboat, or other public conveyance provided by a common carrier for passenger service only, including a passenger elevator, and in consequence of a collision or other accident causing actual and material damage to the conveyance in which the insured is so riding." It is conceded here that there was no collision or other accident causing actual and material damage to the street car plaintiff's husband sought to board, and it is conceded, too, that he had not attained a place within the car, for he met his death on the street in an attempt to take passage on the conveyance. The language of the policy is entirely clear to the effect that insurance in the sum of \$1,000 for accidental death is vouchsafed only in those cases where the injuries received which result in death occur while riding as a passenger in a place regularly provided for the transportation of passengers by a common carrier, etc. The proviso of the policy above copied goes to the effect, not only that the injuries from which the death results shall be effected exclusively by external, violent, and accidental means, but through the conjunction "and" stipulates that it is provided, as a condition of the insurance as well, the injuries to the insured shall occur while riding as a passenger, etc. This is entirely clear.

There can be no doubt of the rule of con-

struction which obtains, to the effect that language employed in insurance policies is to be construed so as to effectuate the insurance, and not for the purpose of defeating it, for, it is said, the insurance vouchsafed is the very object and purpose of the contract. It is true, too, that, if the language employed in the policy is in the least doubtful, it is to be more strictly construed against the company who selects and incorporates it into the policy, and in such a way as to protect the interests of the insured, who has paid a consideration for the indemnity. See *Stix v. Travelers' Indemnity, etc., Co.*, 157 S. W. 870, 872. Therefore, as another court has expressed it, if the words employed in the policy are susceptible of the interpretation given them by the insured to afford indemnity, they will be so construed although the insurer in fact intended otherwise. See *La Force v. Williams City Ins. Co.*, 43 Mo. App. 518, 530. Under this rule of construction, it is urged the policy should be interpreted here as one providing indemnity against every death resulting from external injuries received through an accidental cause, for it is said that a subsequent provision of the policy implies as much in discriminating between injuries, "fatal or otherwise," and therefore suggests the thought that the injuries contemplated in the portion of the policy above copied which are covered only when riding within the passenger car are those other than from which death ensues. Among the conditions printed on the policy, it is stipulated that "this insurance does not cover \* \* \* injuries, fatal or otherwise, resulting from vertigo or from exposure to unnecessary danger \* \* \* or while racing," etc. Because this exemption from liability for loss on account of such injuries, fatal or otherwise, provided in terms in this condition of the policy does not include as well an express exemption from liability for death from accident when not riding as a passenger within the car, it is urged the prior provisions of the policy should be construed as limiting the insurance on the condition of being a passenger within the car to those injuries only from which death does not ensue. But we are unable to discern anything in this portion of the policy which should be regarded as enlarging the covenant of indemnity in the provisions above set forth. It is obvious this condition of the policy provides an exemption in certain cases which might be otherwise included as within the covenant of insurance; but it is equally obvious that the covenant of insurance whereby \$1,000 is stipulated in event of death does not include a death from accident, except it occur while the insured is a passenger. Though it be that the language of insurance contracts is to be construed most favorably to the insured and against the insurer with a view to effectuating the insurance, and that all doubtful language is to be resolved in favor of the insured, the courts are not authorized

to seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

**BARBER ASPHALT PAVING CO. v.  
FIELD et al.**

(Kansas City Court of Appeals. Missouri.  
Oct. 6, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 558\*)—TAX  
BILLS—NATURE OF ACTION.**

An action to enforce the lien of a special tax bill issued under Kansas City charter, permitting such suits against owners of the land charged, but providing that only the title and interest of the defendants shall be affected by the proceedings, is not one in rem until jurisdiction of the subject-matter is acquired.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1265; Dec. Dig. § 558.\*]

**2. MUNICIPAL CORPORATIONS (§ 565\*)—TAX  
BILLS—ACTION TO ENFORCE—INTEREST AFFECTED.**

An action to enforce a special tax bill, brought under Kansas City charter, providing that the owners of any interest in the land charged may be made defendants, but only their right or interest in the land shall be affected, can only be maintained against one owning some interest in the land when the action is brought.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1274; Dec. Dig. § 565.\*]

**3. DEEDS (§ 38\*)—VALIDITY—DESCRIPTION.**

A deed which did not contain a sufficient description of the land conveyed was invalid on its face, and did not convey any title.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 65-79; Dec. Dig. § 38.\*]

**4. DEEDS (§ 194\*)—PRESUMPTION OF DELIVERY.**

It is presumed that a deed was not delivered so as to become operative until after the date of its acknowledgment.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. § 194.\*]

**5. DEEDS (§ 67\*)—DELIVERY.**

A deed which was presumptively not delivered so as to become operative until after the date of its acknowledgment did not, when delivered, relate back to its date or to the date of a prior executed void deed between the parties, at least not for the purpose of conveying title as of those dates so as to uphold an action on a special tax bill against the grantee, who did not otherwise have title at that time.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 145-148; Dec. Dig. § 67.\*]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by the Barber Asphalt Paving Company against Annie Camp Field and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellant. Gage, Ladd & Small and R. H. Field, all of Kansas City, for respondents.

JOHNSON, J. This suit was begun in the circuit court of Jackson county May 29, 1902, on a special tax bill issued to plaintiff by Kansas City, September 28, 1897, for paving Tenth street between Broadway and Summit streets. The tax bill was issued against lot 1, block 6, Coates addition to Kansas City, and the petition alleged that the defendants, Sarah McLean, Annie Camp Field, and Richard H. Field, owned, or claimed to own, the land. Subsequently plaintiff dismissed Sarah McLean from the suit and proceeded against the remaining defendants, who are husband and wife. They filed separate answers disclaiming any beneficial interest in the land at the time of the commencement of the suit, and the answer of Mrs. Field interposed other defenses, but in the view we take of the case we do not find it necessary to refer to them. A jury was waived, and the court, after hearing the evidence, rendered judgment for defendants. An appeal was allowed plaintiff to the Supreme Court, on the ground that title to real estate was involved in the action, but that court ruled that no such issue was involved and transferred the case to this court.

On May 24, 1895, Sarah McLean, who, at the time, resided in California and was the owner of the lot, entered into a written contract with George H. Camp who lived in Georgia, by the terms of which she sold and agreed to convey the lot by proper warranty deed to the said Camp, who was the father of the defendant Annie Camp Field. This contract was acknowledged by Sarah McLean, and was filed for record in the office of the recorder of deeds of Jackson county on May 25, 1895. Camp performed the conditions of the contract, and on June 1, 1895, Sarah McLean, at his request, executed and delivered to his daughter, Annie Camp Field, a warranty deed to the lot. This deed was acknowledged and filed for record on the date of its execution, but was invalid because of its failure to contain a sufficient description of the lot. Acting in the belief that the deed conveyed to her the fee-simple title, Mrs. Field, on September 18, 1895, executed and delivered to her father a written instrument in which she declared that she held the title to the lot in trust for him. This declaration was not acknowledged or recorded, but defendants contend that plaintiff had actual knowledge of its existence. To support this contention, evidence was introduced by defendants to the effect that from the date of the purchase of the lot by Mr. Camp to that of the commencement of this suit, the defendant Field, acting as Camp's agent, leased the premises to ten-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ants; that Camp's name appeared in the leases as lessor, and that the taxes assessed against the lot were paid by Field as the agent of Camp, to whom the tax receipts were issued.

The declaration of trust included other property than the lot in controversy, and in March, 1900, was introduced in evidence by defendants in another suit between the same parties then pending in a federal court over tax bills issued against such other property for a different improvement from that in question. The attorneys who represented plaintiff in that suit were the same as those now appearing for plaintiff, and defendants insist that the notice they received of the existence of a declaration of trust affecting lot 1, block 6, Coates' addition to Kansas City, constituted actual notice to plaintiff, their client. On the other hand, one of the attorneys testified that their employment by plaintiff was special and not general, and, as the present controversy had not arisen at the time of the proceedings in the federal court, they took no note of a fact wholly irrelevant to the issues in that case or to any other case in which they had been specially employed by plaintiff. Under date of April 23, 1902, a warranty deed to correct the error in the former deed was executed by Sarah McLean Campbell (née Sarah McLean) and her husband to Mrs. Field, but this deed was not acknowledged until June 2, 1902, three days after the beginning of this suit. It was filed for record July 2, 1902. The charter of Kansas City in force at the times of the issuance of the tax bills and of the institution of this suit provided that "suits on special tax bills \* \* \* may be brought in any court of competent jurisdiction. \* \* \*

All or any of the owners of the land charged or of any interest or estate therein may be made defendants in any suit, but only the right, title, interest, and estate of the parties made defendants in any such suit shall be affected or bound thereby, or by the proceedings therein. \* \* \* It shall be sufficient for the plaintiff in any suit to plead the making and issuing of the tax bill sued on, giving the date and contents thereof, if any, and to allege that the party or parties made defendants own or claim to own the land charged or some estate or interest therein."

[1] An action to enforce the lien of a special tax bill issued under these provisions is not in rem until after jurisdiction of the subject-matter has been acquired by the court in which the action is being prosecuted. *Land & Lumber Co. v. Bippus*, 200 Mo. 688, 98 S. W. 546.

[2] In order to confer such jurisdiction, the action must have a defendant, or defendants, who own the land sought to be charged or some interest or estate in it, and the judgment can affect only such interest or estate. The action must fail unless it be prosecuted against a defendant owning some interest or estate in the land (*Perkinson v.*

*Meredith*, 158 Mo. 457, 59 S. W. 1099; *Parker-Washington Co. v. Kemper Inv. Co.*, 143 Mo. App. 244, 128 S. W. 271), since without such defendant the court could not acquire jurisdiction of the subject-matter. "The chief object in having the owner brought in would seem to be to enable him to contest the validity of the proceedings as a charge upon his property, and to discharge the lien, if he so desires, without sale thereof." *Vance v. Corrigan*, 78 Mo. 94. "But it has been ruled in similar cases that the record owner would be the proper party unless the true owner was known to the holder of the bill.

\* \* \* It seems to be considered that if the owner of the property fails to record his deed, and a tax lien holder brings his action against one who appears to be the owner by the record, not having notice of the title of the real owner, and proceeds to judgment and sale, it will carry the title in a way similar to the instance of one purchasing from the record owner without notice of any other title." *Parker-Washington Co. v. Kemper Inv. Co.*, supra; *Jaicks v. Sullivan*, 128 Mo. 177, 30 S. W. 890; *Vance v. Corrigan*, supra.

Plaintiff claims that, at the time of the commencement of this suit, Mrs. Field appeared as the record owner of the fee-simple title to the land, and that plaintiff had no actual notice that she held it in trust for her father. The weakness of this position is apparent. So far as the record discloses, Mrs. Field had no title to any estate or interest in the land.

[3] The deed Sarah McLean had executed and delivered to her, which she had filed for record, was void on its face and therefore ineffective to convey any title. That plaintiff so regarded it was manifested by joining Sarah McLean with the present defendants. The record title on the date of the filing of this suit stood in Sarah McLean, subject to the contract of sale between her and Mr. Camp, and since that contract had been fully performed by him, she held the legal and he the equitable or beneficial title. In other words, she and not Mrs. Field was the trustee.

[4-5] The second deed from Sarah McLean to Annie Camp Field, though dated before the filing of this suit, was not acknowledged and recorded until after that date. The presumption must be indulged that it was not delivered, and therefore did not become operative, until after the date of the acknowledgment (*Fontaine v. Bank*, 57 Mo. 552), and when delivered it did not relate back to its date or to the date of the void deed at least, not for the purpose of imparting vitality to a stillborn suit. The doctrine of relation never has been carried to that extent. *Lumber Co. v. Zeitinger*, 45 Mo. App. 114; *Land & Lumber Co. v. Bippus*, supra; *St. Joseph v. Baker*, 86 Mo. App. 310; *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 825; *Wilson v. Fisher*, 172 Mo. 10, 72 S. W. 665; *White v. Davis*, 50 Mo. 333; *Williams v. Hus-*

ky, 192 Mo. loc. cit. 550, 90 S. W. 425; Parmelee v. Simpson, 5 Wall. 81, 18 L. Ed. 542.

These considerations compel the conclusion that, since Mrs. Field was not the owner of any interest or estate in the land, she was not a proper party defendant, and that, since her husband, the only remaining defendant, clearly had no interest or estate but was only the agent of Camp in renting the property and paying the taxes, the suit must fail for lack of a proper defendant.

The judgment is affirmed. All concur.

#### CROWLEY v. DAGLEY.

(Kansas City Court of Appeals. Missouri. Oct. 6, 1913. Rehearing Denied Dec. 1, 1913.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 221\*)—CLAIMS AGAINST ESTATE—CARE BY ADULT CHILD.

Where personal services are rendered to an aged and partially helpless person by an adult child, the ordinary presumption that such services are to be paid for, which would arise if performed by a stranger, does not obtain, and the opposite presumption must be indulged, that, though the child is not legally bound to serve the parent gratuitously, he does so without expectation of pecuniary reward.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 221\*)—SERVICES TO AGED PARENT—COMPENSATION.

The presumption that, where services are rendered to an adult parent by a child, they are without expectation of reward may be rebutted by proof to the contrary, provided the evidence showing that the recipient of the services intended to pay and the servant expected to receive compensation is sufficient to create a contractual obligation to pay.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-902½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.\*]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 221\*)—SERVICES TO AGED PARENT—COMPENSATION.

Where plaintiff filed a claim against her mother's estate for services rendered to the mother in her last illness, the burden was on plaintiff to show affirmatively the existence of a contractual understanding between her and her mother that the services should be paid for in money.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.\*]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 221\*)—CARE FOR AGED PARENT—COMPENSATION—EVIDENCE.

Where a claimant cared for and boarded her mother during the last months of her life, during which she was an invalid, evidence that on various occasions the mother expressed satisfaction with claimant's nursing, stated that she wanted claimant paid for caring for her, and that her other children should have what was left, and on other occasions stated to a noninterested person that she wanted claimant well paid for what she had done, etc., was insufficient to show that claimant's sacrifices for plaintiff were not the result of filial gratitude,

and was insufficient to establish a contract to pay therefor enforceable against the mother's estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.\*]

Appeal from Circuit Court, Clay County; Francis H. Trimble, Judge.

Action by Amanda Crowley against Luther A. Dagley, as administrator of the estate of Emiline P. Asbury. Judgment for plaintiff, and defendant appeals. Reversed.

R. T. Stephens and E. L. Riley, both of Excelsior Springs, for appellant. Martin E. Lawson, of Liberty, for respondent.

JOHNSON, J. This suit originated in the probate court of Clay county on a demand filed by plaintiff against the estate of her deceased mother. The only item before us for consideration is the following: "To personal services rendered said Emiline P. Asbury from August 8, 1910, to February 29, 1912, boarding her, furnishing rooms, washing her clothes and bedding, waiting on deceased, who during all that time was sick and often helpless, changing her clothing, watching her by day and by night, especially during the last three months of said time, when the mind of deceased was affected, and she needed constant care and attention, 80¢/week at \$15, \$1,210.70. \* \* \* For said attention the deceased agreed to pay, and especially promised to pay for the care, attention, etc., first above stated." The issues were tried in the probate court and afterwards in the circuit court, where the cause was taken by appeal. At the latter trial the jury returned a verdict for plaintiff in the sum of \$1,000, and, after unsuccessfully moving for a new trial and in arrest of judgment, defendant, administrator, appealed.

The principal contention of counsel for defendant is that the verdict and judgment are unsupported by substantial evidence, and that the court erred in not sustaining a demurrer to the evidence. On the other hand, counsel for plaintiff argue that the evidence discloses the existence of an implied agreement of the decedent to pay for the services in controversy.

The facts of the case as shown by the evidence of plaintiff thus may be stated: Mrs. Asbury, the mother of plaintiff, was 82 years old at the time of her death, which occurred in Excelsior Springs, February 29, 1912. Her husband had died two or three years before the commencement of the services in dispute, and she had been living alone at their old home in Kearney. Plaintiff, a married woman, lived with her family on a farm near Kearney. Some time before August 8, 1910, she went to live with her mother, who had fallen into ill health, and could no longer live alone. One the date just mentioned plaintiff removed with her family and mother to Ex-

celsior Springs chiefly for the benefit of the health of the mother. They lived in a rented house for a time; but two or three months before her mother's death plaintiff's husband bought a residence for the family. During the time they occupied a rented house Mrs. Asbury paid half of the rent, but paid nothing for her maintenance and the care and attention bestowed upon her by plaintiff. She was afflicted with a disease of the heart, which subjected her to fainting attacks, and on that account and because of her increasing feebleness required constant care and attention. Plaintiff, herself in poor health, faithfully discharged the duties of a nurse and affectionate daughter during the period for which she seeks compensation. The witnesses do not agree about the degree of the aged woman's incapacity to take care of herself; but the evidence as a whole clearly shows that she was feeble, childish, and afflicted with severe attacks of some form of heart disease. That her condition required and she received at her daughter's hands the greatest care and attention are facts about which there can be no reasonable dispute. One day while moving about in the house she accidentally fell to the floor, and broke one of her legs, from the effects of which she died the next day.

A great-granddaughter of Mrs. Asbury, who was a member of plaintiff's family, testified: "Q. Miss Thelma, did your grandma ever say anything to you about the care that Mrs. Crowley was giving her? A. Yes, sir. Q. What did she say about it? A. Well, she said that she wanted Aunt Amanda paid for taking care of her; that she wanted Mandy and Aunt Ida to have what she left. Q. Ida is her sister Mrs. Mullen? A. Yes, sir. Q. How many times did she say anything of that sort to you? A. Oh, she said it several times. Q. What did she say about the kind of care Mrs. Crowley was giving? A. She thought Aunt Amanda was giving her good care. Q. When did she say these things to you? A. She talked to me of night when we would go to bed when she couldn't sleep; lie there, and talk to me. Q. Was it at those times when she said those things about paying her well for it? A. Yes, sir."

The wife of Mrs. Asbury's physician, who was on intimate terms with the family, testified: "Q. What was her physical condition, Mrs. Clark? A. Well, she seemed feeble, I think weak. Q. Who was waiting on her and caring for her when you were there? A. Mrs. Crowley would always be looking after her when I would be there. Q. Did Mrs. Asbury say anything to you about the care that Mrs. Crowley was giving her? A. She said Mrs. Crowley was so good to her, and she wanted her well paid for what she had done. Q. Did she say that to you more than once? A. Yes, yes; when she would be talking, it would be mentioned. Q. What care and attention did you see Mrs. Crowley giving her at different times? A. I would

see her give her a drink, and see her comb her hair; seen her take hold of her when she would go to walk across the room."

This is all the evidence introduced by plaintiff bearing on the subject of the nature of the relation between her and her mother. Mrs. Asbury had about \$2,600 in money, which during the period under consideration was held by a trustee for her benefit. The record does not disclose that she owned any other property at the time of her death. Defendant introduced evidence tending to show that plaintiff rendered the services in question gratuitously; but it is not necessary to go into that evidence, since our consideration of the questions arising from the insistence of defendant that plaintiff failed to make out a case to go to the jury must be confined to evidence most favorable to plaintiff.

[1, 2] Where personal services are rendered to an aged and partially helpless person by an adult child, the ordinary presumption that such services are to be paid for, which would arise were they performed by a stranger, does not obtain, and the opposite presumption must be indulged, that, although the child was not legally bound to serve the parent gratuitously, the impelling motive was filial love or the dictates of humanity, rather than the expectation of pecuniary reward. In this rule the law wisely recognizes the existence of a natural and common human impulse; but this presumption may be overcome by proof that the parties themselves expressly or impliedly agreed before or during the performance of the services that they were not to be gratuitously performed, but were to be compensated. The law will give effect to the mutual intention of the parties whether or not it be expressed in a formal contract, and, where it is made to appear that the recipient of the services intended to pay and the servant expected to receive compensation for them, such intention will be enforced, however informal its expression may have been. The decisions in this state, however, draw a vital distinction between mere expressions of gratitude by the recipient and of a voluntary purpose to reward his benefactor at some future time and an express or implied agreement imposing a contractual obligation upon him to pay for the services. The foundation of a legal demand must be an obligation of the latter character, and mere expressions of gratitude or of the voluntary intention to reward alone will not constitute a contractual obligation. As is well said by Ellison, J., in *Brand v. Ray*, 156 Mo. App. loc. cit. 630, 137 S. W. 624: "The expression of an intention to bestow a bounty and the expectation to receive a bounty will not suffice; an expectation to be made the beneficiary in a will is not sufficient. There must be an understanding of a debtor and creditor relation, capable of enforcement in law. There must be brought into existence a legal obligation." See, also, *Brock v. Cox*,

38 Mo. App. 40; Woods v. Land, 30 Mo. App. 176; Lawrence v. Bailey, 84 Mo. App. 107; Penter v. Roberts, 51 Mo. App. 222.

[3] The burden is on the plaintiff to show affirmatively the existence of a contractual understanding between her and her mother. Being disqualified as a witness in her own behalf, plaintiff is not required to establish this fact by direct and positive evidence, but in the absence of such evidence must produce proof of facts and circumstances which, if accepted by the triers of fact, would overthrow the presumption that the services were gratuitous, and raise a reasonable inference that the parties intended they should be regarded as the subject of a contractual rather than of a family relationship.

As is said by the Supreme Court of Utah in Mathias v. Tingey, 39 Utah, 561, 118 Pac. 781, 38 L. R. A. (N. S.) 749: "If, from all the facts and circumstances surrounding the parties, and under which the services were commenced and rendered, it can be reasonably inferred that the child expected to receive remuneration, and the parent intended to pay, for the services, a promise to pay therefor may be implied." And, further, it is said in the same case that: "If an adult child is no longer a member of the parent's family, but is supporting himself through his own efforts, and the parent under such circumstances requests the child to return to the parent and perform certain services for him, then the general presumption that the services are rendered gratuitously or as a matter of filial duty loses its full force and effect."

But where the facts and circumstances adduced by the plaintiff are found on analysis to be just as consistent with the initial presumption of gratuitous service as with the opposite inference, there can be no issue to send to the jury, since the burden resting on plaintiff compels her to overthrow this presumption by proof before she can be entitled to recover.

[4] The peculiar facts of the present case do not warrant us in holding that the sacrifices made by plaintiff for her mother's sake even tend to show that she was actuated by any other motive than that of filial love and reverence for her aged parent, who was helplessly tottering on the verge of the grave. True, her mother was able to pay for the services; but she was in a condition that enabled her, if she chose, to satisfy the promptings of affection, and it would overtax credulity to believe that this well-to-do farmer and his wife left the farm they owned, broke up their own home, and incurred the expense and inconvenience thereby entailed from any motive of enabling the wife to earn the wages of a nonprofessional nurse. We are persuaded that the evidence of the sacrifices made by plaintiff for her mother is as consistent with the inference of gratuitous

service as with the opposite inference, and therefore, of itself, is insufficient to raise a jury question.

We think plaintiff's case is not greatly aided by the testimony of the great granddaughter and the physician's wife. The declaration of Mrs. Asbury that "she wanted Aunt Amanda paid for taking care of her, that she wanted Mandy and Ida [another daughter] to have what she left," amounts to nothing more than an expression of gratitude, coupled with a voluntary purpose, never carried into execution, to make a testamentary disposition of her property in favor of those two children. It must be borne in mind that the burden of plaintiff requires her to show the existence of a mutual intention that the services were to be paid for, and we fail to perceive any good ground on which it may be said that a declaration of the recipient of the services of her intention to bestow a bounty in her will on her benefactor can support an inference of the existence of a debtor and creditor relation between the parties. In our opinion it tends rather to contradict than to support such conclusion.

Counsel for plaintiff have not referred us to any case that goes the length we would have to go should we affirm the judgment. In the Utah case from which we have quoted the recipient of the services declared to witnesses her present intention to pay, in language which implied a present legal obligation. In Markey v. Brewster, 70 N. Y. 607, and *Id.*, 10 Hun (N. Y.) 16, the deceased was shown to have declared repeatedly that she intended to pay the plaintiff, and the court found that "there is nothing in the evidence tending to show that such compensation was to be made by will." In Lillard v. Wilson, 178 Mo. 145, 77 S. W. 74, the recipient expressed a present intention to pay, and requested his physician to procure a notary to draw up the necessary papers.

In all of the cases in this state relied on by plaintiff (e. g., Cole v. Fitzgerald, 132 Mo. App. 17, 111 S. W. 628; McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728; Fry v. Fry, 119 Mo. App. 476, 94 S. W. 990; Cowell v. Roberts, 79 Mo. 218) there was proof indicating the existence of a present understanding between the parties that the services were to be compensated as distinguished from mere declarations of a voluntary purpose of the deceased to bestow a bounty upon his benefactor.

Our conclusion is that plaintiff failed to sustain her burden of proof, and that the demurrer to the evidence should have been sustained.

The judgment is reversed.

ELLISON, P. J., concurs. TRIMBLE, J., not sitting, having presided at the trial in the circuit court.

**WESTERN UNION TELEGRAPH CO. v. KERSTEN.†**

(Court of Civil Appeals of Texas. Galveston.  
Nov. 13, 1913.)

**1. TELEGRAPHS AND TELEPHONES (§ 66\*)—DELAY IN DELIVERY OF MESSAGES—LIABILITY—EVIDENCE.**

In an action against a telegraph company for delay in the delivery of a message, announcing the death of the sendee's brother, and thereby depriving the sendee of the privilege of attending the funeral, evidence held not to sustain a finding that the sendee could and would have attended the funeral had the telegram been promptly delivered.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 65\*)—DELIVERY OF MESSAGES—SPECIAL CONTRACTS—PLEADINGS.**

A petition, in an action against a telegraph company for delaying the delivery of a message, which alleges that the company accepted the message for delivery to plaintiff with knowledge that his residence was unknown to the sender, and accepted the sender's guaranty that any special delivery charges which might be required if plaintiff resided beyond the free delivery limits at the point of destination would be paid, alleges a special contract, and notwithstanding the stipulation on the back of the message that the company does not undertake to make free delivery beyond the free delivery limits, but will without liability at the sender's request as his agent and at his expense endeavor to contract for him for such delivery at reasonable prices, the company failing to endeavor to deliver the message to plaintiff living a short distance beyond the free delivery limits is liable for breach of the special contract.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 54-60; Dec. Dig. § 65.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 37\*)—DELIVERY OF MESSAGES—SPECIAL CONTRACTS.**

In the absence of a special contract, a telegraph company is not liable for failure to make a delivery of a message beyond the limits of the city of destination or beyond the free delivery limits thereof.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. § 37.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 74\*)—DELAY IN DELIVERY OF MESSAGES—ACTIONS—INSTRUCTIONS.**

An instruction, in an action against a telegraph company for delay in the delivery of a message, that it is the duty of a telegraph company to deliver all messages within its free delivery limits within a reasonable time after receiving the same and to deliver telegrams beyond free delivery limits when the required special delivery fees are paid, or when it accepts a message and agrees to deliver the same in consideration of special delivery fees being guaranteed, is objectionable as requiring a higher degree of care than the law imposes, for the company is only required to use ordinary care to make such delivery, while the instruction makes it the absolute duty of the company to deliver in a reasonable time.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.\*]

**5. TRIAL (§ 251\*)—INSTRUCTIONS—ISSUES.**

An instruction which submits an issue not raised by the pleadings or evidence is erroneous. [Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

Appeal from District Court, Austin County; Frank S. Roberts, Judge.

Action by Herman Kersten, Jr., against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Hume & Hume, of Houston, for appellant.  
C. G. Krueger, of Bellville, for appellee.

**PLEASANTS, C. J.** This suit was brought by appellee against the appellant to recover damages for the alleged negligent failure of appellant to make delivery of a telegram received by it for transmission and delivery to appellee informing him of the death of his brother. The damages claimed are for mental anguish caused by the inability of appellee to attend his brother's funeral, which it is alleged resulted from the negligence of appellant in failing to make delivery of the telegram. The telegram was as follows: "Cat Springs, Texas, Dec. 16, 1910. To Herman Kersten, Haskell, Texas. Brother Julius was killed today. Will be buried Sunday morning. Come. C. Theuman."

The following are the material allegations of the petition: "Plaintiff says that the defendant accepted said message for transmission and delivery to the plaintiff, and did also accept and collect the sum of 25 cents as fees or charges for sending, transmitting, and delivering said message to this plaintiff, and that by reason thereof the defendant became bound and obligated to send, transmit, and deliver said message to this plaintiff immediately, or at least within reasonable time after receiving it at its office in the town of Haskell, Tex. Plaintiff further represents unto the court that C. Theuman, the sender of the message, did not know how far from the office of the defendant this plaintiff lived or resided, nor did he know that this plaintiff resided without the free delivery limits established by the defendant for said town of Haskell, and therefore offered and guaranteed to pay any and all special delivery fees or charges, if any were needed or required, to promptly deliver the aforesaid message to this plaintiff, to which the defendant's agent replied: 'That is all right; if any are needed you can pay later, and I will notify you of it.' Plaintiff further represents unto the court that he and his said brother, Julius, were very much attached to each other by natural brotherly love, and that if the defendant had promptly delivered said message and telegram to him, as it was bound and obligated to do, by reason of the contract aforesaid, he would and could have received said message in time to have reached Cat Springs, Tex., the home of his said brother, in time to have attended his funeral, and that he

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—24 †For opinion on motion for rehearing, see 161 S. W. 109L.

would and could have come to attend the funeral of his said brother, and viewed his body and remains, if the defendant had promptly delivered said message and telegram to him as it had bound and obligated itself to do. Plaintiff further represents unto the court that, at the time said message and telegram was sent by said C. Theuman, and at the time it was received by the defendant at its office in the town of Haskell, Tex., this plaintiff resided near said town of Haskell, Tex., and within about  $1\frac{1}{4}$  of a mile from the defendant's said office in said town, and within about 100 yards of the city limits of said town of Haskell, Tex."

It is further alleged: "That the defendant company did not notify the sender of said message that any special delivery fees were required or needed to deliver said message promptly to this plaintiff, nor did it give to this plaintiff an opportunity to pay special delivery fees, if any were really required to promptly deliver said message or telegram to this plaintiff. Plaintiff further says that, if any special delivery fees were really needed or required to promptly deliver said message or telegram to this plaintiff, the failure on the part of defendant to promptly notify the sender or sendee of the fact that it required special delivery fees to promptly deliver said message or telegram to plaintiff was culpable negligence on the part of the defendant, for which it is answerable in damages to this plaintiff. The plaintiff says that the defendant either willfully or through carelessness or negligence as aforesaid failed and refused to deliver said message to this plaintiff promptly upon receiving it at Haskell, Tex., as it should and ought to have done, and that said carelessness and negligence as aforesaid was the direct and proximate cause of his great mental pain, dire distress, and many disagreeable emotions of the mind which the plaintiff has suffered, and the wounding and lacerating of his feelings as aforesaid."

The defendant's answer contains a general demurrer, a special exception, a general denial, and two special pleas. The first of these pleas is, in substance, that the message was written upon a blank form furnished by the defendant upon which the following stipulation was printed: "Messages will be delivered free within one-half mile of the company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price."

In the second plea it is averred, in substance: That at the time the message was sent the defendant had established office hours in the town of Haskell; said hours being from 8 a. m. to 8 p. m. daily. That the message was received at Haskell at 5:55 p. m. on December 16, 1910, and the agent at

Haskell promptly sought to find plaintiff and deliver said message, but was unable to locate him, as he was not to be found within defendant's free delivery limits, nor within the town of Haskell, and that about 7 p. m. on said date defendant's agent at Haskell, having received information that plaintiff resided out in the country from the town of Haskell, sent a service message to defendant's agent at Cat Springs, Tex., notifying said agent that plaintiff resided in the country from Haskell and advising him that a special messenger would be required to deliver said message, and that payment of the fee for such messenger must be provided. That said service message was promptly transmitted, but that no reply was received thereto on December 16, 1910, by reason of the fact that, though the message was promptly transmitted and due diligence was used to obtain a reply, such reply could not be obtained before the office at Haskell closed under the office hours rule before mentioned.

The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiff for the sum of \$1,200.

[1] The evidence shows that the brother of the plaintiff was killed on December 16, 1910. At the time of his death he lived in the country about eight miles from the town of Cat Springs in Austin county. The message before set out was delivered to appellant's agent at Cat Springs for transmission to appellee about 4 p. m. on December 16, 1910. At the time the message was delivered for transmission, the sender, Theuman, paid the charges for transmission to Haskell and informed appellant's agent that he did not know how far from appellant's office at Haskell appellee resided, and offered to pay or guarantee any charges there might be for delivery beyond the free delivery limits of appellant's Haskell office. On this point he testified as follows: "I offered to pay any and all special delivery fees and offered to deposit the money with the agent there. He would not accept it, and he says: 'Go on, and if there are any fees, that will be all right; you can come around here to-morrow or some other time and pay it; it will be all right.' They never did notify me that there were any special delivery fees for the delivery of this telegram." The message was promptly transmitted to Haskell and reached appellant's office there in a short time. When it was transmitted, the agent at Cat Springs failed to notify the Haskell agent that special delivery charges were guaranteed. The agent at Haskell, after ascertaining that appellee lived outside of the town limits of Haskell and about two miles from appellant's office at that place, telegraphed the Cat Springs office that the payment of special delivery charges was required. This telegram did not reach Cat Springs until after the office was closed on the evening of the 16th, and consequently was not received

there. Not having any notice that the delivery charges were guaranteed, the Haskell agent made no further effort to have the message delivered until the next day, when he mailed appellee a notice that there was a message at the telegraph office for him. Appellee first learned on Sunday, December 18th, of his brother's death. He took the first train out of Haskell, which left there at 7 o'clock p. m. on the 18th, and he reached Cat Springs about 7 p. m. the next day. His brother was buried before appellee reached Cat Springs. Appellee was at home on the evening and night of the 16th. Three trains left Haskell each day, one at 7 a. m., one at 7 p. m., and one at 10 p. m. The train that left Haskell at 7 p. m. on the 18th made connections which enabled appellee to reach Cat Springs in 24 hours. It is not shown what connections were made by the other two trains, nor how long it would have taken to make the trip if appellee had taken either of these trains. The evidence fails to show when or where appellee's brother was buried.

The first assignment of error complains of the verdict on the ground that it is not supported by the evidence, in that there is no evidence that appellee could and would have taken the train from Haskell in time to have reached Cat Springs before his brother's burial, and no evidence that he could have been present at his brother's funeral at the time and place it occurred had the telegram been promptly delivered.

We think this assignment must be sustained. The fact that appellee made the trip in 24 hours by taking the 7 p. m. train on the 18th is sufficient to justify the conclusion that he could have made the trip in the same length of time if he had taken the 7 p. m. train on the 16th or 17th, and if he had done so he would have reached Cat Springs on the evening of the 17th or 18th; but we think it would be only a surmise or conjecture to conclude from this evidence that he could have made the trip in 24 hours if he had taken either of the other trains. But granting that the evidence is sufficient to show that he could have reached Cat Springs within 24 hours by taking any one of the daily trains out of Haskell, and that he might have gotten to Cat Springs as early as 7 p. m. of the 17th, still, in the absence of any evidence as to when and where the brother was buried, we cannot say that he could have reached his brother before his burial. We do not think we are justified in concluding that the deceased was buried on Sunday, the 18th, from the fact that the telegram sent on the 16th informed appellee that the burial would occur on the 18th. The mere fact that it was intended on the 16th that the burial would take place on the 18th does not show that the burial did occur on the last-named date. The time and place of the burial were matters susceptible of positive and exact proof and were facts necessary to be established in or-

der to show that appellee could have been present at the funeral had the telegram been promptly delivered. As we view the evidence, it is clearly insufficient to establish the time and place of the burial, and at most raises only a surmise or conjecture that the burial occurred on the 18th of December, and there is not even an intimation as to where it occurred. Courts are not authorized to act upon evidence of this kind, especially when it is apparent that the facts sought to be so proven can be established by direct and positive evidence.

[2] We do not agree with appellant in the contention, made under its second assignment of error, that the pleading and evidence in this case fail to show a contract on appellant's part to deliver the telegram to appellee at his home outside of the limits of the town of Haskell. The petition before set out alleges, in substance, that the appellant accepted the message for delivery to appellee with the knowledge that his exact place of residence was unknown to the sender of the message, and accepted the sender's guaranty that any special delivery charges which might be required in event appellee resided beyond the free delivery limits at Haskell would be paid. This is an allegation of a special contract, and, giving full effect to the stipulations printed on the back of the message that "beyond the free delivery limits (at Haskell) the company does not undertake to make free delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price," appellant became bound and obligated upon the receipt of the message at Haskell "to endeavor to contract for its delivery at a reasonable price." The evidence fully sustains the allegations of the petition in regard to the special contract for delivery and fails to show that appellant made any endeavor to contract for the delivery of the telegram. The fact that appellee lived a short distance beyond the limits of the town of Haskell does not affect appellant's liability under the contract. The cases of *Klopf v. Tel. Co.*, 100 Tex. 540, 101 S. W. 1072, 10 L. R. A. (N. S.) 498, 123 Am. St. Rep. 831; *Tel. Co. v. Byrd*, 34 Tex. Civ. App. 594, 79 S. W. 40; *Tel. Co. v. Swearingen*, 95 Tex. 420, 67 S. W. 767; *Tel. Co. v. White*, 149 S. W. 791; *Tel. Co. v. Shockley*, 57 Tex. Civ. App. 30, 122 S. W. 945; and *Tel. Co. v. Carter*, 156 S. W. 332—cited by appellant, do not sustain its contention. No special contract for delivery was alleged or proven in any of these cases except the *Carter Case*, and the only special contract in that case was an agreement on the part of the sender of the message to pay the charges of a connecting carrier which the court held was not sufficient to make the telegraph company liable for the negligence of the connecting carrier, a telephone company, in failing to deliver the message.

[3] Of course, in the absence of a special contract, the company would not be liable for failure to make delivery beyond the limits of the town or city to which the message was sent, nor beyond the free delivery limits in such town or city, and this is the extent of the holding in the cases cited.

This conclusion disposes of the questions presented by the third, fourth, fifth, and sixth assignments of error, and each of them is overruled.

[4] The seventh assignment complains of the following paragraph of the court's charge: "You are charged that it is the duty of a telegraph company to deliver all messages within its free delivery limits within a reasonable time after it receives same, and also to deliver telegrams beyond its free delivery limits when the required special delivery fees are paid, or when it has accepted a message and agreed to transmit and deliver same in consideration of special delivery fees being guaranteed to be paid."

This charge is objectionable on the ground that it requires a higher degree of care on the part of appellant than the law imposes. Appellant was not under the absolute duty to deliver the telegram in a reasonable time, but was only required to use ordinary care to make such delivery. *Telegraph Co. v. Grocery Co.*, 126 S. W. 1172.

[5] The paragraph of the charge complained of by the eighth assignment is also erroneous, in that it submits an issue not raised by the pleadings or the evidence. There is no evidence that appellant's agent at the time he accepted the message for transmission was informed that appellee lived outside the limits of the town of Haskell, nor is there any allegation of this kind in the petition, and issue of whether the agent was so informed should not have been submitted to the jury.

What we have said disposes of all the material questions presented in appellant's brief. For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

#### KIRBY LUMBER CO. v. STEWART.

(Court of Civil Appeals of Texas. Galveston.  
Nov. 4, 1913. Rehearing Denied  
Dec. 18, 1913.)

#### 1. BOUNDARIES (§ 40\*)—CALLS—AMBIGUITIES—QUESTION FOR JURY.

Where a latent ambiguity in a call for a boundary arises because the proof shows that a line run in accordance with the call will not reach the corner called for, the manner of ascertaining the true corner is for the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 196-204; Dec. Dig. § 40.\*]

#### 2. BOUNDARIES (§ 37\*)—EVIDENCE—SUFFICIENCY.

In an action for cutting and removing timber from a tract of land, evidence on the issue

of boundaries held to show that the timber was cut and removed from a tract of plaintiff.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

#### 3. EVIDENCE (§ 230\*)—DECLARATIONS—ADMISSIBILITY.

The testimony of a grantor that before the execution of the deed to the grantee he, with the grantee's agent, went on the ground, and pointed out the boundary lines, is inadmissible against a subsequent purchaser of the grantee; the deed being duly recorded, and the subsequent purchaser relying on the description therein without knowledge of the facts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 835-851; Dec. Dig. § 230.\*]

#### 4. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error in admitting improper evidence is not ground for reversal where the court specifically withdrew it from the jury, and directed the jury not to consider it for any purpose.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

Error to District Court, Tyler County; W. B. Powell, Judge.

Action by W. T. Stewart against the Kirby Lumber Company and others. There was a judgment for plaintiff against the defendant named and in favor of codefendants, and the defendant named brings error. Affirmed.

See, also, 141 S. W. 295.

Andrews, Ball & Streetman, of Houston, for plaintiff in error. Joe W. Thomas, of Woodville, for defendant in error.

McMEANS, J. W. T. Stewart brought this suit against the Kirby Lumber Company, J. R. Chapman, and D. G. Mann to recover damages in the sum of \$2,473.20, for timber alleged to have been cut and removed from a certain 24½-acre tract of land in Tyler county, and for the alleged injury and destruction of other timber on said tract, and for alleged injury to the land itself through the hauling and dragging of logs thereover. The defendants each pleaded the general denial, and the Kirby Lumber Company in addition vouched in its remote warrantors, S. A. Hawthorne and M. J. Hawthorne, and prayed for recovery over against them in the event plaintiff recovered against it. Subsequently the Kirby Lumber Company dismissed its action against said remote warrantors, and thereafter a trial before a jury resulted in a verdict in favor of defendants Chapman and Mann, and against the Kirby Lumber Company in favor of the plaintiff, Stewart, for the sum of \$275, from which the Kirby Lumber Company has appealed.

The 24½ acres of land in question is a part of a tract of 200 acres described in a deed from Wm. Neyland to R. C. Fulgham. On the western side of the 200-acre tract there are two lines running north and south and paralleling each other, and the 24½-acre tract is that lying between these two lines.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The 200-acre tract was conveyed by Fulgham to S. A. Hawthorne, and under Hawthorne both appellee and appellant claim in the following manner: (a) On June 21, 1902, Hawthorne and wife and the said Fulgham conveyed to W. W. Wilson the timber on 100 acres of the 200-acre tract, describing the 100 acres by metes and bounds, and Wilson's title passed to the Kirby Lumber Company. (b) On October 31, 1906, after the aforesaid conveyance had been duly recorded, Hawthorne and wife conveyed the 200 acres of land to W. B. Fondren and wife, and the parties last named afterwards conveyed the same to appellee, W. T. Stewart. The description in the timber deed from Hawthorne and wife and Fulgham to Wilson is as follows: "All of the timber standing, lying, and growing upon the following described tract or parcel of land lying and being situated in Tyler county, Texas, and a part of the Wm. Campbell league in said county and state, containing 100 acres more or less, and being a part of the same tract of land conveyed to me, the said S. A. Hawthorne, by R. F. Fulgham, on the 31st day of December, A. D. 1897, and described as follows: Beginning at the northeast corner of said tract; thence west to the northwest corner of said tract; thence south to where the present farm fence now stands; thence in an easterly course with said fence to Wolf creek; thence down said creek to where the east line of said tract crosses said creek; thence north to the place of beginning—and for further description reference is hereby made to land records of Tyler county in Book J, page 525." By the terms of the timber deed Wilson and his heirs were given the right of ingress and egress to and from all portions of said land and the adjoining lands for the purpose of cutting and removing the timber.

Appellee's contention is that the west line of the 100-acre tract described in the timber deed was the interior one of the two lines running north and south on the west side of the 200-acre tract, and not the exterior line.

[1,2] By its first assignment of error plaintiff in error complains that the court erred in refusing to give its special charge No. 1, which was a peremptory instruction to find for the defendant. It contends in its proposition under this assignment that the charge should have been given for the reason that under the undisputed testimony the timber deed to the Kirby Lumber Company included within its bounds all of the 24½ acres described in plaintiff's petition, from which the evidence showed the defendant Kirby Lumber Company cut the timber.

The evidence shows that the Kirby Lumber Company, in cutting the timber on the 100 acres, at first took only that east of the interior western line, and it is evident, we think, that its agents acting for it in the premises believed that line to be the true

west boundary line of the tract. Later, on surveying a tract of land lying west of the 100-acre tract, the exterior or most western northwest corner of the 100 acres was discovered, and the evidence indisputably shows, we think, that that corner is the true northwest corner of the tract. By the terms of the timber deed the timber was sold on 100 acres to be taken out of the northern part of a 200-acre tract of land which had for its beginning point the northeast corner of the tract. The line runs thence west to the northwest corner of the 200-acre tract, and under this call the Kirby Lumber Company had the right, under the facts of this case, to take the timber to the true northwest corner, although the seller and the agents of the Kirby Lumber Company at the time of the purchase believed that the interior line was the true west boundary line. The next two calls in the timber deed is "thence south to where the present farm fence now stands; thence in an easterly course with the fence to Wolf creek." The call for the western line is not at all ambiguous; but a latent ambiguity arose when attempt was made to reach the farm fence "as it now stands" (1902) by a line run south from the northwest corner, because the proof shows that a line so run would not reach the fence at all, but would pass west of the most western line of the fence a distance of some 12 or 15 feet. This ambiguity being disclosed, the matter of ascertaining the true southwestern corner of the 100 acres became a question of fact for the jury. The general direction in which Wolf creek runs is east and west, and the fence surrounding the farm in 1902 was on both sides of it; but on neither the north or the south sides of the creek did the fence extend far enough west to meet a line run due south from the northwest corner, so that a line run from that corner in order to strike the fence at a point either north or south of the creek would have to be deflected to the east. It is apparent from what we have said that the Kirby Lumber Company contends that the west line should be deflected only far enough to the east to reach the nearest point of the fence from a line run due south from the northwest corner, which would extend the west line to a point south of Wolf creek; while the plaintiff contends that the line should be deflected far enough east to reach the fence on the north side of the creek. Both recognize the rule that the call for the fence for the southwest corner would control over the call for a line to run due south. The jury found under appropriate instructions that the southwest corner of the 100 acres was at a point on the fence north of the creek, and, if there was evidence to justify this finding, their verdict should not be disturbed. From the testimony, and from a map illustrating the situation, it appears that a line run due south would not strike the fence at all, but to reach the fence must

be deflected slightly east. After reaching the fence in this way, Wolf creek would be reached by following the fence in an easterly course. The defendant contends that from the point thus reached Wolf creek would constitute the south boundary of the 100 acres. On the other hand, plaintiff contends that it is manifest that the corner on the fence called for in the field notes was at a point north of the creek, and that the west line should be deflected far enough east to reach the most westerly point on the fence north of Wolf creek. We think plaintiff's contention must be sustained. The map referred to shows that a line run from the northwest corner to the point on the fence south of the creek would, on account of the bends of the creek, cross the creek three times before reaching that point. From thence back to Wolf creek the fence runs in a northeasterly course, and after turning a bend in Wolf creek runs in a northwesterly direction to the creek. This takes in a small triangular piece of land in the southwest corner, south of the creek. The field notes do not call to cross the creek, and the only call for it is in the call to follow the field notes after the southwest corner is reached. If it was the intention of the parties to make the creek the west boundary of the 100 acres, it is reasonable that the call from the northwest corner would have been south to the creek, and it is not reasonable to presume in such case that they would have adopted a call for a line to cross the creek, not once, but three times. On the other hand, a line run from the northwest corner to the point which plaintiff contends is the southwest corner reached the fence north of the creek, and by running with the fence in an easterly course for the greater part of its length, and in a southerly course for a less distance, would reach Wolf creek, and the creek would not be crossed at all. The timber taken, and for which recovery was had, was that on the strip of land lying between the western line as contended for by defendant and the line contended for by plaintiff. We think that plaintiff's contention as to the location of the line is more in consonance with the evidence, reason, and justice of the case, and the first assignment presented by defendant cannot be sustained.

[3] The second assignment is as follows: "The court erred to the prejudice of this plaintiff in error in admitting over the objections of this plaintiff in error the testimony of S. A. Hawthorne to the effect that at the time he, with others, sold the 100 acres, more or less, to Wilson he went upon the ground with Wilson's agent, D. G. Mann, before the deed was made, and pointed out to said Mann the timber that was being sold, and showed Mann the lines bounding said timber, and showed him a certain interior west line, and showed him that the west line of the 100 acres, more or less, would strike the farm fence north of the creek, and

showed him where said line would strike the fence, as will more fully appear from this plaintiff in error's bill of exceptions herein No. 2."

Under this assignment we have the following proposition: "The testimony objected to was incompetent and inadmissible as against plaintiff in error, Kirby Lumber Company, because clearly res inter alios acta; the Kirby Lumber Company not being a party to said original timber deed but only a subvendee thereunder, and there being no testimony that D. G. Mann, who was representing the vendee, Wilson, in said timber deed, was in any sense an agent or representative of the Kirby Lumber Company, which subsequently purchased from Wilson."

[4] The witness Hawthorne did testify as complained in the assignment, and we think it was error to allow the testimony over the objections made to it. Its admission, however, does not constitute reversible error, for the reason that the court withdrew the objectionable testimony from the jury by instructing them to disregard it. We quote that portion of the charge: "There is no evidence before you to show that the Kirby Lumber Company knew at the time it bought the timber on said 100 acres, more or less, that the witness Hawthorne and D. G. Mann went upon the ground, and Hawthorne showed the lines and corners of the 100 acres of land, more or less, to D. G. Mann, at the time he bought the timber for W. W. Wilson, and, the deed from Hawthorne and wife and Fulgham to said Wilson being duly recorded in the deed records of Tyler county, Texas, at the time said company bought the timber, it had the right to rely upon the description of the land as given in said deed, and cannot be bound by the acts and declarations of said Mann and Hawthorne made by them at the time the timber on said 100 acres of land, more or less, was bought for Wilson; therefore the testimony of the witnesses S. A. Hawthorne and D. G. Mann as to where the lines and corners of the 100 acres were is withdrawn from you, and will not be considered by you for any purpose in passing upon the location of said land."

The assignment must be overruled, as are also the third, fourth, and seventh, which present practically the same point but in different form. Neither party in their briefs, or otherwise, have called our attention to the quoted charge which eliminated the objection made to the admission of the testimony complained of. We hardly think this is fair to this court. See rule 31 (142 S. W. xiii).

What we have said in disposing of the first assignment of error sufficiently disposes of the sixth, which, with its several propositions thereunder, is overruled.

We have carefully examined the eighth and ninth assignments, and are of the opinion that neither points out reversible error, and each, with the propositions thereunder, is overruled.

We find no reversible error in the record, and the judgment of the court below is affirmed.

Affirmed.

# NATIONAL AÉROPLANE CO. v. McCORMICK.

(Court of Civil Appeals of Texas. San Antonio. Nov. 19, 1913. Rehearing Denied Dec. 17, 1913.)

## APPEAL AND ERROR (§ 1133\*)—STATEMENT OF FACTS—NECESSITY.

In the absence of a statement of facts, bills of exception, and motion for new trial, a judgment will be affirmed, unless fundamental error appears on the face of the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4450-4453; Dec. Dig. § 1133.\*]

Error to Galveston County Court; George E. Mann, Judge.

Action between the National Aéroplane Company and Mart. C. McCormick. There was a judgment for the latter, and the former brings error. Affirmed.

Maco & Minor Stewart, of Galveston, for plaintiff in error. Geo. G. Clough and McInerney & Wilson, all of Galveston, for defendant in error.

TALIAFERRO, J. This suit was for debt and foreclosure of lien upon personal property. It comes to this court without statement of facts, conclusions of fact by the trial court, or bills of exceptions, and no motion for new trial was made in the lower court.

We find no fundamental errors apparent upon the record, and the judgment is affirmed.

# LOUISIANA RIO GRANDE CANAL CO. v. QUINN.

(Court of Civil Appeals of Texas. San Antonio. Nov. 26, 1913.)

## 1. MASTER AND SERVANT (§ 41\*)—BREACH OF CONTRACT OF EMPLOYMENT—DAMAGES.

The measure of damages for breach of a contract of employment for a year for a monthly compensation, on the faith of which the employé incurred expense in moving, was the amount of such expense and such other damages and loss sustained, not to exceed the amount to which he would have been entitled had the contract been performed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 50-53; Dec. Dig. § 41.\*]

## 2. MASTER AND SERVANT (§ 41\*)—ACTION FOR WAGES—RIGHT OF ACTION.

A servant employed for a year, at a certain amount per month, on his discharge without cause has an immediate right of action for the damages accruing from the breach, though only those damages accrued at the time of the trial are recoverable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 50-53; Dec. Dig. § 41.\*]

## 3. APPEAL AND ERROR (§ 1171\*) — APPEAL — AMOUNT AWARDED.

Where the jury did not follow erroneous instruction as to the measure of damages, and it did not appear what evidence they considered in arriving at an excessive verdict, such verdict must be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.\*]

Appeal from Hidalgo County Court; James H. Edwards, Judge.

Action by R. E. Quinn against the Louisiana Rio Grande Canal Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 160 S. W. 151.

F. W. Kibbe and L. J. Polk, Jr., both of Brownsville, for appellant.

FLY, C. J. This is a suit for damages instituted by defendant in error, which, it was alleged, accrued by reason of the discharge of defendant in error without cause by plaintiff in error. Defendant in error claimed to have been employed by plaintiff in error on or about July 1, 1911, for 12 months at the rate of \$100 a month and house rent and fuel valued at \$25 a month; that he was discharged without cause in November, 1911, after having worked for 5 months; that the cost of moving his family from Lane City, Tex., to Hidalgo, Tex., amounted to \$125 and his services for the remaining 7 months were, by the contract, of the value of \$875, which he claimed as damages. The suit was instituted on January 23, 1912, and was tried on February 16, 1912.

The court instructed the jury that the measure of damages was the expense of removal of defendant in error and his family from Lane City to Hidalgo and his salary for any time, not paid for, prior to the institution of the suit. In other words, the damages the jury were authorized to find could not have exceeded \$125 expense of moving and not more than \$250 for two months' wages. The jury returned a verdict for \$875, evidently the amount of salary for the remaining seven months of the year.

[1] The measure of damages under the facts of this case, if defendant in error was hired for one year, and on the faith of that contract of hire incurred expenses in moving himself and family to Hidalgo, and was discharged without cause, was the amount of such expenses and such other damages and loss sustained, not to exceed the amount to which he would have been entitled had the contract been fulfilled.

[2] The right to recover the damages accruing from the breach of the contract arises at once, but no more damages can be recovered than have accrued at the time of the trial. Meade v. Rutledge, 11 Tex. 44; Hassell v. Nutt, 14 Tex. 260; Railroad v. Shirley, 45 Tex. 355; Hearne v. Garrett, 49 Tex. 619;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

*Litchenstein v. Brooks*, 75 Tex. 196, 12 S. W. 975.

Appellee could not recover for any damages except those which had accrued up to the time of the trial. If appellee had withheld his suit until the expiration of the year he might, under proper conditions, have recovered for the whole amount of salary, but it may be difficult to ascertain what his damages are when the whole time has not expired. Still it is for the jury to determine under proper instructions and the evidence what the damages amount to. Any damage that naturally grew out of the discharge of defendant in error, if wrongfully done, should be taken into consideration; the only limitation upon the amount of the damages that could be recovered being the total amount of the salary during the remainder of the year after the discharge took place.

[3] We do not know what the jury took into consideration in arriving at a verdict, but it is evident that they did not follow the erroneous charge. Without chart or compass they found a verdict directly in the face of the charge and for an amount so excessive that appellee remitted \$250.

The judgment is reversed, and the cause remanded.

**SAN ANTONIO & A. P. RY. CO. v. SCHEDEL.**

(Court of Civil Appeals of Texas. San Antonio. Nov. 26, 1913.)

**RAILROADS (§ 425\*) — INJURIES TO STOCK — NEGLIGENCE—PROXIMATE CAUSE.**

Where a railroad company cast rocks on each side of a private crossing, rendering it difficult for animals, that negligence will not render it liable for the death of a horse, found dead near the crossing, where there was nothing to show that it had been killed by a train, or that the company's negligence caused the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1527-1533; Dec. Dig. § 425.\*]

Appeal from Lavaca County Court; P. H. Green, Judge.

Action by Emil Schendel against the San Antonio & Aransas Pass Railway Company, begun in justice court and appealed by defendant to the county court. From a second judgment for plaintiff, defendant appeals. Reversed and rendered.

Patton & Schwartz, of Hallettsville, for appellant.

**FLY, C. J.** This is a suit for the value of a horse, alleged by appellee to have been killed, at a private crossing by a train, through the negligence of appellant. The allegation of negligence was that "the crossing at the time of the injuries hereinafter complained of was improperly, negligently, and carelessly constructed and maintained, and did not permit of the free and easy passage of cattle, horses, and other stock from part of

said lands to the other part thereof." Appellant obtained a judgment in the justice's court for \$150, which on appeal to the county court was reduced to \$90.

It was shown that rocks had been thrown on each side of the crossing, which was a private one in a pasture, but no causal connection was shown to exist between the rocks and the death of the horse. There was no evidence that tended to show that the horse was killed by a train, except that he was dead near the crossing. No wounds, no blood, no broken bones, were shown to have existed. It may have been exceedingly wrong and improper for appellant to place rocks at or near the crossing to sustain its embankment, which rocks made it difficult for horses or cattle to cross, but that does not indicate that the rocks had anything to do with the death of the horse. Negligence that renders any one liable for damages must be the proximate cause of the injury.

The judgment is reversed, and judgment here rendered that appellee take nothing by his suit and pay all costs in this behalf expended.

**WILLINGHAM v. GEITZENAUER.**

(Court of Civil Appeals of Texas. Amarillo. Dec. 6, 1913.)

**1. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSION—FRAUD—EVIDENCE.**

Evidence in a suit to rescind an exchange of property held sufficient to support a finding that defendant's representations that the title to the land to be conveyed to plaintiff was unincumbered, except for a \$500 mortgage, were fraudulently made.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. § 10; Dec. Dig. § 8.\*]

**2. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSION—FRAUD—RELIANCE ON REPRESENTATIONS—EVIDENCE.**

Evidence in a suit to rescind an exchange of property held sufficient to show that plaintiff did not undertake to determine for himself that the title offered him was clear, but relied on the false representations made to him by defendant.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. § 10; Dec. Dig. § 8.\*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by J. Geitzenuer against G. W. Willingham and wife. Judgment against defendant G. W. Willingham, and he appeals. Affirmed.

Barrett & Jones, of Amarillo, for appellant. Cooper, Merrill & Lumpkin, of Amarillo, and Zink & Cline, of Hobart, Okl., for appellee.

**HUFF, C. J.** This case was tried without the intervention of a jury in the trial court. The suit was brought by appellee, J. E. Geitzenuer, against G. W. Willingham and his wife, Ora Willingham, to rescind a contract whereby appellee had sold and conveyed to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appellant lot 3, block 41, Glenwood addition to the city of Amarillo, or in the alternative for damages. The trial court, without filing conclusions of fact and law, rendered judgment against the appellant G. W. Willingham for the sum of \$420, in favor of the appellee, discharging Mrs. Willingham. Appeal is prosecuted in this court, by the appellant, G. W. Willingham, in which he complains of the judgment rendered.

It is urged there was no evidence showing a fraud practiced on appellee by appellant, and that there was no actual fraudulent representation, or that appellee relied upon the representations made by appellant. The facts of this case show that appellant and appellee effected an exchange of property September 8, 1911. Appellant and his wife conveyed by deed to appellee lot 5, block 24, Hill's addition to the city of Hobart, Okl. Appellee and wife conveyed to appellant, by deed, lot 3, block 41, Glenwood addition to the city of Amarillo. The appellant represented to appellee that he had a good title to his lot in Hobart, except a mortgage lien for the sum of \$500, which appellee was to assume; and appellee that he had a good title to his lot in Amarillo, except a vendor's lien for the sum of \$360, which appellant was to assume. The appellee paid \$40 cash difference in the trade. Each party claimed to have an abstract of title to their respective lots. The facts supporting the judgment warrant the finding that the abstract produced by appellant showed only a lien against the lot in Hobart for \$500, secured by a mortgage; that appellee at the time of the trade, told appellant, "If you get abstract up to date and show me clear title, I will make the trade with you." Appellant said, "Mine is all right, I believe." The appellee said he did not know anything about it, and thought they had better go to a lawyer; that he did not "understand them abstracts." The appellant said that it was no use to spend money. "Mine is all right, and I will show you it is all right." They then took the abstract, and went through and examined each page. The abstract then showed only a lien to secure the \$500 note. The last conveyance in the abstract shows to have been filed for record the 2d day of September. Appellee testified: "We saw the date it was made out, and I had in my mind everything was all right." The appellee, four or five days after the execution of the deeds, moved into the property at Hobart with his family. He says he thought he was getting a fee-simple title to the lot in Hobart, except the \$500 lien mentioned by appellant. He met, after his arrival at Hobart, a Mr. Bredel, and told him of his trade, and told him that he had an abstract to the property showing a lien on the lot for \$500. At that time Bredel told him that was not all; that there was a judgment lien against the lot for \$774; that this was the first time he knew or had heard of the

judgment lien. This conversation with Bredel was about the 15th day of September, 1911. This property was sold in November following under the judgment lien. Appellant at that time was in Hobart at the sale, but did not bid on the property or buy it in. He and appellee had some negotiations looking to a settlement, which resulted in no arrangement. They visited an attorney who in the course of the conversation said Geitzenuer had been "flimflammed" to which Willingham replied, "Well, they have slapped it on me, and I have a right to slap it onto him or some one else."

In a few days after appellant obtained possession of the lot in Amarillo, he moved therefrom the house and placed it in another portion of the city of Amarillo. He also paid off the vendor's lien note for \$360. The facts further show that there was a judgment against appellant in the district court of Kiowa county, in which Hobart is situated, for the sum of \$774, rendered on the 28th day of February, 1911, in favor of the Farmers' & Merchants' National Bank of Hobart, and that by the laws of Oklahoma such judgment was a lien on the lot when appellant deeded the same to appellee, the 8th of September, 1911. The facts further show that the abstract which appellant showed appellee had been brought down to the 5th day of September, 1911, by the Kiowa County Abstract Company, at the instance of one Hamilton, who at that time was negotiating for the purchase of the lot through Bredel, the then agent of appellant. The agent paid the charges for bringing the abstract down to the 5th of September. The abstract had been originally prepared by this abstract company August 30, 1909, and consisted of seven pages, and the certificate of the company at that date attached was No. 4,987. On April 29, 1909, an additional certificate was made thereto, No. 5,331, and on that date there were added to the abstract two extra pages, and on September 5, 1911, the abstract company continued the abstract up to that date under certificate No. 8,291, and added thereto three extra pages, which contained an abstract of a deed from Foster to Willingham, filed for record September 2, 1911. This last certificate also showed the judgment lien against Willingham for \$774. Hamilton refused to take the land because of this judgment lien. He returned the abstract to Mrs. Willingham, and appellant wrote a letter to Hamilton, offering to guarantee the title or make bond for title. The abstract shown to appellee on the date of the trade was identified by the president of the abstract company, Hamilton, and others, as the one made by the company and turned over to Mrs. Willingham by Hamilton, except as changed. It did not, after the change, have the last certificate, of date September 5, 1911, No. 8,291, showing the judgment lien on the 8th of September, 1911; but that certificate was detach-

ed, and in its place the original certificate of August 30, 1909, was put in, or changed to the place occupied by the certificate of September 5, 1911.

[1] The evidence is sufficient to establish that appellant exhibited the abstract to appellee in its mutilated condition, and that the abstract did not, as shown to appellee, disclose the judgment lien. The lot deeded to appellee was afterwards sold under execution issued on the judgment mentioned above, and by order of the court the sale was confirmed and a deed directed to be made to one Mr. Harris, who had purchased it under the sheriff's sale. The appellant denies all of the appellee's statements, and denies that he showed to him a mutilated abstract, and testified he notified appellee of the existence of the judgment lien. These questions were all for the court below, before whom the case was tried, and we think the evidence sufficient to support the judgment of the trial court.

The facts establish that appellant represented that his title was good, and that there was nothing against it except the sum of \$500, secured by a mortgage lien, when in fact an additional lien for the sum of \$774 was shown as a judgment lien against the property. That these representations were fraudulent is evidenced by appellant exhibiting a mutilated abstract, which, if it had been as prepared by the abstract company, would have revealed the judgment lien. There could have been but one purpose in so exhibiting the abstract, and that was to deceive appellee. *Buchanan v. Burnett*, 102 Tex. 492, 119 S. W. 1141, 132 Am. St. Rep. 900.

[2] We do not think the facts show that appellee undertook to investigate for himself the title before he purchased the lot, but he evidently relied upon the representations of the appellant and the facts as then shown by the abstract exhibited to him, and that the representations so made and acts in so exhibiting the abstract induced him to make the trade, which he otherwise would not have done. *U. S. Gypsum Co. v. Shields*, 106 S. W. 724. We think the evidence in the case sufficient to support the judgment of the trial court.

We therefore affirm the judgment.

#### ST. LOUIS SOUTHWESTERN RY. CO. v. MOORE.

(Court of Civil Appeals of Texas. Dallas. Nov. 29, 1913.)

#### 1. DAMAGES (§ 166\*)—PERSONAL INJURIES—ADMISSION OF EVIDENCE.

Where plaintiff's bruises received from personal injuries were slight and he was apparently entirely well at trial, evidence as to whether a very slight bruise had not sometimes caused a cancerous wound resulting in death, and as to whether witness did not know of a school teach-

er who died from a pin scratch, was not admissible.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 478, 479, 481; Dec. Dig. § 166.\*]

#### 2. CARRIERS (§ 321\*)—PASSENGERS—INJURIES—INSTRUCTIONS.

A special charge that common carriers are held to the highest degree of care in operation for the protection of passengers was correct so far as it went.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1843; Dec. Dig. § 321.\*]

#### 3. TRIAL (§ 252\*)—INSTRUCTIONS—SUPPORT IN EVIDENCE.

An instruction, in an action for injuries by the falling of a coach panel, that if there was nothing about the panel which indicated that it was defective, and inspection would not have disclosed that it was likely to become loose or fall, the railroad company would not be liable, was properly refused, in the absence of any evidence that an experienced man ever inspected the car.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.\*]

#### 4. CARRIERS (§ 290\*)—PASSENGERS—INSPECTION OF CAR.

A carrier of passengers must furnish a reasonably safe car and exercise the highest degree of care to ascertain and repair defects in the car, as by furnishing an experienced inspector, etc.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1168, 1169, 1177, 1178, 1180, 1182-1184; Dec. Dig. § 290.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by R. T. Moore against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

D. Upthegrove, of Dallas, for appellant. Chas. F. Clint, of Dallas, for appellee.

**RAINEY, C. J.** This suit was instituted by appellee against appellant to recover damages for personal injuries alleged to have been received on February 12, 1911, while a passenger on one of appellant's trains, on account of the panel coming loose between two windows in the coach in which appellee was riding, falling against him, and injuring his head, hand, and foot. The trial resulted in a verdict for plaintiff for \$175, from which appellant in due time perfected its appeal to this court.

#### Reasons for Reversal.

[1] The court erred in permitting the plaintiff's counsel to ask the witness Dr. Blackburn certain questions and allowing his answers thereto, as shown by the following bill of exception: "Be it remembered that, on the trial of this cause, Dr. Blackburn, a witness for defendant, on redirect examination, was asked the following question: 'Do you not know that a very slight wound or bruise has sometimes caused a cancerous wound, and that such wound sometimes results in death?' To which question the defendant then and there objected because there was no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

allegation in the plaintiff's petition to warrant the introduction of such evidence, and, second, because it was immaterial and irrelevant, which objection was by the court overruled, and the witness answered that such wound sometimes produces serious results and also death. And the same witness, being further interrogated by counsel for plaintiff, was asked if he did not know of a school teacher, a citizen of Dallas county at the time, that got a pin scratch, a very slight wound, and that it resulted in death. To which question the same objection was made by the defendant as to the first above recited, and, the objection being overruled, the witness answered that he knew of a pin scratch, which was a very slight wound, resulting in death to the teacher, whose name was mentioned in the interrogatory."

The bruises received by appellee were slight. At the time of the trial he was entirely well, and no possible danger of cancer was apparent or probable. The testimony complained of was speculative as to what might have happened. The company was liable, if at all, only for the consequences that resulted from the injury, and what happened to some other person in time past was calculated to prejudice the minds of the jurors, and it was improper to have admitted it. *Railway Co. v. Powers*, 101 Tex. 161, 105 S. W. 491.

[2] The court instructed the jury that the defendant was at the time in question a common carrier, and that common carriers are held to the highest degree of care in the operation of a passenger train for the protection and safety of its passengers. Appellant objects to this charge and complains of the court's refusal to give a special charge as follows: "The degree of care required of a railway company toward its passengers is that high degree of care that very cautious persons generally are accustomed to use in their line of business under similar circumstances. Therefore, if the jury believe from the evidence that there was nothing about the panel that fell that indicated it was defective, and that inspection would not disclose that it was in any way loose or likely to become so, or to fall, then the defendant would not be liable."

The charge of the court was not error so far as it went, as the degree of care to be used in the carriage of passengers is the highest; but, when the defendant has asked a charge conveying to the jury a definite standard for the conduct of prudent and skillful carriers in like situations, it should be given if said special charge is otherwise correct. *Railway Co. v. Keeling*, 102 Tex. 521, 120 S. W. 847.

[3] The special charge asked was incorrect in the latter clause thereof, where it tells the jury, in effect, that if there was nothing in the panel that would indicate by inspection that it would fall, etc., to find for

the defendant. We think this was error. There was no evidence that an inspection of the car was ever made by an experienced carman, which we think was the duty of appellant to have made.

[4] A carrier of passengers is under obligations to furnish a reasonably safe car in which to ride, and it will not be relieved of the consequences of a panel falling unless it has shown the highest degree of care of ascertaining defects in its car and repairing the same. Until this care is shown on the part of the carrier, the presumption will arise that it has not done its duty, and the doctrine of unforeseen accident has no application.

The motion of the appellee to strike out appellant's brief, because it does not conform to the rules, in that it does not direct the court's attention to the pages of the transcript embodying its assignments of error, or the motion for new trial, etc., is overruled.

The brief is not defective to the extent that we feel justified in not considering the assignments; but we have done so, and, for the error suggested, the judgment is reversed, and the cause remanded.

Reversed and remanded.

#### ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. BENJAMIN.

(Court of Civil Appeals of Texas. Dallas. Nov. 29, 1913. Rehearing Denied Dec. 13, 1913.)

##### 1. DAMAGES (§ 105\*)—ACTION—EVIDENCE.

In an action for damages for the firing of plaintiff's household goods, plaintiff is competent to testify as to the value of the use of the goods to him, where the goods had no market value at the place of loss; such testimony not being as to what plaintiff could have sold them for, or what he would have taken for them.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 266-271; Dec. Dig. § 105.\*]

##### 2. RAILROADS (§ 481\*)—IMPEACHMENT—REBUTTAL.

In an action against a railroad company for burning plaintiff's goods, where its witnesses testified that the engines were equipped with the best spark arresters, plaintiff is entitled to show that the engines threw sparks and started fires.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.\*]

Appeal from Grayson County Court; J. Q. Adamson, Judge.

Action by Ben Benjamin against the St. Louis Southwestern Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Head, Smith, Hare, Maxey & Head and Jot Horton, all of Sherman, for appellant. J. M. McMillin, of Whitewright, and Chas. Orenshaw, of Sherman, for appellee.

RAINEY, C. J. Appellee sued appellant to recover damages for the burning of certain household goods, kitchen furniture, and wearing apparel, which were located in a house

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

near appellant's railroad track, and which were ignited by sparks of fire escaping from appellant's engines, which destroyed said goods. The general issue was pleaded by appellant. A trial resulted in a judgment in favor of appellee for \$425, from which this appeal is taken.

1. The evidence in this case was sufficient to show liability of the appellant for the destruction of the goods sued for and supports the verdict of the jury.

[1] 2. Where it is shown that goods destroyed had no market value at the place destroyed, and the condition of the goods is fully shown, it is not error to permit the appellee and wife to testify to their opinion as to the value of the use of said articles to them. *Railway Co. v. Nicholson*, 61 Tex. 551; *City of Dallas v. Allen*, 40 S. W. 324; *Railway Co. v. Dement*, 115 S. W. 635; *Railway Co. v. Green*, 44 Tex. Civ. App. 13, 97 S. W. 531.

As said in the *Nicholson* Case, *supra*, "not a price suggested by his partiality to them, nor yet what he could sell them for, but the actual loss in money he would sustain by being deprived of such articles," so specially adapted to the use of himself and family.

[2] 3. The appellant's witnesses having testified that all of its engines were equipped with the best improved spark arresters, it was not error to allow appellee to show that about that time said engines threw sparks and caused other fires. *Railway Co. v. Dawson*, 109 S. W. 1110; *Railway Co. v. Qualls*, 124 S. W. 140; *Railway Co. v. Wooldridge*, 126 S. W. 603.

The judgment is affirmed.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. WESTERN AUTOMATIC MUSIC CO.

(Court of Civil Appeals of Texas. Dallas.  
Nov. 22, 1913. Rehearing Denied  
Dec. 13, 1913.)

#### 1. TRIAL (§ 228\*)—INJURY TO FREIGHT—ACTIONS FOR DAMAGES—INSTRUCTIONS.

The court instructed, in an action for damages to a piano in shipment, that if the piano, while in the possession of the railroad company, was injured by defendant, and the injury was directly and approximately the result of the negligence of its servants, the jury should find for plaintiff the difference in the cash market value of the piano in the condition in which it was delivered to defendant, if they found the same was in good condition, and "said piano should have arrived in at Dallas, the difference in" the cash market value of said piano in the condition in which it did arrive at Dallas. *Held*, that the instruction was not erroneous or misleading because of the quoted part; that being merely senseless and surplusage.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 509-512, 526; Dec. Dig. § 228.\*]

#### 2. CARRIERS (§ 132\*)—INJURY TO FREIGHT—PRESUMPTION OF CONDITION—REBUTTAL.

There is no presumption that property when delivered to a carrier for shipment was in the same condition as when delivered to the consignee, where there was evidence that it was

in good condition when delivered to the railroad company and was damaged when delivered to the consignee.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 578-582, 605; Dec. Dig. § 132.\*]

#### 3. CARRIERS (§ 134\*)—FREIGHT—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for damage to a piano while being shipped on defendant's railroad, *held* to sustain a finding of ownership of the piano in plaintiff.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 588-592, 607; Dec. Dig. § 134.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by the Western Automatic Music Company against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Alex. S. Coke and Lawther & Pope, all of Dallas, for appellant. Wilson & Williamson, of Dallas, for appellee.

RASBURY, J. Appellee sued appellant for \$500 for damages alleged to have been inflicted upon an automatic musical instrument known as a violin pianola while being transported by appellant from San Antonio to Dallas in this state, and upon trial before jury recovered verdict followed by judgment for \$225, from which this appeal is taken. The verdict and judgment are sustained by the evidence, and for that reason we shall not set out any portion of the evidence, except under the third assignment of error.

[1] The first assignment of error complains of the court's charge defining the measure of appellee's damage. The portion complained of is as follows: "If you find from the evidence that said piano, while in transit in the possession of the defendant, its agents and employes, was broken and injured by the said defendant, and you find that said injury to said instrument was directly and approximately the result of negligence of the defendant, its agents or servants, then you will find for the plaintiff against the defendant, the difference in the cash market value of said piano in the condition said piano was delivered to the said defendant at San Antonio, Tex., if you find same was in good condition and (said piano should have arrived in at Dallas, the difference in) the cash market value of said piano in the condition in which it did arrive at Dallas, Texas." It will be observed that certain words in the charge are parenthesized. This arrangement is ours. In the charge the words were not so separated, but were an uninterrupted and continuous part of the charge. Our purpose in separating the words as we have is to show that but for such words the charge, in substance at least, understandingly and correctly presents the measure of damages, i. e., the difference in the cash market value of the pianola at the time and in the condi-



tion in which it was delivered to the appellant and its cash market value at the time and in the condition it should have been delivered to the appellee. While we do not approve that portion of the charge that states that the pianola should be in the same condition when delivered to appellee at Dallas that it was in when delivered to appellant at San Antonio, for the reason that it incorporates into the charge much surplusage, yet it cannot be said that the same is in any sense erroneous, since appellee was in fact bound to prove the condition of the pianola when delivered to appellant at San Antonio before it was entitled to recover any sum at all for a failure of appellant to deliver at Dallas in like condition. Nor do we think the words which we have parenthesized confused or misled the jury in consideration of the case. They are meaningless and can in no sense be made to harmonize with the balance of the charge, and hence without force or persuasion. They neither limit nor enlarge the rule stated in the balance of the charge and have no application or relation thereto. They stand alone, are valueless, and import nothing. Further, it may be said that the verdict conclusively shows that the jury were in no sense misled thereby. Appellee sued for \$500, and the testimony would have sustained a verdict for such an amount. The jury, however, only allowed \$225.

[2] The second assignment of error complains of the refusal of the court to read to the jury the following special charge: "You are instructed that, unless the piano is shown to have been delivered to the defendant railroad in a different condition, it will be presumed as a matter of law that it was in the same condition as when delivered to plaintiff." This charge was approved "in the exact form in which it was submitted in *Missouri Pacific Ry. Co. v. Breeding*, 16 S. W. 184 (Court of Appeals, Civil Cases); the court holding it should have been read to the jury for the reason that negligence or a failure to perform a duty required by law is never presumed as a fact, but must be established by evidence, and that in the case just cited there was no evidence to support the charge of negligence. From a reading of the case it will be seen that the appellate court on the issue of negligence would probably have sustained an instructed verdict. The rule announced by the requested charge is also inferentially approved in *G. C. & S. F. Ry. Co. v. Holder*, 10 Tex. Civ. App. 223, 30 S. W. 383. In that case this court, as applied to carriers receiving property for transportation inclosed in boxes, bales, packages, etc., not open to inspection when received by the carrier, held that the presumption was that such shipments reached destination in the same condition in which they were delivered to the carrier, and that it devolved upon the plain-

tiff to rebut such presumption by proof that the injury in fact resulted after the shipment was delivered to the carrier. In the case at bar, however there was ample testimony that the pianola was in good condition when delivered to the appellant at San Antonio, and in a damaged condition when delivered to appellee in Dallas. Thus, the presumption here urged was rebutted, and the rule stated in *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963, and in *Missouri, Kansas & Texas Ry. Co. v. Baker*, 58 S. W. 964, applies. In *Stooksbury's Case*, as bearing upon the right of appellant to have read to the jury the charge under discussion, it is said in substance that, when a fact to be presumed is controverted by direct testimony, the jury may indulge or reject the presumption as the entire evidence may justify, but in all cases, if there be a conflict in the testimony, must be left to their determination under appropriate instructions by the trial judge. Hence while it may be said that the requested charge is correct as far as it goes, it does not go far enough. The jury could have been told of the presumption that was to be indulged in the absence of any evidence, but, when evidence rebutting the presumption was offered, the rule we have just stated should have been applied in order that the jury could have determined if the evidence did in fact rebut the presumption.

[3] The third assignment of error asserts that the testimony is insufficient to establish ownership in appellee of the pianola. We conclude the evidence is sufficient. Appellee instructed Ripps, at San Antonio, to pack and ship the instrument to Dallas. For some reason Ripps consigned the shipment to himself, probably in order to insure the collection of packing and transfer charges, but in the bill of lading was the request that the appellee be notified. Appellant itself delivered the car to appellee, and it was unpacked in appellee's office in the presence of appellant's claim agent for the purpose of ascertaining the extent of the injury done the car. Ripps says he shipped it to Dallas at request of appellee. Whittle, a former agent at Dallas for the Wurlitzer Company, which manufactured the pianola, testified that the instrument was shipped by said company to him and arrived at Dallas about April, 1911, from whence it was shipped by him to San Antonio, where it remained until August, when it was returned to Dallas in the manner we have detailed and delivered to appellee, of whom the witness in the meantime had become manager. In the absence of any direct attack upon appellee's ownership of the instrument and consequent right to sue, we are of opinion that the facts and circumstances detailed are sufficient to sustain the verdict on the issue of such ownership.

The judgment is affirmed.

**MISSOURI, K. & T. RY. CO. OF TEXAS v. LEABO.**

(Court of Civil Appeals of Texas. Dallas. Nov. 22, 1913. Rehearing Denied Dec. 13, 1913.)

**1. MASTER AND SERVANT (§ 125\*)—PERSONAL INJURIES—NEGLIGENCE.**

Where defendant's switching foreman, directing the running of cars in the nighttime at the rate of 10 miles an hour, failed to know the condition of the track on which they were run in consequence of which there was a collision resulting in injury to a switchman, the defendant was liable, irrespective of whether the foreman actually gave the signal to go at that rate or not.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

**2. APPEAL AND ERROR (§ 1033\*)—PARTY ENTITLED TO COMPLAIN.**

After judgment for plaintiff, defendant could not complain on appeal of the action of the trial court in submitting a ground of defense not supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**3. TRIAL (§ 260\*)—REQUESTS—INSTRUCTIONS ALREADY GIVEN.**

A requested charge is properly refused where covered by other charges given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**4. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.**

Where the evidence in a switchman's action for injuries was such that only a verdict for plaintiff could have been rendered, error, if any, in an instruction as to the negligence of defendant's foreman and yardmaster was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**5. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—PERMANENT PERSONAL INJURIES.**

A verdict of \$8,500 to a switchman whose right hip and left ankle were injured, whose elbow was dislocated, and who suffered an injury in the small of the back, which injuries were permanent, leaving him disabled to perform the duties of a switchman, was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

**6. APPEAL AND ERROR (§ 999\*)—REVIEW—VERDICT.**

It is for the jury to determine the credibility of the witnesses and the weight of the evidence, and, where the appellate court cannot say that they were wrong, the verdict will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.\*]

Appeal from District Court, Grayson County; W. M. Peck, Judge.

Action by M. J. Leabo against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Alex S. Coke, of Dallas, and Head, Smith, Maxey & Head, of Sherman, for appellant. Wolfe, Wood & Haven, of Sherman, for appellee.

**RAINEY, C. J.** This suit was brought by appellee to recover of appellant damages for personal injuries caused by the negligence of appellant's employes. The petition, in effect, alleged that appellee was in the employ of appellant as a switchman in appellant's freight yards west of Denison, known as Ray Switch; the switch crew was composed of a foreman, another switchman, and appellee; that an assistant yardmaster also worked in said yards, and had charge, for appellant, of the placing of cars upon the different tracks; that appellee was known as a fieldman; that the engine with which he was working was pushing a drag of cars, and it was appellee's duty as fieldman to go to the last car in the drag, and ride it down to where his foreman is located; that when the foreman boarded the head of the drag it was then appellee's duty to go some six or eight car lengths back over the drag closer to the engine to receive signals from the foreman, who was to ride the front car, and communicate such signals to the engineer; that when he took his position at this point the foreman, riding the front car of the drag, gave a come ahead signal, which appellee in turn gave to the engineer; that the engineer, acting upon said signal, started the cars forward until they reached the speed of 15 miles per hour; that the foreman then gave a stop signal, which the appellee in turn communicated to the engineer, but just as appellee gave the stop signal the entire drag of cars upon which he was riding ran into and collided with another train of cars, wrecking appellee's car, and throwing him with great violence to the track, and severely injuring him; that appellant was guilty of gross carelessness and negligence in the following particulars:

"(a) The assistant yardmaster was guilty of gross carelessness and negligence in ordering the drag of cars upon which plaintiff was riding onto track where the same were being taken, and thereby advising plaintiff and his crew that said track was clear, and had room to receive said cars, when in truth and in fact said track was not clear, but other cars were standing thereon, and said assistant yardmaster knew, or by the exercise of ordinary care should have known, that said cars were on said track, but failed to inspect said track for said cars, and negligently and carelessly ordered plaintiff's crew to go in upon said track with their drag of cars.

"(b) The foreman of plaintiff's switch crew, who was riding the front end of the drag upon which plaintiff was riding, knew, or by the exercise of ordinary care should have known, that the track upon which he had thrown the switch and lined up for plaintiff's cars had other cars upon it, and with this information carelessly and negligently gave a signal to plaintiff to be conveyed to the engineer for the engineer to shove said cars

forward at a rapid rate of speed, and said foreman negligently and carelessly permitted plaintiff to stand some six or seven car lengths from the end of said drag, and signal for said cars to come forward until the same reached the speed of, to wit, 15 miles an hour, knowing, or by the exercise of ordinary care should have known, that said cars would collide with other cars located on said track, and knew that plaintiff was ignorant of said cars being upon said track, and knew plaintiff would rely upon his signals, and ride said cars down in upon said track, and failed and refused to warn plaintiff or to give any signal whatever until said cars collided with the cars as hereinbefore set out, and plaintiff was injured.

"(c) That both the assistant yardmaster and the foreman of plaintiff's crew were guilty of gross carelessness and negligence in failing to inspect said track where they had ordered said cars to run to ascertain if the same was clear and had room for the cars which they had ordered placed thereon before ordering same sent in up said track."

Appellant answered by general and special exceptions, general denial, contributory negligence, and assumed risk. A trial resulted in a verdict and judgment for \$8,500, from which appellant prosecutes this appeal.

The material allegations of plaintiff's petition were established by the evidence.

Appellant's first assignment of error is: "The court erred in giving the following portion of paragraph 4 of the main charge of the jury: 'If you believe from the evidence that the foreman of the plaintiff's crew, to wit, J. S. Shaw, knew, or by the exercise of ordinary care should have known, that the track upon which he was attempting to place said cars had other cars upon it, and, so knowing, gave a signal to plaintiff for him to convey to the engineer to shove said cars forward at a rapid rate of speed, and if you further believe from the evidence that said foreman permitted said cars to be shoved and pushed at a rapid rate of speed, so that said cars collided with other cars located on said track, and if you further believe from the evidence that, in giving said signal to move said cars at a rapid rate on said track under the circumstances, said foreman was guilty of negligence as that term has been hereinbefore defined to you and that such negligence, if any, was the direct and proximate cause of plaintiff's injury, you will, in either of said events, find for plaintiff, and assess his damages as hereinafter directed, unless you find for defendant under other instructions given you.'"

The contention is that "there was no evidence in the record warranting the submission to the jury of an issue as to whether appellant's foreman, J. S. Shaw, gave a signal to be conveyed to the engineer for said engineer to shove the cars forward at a rapid rate of speed, and appellant's liability in this case should not have been made to de-

pend upon the determination of such an issue."

[1] The evidence shows that this accident occurred at night; that Shaw was foreman, and appellee performed his work under Shaw's direction; William Clayton was assistant yardmaster; it was Clayton's duty to know the condition of the yard, and the foreman, Shaw, is responsible for all the cars he handles; he was handling cars the night in question, and it was under his direction the cars were being placed; he ought to have known what he was doing, if he did not; the cars were being transported at the rate of 10 miles an hour, which was a rather rapid rate in the nighttime, and upon the track the condition of which as to other cars was unknown; the manner of handling the car shows such negligence of appellant's employes for which appellee is in no way responsible; that it shows appellant was liable irrespective of whether Shaw actually gave a rapid signal or not; he was controlling the train, and should not have permitted it, under the circumstances, to run in on the track.

[2] Appellant's second assignment is: "The court erred in giving the following portion of paragraph 5 of the main charge to the jury: 'On the other hand, if you believe from the evidence that defendant's assistant yardmaster did inspect the track for cars, and that he did not know, and in the exercise of ordinary care he could not have known, that there were cars on said track, or that there was not room on said track for said drag.'"

The foregoing assignment is an excerpt from the fifth paragraph of the court's charge, in which the court was instructing on the ground of defense, and, if it should not be supported by the evidence, it affords no reason for complaint by appellant. *Burns v. True*, 5 Tex. Civ. App. 74, 24 S. W. 338.

There was evidence, however, that it was the duty of the assistant yardmaster to know the condition of the track, and that Shaw, the foreman, was misled by the statement of Clayton that there was room enough for the drag of cars to be placed upon said track.

What we have heretofore said disposes of assignments 3 and 4.

[3] The fifth assignment is based on the refusal of the court to give the following charge, to wit: "Unless you believe from the evidence that defendant's assistant yardmaster, Clayton, in directing defendant's foreman, Shaw, to place the cars on track No. 2, where the collision occurred, was guilty of negligence, that is, did that which an ordinarily prudent man would not have done under the circumstances, or unless you believe that defendant's foreman, Shaw, in directing his fellow employes to place said cars on said track No. 2, where the collision occurred, was guilty of negligence in doing as he had been directed to do by the assistant yardmaster, that is, that he

did that which an ordinarily prudent person would not have done under the circumstances, then you will find that the defendant was not guilty of negligence, and that plaintiff's injuries were the result of an accident for which the defendant is not liable, and, unless you so find, you will return a verdict in favor of the defendant."

[4] The court, in its main charge, submitted to the jury: " \* \* \* Or if you do not believe from the evidence that said assistant yardmaster and said foreman, or one of them, were guilty of negligence, as that term has been defined to you, \* \* \* in either of these events you will find for the defendant." This, we think, was sufficient under the circumstances, as it covered the special charge. If it should be considered not sufficient, we think the evidence is such that no other verdict should have been rendered.

[5] The sixth assignment complains that the verdict is excessive. The evidence shows that appellee was injured in his right hip, left ankle, the dislocation of one elbow, and an injury in the small of his back, and that his injuries are permanent, and that he has not physical force or energy now to perform the duties of a switchman.

[6] It is the peculiar province of the jury to determine the credibility of the witnesses, and weigh the evidence. They have done so in this case, and we are, under the evidence, unable to say they were wrong.

Finding no reversible error in the record, the judgment of the court below is affirmed.

#### INDIANA & O. LIVE STOCK INS. CO. v. KEININGHAM.

(Court of Civil Appeals of Texas. Dallas. Nov. 1, 1913. Rehearing Denied Dec. 13, 1913.)

##### 1. INSURANCE (§ 146\*)—ISSUANCE OF POLICY—DUTY TO READ.

Insured is ordinarily bound by the terms of the policy, whether he reads it or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

##### 2. INSURANCE (§ 145\*)—ISSUANCE OF POLICY—CONDITIONS.

Where live stock insurance policies and applications therefor did not provide that the policy was in force only while the horse was in a certain town and insured requested a similar renewal policy, and the application therefor did not contain such limitation, insured could assume without reading it that the policy issued did not contain the provisions so limiting the company's liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 276-291; Dec. Dig. § 145.\*]

##### 3. INSURANCE (§ 151\*)—CONSTRUCTION OF CONTRACT—CONFLICTING PROVISIONS—POLICY AND APPLICATION.

Where an application for a live stock insurance policy recited that the policy should be "based entirely upon" the answers in the application, and the policy provided that the application was a "part of the policy" and a warranty by assured, if the policy provided that the horse should be insured only while it remained

in a certain county, while the application did not so limit the company's liability, the application would control.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.\*]

##### 4. INSURANCE (§ 146\*)—CONSTRUCTION OF CONTRACT.

Every doubt must be resolved against the company in case of conflicting and inconsistent provisions in an insurance policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

Error to Ellis County Court; J. C. Lumpkins, Judge.

Action by J. D. Keiningham against the Indiana & Ohio Live Stock Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Thompson and John S. Patterson, both of Dallas, for plaintiff in error. Will Hancock, W. H. Fears, and Supple & Harding, all of Waxahachie, for defendant in error.

RASBURY, J. Defendant in error sued plaintiff in error upon a policy of insurance by which plaintiff in error agreed to pay defendant in error \$750 in the event of the death of defendant in error's horse described in said policy and alleged the death of the horse and the compliance by defendant in error with all provisions of the policy. In answer to the suit plaintiff in error, in addition to general demurrer, special exceptions, and general denial, alleged specially that the horse died at Dallas, where it was being exhibited at the State Fair, for which it was not liable, since the policy was in force only while the horse was situated in Waxahachie, Ellis county, and with the plea tendered back the premium paid and asked that the policy of insurance be canceled. In response to plaintiff in error's special plea, the defendant in error averred that in 1909 and 1910 plaintiff in error, upon written application by defendant in error, insured said horse under said policies without such provision, and that upon the expiration of the 1910 policy he made application for a renewal of his policy for 1911, without the clause prohibiting the removal of the horse to other places, and that subsequently plaintiff in error's agent delivered defendant a policy represented to be in compliance with his application, and, relying upon said representations, defendant in error accepted the policy without reading it and placed the same in a local bank. If was also alleged that the provision regulating the situation of the horse was fraudulently inserted in the policy by plaintiff in error, and that defendant in error was not bound thereby. Defendant in error further alleged that plaintiff in error's agents had full knowledge of the fact that said horse was being removed from Ellis county and acquiesced therein and consented thereto, and further that express notice was given one of plaintiff in error's special agents, and that in

neither case was any protest made. The foregoing is in substance the answer of defendant in error to the plaintiff in error's defense. We have not attempted to recite it in the order in which it is set out, since it is in no sense set out in due order of pleading. Upon trial by jury, verdict was for defendant in error for the amount of the policy.

The evidence warrants the following conclusions of fact: The policies by which the horse was insured were issued upon printed applications filled in by plaintiff in error's local agent in Waxahachie, signed by defendant in error, and then forwarded to Gainesville to Mr. J. W. Blanton, a general agent, who had authority to and did issue the policy. The 1909, 1910, and 1911 applications signed by defendant in error did not contain any provision that the horse while insured should remain in Ellis county. Nor did the 1909 and 1910 policies of insurance contain any such provisions. On the back of the 1910 and 1911 applications, however, there was written the provision pleaded by plaintiff in error. The clause was written there by Mr. Blanton, or by his direction, in his office in Gainesville, after defendant in error had signed same, without the knowledge or consent of defendant in error, and without notice to him by Blanton or the local agent. The 1911 application was designated "Renewal Stallion Application," and in making application for insurance defendant in error requested the local agent to renew his old policy. The 1911 policy issued upon the 1911 application did contain the clause prohibiting the removal of the horse from Waxahachie; but, as we have just said, the application did not. The policy was sent by Mr. Blanton to Mr. Alderman, plaintiff in error's local agent, was countersigned by Alderman, and delivered to defendant in error. Defendant in error did not read the policy, but placed same with a local bank for safe-keeping, where it remained until the insured horse died. Neither Alderman, the local agent, nor Blanton, the general agent, notified defendant in error that the policy contained the provision mentioned. The application for insurance provided that all the statements therein of defendant in error in reference to the description, condition, situation, and value of the horse should be warranties, and warranted as well that no oral representations contrary thereto had been made by defendant in error to the local agent, and that the agent had made no contrary representations to him and agreed that any agent of the company was without authority to bind the company to conditions not contained in the application. The policy of insurance issued upon said application provided that the application, which was the basis of the insurance, should be a part of the policy and should constitute one of its warranties. The policy also provided that the horse was insured while situated in Waxahachie or Ellis county and not else-

where. The policy also contained warranties unequivocally reciting that agents of the company were without authority to waive the conditions, stipulations, provisions, or agreements of the policy, or to alter or discharge contracts or waive forfeitures, etc. Defendant in error notified Alderman, plaintiff in error's local agent, and also Tullos, a special agent, that he intended to exhibit his horse at the State Fair in October, 1911, and both said he might do so. Alderman testified that he also wrote the company, notifying it that defendant in error would exhibit the horse at the State Fair in 1911, but received no reply from the company.

The materiality of all of the assignments of error presented by plaintiff in error depend upon the construction to be placed upon the conflict between the application for insurance signed by defendant in error and the policy issued by plaintiff in error upon said application, and accordingly, in order to shorten this opinion and relieve it of unnecessary issues, we will first consider that point. As we have said in the statement of the pleading, defendant in error averred in the court below that the former policies issued to him did not contain the provision requiring the horse to remain in Ellis county in order to make the policy enforceable, and the evidence and the verdict sustained the claim. Such provision was not contained in his application upon which the policy sued upon was issued, but by the pleading and evidence and verdict it appears defendant in error fraudulently inserted said provision into the policy. Thus, it appears that the provision in the policy is in conflict with the application, in that by the terms of the application the assured was not bound to keep the horse within any particular place, and the collection of the loss as a consequence was not at all dependent upon keeping the horse in Ellis county. Incidental to the question of the conflict between the application and the policy is the preliminary question relating to the duty of defendant in error to examine his policy at all events when delivered to him.

[1] It is stated by Mr. Chief Justice Brown of the Supreme Court, in *Aetna Insurance Co. v. Holcomb*, 89 Texas, 404, 34 S. W. 915, and supported by numerous authorities, in effect, that the insured, in the absence of any showing of facts or circumstances that will relieve him from the provisions thereof, is bound by the terms of his policy whether he reads it or not.

[2] Measured by the rule stated, were the facts proven upon trial of the case at bar sufficient to relieve defendant in error from the binding force of the terms of the policy? We think they clearly are. Aside from the fact that the former policies contained no such provision, and that his application stated that the 1911 policy was to be a renewal of his former policy, the application in effect requested the issuance of a policy

without the restriction imposed by the policy actually issued, and, in the absence of any notice from the company that it intended to issue a policy containing vital restrictions not provided for by the application, defendant in error had the right to assume that such a policy would be issued as he had requested. The application was one apparently prepared and printed by plaintiff in error for its private use, and, if it intended to ingraft upon it some new provision after defendant in error had signed same, some notice of such intention must have been given defendant in error in order to bind him thereto. Accordingly, we hold that the proven facts were sufficient to excuse defendant in error from reading his policy.

[3] What then results from the conflict in the provisions of the application and the policy? And in determining that question we must keep in mind that the application recites that the policy to be issued "shall be based entirely upon" the answers contained in such application, and that the policy in pursuance of the declarations of the application especially recites that the application is a part of the "policy and a warranty on the part of the assured." The application is thus made as much a part of the policy as if its very terms were written into the body of the policy. That being true, then we have one provision of the policy which provides that in order to collect the insurance in case of a loss the horse must be in Ellis county at the time of its death, and another provision that has no restrictions whatever relating to the location of the horse.

[4] In case of conflicting or inconsistent provisions in policies of insurance, it is said in *Bills v. Hibernia Insurance Co.*, 87 Tex. 547, 29 S. W. 1063, 29 L. R. A. 706, 47 Am. St. Rep. 121, that every doubt arising thereon must be resolved against the insurer. To the same effect is *Goddard v. East Texas Fire Ins. Co.*, 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1: "The application was a part of the contract, and, if the appellee stated therein that he applied for insurance upon certain conditions \* \* \* in direct conflict with the conditions of the policy issued under and pursuant to the application, it must be assumed that such conditions in the policy were waived by the company when it issued the policy." *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495. See, also, *McElroy v. British America Assurance Co.*, etc., 94 Fed. 990, 36 C. C. A. 615, and many cases there cited. Hence, and in accordance with the views above expressed and the authorities cited, we hold that defendant in error was excused from reading his policy; that the acceptance of his application without notice by plaintiff in error of its intention to issue a policy of insurance varying the terms of the application was a waiver of the provision restricting the loca-

tion of the horse, and that in any event that clause, being in conflict with another portion of the policy, must give way to the other if thereby a forfeiture of the policy can be avoided. There being no conflict in the testimony upon which our conclusions are based, and such conclusions being sufficient to sustain the judgment of the trial court, it is unnecessary to further discuss the various assignments of error, and, for the reasons stated, same are overruled.

The judgment is affirmed.

#### BARTLEY et al. v. ROBINSON.

(Court of Civil Appeals of Texas. Amarillo. Nov. 15, 1913. Cause Dismissed by Agreement Dec. 13, 1913.)

#### 1. APPEAL AND ERROR (§ 1127\*)—MOTIONS TO AFFIRM.

Defendant in error, within 90 days after acceptance of service of the citation in error, filed a complete transcript, with a motion to affirm on certificate, and the motion was denied as prematurely filed; the 90 days not having elapsed. *Held*, that a similar motion, filed at the next term of court, should be considered as an independent motion, and hence comes too late, not being made at the term of court at which the transcript should have been filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4432-4440; Dec. Dig. § 1127.\*]

#### 2. APPEAL AND ERROR (§ 625\*)—FILING OF TRANSCRIPT—SUFFICIENCY.

Where defendant in error filed a complete transcript of the record in support of his motion to affirm on certificate, and the motion was denied as prematurely filed, the transcript should be considered a sufficient filing of the record to warrant a consideration of the case on its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2743; Dec. Dig. § 625.\*]

Error to District Court, Lynn County; W. R. Spencer, Judge.

Action between T. M. Bartley and others and John F. Robinson. There was a judgment for the latter, and the former bring error. On motion to affirm. Motion denied.

G. E. Lockhart, of Tahoka, and W. H. Bledsoe, of Lubbock, for plaintiffs in error. W. Boyce and Turner & Wharton, all of Amarillo, and Jno. F. Robinson, of Lubbock, for defendant in error.

HENDRICKS, J. [1] At the last term of the court the defendant in error, John F. Robinson, within 90 days after acceptance of service by his attorney of record of the citation in error, filed a complete transcript of the proceedings in the cause, with a request and motion to affirm on certificate. The 90 days not having expired, we overruled the motion to affirm on certificate, as prematurely filed, and at this term defendant in error proffers another motion of the same nature, if overruled, with a prayer in the alternative for a setting of this case for sub-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mission on its merits. Upon a consideration of the matter, we believe that this motion to affirm on certificate should also be overruled. We are inclined to think that this should be regarded as an independent motion to affirm this cause on certificate, and, not having been filed at the term of the court at which the transcript should be filed, comes too late; the prior motion being premature and overruled, and the term of court having expired, we are not disposed to regard this as a renewal or a carrying forward of that motion for the purpose of determining this particular question.

[2] We, however, believe that the filing by the defendant in error of the transcript at the last term of the court, within the 90 days, and the plaintiff in error having failed to file any transcript in this court, and it appearing upon the face of it at this time to be a complete transcript, in accordance with the statute, that the same is here for all purposes, notwithstanding at the last term of court the defendant in error was not using it for the apparent purpose of aiding his attempted affirmance on certificate; and without extending this opinion on this matter, it is our order that the clerk shall set this case for submission on its merits, awaiting a further disposition of the cause.

#### TEXAS CENT. RY. CO. v. ROSE.

(Court of Civil Appeals of Texas. Dallas.  
Dec. 13, 1913.)

##### 1. CARRIERS (§ 353\*)—CARRIAGE OF PASSENGERS—RIGHT TO EJECTION.

Even though plaintiff purchased a ticket, yet if he refused to deliver it to the conductor for cancellation, and informed him that he had no money to pay his fare, the carrier's servants may properly eject him, whether he was intoxicated or not.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1415; Dec. Dig. § 353.\*]

##### 2. NEGLIGENCE (§ 8\*)—CARE AS TO PERSON INTOXICATED.

The care due of a person intoxicated to the extent of being unable to take care of himself is that of reasonable care to avoid injuring him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 10; Dec. Dig. § 8.\*]

##### 3. CARRIERS (§ 366\*)—CARRIAGE OF PASSENGERS—PRESUMPTIONS.

Where the employés of a common carrier do not know of the condition of an intoxicated person, they may act upon the presumption that he will exercise care to avoid injury, for they are under no obligation to take unusual precautions to protect an intoxicated man from the consequences of his own folly.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1454; Dec. Dig. § 366.\*]

##### 4. APPEAL AND ERROR (§ 1064\*)—REVIEW—HARMLESS ERROR.

In a personal injury action by a passenger who had been ejected from a train while in an intoxicated condition, owing to his refusal to pay his fare or to produce his ticket, where he counted upon the negligence of the carrier's servants in leaving him at a danger-

ous place while physically and mentally incapacitated, repeated charges, which allowed recovery upon proof of either physical or mental incapacity, were prejudicial, for if only physically incapacitated, plaintiff could have used care to protect himself from injury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

##### 5. CARRIERS (§ 366\*)—CARRIAGE OF PASSENGERS—EJECTION OF INTOXICATED PASSENGER.

Where the servants of a carrier ejected an intoxicated passenger who was both mentally and physically incapacitated, the carrier's liability depends upon whether the place of ejection was such a one as a prudent person would have considered safe under the circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1454; Dec. Dig. § 366.\*]

Appeal from District Court, Dallas County; Horton B. Porter, Judge.

Action by Charley Rose, by next friend, against the Texas Central Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Alex. S. Coke and S. W. Marshall, both of Dallas, and Spell & Sanford, of Waco, for appellant. Walter Collins and Shurtleff & Cummings, all of Hillsboro, for appellee.

RAINEY, O. J. Suit by appellee against appellant to recover damages for personal injuries in the loss of a leg through the alleged negligence of appellant. The petition alleged, in substance, that on the 17th of September, 1912, while in Waco, Tex., he became intoxicated to such an extent that he was rendered mentally and physically incapable of protecting himself from danger, or of appreciating his danger, or of knowing and understanding the nature and consequences of his acts, and that said condition obtained until after he received the injuries alleged; that while in such condition he purchased a ticket which entitled him to transportation from Waco to Aquilla, and, boarding the train at Waco, the train crew at the time knowing his condition, was put off at Tokio, a station nearer Waco than his destination; that he was still in the same condition, and said place was one of danger, and that trains passed at intervals over said track, and plaintiff on account of said condition came in contact with one of defendant's trains, and his leg was so mashed amputation was necessary. Defendant answered by general and special exceptions, and denied specially any knowledge on the part of defendant's agent that appellee was intoxicated; that the conductor called on appellee for his fare, and appellee denied having a ticket, or that he had any money with which to pay fare, and that when Tokio, a regular station, was reached appellee got off the train without assistance; and also contributory negligence. A trial resulted in a verdict and judgment for \$10,000, from which this appeal is taken.

The appellant complains of the following

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

paragraph (7) of the court's charge: "If you believe from the evidence that the plaintiff, Charley Rose, or some one for him, bought a ticket from the defendant's agent at Waco, which entitled the plaintiff to ride on defendant's train to Aquilla, and that after buying the ticket he boarded the train he was mentally or physically incapable from the use of intoxicants of caring for and protecting himself, and that the defendant's employes in charge of the train knew that such was his condition or knew from his conduct such facts as reasonably would have produced such knowledge in an ordinary mind, and that the defendant's servants of its train with such knowledge allowed the plaintiff to board said train, and that said employes knew at the time plaintiff boarded the train that his destination was Aquilla, and if you further believe from the evidence that at Tokio the defendant's employes in charge of said train ejected plaintiff from the train, or that plaintiff debarked from said train at the order or request of the defendant's employes, and that after leaving said train he was injured, as alleged in his petition, and if you further believe from the evidence that the defendant's employes in charge of said train were guilty of negligence in ejecting plaintiff from the train, if they did, or in directing or ordering him to leave the train at said place as they did, and that such negligence, if any, was the proximate cause of plaintiff's injury, if any, you will find for plaintiff."

[1-3] The charge assumes that because appellee had bought a ticket to Aquilla he was entitled to the same care as a passenger, regardless of his refusal to deliver it to the conductor when called on to do so. Under the evidence we think this was error. Conceding that appellee had purchased a ticket entitling him to transportation, it was of no use unless presented to the conductor for cancellation. The uncontradicted testimony shows that appellee denied having a ticket, or that he had money to pay his fare. Such being the case the servants of appellant had the right to eject him at a proper place, whether he was intoxicated or not. The care due an intoxicated person to the extent of being unable to take care of himself is that of reasonable care to avoid injuring him. If the employes do not know of the condition of the intoxicated person, they may, as a rule, act upon the presumption that he will exercise care to avoid injury, for they are under no obligation to take unusual precaution to protect a man from the consequences of his own folly or wrong. *Elliott, R. R., § 1172 (2d Ed.)*; *Railway Co. v. Evans*, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 476; *Brown's Adm'r v. Railway Co.*, 103 Ky. 211, 44 S. W. 649; *Nash v. Railway Co.*, 136 Ala. 177, 33 South. 932, 96 Am. St. Rep. 19; *McClelland v. Railway Co.*, 94 Ind. 276.

[4] The court also told the jury that if when appellee boarded the train he was "mentally or physically incapable from the use of intoxicants of caring for and protecting himself," and the employes knew of it, and they were negligent, etc., in ejecting him the appellant would be liable. It will be noted that liability is based on the existence of two conditions of the appellee at the time of his ejection, for either of which a recovery could be had, viz., that of mental incapacity, and that of physical incapacity, when a recovery is sought upon the ground of mental and physical incapacity, and a recovery could only be had upon the evidence showing both mental and physical incapacity. The error is emphasized in three or four paragraphs of the charge, which aggravates the error and renders it reversible error. A man intoxicated is not always mentally incapacitated thereby, and his mind may be able to appreciate his condition and fully realize his situation. If he was physically incapacitated and the mind not, he could not go into danger, if placed in a safe place. But if mentally incapacitated only, he could not use his senses, and would be liable to run into danger.

[5] If the appellee at the time of his ejection from the train was mentally and physically incapacitated from being able to care for and protect himself from danger, then appellant's liability depends upon whether or not the place where ejected was such a one as a prudent person would have considered safe under the circumstances. *Thompson on Neg.*, vol. 3, §§ 3246-3248.

There are various assignments of error which we will not discuss. What we have said sufficiently shows upon what line the case should be tried.

The judgment is reversed, and the cause remanded.

#### Ex parte SAMS.

(Court of Civil Appeals of Texas. Amarillo. Nov. 15, 1913. Rehearing Denied Dec. 13, 1913.)

#### 1. HABEAS CORPUS (§ 99\*)—TRANSFER OF CHILD.

A surrender of the possession of a child by its parents, whether evidenced by a written instrument or resting in parol, is not a contract, and cannot be enforced as such, because neither the child nor its custody is a matter of contract, although the transfer will be enforced if for the benefit of the child.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. § 99.\*]

#### 2. HABEAS CORPUS (§ 85\*)—ACTIONS FOR CUSTODY—EVIDENCE—SUFFICIENCY.

In an action by a father for the custody of his minor child, evidence held to establish that the child's maternal grandparents acquired custody lawfully.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



### 3. HABEAS CORPUS (§ 99\*)—CUSTODY OF CHILD—RIGHTS OF PARENT.

Appellant eloped with the minor daughter of respondents, and upon a reconciliation the runaways made their home with respondents. About two years after the young wife was killed, leaving a child less than a year old. Appellant, the father, left the child with its maternal grandparents, who carefully nurtured it, and were in a position to do so. Held that, as the prime consideration in such matters is the welfare of the child, the custody of the maternal grandparents would not be disturbed while the child was of tender years; the father being inexperienced, and the maternal grandmother being able and anxious to take the best possible care of the child.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.\*]

### 4. HABEAS CORPUS (§ 113\*)—CUSTODY OF CHILD—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In habeas corpus for the custody of a child, the erroneous admission of a deposition taken in another suit is not prejudicial error where the same matters were testified to by another witness.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102-115; Dec. Dig. § 113.\*]

Appeal from District Court, Hale County; L. S. Kinder, Judge.

Habeas corpus by Buck Sams for the custody of Robert Andrew Sams. From a denial of his application, he appeals. Affirmed.

C. D. Russell, of Plainview, for appellant. R. M. Ellerd, of Plainview, and Carrigan, Montgomery & Britain, of Wichita Falls, for appellees.

HENDRICKS, J. Buck Sams, the father of Robert Andrew Sams, a minor child, sought to recover the custody of said minor by writ of habeas corpus from appellees, Bob Mitchell and E. A. Mitchell, the maternal grandparents, and, upon hearing before the court, the temporary custody of the infant was awarded to the maternal grandparents Mitchell.

[1, 2] The first contention of appellant is that the district court in a habeas corpus proceeding has no right to inquire into the matter of the fitness of a parent to care for his minor child, unless it is first shown that said parent has voluntarily surrendered his custody of the child to some other person, and claiming that, such voluntary surrender not having been shown in this record, the father, without any further inquiry, was entitled to his child. If we concede the correctness of the appellant's proposition as a legal principle, we are inclined to think that an analysis of this evidence is sufficient to show that the father at one time did surrender the custody of his child to the maternal grandparents, and that the control of the child by the appellees Mitchell, as an original question was not an illegal control. This evidence discloses the marriage of Buck Sams with the daughter of the appellees when he was about 20 years of age and his wife a maiden of about 16. It was a "runaway"

match, with a complete reconciliation between all parties immediately following the marriage; Sams and his wife, almost immediately after said marriage, making their home with the appellees, and the child was born in the house of the latter about 14 months after the marriage. Upon the 4th of July, 1913, a deplorable automobile accident occurred in the town of Plainview, the home of these people, at a time when Buck Sams was driving the car; the automobile was wrecked, his wife was killed, and at that time the child had been left at the home of the grandparents Mitchell. R. H. Mitchell testified: "After the funeral, and after the return from the cemetery (the funeral took place from our house), old Mr. Sams said, \* \* \* 'We want you to have the baby; we want you to come to see us; and we want to come to see you;' and I said, 'That is fair; I will do the best I can by it.' Buck spoke up, and said, 'I want you to bring the baby to the store to see me.' I said, 'I will whenever I can.' We then went back into the room where my wife was, and about the same conversation took place. Buck was asked if he was going to his father's or stay there (here), and I told him I would furnish him a room, and he could stay there (here) as long as he wanted to. So my wife took charge of the baby, and Buck lived there until about the last of August. During that time he and I talked about the baby two or three times; I asked him if it was his intention to let us have the baby until it is grown, and he said, 'That is what I understand.' I told him I wanted to do the best I could by it, and he replied he was satisfied of that. I then told him I would have some papers drawn up to that effect, so that after I had partly raised it he could not come and take it. Four or five weeks after that I told him the paper was at Mathis & Williams' office, and for him to go and look at it, and he said he would take it and let his father see it before signing it, and I told him that would be all right." It seems that some character of suit was instituted by the appellees Mitchell, against Sams which was dismissed prior to the filing of the present suit by Sams, and with reference to this prior suit and his intentions at that time he said, "I did not make any effort to get the boy until they brought this suit, and did not have at that time any present intentions of taking it," rather corroborative of the relinquishment of the child, asserted by appellees. When young Sams refused to sign the formal instrument, he did not demand the possession of the child, and this refusal would not affect the prior relinquishment of the custody of the child. The surrender of the possession of the child by its parent, whether evidenced by written instrument or in parol, as an attempted transfer of the child, of course "is not a contract, and cannot be enforced as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such, because neither the child nor its custody was the subject-matter of contract." *Legate v. Legate*, 87 Tex. 252, 28 S. W. 282. The Supreme Court, however, further says in the same case: "It is sometimes said that such a voluntary transfer is 'void,' or that it is 'contrary to public policy'; but the cases using such language show that it is not used in an absolute sense, but in the sense that such transfer is no impediment to the action of the court in determining what is the best for the interest of the child. The law does not prohibit such a transfer, but, on the contrary, allows the child to reap the benefit thereof when it is to its interest so to do." While Buck Sams finally refused to sign a formal instrument several weeks after the previous conversation, in which it is stated that he understood that the Mitchells were to have the baby until it was grown, however, we think the evidence, taken as a whole, is sufficient to show that the status of the maternal grandparents as to the child was not illegal, and think that the court should not have awarded the child to the father without further inquiry as to the best interests of the infant, which in all cases of this character is the paramount issue involved.

[3] Second. The appellant, Buck Sams, strenuously assails the judgment of the trial court by asserting that, "even if the court found that he [the father] had voluntarily surrendered the baby into the custody and keeping of Bob Mitchell and E. A. Mitchell, upon the hearing, the burden was upon the latter to show to the court that he was unworthy of the trust imposed upon him by law to maintain and rear the child;" the relators relying principally upon the theory that the presumption that arises when a parent is demanding the custody of his child, that the best interest of the child is presumed to be with its parent, is not overcome in this record, and cites the case of *State v. Deaton*, 93 Tex. 244, 54 S. W. 901, by our Supreme Court, as one of the cases convincingly suggestive that the father should recover the custody and possession of his child. Of course we acknowledge all the force attributable to the language of the Supreme Court with reference to the principle enunciated. Our Supreme Court there had a case under consideration where the mother had surrendered the child to a connection whose wife was a distant relative to the applicant to raise and care for the same. Her financial condition and surrounding circumstances at that time were such as to prevent the proper raising and education of this child; but subsequently by marriage her financial condition became very much improved, and her husband joined with her for the recovery of her child. There was no question as to the character of the mother and as to the condition of her husband with reference to the future maintenance and education of this particular minor. The district court and Court of Civil Appeals

denied the application of the mother, and the Supreme Court, where no question whatever was raised as to the fitness of the mother, reversed and rendered the case. This question has been before our higher courts several times, and has been often decided by numerous courts of the different states. Every case is bottomed upon the particular facts as this case should be, and in the determination of conflicting rights the guiding star is, of course, the best interests of the child, either temporarily or permanently. As stated, Buck Sams, at the time of the marriage, was about 20 years of age, and only 22 at the time of the trial. Prior to the time of the disagreement between him and the maternal grandparents, they had either lived with the latter or only a block and a half away, and Sams testified that, after they moved from the home of the Mitchells to another home near by, the maternal grandmother had about as much care of the child as its own mother, and at the very time of the unfortunate catastrophe, when the mother was killed, the baby was in the care of these grandparents. The testimony is susceptible of the conclusion that Sams was drunk, and drove the auto at a rather reckless rate of speed, which to some extent contributed to the accident. Sams testified that, although he had run away with the daughter, had signed an affidavit (but not sworn to) that she was over 18 years of age, yet these grandparents, up to the time of the disagreement over the child, had not complained or used a single word of reproach, and the relations between them were amicable in every respect. The several months that he stayed in their house these grandparents provided a home and board for him and his wife without charge. The grandparents testified that when Sams moved to the home near by they visited their daughter nearly every day, and that they still helped to care for the baby, and this continued until the death of his daughter, with the exclusive care thereafter of said child. Buck Sams testified that a short time after the death of his wife, and during a spell of sickness of the child, he went to Galveston for a period of about five days, and said that during the sickness of the child (whether before or after the trip we are unable to infer): "I was not up a single night with the baby. I did not have a room where I could be with it. The baby was very sick during a good part of the time. I did not go down and ask about him a single night." He further said that after he left the home "during September, October, and November, he was not afraid but what the baby would be properly cared for, and he knew that they would take good care of the child." The testimony indicates that young Sams, at least prior to the death of his wife, although by a great many considered as sober and industrious and a hardworking young man, was rather a steady drinker,

keeping whisky at times at his home, and ordering beer by the barrel. He says the reason he left the home of the Mitchells was that Mrs. Mitchell accused him of murdering her daughter. Mr. Mitchell gives an entirely different version of the conversation at that time, stating that when Sams said that he could not sign the instrument prepared by the lawyers for the transfer of the child, and that it would break his mother's heart, his wife replied, "You have not broken any hearts, have you?" Sams further said that the mother, for the purpose of obtaining his signature, held a threat of indictment over his head for the killing of the daughter, and states that when these things occurred Bob Mitchell was present; and Mitchell states that he did state to young Sams that, "You know if it had not been for me you would have been indicted," and further stating to him that there was no intention whatever of having him indicted for anything with reference to that matter.

When Sams left the home of the maternal grandparents, the evidence discloses that they tried at various times to get the father to come and see the child, which was refused by him, on the ground that he did not know what they would do; that he did not feel just right about what they had said to him. On one or two other occasions the child was in an auto in the streets of Plainview, and he was solicited to come and see the child, but refused without any reason. We are inclined to think that the appellant in this instance has exhibited some indifference to the real welfare of the child. Of course we are not pretending to sound the depths of human affection flowing from parent to child; but we do believe that the trial court, under all the circumstances, was entitled to hold that temporarily the best interests of this child were with its maternal grandparents. The prior actions of the father may have indicated to the trial court some deterioration in that moral force and character which in some degree unfitted him for the supervision of this infant at this particular time, notwithstanding the care and nurture would be with his mother. The child at the time of the trial was shown to be in the very best of health, and the love and affection of the maternal grandparents is strong, and their previous solicitude and successful care undisputed. It is natural that this particular grandmother knows more of the temperament and the physical necessities of this child than any other person living. The record does not show that the paternal grandparents in any one particular had ever had the care of this infant, either in sickness or in health; naturally so, as the mother of this child would turn to her own mother for advice and assistance in the care of her child. The testimony indicates a peculiar and unusual disposition of forbearance upon the part of the appellee Bob Mitchell with reference to the appellant, Buck

Sams. The father of Sams, after his daughter-in-law's death, evidently having in mind the best interests of the child, agreed that it was best for the Mitchells to have the infant. It is true he says that he is willing now to give Buck and the child a home in his house, and that it is his wife's wish, and this court is not drawing any invidious comparisons between the two homes, but the strong attachment of the grandmother Mitchell and the grandfather, it being the only lineal relative, intensified by the association previously and at present existent, with the care at all times manifested for the baby—naturally at this time their knowledge of the child is greater and the attachment stronger. If you eliminate the paternal grandparents and the home offered by them in this case, there could be no hesitation on the part of any court that the appellees should have the child. The evidence indicates that both grandparents are people of comfortable circumstances, the father and mother of Sams being 60 and 45 respectively, and the citizenship and moral worthiness of all unquestioned; Bob Mitchell is 51, and his wife 39, the latter in good health, and in every way capacitated to care for the baby. But the inexperience of the father, taken in connection with other circumstances with reference to his attitude towards the child, aside from the mother and father, would necessarily, when you regard the best interests of the child, lead to this conclusion.

The case of *Sturdevant v. State*, decided by the Supreme Court of Nebraska, reported in 19 N. W. 818, was one where an infant child, eight months old, was placed in the custody of its grandparents, its mother being dead, and on account of the father's age—23 years—and inexperience of the father of the child, the grandparents' custody was maintained. That court said: "From a careful examination of the authorities at our command, we think the prevailing rule in this country may be briefly stated to be that in controversies similar to this, especially where the infant is of the tender age of the one contended for, the court will consider only the best interest of the child, and make such order for its custody as will be for its welfare, without any reference to the wishes of the parties. \* \* \* It is no doubt true that the defendant in error is greatly attached to this child, and the facts as found by the court show that he is in every respect a suitable person to have its care and custody. But when we consider his age and want of experience we are driven to the conclusion that personally he could not care for the wants of a child so young and helpless. \* \* \* The grandparents have had the custody of the child since its birth, are greatly attached to it, have ample means to provide for its wants, and have the judgment and experience so essential and necessary to convince any one that it is better for the

child to remain where it is until such time as its age and condition will justify the father in assuming its custody."

Our own Supreme Court (*Legate v. Legate*, 87 Tex. 248, 28 S. W. 281), has said in cases of this kind: "The right of the parent or the state to surround the child with proper influences is of a governmental nature; while the right of the child to be surrounded by such influences as will best promote its physical, mental, and moral development is an inherent right, of which, when once acquired, it cannot be lawfully deprived."

As stated, there is no question as to the citizenship of the grandfather Sams and the excellence of his wife, the paternal grandmother. There is, however, the question that the Mitchells know this infant better and are endeared to it deeper on account of the previous association and solicitude in sickness and in health than any other one person; that they understand better its physical well-being, and we all know that a child of this age is to a considerable extent passing through a critical period in infantile existence; probably since the death of its mother, at which time it was about seven months of age, it has been a "bottle baby," sustained by artificial food. We do not say that the evidence shows that the paternal grandparents will not give this child the same attention as the maternal grandparents; but we do say that it is a demonstrated fact, from the birth of this baby, through all infantile vicissitudes, the deep solicitude and successful nurture manifested by the appellees point to the correctness of the trial court's conclusions. The following cases, involving controversies between the parent and grandparents, and decided in favor of the latter, touch this case upon some features of the question involved; the prime consideration in some of the cases being the best interests of the physical condition of the child, and in some of the cases blended with a moral and mental welfare of the infant, and considered by the court in awarding the child to the grandparents who had in the past the care and custody of the infant, and to which we refer without further extending the limits of this opinion: *McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406; *State ex rel. Thompson v. Porter*, 78 Neb. 811, 112 N. W. 286; *Gardenhire v. Hinds*, 38 Tenn. (1 Head) 410; *Ex parte Davidge*, 72 S. C. 16, 51 S. E. 269; *Jones v. Darnall*, 103 Ind. 569, 2 N. E. 229, 53 Am. Rep. 545; *Hussey v. Whiting*, 145 Ind. 580, 44 N. E. 640, 57 Am. St. Rep. 220.

[4] The appellant insists that the court improperly admitted and considered the deposition of one Runyon and his wife taken in another suit between the same parties; this record disclosing that in that case the same question, that is, the custody of this child, was involved. This testimony purports to reveal certain occurrences between Sams and

his wife and the conduct and condition of Sams on one of the streets of Plainview a short time prior to the accident when Mrs. Sams was killed. The prevailing and influencing considerations indicated in this opinion, requiring, as we think, an affirmance of the judgment of the trial court, devitalize the force of the position of appellants as to any technical error committed by the trial judge in the admission of this testimony, and make it of little weight, if any, in regarding the matter of the real interests of the child, considering its helplessness and the present possession of the Mitchells in ministering to the child for its present welfare. The same testimony was in substance delivered by another witness on the stand, the brother of Runyon, who saw the occurrences detailed in the depositions, and upon the whole we think the error harmless, and overrule the assignment.

The court's judgment in this cause, the form of which we commend, is merely a deprivation of the father, and a permission of the custody of the maternal grandparents, subject to the further order of the court, with the further provision for the right of visitation of the father at all reasonable times for the purpose of seeing the child, and our conclusion is upon the whole that the judgment of the court as to the present custody of this child is proper.

Judgment affirmed.

#### ELLERD v. CAMPFIELD.

(Court of Civil Appeals of Texas. Amarillo. Nov. 22, 1913. On Motion for Rehearing, Dec. 20, 1913.)

#### 1. TRIAL (§ 349\*)—SPECIAL ISSUES—DISCRETION OF COURT.

The rule of the Supreme Court for the district and county courts that special issues should be submitted only when the pleadings contain several combinations of fact, each of which constitutes a cause of action or ground of defense, is not a limitation of the power of the court and a definition of the character of the cases which should be submitted to the jury on special issues; but, under the statute, the court, on the request of either party or on its own motion, may submit a case on special issues, and a party complaining must show that he was prejudiced thereby before he can complain.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 590; Dec. Dig. § 349.\*]

#### 2. TRIAL (§ 255\*)—INSTRUCTIONS—DEFINITION OF TERMS—REQUESTS—NECESSITY.

The failure of the court to define legal phrases in its instructions is not error, unless the party objecting requests a charge defining the terms, and, in the absence of a special request, the failure to define the word "agreement" in an instruction is not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 427, 423; Dec. Dig. § 255.\*]

#### 3. APPEAL AND ERROR (§ 1027\*)—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

Where, in an action on vendor's lien notes, the issue was whether the time for payment had been extended under an agreement be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tween an agent of plaintiff and defendant, and the jury specifically found that no agreement was made, rulings involving the authority of the agent to make the agreement were immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.\*]

#### On Motion for Rehearing.

#### 4. APPEAL AND ERROR (§ 690\*)—QUESTIONS REVIEWABLE—BILL OF EXCEPTIONS.

An assignment of error complaining of the exclusion of evidence, not supported by the bill of exceptions applicable to the assignment, does not raise any question on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.\*]

Appeal from District Court, Hale County; L. S. Kinder, Judge.

Action by John W. Campfield against John J. Ellerd. From a judgment for plaintiff, defendant appeals. Affirmed, and motion for rehearing overruled.

Madden, Trulove & Kimbrough, of Amarillo, and L. R. Pearson, of Plainview, for appellant. Mathes & Williams and Graham & Graham, all of Plainview, for appellee.

**HENDRICKS, J.** This suit was filed by the appellee, John W. Campfield, against John J. Ellerd, the appellant, to recover in the trial court on two vendor's lien notes amounting to \$1,150 each; also, for the usual attorney's fees and foreclosure of the vendor's lien upon the land and for which the notes were partly given. The appellant, Ellerd, admitted the execution of the notes in question, but specifically alleged that the notes had not matured at the time the suit was instituted, for the reason that an agreement had been made between him and one E. E. Winn, the alleged authorized agent of Campfield, to extend the time of payment of the notes in question until February 9, 1913, and the suit having been instituted prior to that time was premature and should be abated. The court, at the request of the appellee, submitted the case to the jury on special issues, and the first issue tendered by the court was as follows: "Was there an agreement between E. E. Winn and the defendant, John J. Ellerd, by which it was agreed that the payment of the notes in controversy was extended from February 9, 1912, until February 9, 1913"—the court further instructing the jury that, if they gave an affirmative answer to this question, the jury would proceed to answer further questions submitted by him; but, if they answered the first question in the negative, it would not be necessary to answer any subsequent questions embodied in the charge.

[1] The appellant claims that this cause and the issues involved therein should not have been submitted to the jury on special issues, "because the issues of fact and of law involved in this case were not such as could be fairly and legally presented to the

jury upon special issues" submitting a proposition that "the charge of the court should be submitted on special issues only when the pleadings contain several combinations of fact, each of which constitutes a cause of action or ground of defense, and is sufficiently supported by the evidence to require a charge upon which an issue has been formed."

Appellant is attempting to apply rule 61, quoted as above, and promulgated by the Supreme Court of the state for the district and county courts, with reference to charges and instructions by those courts to juries. This rule is not intended as a limitation upon the power of the trial court and a definition of the character of case which should be submitted to the jury upon special issues. It is very plain from our statute that, upon request of any party to the suit, and at the present time, without any request, the court, upon its own motion, may submit the cause in such a manner. The appellant has not suggested in the slightest in what manner he was injured by a submission of this cause upon special issues. In reading the brief proffered in this court for a reversal of the cause, we are unable to find any statement of the evidence of any witness that an agreement of extension in accordance with the defendant's pleadings was ever made; and, again, the court has quite a plenary power in this respect, and, to say the least of it, it would certainly be incumbent upon appellant, in a matter of this kind, to show some deprivation of a legal right or some abuse of discretion, when, under the statute, either party requests such a submission, and the jury is so instructed; and, as a concrete proposition, we take it would be hard to show injury.

[2] Appellant assigns as error the action of the court in submitting to the jury special issue No. 1, which we quoted above, for the reason, as indicated in his proposition, that "it is the province of the court to charge the jury on questions of law involved in the case, and all legal propositions should be defined." And in his argument under this assignment he further says that the court does not undertake to give a legal definition of "agreement," but leaves this question of law entirely to the jury; and that "it is well settled that questions of law, with only a few exceptions, are for the court, and all legal phrases and terms, such as 'agreement,' 'negligence,' etc., should be defined by the court in its charge, and a failure of the court to define legal phrases is error."

Appellant has a misconception of the law upon this subject as applicable to the particular question involved, the authorities cited are not in point, and a failure of the trial court to define legal phrases or give definitions is ordinarily not error unless the party who is objecting in the appellate court to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

omission of the trial court in this respect has himself requested a charge of the lower court desiring a definition of the terms used in the general charge. We think this is well illustrated by the following cases: *Arkansas Construction Co. v. Eugene*, 20 Tex. Civ. App. 601, 50 S. W. 736; *Lagow v. Grover*, 77 Tex. 448, 14 S. W. 141; *Texas Midland R. Co. v. Ritchey*, 49 Tex. Civ. App. 409, 108 S. W. 732; *Texas & Pacific R. Co. v. O'Donnell*, 58 Tex. 27. The omission of the trial court to define the term "ordinary care" is not affirmative error and cannot be complained of where a special instruction defining them has not been requested. *Western Union Telegraph Co. v. James*, 31 Tex. Civ. App. 503, 73 S. W. 79, writ of error refused in 97 Tex. 651, 73 S. W. 79, no opinion.

The appellant in this case failed to request any definition of the trial court as to the meaning of the term "agreement," and hence we believe is not in an attitude to complain under the decisions.

[3] The appellant submits other assignments upon other alleged errors of the trial court, which we deem to be entirely immaterial on this appeal for the reason that when the jury specifically answered that there was not any agreement entered into between the agent Winn and the defendant Ellerd, as to the extension of the notes, necessarily the whole defense of the appellant failed.

The succeeding questions, as to whether or not the agent had the authority, or whether it was within the apparent scope of Winn's authority to make the agreement, or whether the court committed error in other portions of the charge, or whether special charges submitted and refused by the trial court upon such questions were error, are clearly unavailing, for if the agreement was not made the predicate of appellant's defense is gone. We are unable to ascertain from appellant's brief, or from the record, that the alleged failure upon the part of the trial court to do certain things complained of, or in doing other things charged as error, affected in any respect the action of the jury in finding that an agreement was not made between Ellerd and the agent Winn; and, again, appellant's assignments, with the statements thereunder, with reference to such other errors charged against the trial court, are quite abstract in their presentation with insufficient statements, and, as stated above, without even a presentation to this court of any testimony of any witness with reference to any part of the record that any agreement for extension of the particular indebtedness was ever made.

The appellee suggests in this case that the appeal is one for delay and requests an affirmance of the cause with 10 per cent. damages under the statute. We have gone to the record and statement of facts in this

case, upon the matter of the sincerity of this appeal, and have concluded to affirm the case without the 10 per cent. damages requested.

We find no error in this record, and the judgment of the trial court is affirmed.

#### On Motion for Rehearing.

[4] The appellant, Ellerd, in this cause complains that this court erred in failing to pass upon his first assignment of error, stating as one of his reasons that witness Walter Day, whose testimony was rejected by the trial court, would have testified, if permitted by the court, in substance that he had no absolute knowledge of the business relations existing between Winn and Campfield, "or that he knew in a general way that they were partners." In referring to the appellant's brief on this subject, and applicable to this assignment, the statement under the assignment is as follows: "The witness Walter Day testified that he had been acquainted with the witness E. E. Winn and the plaintiff Campfield for the past five years, and that he knew in a general way the business which the said E. E. Winn looked after for the plaintiff Campfield; that he did not remember any certain transaction, but knew in a general way. Upon objection by plaintiff's counsel, this testimony was by the court excluded from the jury. Defendant's Bill of Exception No. 3, Tr. pp. 35, 36."

The above statement in appellant's brief of the offered testimony of Walter Day is a correct reflection of defendant's bill of exception No. 3, referred to herein by appellant, and his bill of exception No. 3 has no reference whatever to any testimony of Day "that he knew in a general way that they were partners." The statement of the testimony in bill of exception No. 3, made by appellant in his original brief, and the bill of exceptions in the transcript sustaining it, present a character of testimony we thought was plainly inadmissible and that it was unnecessary to discuss it.

In re-reading appellant's brief especially applicable to this assignment, we do not find a single reference offered in the assignment, the proposition, the statement, or the "remarks," of any offered testimony of Walter Day "that he knew in a general way that they (Winn and Campfield) were partners." We find such a statement, in reading the record, in another and different bill of exceptions, which is not assigned; but we are not saying that we would consider such testimony would have effected a reversal of the case, but simply state that appellant has not complained that the court rejected such testimony, nor was it called to the attention of this court in any way, and defendant's bill of exception No. 3 supporting the assignment does not raise such a question.

The motion for rehearing is overruled.

**TRINITY & B. V. RY. CO. v. BLACKSHEAR.**

(Court of Civil Appeals of Texas, Dallas.  
Nov. 22, 1913. Rehearing Denied  
Dec. 20, 1913.)

**1. RAILROADS (§ 396\*)—INJURIES NEAR TRACK—  
NEGLECT—RES IPSA LOQUITUR DOCTRINE.**

The *res ipsa loquitur* doctrine will raise a presumption of negligence by defendant railroad company, where plaintiff while plowing in his field about 50 feet from the track was struck by a spike "picked up" by a passing freight train and thrown with great force into plaintiff's field.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1341-1343, 1357; Dec. Dig. § 396.\*]

**2. RAILROADS (§ 364\*)—INJURIES NEAR RIGHT OF WAY—DUTY OF COMPANY.**

A railroad company was bound to operate its train so as not to interfere with plaintiff's enjoyment of his premises near the right of way by casting missiles from the train and injuring plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1252, 1253; Dec. Dig. § 364.\*]

**3. DAMAGES (§ 208\*) — JURY QUESTIONS — TIME OF DAMAGE.**

In an action against a railroad company for injuries by being struck by a spike thrown by a passing train while plaintiff was in an adjoining field, whether plaintiff was rendered unable to sleep on his left side by reason of the injury, so as to be entitled to damages on that ground, held a jury question.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

**4. APPEAL AND ERROR (§ 216\*) — INSTRUCTIONS—NECESSITY OF REQUEST.**

Any error in not limiting the recovery for loss of time to the sum alleged in the petition to have been lost was one of omission of which defendant cannot complain, where he did not ask a special charge correcting such omission, especially where the evidence did not show that the damage for loss of time exceeded that amount, it being unlikely that the award for that item was greater than shown by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 627-641, 660, 662-676; Dec. Dig. § 216.\*]

Appeal from District Court, Hill County, Horton B. Porter, Judge.

Action by C. M. Blackshear against the Trinity & Brazos Valley Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. H. Lassiter and Robt. Harrison, both of Ft. Worth, and Morrow & Morrow, of Hillsboro, for appellant. H. B. Porter and Collins, Cummings & Shurtliff, all of Hillsboro, and W. F. Ramsey and Chas. L. Black, both of Austin, for appellee.

RAINEY, C. J. Appellee sued appellant to recover damages for personal injuries inflicted upon him by a train throwing an iron spike and striking him in the side, breaking his ribs, causing great suffering, etc. A trial resulted in a verdict and judgment in appellee's favor for \$6,000, from which this appeal is prosecuted.

This is the second appeal in this case. On the former appeal, in which a verdict was instructed for the railroad, the judgment was reversed and cause remanded. 131 S. W. 854. The evidence on this appeal is practically the same as on the former appeal, and from which we conclude that, as appellee was plowing in his field adjacent to appellant's right of way and about 50 feet from the railroad track, a passing freight train picked up a loose iron spike and threw it with great force into appellee's field, which spike struck him in the side, breaking his ribs, and causing him much suffering, loss of time, etc.

[1] The first assignment of error complains of the court's refusal to give a peremptory charge to find for appellant. The proposition submitted under this assignment is: "Before a plaintiff can recover of a defendant in a case such as this, in order to show negligence he must prove that the injury was one which under the law the defendant must have anticipated as a result of the alleged acts of negligence." As a test of liability under the evidence in this case, was it incumbent upon appellee to show that the accident could have been reasonably foreseen or anticipated? We think not. The rule of *res ipsa loquitur* applies here. As in a case where a passenger is injured from a derailment of a train at a place where the track and train are entirely under the control of the company, the presumption of negligence arises. *Railway Co. v. Parks*, 97 Tex. 131, 78 S. W. 740; *Railway Co. v. Wood*, 63 S. W. 164; *Street, Per. Injuries*, § 196; *Railway Co. v. Troutman*, 138 S. W. 427.

[2] The appellant introduced no evidence to explain the accident, but there was evidence tending to show the condition of the track, from which the jury might legitimately infer that a loose spike was on the track and was thrown by the train. The appellee, to show liability, was not called upon to prove negligence on the part of the appellant, as the fact of its train throwing the spike or missile on the premises of appellee and injuring him made it liable for all damages resulting, irrespective of the question of negligence. Appellee was on his own premises, and, while appellant had the right to operate its own trains along its tracks, it was legally bound to so operate them as to not interfere with appellee's peaceful enjoyment of his premises by throwing thereon missiles which caused injury to him. *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Steger v. Barrett*, 124 S. W. 174; *Cooley on Torts* (1st Ed.) 332.

[3] The court did not err in refusing to give special charge No. 10, to the effect that the jury could not allow plaintiff damages for being unable to sleep on his left side. Plaintiff alleged and testified as to his being unable to sleep at night on his left side, by reason of smothering spells when trying to sleep on that side. The doctor testified that

he did not think the smothering spells were produced by the injury. Under the state of the evidence, the charge ought not to have been given. The court had already withdrawn from the jury the evidence of smothering spells, and, as the evidence on the question of sleeping at night was conflicting, it was for the jury to determine, and it was proper for counsel to argue it to the jury.

[4] Error is predicated upon the charge to the jury which is as follows: "If you find for plaintiff, you will find for him such an amount as you believe from the evidence will be a fair and just compensation in cash for the injuries suffered by him as a direct and proximate result of defendant's negligence, if any negligence there was, taking into consideration only the physical and mental pain, if any, suffered and to be suffered by him, and the amount of time lost by him, if any, from his usual and customary vocation." The allegations claimed in the petition for loss of time was \$1,000, and appellant contends the court should have limited a recovery for loss of time to the \$1,000, and, as the court did not do this, it was calculated to cause the jury to assess a much higher amount than they otherwise would have done. If this was error, it was one of omission, and appellant should have requested a special charge correcting the omission, and, not having done this, it will not be heard to complain, especially when the evidence does not show the damages for loss of time exceeded that amount. It is not probable the jury allowed damages for loss of time in a greater amount than shown by the evidence. *City of Dallas v. Jones*, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377; *Railway Co. v. Motwiller*, 101 Tex. 515, 109 S. W. 918.

Appellant has presented other assignments of error on the questions of "anticipation of accident and negligence," which, in our view of the case, do not affect the liability of the appellant, and what we have heretofore said on these points makes it needless to say more.

Complaint is made that the verdict is excessive. From the nature of the injury, as shown by the evidence, we are not prepared to say the jury were wrong. They had the witnesses before them, and they were in a better position to weigh the evidence than we. Their verdict is not so large as to indicate prejudice or passion, and the judgment will not be disturbed.

The judgment is affirmed.

#### TEXAS & N. O. R. CO. v. CUNNIFF.

(Court of Civil Appeals of Texas. Galveston. Nov. 22, 1913. Rehearing Denied Dec. 18, 1913.)

RAILROADS (§ 443\*)—KILLING OF STOCK ON TRACK—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for the killing of a horse on the track, evidence

held to sustain a finding that the horse entered on the track at a point where railroad employes, putting in a new crossing negligently left an opening in the fence, authorizing a recovery.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

Error to Jefferson County Court; R. W. Wilson, Judge.

Action by J. F. Cunniff against the Texas & New Orleans Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, and Hightower, Orgain & Butler, of Beaumont, for plaintiff in error. O'Fiel & O'Fiel, of Beaumont, for defendant in error.

REESE, J. J. F. Cunniff sued the Texas & New Orleans Railroad Company in the justice court, to recover \$150, the value of a mare alleged to have been killed by one of defendant's trains. On trial in the justice court he recovered judgment for \$100. Defendant appealed, and in the county court plaintiff recovered a like judgment, from which this appeal is prosecuted.

A gang of men were engaged in putting in a new crossing about 100 yards from appellee's house. There was another crossing between a quarter and a half a mile south of this point. Appellant's track was fenced, but while engaged in the work of putting in the new crossing the men cut an opening in the fence. Their foreman testified that this place was kept open in the daytime, but that he was always careful to have it closed at night when the men quit work, so as to prevent stock straying upon the track, and that it was so closed on the night appellee's mare was killed. Appellee turned his mare out about 9 o'clock at night, and the next morning found her lying dead on the appellant's track at the old crossing aforesaid. She was lying in the culvert or stock gap on the south side of the crossing, and up against the south wall of this stock gap. She had a gash in her neck from near the shoulder to the ear. Appellee testified that he did not know whether any bones were broken or not. It is appellant's contention that the mare was struck on this crossing, and, as no negligence was shown in the operation of the train, appellant was not liable. Appellee contends that the fence where the men were working on the new crossing was negligently left open, and that his mare strayed onto the track through this opening, and that she became frightened by a train approaching from the north, and ran down the track to the north stock gap at the south crossing, where she was caught by the engine and carried across this crossing to the place where she was found, killing her. He testified that his mare was shod, and that the next morning he traced the tracks of a shod horse onto the track at the point where the new crossing

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



was being put in and down the track to the stock guard, at and north of the south crossing, where the tracks stopped. There were no signs of blood or hair at this point on the track, or of the mare having been dragged. If the mare was struck at this point by a train running even at ordinarily high speed, there is nothing unreasonable in the idea that she should be taken up by the cowcatcher of the engine and carried across the stock guard and the 30-foot roadway into the stock guard, where she was found. And it is not necessarily inconsistent with this that no signs of blood or hair, or other signs that the mare was struck at that point, were found on the track. Appellant lays much stress upon the fact that no bones were broken, which it is said was testified to by appellee. He did not so testify, but only that he did not see any broken bones. But it is reasonably certain that the mare was struck by an engine running south. Appellant contends she was struck on the crossing, and thrown into the stock guard, where she was found. That this could be easily done without breaking any bones, while it would be impossible that the mare should have been struck at the north cattle guard with such force as to carry her across the 30-foot roadway without breaking any bones, as contended by appellant, appears to us to be, in logic, a non sequitur. On the whole the evidence was sufficient to authorize the court's finding of fact that the mare entered upon the track at the point where the men were putting in the new crossing through an opening negligently left in the fence. This is the only question presented by the appeal.

The judgment is affirmed.

Affirmed.

#### RISINGER v. SULLIVAN.

(Court of Civil Appeals of Texas. San Antonio.  
Dec. 3, 1913.)

##### 1. APPEAL AND ERROR (§ 742\*)—ASSIGNMENT OF ERROR—SUFFICIENCY.

An assignment of error complaining of the exclusion of evidence will be overruled, where the statement of facts does not contain that part of the evidence, and where the judge's qualification of the bill of exceptions shows that that part was excluded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8000; Dec. Dig. § 742.\*]

##### 2. TRIAL (§ 229\*)—INSTRUCTIONS—UNDUE EMPHASIS OF FACTS.

Where the evidence is so conflicting as to authorize the jury to find for either party, instructions so emphasizing and repeating the theory of plaintiff's cause that they amount to a peremptory instruction for him are erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 513; Dec. Dig. § 229.\*]

Appeal from Jim Wells County Court; W. B. Perkins, Judge.

Action by J. E. Sullivan against William

Risinger. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. Broeter, of Alice, and C. A. Davies, of San Antonio, for appellant. B. D. Tarlton, Jr., of Beeville, for appellee.

**TALIAFERRO, J.** This was a suit by J. E. Sullivan, appellee, against William Risinger, appellant, for a mule. It was alleged that on November 1, 1912, appellee was in possession of the mule, and that upon that day appellant wrongfully took it from him, and refused to surrender it to him. Appellant claimed the mule as his own. The evidence was voluminous and conflicting. The jury might have found in favor of either party, with ample evidence to support the verdict. They did find in favor of appellee, Sullivan, and the court adjudged the mule to him.

[1] There is no merit in appellant's first assignment of error. The statement of facts does not contain the part of the testimony to which the assignment is directed, and the judge's qualification of the bill of exceptions shows that that part of the evidence was excluded. The assignment is overruled.

[2] The second, third, fourth, and fifth assignments of error are sustained. They assail the court's general charge to the jury. We have examined the charge, and find that it so emphasizes and repeats the theory of the plaintiff's cause that it amounts to a peremptory instruction for the plaintiff.

The other assignments of error complain of the court's refusal to give certain special charges requested by appellant. Upon another trial we have no doubt a more maturely prepared charge will be given to the jury, and we deem it unnecessary, if proper, to further discuss the questions which bear upon issues raised in the case, and the judgment will, without further discussion, be reversed, and the cause remanded.

#### TREADWELL et al. v. WALKER COUNTY LUMBER CO.

(Court of Civil Appeals of Texas. Texarkana.  
Dec. 4, 1913.)

##### 1. APPEAL AND ERROR (§ 1027\*)—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

Where, in trespass to try title against a husband and wife, who claimed the property as the wife's separate property, a judgment for plaintiff involved only a finding that the property was community property, the error, if any, in holding that when property comes to a wife, so as to make it her separate property, limitations will not run in her favor, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.\*]

##### 2. HUSBAND AND WIFE (§ 250\*)—COMMUNITY PROPERTY—WHAT CONSTITUTES.

Where one entered on land as a naked trespasser, and occupied it for four or five years, and then without any conveyance gave the property to a married daughter, who, with

her husband, remained in possession long enough to establish title by adverse possession, the property was acquired after the daughter's marriage, and was community property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 893; Dec. Dig. § 250.\*]

### 3. JUDGMENT (§ 693\*)—CONCLUSIVENESS—PARTIES CONCLUDED.

A judgment for plaintiff, in trespass to try title against a husband, is conclusive on the rights of the wife, where the property was community property.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1216; Dec. Dig. § 693.\*]

Appeal from District Court, San Jacinto County; L. B. Hightower, Judge.

Action by the Walker County Lumber Company against Horace Treadwell and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Wm. McMurrey, of Cold Springs, for appellants. Dean, Humphrey & Powell, of Huntsville, for appellee.

LEVY, J. The action was brought by appellee against the appellants in trespass to try title to the land described in the petition. Appellants pleaded not guilty, and answered, claiming the land as the separate property of Polly Treadwell, wife of Horace Treadwell, and acquired by the ten-year statute of limitation. In a trial to the court judgment was entered for the appellee. In the trial of the case it was agreed that appellee had legal title to the land unless divested of the same by appellants' plea of limitation.

It appears from the evidence that in 1873 Polly Treadwell, then a woman of legal age and single, moved with her father and his family onto the land in suit. Her father built a house on the land, and lived in it with the family, cleared a field, and cultivated it, and made claim of ownership to all the land in suit. Polly Treadwell worked with her father in making the improvements on the place. The original entry on the land was as naked trespassers. The father lived on the land with his family between four and five years, then decided to move off and live on another place, and abandoned the place in suit. Before the father left the place Polly Treadwell was married on the place to Horace Treadwell, and has been his wife all the time since, and they together continued the same as before the time the father left to live on the land, and have since used, cultivated, and enjoyed it without being disturbed. According to the testimony of Horace Treadwell, husband of Polly, he does not make any claim, and had never made any claim, of interest in the land or to it. The appellee's vendor sued Horace Treadwell in trespass to try title to the land, and on April 21, 1898, an interlocutory judgment by default was entered against Horace Treadwell for all the land, and a final judgment entered in the

case in May, 1901. This final judgment is existing and not appealed from.

The present suit was filed by appellee against appellants August 25, 1910. The entire testimony of Polly Treadwell, in support of her claim of separate property, is as follows: "I got that land from my father. He moved off, and he gave it to me. He went back to the plantation. I was grown when my father commenced claiming that land. I helped to clear it. As near as I can get at it, my father stayed there on that place five years, and then went back to the plantation. If I make no mistake, it was four or five years. Then I just stayed there. I was married before my father left. I was married to Horace Treadwell, and have been his wife all the time. We have never been separated. Horace never claimed the land. He did not claim it. It was just my claim. My father never gave me any deed to it. He just turned me over the improvements and moved off."

[1] The first assignment of error reads: "The court erred in holding that when property comes to the wife in such a way as to make it her separate property that limitation will not run in her favor." The assignment, as we interpret it, merely presents the point that the court erred as a matter of law in ruling that the wife cannot avail herself of the statutes of limitation as to her separate property. As we understand the record before us, there is involved in the judgment of the court the findings only that the property in controversy was community property, if any title ever existed, of Horace and Polly Treadwell, and that the final judgment of 1901 against the husband divested all such title to the land and placed it in appellee's vendor, and that ten years' adverse possession on the part of appellants since that judgment had not elapsed before the instant suit. Therefore, in view of the record, it could not be said, we think, that the court held as a matter of law that the statute of limitation would not run in favor of separate property of the wife.

[2] But if the assignment by intentment presents the point that under the facts of this case the property was the separate property of the wife, even then we think the judgment of the court was correct, and the assignment should be overruled. It affirmatively appears that Polly Treadwell predicates the commencing of her right to the land as separate property at a time after her marriage with Horace Treadwell, if force be given to her statement, as the court was authorized to do, that she "got that land from my father." So the fact is established that Polly Treadwell's "claim," if any, to the land, commenced and arose during coverture. But in this connection it appears that she predicates no right under any conveyance from her father, and it further appears that the father had only adversely occupied

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the land between four and five years, with entry thereon only as a naked trespasser, and that he was intending at the time to voluntarily abandon the premises and his adverse possession. Under such circumstances the father had no legal or equitable right in or claim to the land. And in the absence of a conveyance, which she says was not given her, there is no legal basis to enforce or predicate any distinct legal claim or equitable right under the father. It is quite well understood that a conveyance is necessary to pass interest in land to another; and in legal force and effect there is not founded, under the facts of this case, any ownership by gift or acquisition for value, such as to make the title separate property, upon the bare statement that her father "gave her the land." And if the contention could be made that her father gave to her such possession as he had in consideration of her former services in helping him clear the land, and that she entered the possession under such circumstances, and this would give Polly an equitable claim to the land in controversy as separate property, it must be said that the court was warranted in finding that such services were otherwise given, and that no such consideration entered the father's verbal declaration to the daughter; and in support of the court's judgment we must so hold.

[3] Consequently on the record it must be said, in support of the court's findings, as involved in the judgment, that any ownership or claim on the part of Polly Treadwell commenced after coverture, and rested in and was referable only to her adverse possession, commenced when her father abandoned his adverse possession to her, and for ten years thereafter during her coverture. The effect of the facts is to "acquire" the property after the expiration of the full ten-year period of limitation, and not before. And, as provided by statutes, if either the husband or wife "acquire" property after marriage, it is common to both. The status of the property was that of community property, as ruled by the court, because title to the property was not "acquired" under the statutes until the expiration of the full period of limitation. *Sauvage v. Wauhup*, 143 S. W. 259. And the conclusion of the court that the legal effect of the judgment in 1901 against the husband was to conclude the rights of the community was correct.

The judgment is affirmed.

**BARTELDES SEED CO. v. BENNETT-SIMS MILL & ELEVATOR CO.**

(Court of Civil Appeals of Texas. Amarillo. Nov. 29, 1918.)

**1. SALES (§ 36\*)—OFFER—MISTAKE.**

The rule that when a mistake is not mutual courts will not relieve the party making it against his own negligence or inattention does

not apply to a mistake in an offer to sell merchandise, where the party accepting the offer knows of the mistake when he accepts it, and seeks to reap a benefit from the mistake, to the injury of the person making the offer.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 63, 64; Dec. Dig. § 36.\*]

**2. SALES (§ 36\*)—OFFER AND ACCEPTANCE—MISTAKE.**

At a time when the market price of millet seed was \$2.35 per hundredweight, defendant wrote plaintiff, offering to sell between 700 and 800 bushel at \$1.35 per hundredweight, and plaintiff, immediately on receiving the letter, wired a reply: "We accept your letter seventeenth. Ship quick." The price quoted was a clerical error, and on discovery defendants refused to ship. Both parties were in the wholesale and retail grain and seed business, and knew the market value of the seed at the time the offer and acceptance were made. *Held*, that there was no meeting of minds, and plaintiff was not entitled to recover for breach of contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 63, 64; Dec. Dig. § 36.\*]

**3. APPEAL AND ERROR (§ 926\*)—RULINGS ON EVIDENCE—TRIAL TO COURT.**

Where witnesses testified to the market value of millet seed on a trial to the court, after having qualified themselves by proof that they kept up with the markets and received reports and cards from various dealers in different parts of the country, it would be presumed that letters and cards showing the market price of such seed were considered by the court, not as evidence of market value, but only as bearing on the weight of the testimony of the witnesses, and hence their admission was not error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1279, 2899, 3729, 3730, 3735-3747; Dec. Dig. § 926.\*]

Appeal from Donley County Court; J. C. Killough, Judge.

Action by the Barteldes Seed Company against the Bennett-Sims Mill & Elevator Company. Judgment for defendant, and plaintiff appeals. Affirmed.

H. B. White, of Clarendon, for appellant.  
A. T. Cole, of Clarendon, for appellee.

**HUFF, C. J.** The appellant, the Barteldes Seed Company, brought suit in the county court of Donley county, against the appellee, Bennett-Sims Mill & Elevator Company, for damages on an alleged breach of contract for the sum of \$434, in refusing to deliver 35,000 pounds of German millet seed, in accordance with the terms theretofore entered into between the parties on April 19, 1912. The appellee denied liability, on the ground that in quoting the price of the seed they made a clerical error in their letter of \$1 per hundredweight, which fact was known to appellant at the time it accepted the offer to sell. On April 17, 1912, the appellee wrote the following letter to appellant: "Under separate cover we are mailing you sample of German millet seed. We offer you delivered Oklahoma City \$1.35 per cwt. in 10 oz. bags. There is 7 or 800 bu. of this lot. We want it to all go together." This letter appears to have been received by the appellant on the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

morning of the 19th of April, 1912, and at 8:20 a. m. that day they sent to appellee the following telegram: "We accept your letter seventeenth. Ship quick." The seed was not shipped. The appellee's evidence shows that the price quoted was by clerical error, made to read "\$1.35 per cwt." instead of "\$2.35 per cwt.," the then market price of millet seed per hundredweight. The trial court found as a fact that appellant was in a position to know, and did know, that the market price of the millet was \$2.35 per hundredweight; that the appellee made a mistake in quoting the price, and intended to offer the sale of the seed at \$2.35, instead of \$1.35, per hundredweight, and by the judgment we must also impute to the finding of the court that the appellant knew that the appellee had made the mistake in quoting the price. The evidence introduced by appellant from its employé, is that during the month of April—up to the 17th of the month—the market price of that class of millet was from \$1.40 to \$1.60 per hundredweight; that on the 19th the price advanced \$1.24 per hundredweight and he further testified that after this sudden rise the price remained about the same for some days thereafter. The retail price obtained by appellant on the 17th, the date of the letter, for seed, in lots weighing from 100 to 1,000 pounds, in Oklahoma City, ranged from \$2.40 to \$2.65 per hundredweight, and from the 20th to 22d of April ranged from \$2.50 to \$3.55 per hundredweight. Both parties were in the wholesale and retail grain and seed business, and their witnesses testified they knew the market value of the seed on the 17th of April. The evidence of appellee shows it was \$2.35 per hundredweight. We think the evidence sufficient to show that the market price was, on the 17th of April, \$2.35 per hundredweight, and that appellant knew that fact when it wired the acceptance, and must have known that appellee's quotation of the price was a clerical error.

[1] Ordinarily, when the mistake is not mutual, courts will not relieve the party making it against his own negligence or inattention; but we think a different rule should apply when the evidence shows that the party accepting the mistaken offer knows of the mistake when he accepted it, and that he should not reap the benefit of the mistake to the evident injury of the other. We think fair dealing and good conscience should require an opportunity to correct the error, before trying to found a binding contract on it. *Dorsey Printing Co. v. Gainesville Cotton O. M. & G. Co.*, 25 Tex. Civ. App. 456, 61 S. W. 556; Cyc. vol. 9, 396, and note 87; Page on Contracts, vol. 1, p. 144, § 86, and authorities in note; *Everson v. International Grain Co.*, 85 Vt. 658, 27 Atl. 320; *Shelton Co. v. Ellis*, 70 Ga. 297; *Hume v. U. S.*, 132 U. S. 406, 10 Sup. Ct. 134, 33 L. Ed. 393.

[2] The evidence in this case is that both parties knew the market value of the millet

seed on the 17th of April, 1912. Upon receiving a letter from a dealer in that commodity, appellant must have known that \$1 per hundredweight less than the market value was a mistake. That they did is evidenced by the telegram to "Ship quick." It did not wire back that "Your \$1.35 per cwt. offer is accepted." Appellee thought it had quoted the market price in the letter—\$2.35. We think from the evidence it is manifest that appellant knew a mistake had been made, and sought to take advantage of the mistake by an immediate acceptance and quick shipment. The haste in this matter to procure the seed at \$1 less than their market value, under all the circumstances of the case, amounted to a fraud. The Georgia court said, in *Shelton v. Ellis*, supra: "What is a mistake on one side and a fraud on the other is as much the subject of correction as if it were a mistake on both sides." Judge Fuller said in *Hume v. U. S.*, supra: "If the claimant knew that a clerical error had been committed, of which the agent of the government was ignorant, and deliberately intended to take advantage of the error to obtain the execution of a contract for the payment of so grossly unconscionable a price, or if the facts were such that he must \* \* \* have known that their action, if understandingly taken, would be impalpable dereliction of their duty to their principal, and, notwithstanding, sought to profit by it, the character of the fraud, so far as the claimant is concerned, is not changed by the fact that such action was the result of the negligence or mistake of the government's agents, untainted by moral turpitude on their part." True, appellant sought to prove that the market value of the seed was only about 25 cents per hundredweight in Oklahoma City on that date more than the price demanded, but from an examination of that testimony, we think the trial court was amply justified in disregarding this part of the evidence. The evidence clearly, to our minds, shows this was not true. At any rate, the trial court has found differently, and we think the evidence supports the judgment.

[3] The witnesses of appellee testified they knew the market value of the seed at that time, and in stating how they knew it in addition to the evidence shown—they were experienced dealers in products of that kind—they show that they kept up with the markets; that they received reports and cards from various dealers in different parts of the country. When they stated they knew the market price, they could testify what it was, and the fact that they gave the source of their information upon which they based their opinion as to the market only reaches the weight to be given to their testimony. These specified letters, cards, and the like perhaps were not admissible as testimony showing the market; but, as the case was tried before the court without the intervention of a jury, we will not presume the court

considered them as testimony of the market value, but only that he considered the same in weighing the testimony of the witnesses who testified to what the market value was. The appellant's witnesses show their opinion of the market was also based upon reports. *Ry. Co. v. Scott*, 86 S. W. 1065; *Ry. Co. v. Bennett*, 46 Tex. Civ. App. 379, 103 S. W. 1115.

We find no error in the judgment of the court, and the case is affirmed.

### BLAND & FISHER LUMBER CO. v. SCANLAN.

(Court of Civil Appeals of Texas. Galveston. Nov. 28, 1913. Rehearing Denied Dec. 18, 1913.)

#### SALES (§ 177\*)—CONSTRUCTION OF CONTRACT—ENTIRE AND SEVERABLE CONTRACTS.

Under a contract for the sale of 150,000 feet of "No. 1 common" lumber, more or less, at \$11 a thousand feet for 100,000 feet of certain dimensions, and \$9 a thousand feet for 50,000 feet of certain dimensions, the buyer had a right to accept and take so much of the lumber tendered as complied with the contract, and to reject the remainder, and the seller had a right to demand that it accept so much as complied with the contract, since it was a severable and not an entire contract, and hence the fact that part of the lumber tendered was No. 2 common did not justify the buyer's refusal to accept any of it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 445-450; Dec. Dig. § 177.\*]

Appeal from Harris County Court; Clark C. Wren, Judge.

Action by T. M. Scanlan against the Bland & Fisher Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Andrews, Ball & Streetman, of Houston, for appellant. L. B. Moody, of Houston, for appellee.

REESE, J. This is an action for damages in the county court by T. M. Scanlan against the Bland & Fisher Lumber Company. Upon trial with a jury the plaintiff recovered judgment, and defendant appeals.

Appellee sued upon a contract in writing for the sale of 150,000 feet of lumber, more or less, by himself to appellant, 100,000 feet of certain dimensions at \$11 per thousand feet, and 50,000 feet of certain dimensions at \$9 per thousand feet, the lumber to be "dry and bright, No. 1 common," to be delivered to appellant at Cairo, Ill.; the lumber to be shipped at once. Contract dated May 25, 1910. On May 27th appellant notified appellee that the order was canceled. Part of the lumber was shipped, which appellant refused to receive on the ground that the order to fill which the lumber had been bought had been canceled. One car had been loaded, but not shipped. The court limited the recovery to lumber shipped or loaded on cars before appellee received the notice aforesaid. Appellant testified that 15 per cent. of the lum-

ber so shipped (in four several car load lots) was No. 2 common, and 85 per cent. No. 1 common as called for in the contract. There was no evidence as to any custom of the trade which would have rendered this a substantial compliance with the contract.

The only question presented by the single proposition advanced under the two assignments of error is that, as the evidence indisputably showed that only 85 per cent. of the lumber tendered was of the grade ordered, the court should have given the instruction requested by appellant, which was a peremptory charge to return a verdict for defendant. Pretermittting any discussion of the testimony as to the grade of the lumber, and admitting that only 85 per cent. was of the grade contracted for, the contract was severable and not an entire contract, and the rule in such cases with regard to several contracts must be applied. *Streeper v. Frieberg*, Klein & Co., 3 Wilson's Civ. Cas. Ct. App. § 240; *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17. The lumber was to be paid for, not in a lump sum, but at a certain price per thousand feet, and the contract called for 150,000 feet, more or less. Clearly, when part of the lumber was tendered to appellant, it had the right to accept and take the 85 per cent. that was up to grade, and to reject the remainder. Appellee would not have been allowed to demand that appellant take all or none. The rule is reciprocal. As appellant had the right as against appellee to take that which was up to the grade contracted for, so appellee had the right as against appellant to demand that he do so. Appellant bases his contention for a reversal, under the proposition stated, on the ground that the contract was an entire contract. None of the cases cited by him deal with this kind of a contract. *Schreiber v. Andrews*, 101 Fed. 763, 41 C. C. A. 683; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. Rep. 455; *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967; *Vassau v. Campbell*, 79 Minn. 167, 81 N. W. 829.

Appellant never inspected the lumber, and the contract was canceled by it for the reasons stated before any of it was received. The court did not err in refusing the peremptory charge requested. The judgment is affirmed.

Affirmed.

### JOHNSON v. TINDALL.

(Court of Civil Appeals of Texas. Galveston. Nov. 28, 1913. Rehearing Denied Dec. 18, 1913.)

#### 1. FRAUDS, STATUTE OF (§ 152\*)—NECESSITY OF PLEADING.

The defense of the statute of frauds is available under a general denial if interposed by seasonable objection to testimony.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 363-366, 371, 372; Dec. Dig. § 152.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—26

**2. TRIAL (§ 89\*)—CONTRACT.**

Plaintiff, who sued defendant and the latter's son-in-law for medical services rendered to the son-in-law's wife, testified that defendant orally agreed to pay for the services, but on cross-examination qualified his statement by testimony that defendant agreed to pay only in case his son-in-law did not. *Held* that, as defendant's promise to pay was a collateral one, it was void under the statute of frauds (Rev. Civ. St. 1911, art. 3965), and plaintiff's testimony was incompetent and should have been excluded on motion made at the close of his cross-examination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 228-234; Dec. Dig. § 89.\*]

**3. TRIAL (§ 95\*)—RECEPTION OF EVIDENCE—OBJECTIONS.**

In an action to recover for medical services rendered defendant's daughter, plaintiff's collector testified that defendant told him to get all he could out of the daughter's husband and that he would pay the balance. It was objected to on the ground that it only showed a promise made after the services had been performed and, not being in writing, was not binding on defendant. *Held* that, while the testimony was inadmissible because tending to show an oral contract in contravention of the statute of frauds, the court properly overruled the objection made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 250; Dec. Dig. § 95.\*]

**4. MALICIOUS PROSECUTION (§ 71\*)—ACTIONS FOR WRONGFUL ATTACHMENT—PUNITIVE DAMAGES.**

In an action for compensation for medical services begun by attachment, where defendant claimed damages for malicious attachment, the evidence *held* to raise the issue of punitive damages.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 160-167; Dec. Dig. § 71.\*]

**5. MALICIOUS PROSECUTION (§ 55\*)—WRONGFUL ATTACHMENT—PLEADING.**

In an action begun by attachment, where defendant's plea in reconvention did not in terms allege that the attachment was sued out without probable cause but alleged facts showing that it was, such plea is sufficient to support a recovery of exemplary damages.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 106-110; Dec. Dig. § 55.\*]

**6. JUSTICES OF THE PEACE (§ 173\*)—APPEAL—JUDGMENT AGREEMENT.**

In an action begun in justice court by attachment, where defendant claimed damages for wrongful attachment, the parties entered into an agreement reciting that, since whichever party lost would appeal, the attachment should be quashed, and that the court should enter judgment as he thought proper on the facts, which was incorporated into the judgment. *Held*, that the agreement did not preclude defendant, after adverse judgment, from asserting on appeal his claim for damages for wrongful attachment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 660-664; Dec. Dig. § 173.\*]

Appeal from Nacogdoches County Court; Geo. F. Ingraham, Judge.

Action by C. H. Tindall against Calvin Johnson and another, begun in Justice Court and appealed by defendant to the County Court. From a judgment for plaintiff, the named defendant appeals. Reversed and remanded.

Blount & Strong and J. M. Marshall, all of Nacogdoches, for appellant. V. E. Middlebrook, of Nacogdoches, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against the appellant and one Will Allen to recover the sum of \$117.50, the value of professional services and medicines rendered and furnished by appellee, a physician, to the wife of said Allen, who is the daughter of appellant. At the time of filing the suit in the justice court, the plaintiff procured the issuance of an attachment against the property of both defendants. In his affidavit for attachment plaintiff swore: "That the said defendants, Calvin Johnson and Will Allen, secrete themselves so that the ordinary process of law cannot be served upon them. \* \* \* And that plaintiff will probably lose his debt unless such attachment is issued." The attachment was levied upon two mules belonging to appellant, which he replevied. Appellant answered in the justice court by a sworn denial of plaintiff's claim against him and by a plea in reconvention sought to recover of plaintiff \$200 damages for suing out the attachment against him, which he averred was wrongfully, willfully, and maliciously sued out without probable cause. Upon a trial in justice court the following judgment was rendered: "This day this cause came on to be heard upon the regular order of the call of the docket, whereupon came the plaintiff, C. H. Tindall, both in person and by counsel, and also came Calvin Johnson, in person and by counsel, and the defendant Will Allen, though duly called and having been duly cited, answered not but wholly made default herein. Wherefore the plaintiff introduced his evidence, and the court, after hearing the evidence, believes the plaintiff ought to recover against the defendant Will Allen the full amount sued for. It is therefore ordered, adjudged, and decreed that the plaintiff, C. H. Tindall, do have and recover of and from the defendant Will Allen the sum of \$117.50, together with 6 per cent. per annum interest thereon from the 1st day of January, 1910, and all costs in this behalf expended, for all of which let execution issue. Then came on to be heard the case as between C. H. Tindall and the defendant Calvin Johnson. The defendant demanded a jury. Both sides announced ready for trial, and six good and lawful jurors were impaneled, to wit, L. T. Blake, foreman, and five others, who, after hearing the evidence and argument of counsel, reported to the court that it was impossible for them to agree, and, having considered of their verdict a reasonable time, they were discharged by the court and a mistrial entered. Then came the attorneys for both the plaintiff and defendant and announced to the court that it was certain that, whichever party to this suit lost in this court, that same party would appeal the case

to the county court, and further announced to the court that it was agreed by and between the plaintiff and defendant that the affidavit and bond and the writ of attachment sued out in this case should be quashed and held for naught, and that the court might enter such judgment from the facts of the case as he thought proper. It is therefore considered by the court, and it is so ordered, adjudged, and decreed, that the affidavit and bond for attachment, the writ of attachment with the agreement of the parties, C. H. Tindall and Calvin Johnson, is in all things held for naught and quashed, and therefore that the defendant Calvin Johnson take nothing by his plea for damages. It is the further order of the court that the plaintiff take nothing by his suit as against Calvin Johnson, and that said Calvin Johnson go hence without day, and that he recover of and from the plaintiff, C. H. Tindall, all costs in this behalf expended. The plaintiff then presented to the court his oral motion for a new trial, which is in all things overruled by the court. Whereupon plaintiff gave notice of appeal to the county court of Nacogdoches county, Tex."

The trial in the county court with a jury resulted in a verdict and judgment in favor of plaintiff against the defendant Allen for \$117.50 and against the appellant for said sum, less the sum of \$2.50, which the jury found to be the actual damages sustained by appellant because of the wrongful suing out of the attachment.

[1, 2] The plaintiff testified: "I was called to see Will Allen's wife on or about October 13, 1909. One of Calvin Johnson's boys came after me. Will Allen's wife was then at her father's, Calvin Johnson. When I arrived at Calvin Johnson's house, I sent for Calvin to come to the house, and when he came I advised him that an operation was necessary on Will Allen's wife, and told him I would not perform the operation unless he would agree to pay for the same, and he promised me that he would pay for the operation. There was no one present when this conversation took place except myself, Calvin Johnson, and Calvin Johnson's wife. I afterwards performed the operation on Will Allen's wife, for which I charged Calvin Johnson \$100, and made some other visits to her and furnished her medicine, making the total amount, including the operation, \$117.50. This amount is due me by Calvin Johnson, and he has never paid me anything on it." On cross-examination he further testified: "The substance of the conversation that I had with Calvin Johnson at the time I sent for him to come up to the house, and before the operation was performed, and before I did any medical service for Will Allen's wife, was that I told Calvin Johnson that I would not do any work or perform the operation on Will Allen's wife and look to Will Allen for the pay because he was a transient negro, going from one sawmill to another, and he (Calvin Johnson) told me to go ahead and

perform the operation, and if Will Allen did not pay for it he would. Calvin Johnson never did at any time promise in writing to pay this debt." Appellant objected to this testimony and asked the court to withdraw it from the jury because it showed that "the defendant Calvin Johnson did not bind himself primarily to pay said debt but only to become security therefor, and said promise, being verbal and not in writing, would not bind the defendant Calvin Johnson legally to pay said debt." The motion to have this testimony withdrawn from the jury should have been sustained. It is well settled that the defense of the statute of frauds is available under a general denial if interposed by seasonable objection to testimony. *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93. This testimony conclusively shows that appellant's promise to pay for the services rendered by appellee to his daughter was a collateral and not an original undertaking. The appellee's statement on cross-examination that appellant promised to pay for the operation "if Will Allen did not" is not in conflict with his statement on direct examination that appellant "promised that he would pay for the operation" but explains said statement by showing the form of the promise and the condition attached thereto. Taking his testimony as a whole, there is no issue as to the character of the promise and undertaking of the appellant. He only became security for the payment of the debt by Will Allen, and his promise, not being in writing, is unenforceable. Article 3965, Revised Statutes 1911; *Rentfro v. Lancaster*, 10 Tex. Civ. App. 321, 31 S. W. 229; *Loftus v. Ivy*, 14 Tex. Civ. App. 701, 37 S. W. 766; *Nichols v. Dixon*, 85 S. W. 1051.

[3] Ollie Strode, a witness for plaintiff, testified that he had plaintiff's account for collection and saw the appellant in regard to it. The witness was then asked by plaintiff's counsel what appellant said to him as to whether or not he would pay the account. To this question the witness answered: "He told me to get all I could out of Will Allen, and he would pay the balance." Appellant objected to this question and answer on the ground, in substance, that they only showed a promise on the part of appellant to pay plaintiff's claim made after the services had been performed and, not being in writing, was not binding on appellant. This objection was overruled, and the testimony admitted. Appellant at the close of the testimony asked the court to instruct the jury that they could not consider the above testimony of the witness Strode as evidence of liability on the part of appellant for the payment of plaintiff's account. This charge was refused. We think this testimony was subject to the objection that it only showed a promise on the part of appellant to pay the debt of the defendant Will Allen, and such promise, not being in writing, created no liability on the

part of appellant. This objection, however, was not made to its introduction. The fact that the promise to pay was made after the service was performed might render it void for want of consideration but would not make such promise obnoxious to the provisions of the statute of frauds, and the court did not err in refusing to exclude the testimony on the objection made.

[4] On the issue of appellant's claim for damages for wrongfully suing out the attachment against him, he testified: "On the 10th day of October, 1911, when Dr. Tindall (appellee) made the affidavit for attachment in this case, I was either in the town of Appleby or on my way from home to said place. The writ of attachment was levied on two mules that I was driving in the town of Appleby. These mules were at that time reasonably worth on the market \$400. At that time, and at no other time during my life, have I secreted myself in any manner to avoid the service of the ordinary process of law. On the 10th day of October, 1911, or any time just prior thereto, covering a period of several months, I had not been away from home except to go to Appleby, where Dr. Tindall lives, or to come to Nacogdoches, about 12 miles away. At the time Dr. Tindall made this affidavit for attachment, and at the time the writ of attachment was levied, I owned in my own name, outside of my homestead, 273 acres of land, most of which was in cultivation. The reasonable market value of this land was \$10 per acre. My deed to this land was on record at the time the affidavit for attachment was made by Dr. Tindall in the county clerk's office of Nacogdoches county, Tex. I also owned on the 10th day of October, 1911, eight head of mules and horses, and the six head outside of the two mules levied upon were reasonably worth on the market \$800. I also owned and had on hand at the time the affidavit was made for this attachment, to wit, on October 10, 1911, 13 bales of cotton, which was reasonably worth on the market \$50 per bale. There was no lien or incumbrance of any kind on the 273 acres of land or on the stock or cotton."

On this issue appellee testified as follows: "Calvin Johnson lives about three miles from Appleby (the place where I live), and we both lived that close together at the same places on the 10th day of October, 1911, when I made the affidavit for attachment in this suit against Calvin Johnson. I was sworn to that affidavit by the justice of the peace on the 10th day of October, 1911, and I swore in that affidavit that 'Calvin Johnson and Will Allen secrete themselves so that the ordinary process of law cannot be served upon them.' At the time I swore to this statement in the affidavit, I had made no investigation with reference to the whereabouts of Calvin Johnson to determine whether or not this state-

ment was true. I had no information from any source upon which to base this statement. I did not know at the time I made this affidavit whether Calvin Johnson was then at home, just three miles away from Appleby, or whether he was then in the town of Appleby. I did see Calvin Johnson in the town of Appleby within an hour or so after I made this affidavit. The writ of attachment was levied on two mules of Calvin Johnson, in the town of Appleby, within an hour after I made the affidavit, and Calvin Johnson himself was driving the mules. I had no reason whatever to believe, at the time I made this affidavit, that Calvin Johnson was secreting himself to avoid the ordinary process of law. I further swore in the affidavit for attachment that I (plaintiff) 'would probably lose my debt unless such attachment issued.' I did not know at that time how much land Calvin Johnson had subject to execution and had made no investigation to determine this. I did not know whether he had six head of horses subject to execution or not, and made no investigation to find out. I did not know whether he had 13 bales of cotton on hand at that time subject to execution or not, and made no investigation to find out. I did know that Calvin Johnson was well fixed and owned considerable property. I did not go to the real estate records of this county to see how much more."

The evidence shows that appellant sustained actual damages by reason of the levy of the attachment, and the jury found a verdict in his favor for such damages in the sum of \$2.50. The court in his charge only submitted the issue of actual damages and refused special charges requested by the appellant submitting the issue of exemplary damages. The evidence before set out clearly raises the issue of exemplary damages, and the court should have submitted that issue to the jury. *Biering v. Bank*, 69 Tex. 599, 7 S. W. 90; *Parks v. Young*, 75 Tex. 278, 12 S. W. 986; *Willis Bro. v. McNatt*, 75 Tex. 69, 12 S. W. 478; *Farrar v. Talley*, 68 Tex. 352, 4 S. W. 558.

[5] Appellant's plea in reconvention filed in the county court does not allege in terms that the attachment was sued out "without probable cause," but it alleges facts which, if true, show that no probable cause existed, and is sufficient to entitle him to recover exemplary damages.

[6] The agreement recited in the justice court judgment did not preclude appellant from asserting his claim for damages on the trial in the county court.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.



## ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. MARTIN.

(Court of Civil Appeals of Texas, Dallas, Nov. 29, 1913. Rehearing Denied Dec. 20, 1913.)

## 1. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—AMPUTATION OF FOOT.

A verdict of \$10,500 to a brakeman earning \$100 a month for the loss of his foot, the attendant pain and mental anguish, the diminution of his earning capacity, and his loss of time and medical expenses, was not so excessive as to indicate passion or prejudice in the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 896; Dec. Dig. § 132.\*]

## 2. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a brakeman's action for injuries, an instruction that if, while discharging his duties, he attempted to get upon the train by stepping upon a step upon the tender provided by defendant, and that when he stepped upon it his foot slipped and he was caught under the wheels and injured, and that if such step was made of wood which had worn so that it did not present a square surface, but slanted downward and made it easy to slip therefrom, and dangerous to use in attempting to board the tender, and that its maintenance in such condition was negligence, proximately causing the injury, plaintiff could recover, was not objectionable as a charge upon the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

## 3. MASTER AND SERVANT (§ 293\*)—ACTION FOR INJURIES—INSTRUCTIONS—NEGLIGENCE.

Nor was such charge objectionable as authorizing a verdict in favor of plaintiff, even though the defendant had exercised ordinary care to equip the tender with a proper step and to keep the same in repair.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

## 4. MASTER AND SERVANT (§ 278\*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONDITION OF STEP.

In a brakeman's action for injuries, evidence held sufficient to show that on account of use and wear the outer top edge of a step on a tender had worn off, so that instead of presenting a square edge on top it slanted downward.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

## 5. MASTER AND SERVANT (§ 286\*)—ACTION FOR INJURIES—QUESTION FOR JURY—NEGLIGENCE.

Whether the wearing down of the step of a tender, so as to slant downward instead of presenting a square edge on top, made it more likely that one's foot would slip therefrom, and whether the maintenance of the step in such condition for the use of employes was negligence, were questions for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

## 6. MASTER AND SERVANT (§ 278\*)—ACTION FOR INJURIES—QUESTION FOR JURY—SCOPE OF EMPLOYMENT.

In a brakeman's action for injuries by slipping from a worn step on the tender as he was attempting to board after opening a gate, evidence held sufficient to show that at the time

of his injury he was in the discharge of his duty.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

## 7. MASTER AND SERVANT (§ 278\*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—STEP PROVIDED FOR USE OF EMPLOYEES.

In such action, evidence held sufficient to show that such step on the tender was provided for the use of employes in going upon the tender and train.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

## 8. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY OF STATEMENT.

An assignment of error, not followed by a sufficient statement of the evidence tending to support it, as required by Courts of Civil Appeals Rule 31 (142 S. W. xiii), is not entitled to consideration.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

## 9. TRIAL (§ 255\*)—INSTRUCTIONS—REQUESTED INSTRUCTIONS.

An error of omission in the court's general charge should be supplied by a request for a correct special charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

## 10. TRIAL (§ 242\*)—INSTRUCTIONS—CONFUSING INSTRUCTIONS.

In a brakeman's action for injuries by slipping from a worn step on the tender, a charge that, unless the jury found the existence of all the facts enumerated in a previous paragraph of the charge, to return a verdict for defendant, objected to on the ground that whereas defendant was entitled to a verdict unless the step was negligently maintained and was the proximate cause of the injury, irrespective of the jury's belief of the other matters submitted in the charge, was not confusing.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 569-576; Dec. Dig. § 242.\*]

## 11. APPEAL AND ERROR (§ 1170\*)—GROUND FOR REVERSAL—INSTRUCTIONS—FACTS PRESENTED.

A charge correct in law, which directs a verdict for the defendant on the finding of certain facts, is not ground for reversal, though the defense could be sustained by a finding of fewer facts than were embraced in the hypothesis.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

## 12. APPEAL AND ERROR (§ 216\*)—OBJECTION BELOW—NECESSITY OF REQUEST FOR INSTRUCTIONS.

Such a defect is one of omission, unavailable in the absence of a requested charge.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 216.\*]

## 13. APPEAL AND ERROR (§ 1033\*)—PARTY ENTITLED TO COMPLAIN—ERROR FAVORABLE TO PARTY.

In a brakeman's action for injuries, a charge that plaintiff could not recover unless the jury should find from a preponderance of the evidence the existence of all the facts enumerated in a previous paragraph of the charge, if erroneous as submitting facts about which there was no dispute, was favorable to defendant, so that it could not complain thereof.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**14. TRIAL (§ 296\*)—INSTRUCTIONS—CURE OF ERROR—ASSUMPTION OF REASON.**

In a brakeman's action for injuries from slipping from a step on the tender, a charge that plaintiff in entering defendant's service assumed the risks ordinarily incident thereto, but not those growing out of the defendant's negligence, if objectionable as stating an abstract proposition of law, yet when considered with a special charge for defendant that if plaintiff was injured, and his injury was the result of a risk ordinarily incident to the character of his employment, he could not recover, correctly submitted that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

**15. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

In a brakeman's action for injuries, where it appeared that he had lost all the time between the injury and the trial, that he had been earning from \$100 to \$115 per month, that a part of his foot was amputated so that he had been unable to earn anything, and that he had intended to continue as a brakeman, a charge that, in estimating the damage, the reasonable value of the time lost in consequence of his injury might be considered, was not inapplicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

**16. TRIAL (§ 203\*)—INSTRUCTIONS—CONFORMITY TO ISSUES.**

Where two or more grounds of negligence are alleged as the basis of the plaintiff's action, and the court submits the case only upon one of them, the other ground of negligence is thereby withdrawn from the jury's consideration, and the defendant is not entitled to have any special charge relating thereto read to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

**17. MASTER AND SERVANT (§ 110\*)—ACTION FOR INJURIES—CHARGE—NEGLIGENCE.**

In view of Rev. Civ. St. 1911, art. 6713, requiring railroads to equip their engines and tenders with foot stirrups, and in view of defendant's nonperformance of such duty, its requested instruction, that it was not required to maintain foot stirrups upon its engines or tenders, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 214, 214½; Dec. Dig. § 110.\*]

**18. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.**

Special charges requested by defendant were properly refused, where the subject-matter thereof had been sufficiently charged in the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**19. NEGLIGENCE (§ 101\*)—CONTRIBUTORY NEGLIGENCE—EFFECT.**

In view of Rev. Civ. St. 1911, art. 6649, providing that plaintiff's contributory negligence shall not absolutely bar his recovery, but should merely diminish his damages proportionately to his negligence, a requested charge that, if plaintiff was guilty of contributory negligence, he could not recover, was properly refused.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.\*]

Appeal from District Court, Hill County; Horton B. Porter, Judge.

Action by F. M. Martin against the St. Louis Southwestern Railway Company of

Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Perkins, of Dallas, and Scott & Ross, of Waco, for appellant. V. L. Shurtleff, of Hillsboro, and W. F. Ramsey and Chas. L. Black, both of Austin, for appellee.

TALBOT, J. F. M. Martin brought this suit against appellant to recover damages, alleging, in substance, that on the 7th day of December, 1912, he was in the employ of appellant in the capacity of brakeman and working on one of its trains then being operated between Corsicana, in Navarro county, Tex., and Hillsboro, in Hill county, Tex.; that when this train reached a point near the station of Mertens, in Hill county, where appellant's road crosses the railroad of the International & Great Northern Railway Company, it became necessary and was the duty of plaintiff, as appellant's brakeman, to open a gate situated and maintained on appellant's right of way, and then to get back upon appellant's said train; that in attempting to get back upon the train, the same being then in motion, he stepped upon a step, attached to the front end of the tender, which was provided by appellant for the use of its servants and employes in getting upon said tender and train; that when the plaintiff, in his effort to go upon said train, stepped upon said step, his foot slipped from the same, resulting in one of his feet being caught underneath the wheel of the train and injured; that his said foot was mashed and mangled, cut and torn in such a way that it was rendered necessary to amputate a large portion thereof; that such operation was attended with great pain, mental anguish, etc., and his capacity to labor and earn money for all future time is greatly diminished; that at the time of the injury he was earning \$100 per month, and that he had lost time and would continue to lose the same, which is reasonably worth \$100 per month, and had expended \$50 for drugs and medicine. Plaintiff alleged that, at the time of the accident, the defendant railway company was engaged in intrastate commerce, and that it was its duty, under the laws of the state of Texas, to provide said tender with a good and sufficient foot stirrup and to keep the same in proper repair; that defendant failed to provide and keep and maintain such stirrup upon said tender, but provided and maintained a step of a different kind, which was insufficient and more unsafe and rendered the hazard of slipping from said step and being injured much greater than it would have been if the same had been a foot stirrup; and that the failure to have said tender properly equipped with a foot stirrup was negligence on the part of the defendant and the proximate cause of plaintiff's injury. Plaintiff further alleged that, if he was mistaken in the al-

legation that defendant's train was engaged in intrastate commerce, then the same was engaged in interstate commerce, and that under the laws of the United States it was the duty of defendant to have said tender equipped with a good and sufficient foot stirrup, etc., and that the failure to do so was negligence and the proximate cause of plaintiff's injury. Plaintiff also alleged that the defendant was negligent in maintaining the step in a dangerous and unsafe condition for the use of persons attempting to use it; that the step was of wood, had grown old and rotten and worn in such a way that the same slanted and did not present a square surface or edge, but slanted downward and rendered it more likely and very easy for one's foot to slip, which condition and negligence caused the injury; that the defendant was negligent in maintaining the step at a height from the ground which rendered it difficult and dangerous to use; and that it maintained only one step, instead of two, which negligence caused the injury; that the defendant was negligent in not bringing its train to a full stop before crossing the International & Great Northern Railroad track; that, if it had done so, plaintiff could have boarded the train while it was not in motion, which negligence and failure plaintiff alleged caused his injury.

The defendant answered by general demurrer, special exceptions and general denial, and specially pleaded that the plaintiff was acting in violation of the rule of the defendant when he attempted to board said train at the time and place he did; that under the rule of defendant he was required to board the rear end of the train, and in attempting to board the train in violation of the rule, and while the train was in motion, plaintiff was guilty of contributory negligence; that it was the custom and the plaintiff's duty to board the train at the rear, and in failing to do so he was guilty of contributory negligence and ought not to recover; that the plaintiff's injury, if he was injured, was caused from attempting to board defendant's train while it was in motion; and that by reason of his employment he assumed the risk of injury. Plaintiff filed a supplemental petition, replying to defendant's answer, in which he pleaded a general demurrer, a general denial, and specially that, if the defendant promulgated the rule mentioned in its answer, the same was never known to the plaintiff, or made known to him in any manner whatever; that if such rule had been promulgated it had never been enforced or obeyed; that it was systematically and customarily disobeyed and never followed by any of its employees; and that thereby the rule had been abrogated. The trial of the case resulted in a verdict and judgment in favor of the plaintiff for \$10,500, and, defendant's motion for a new trial being overruled, it appealed.

[1] The first and second assignments of

error are grouped, and assert, respectively, that the undisputed evidence shows that there was no negligence on the part of the defendant, and that the verdict of the jury is excessive. Waiving any objection that might be urged to a consideration of these assignments on the ground that they are too general and cannot be grouped because presenting different and distinct questions for decision, we hold the evidence was sufficient to show negligence on the part of appellant, and that the verdict, while large, is not so excessive as to indicate that the jury were influenced in arriving at the amount awarded by passion, prejudice, or other improper motive.

[2, 3] The court, after properly defining negligence, instructed the jury in the second paragraph of the main charge as follows: "Now if you believe from a preponderance of the evidence that on or about the 7th day of December, 1912, the plaintiff, F. M. Martin, was a brakeman in the employ of the defendant, and that, while in the proper discharge of his duties as such brakeman, he attempted to get upon defendant's train by stepping upon a certain step located upon the tender of said train, and that said step was provided by the defendant company for the train, and that when the plaintiff stepped upon the said step his foot slipped from same, and on said account his foot was caught underneath the wheel of said train and was injured as alleged in his petition; and if you further believe from a preponderance of the evidence that the said step was made of wood, and the said wood had grown old and worn in such a way that the same did not present a square surface or edge for one to step upon, and that the same slanted downward and rendered it more likely and very easy for one's foot to slip from said step, and that by reason of such condition, if such conditions there were, the said step was made dangerous and unsafe for the use of persons in attempting to use it in the manner the plaintiff was using it; and if you further believe from a preponderance of the evidence that said step was so maintained by the defendant at the time plaintiff was injured, and that the maintenance of same in such condition, if you find it was so maintained, was negligence, and that as the direct and proximate result of such negligence, if any, plaintiff was injured in the manner alleged in his petition—you will find for the plaintiff, unless you find for the defendant under other instructions given you." Appellant contends that this charge is erroneous because: (1) It is upon the weight of the evidence; (2) because it submits to the jury the issue as to whether or not the plaintiff was in the discharge of his duty at the time he attempted to board the defendant's engine, there being no evidence that such was his duty; (3) because it submits the issue as to whether or not the step in question was provided by the defendant

company for the use of its employes in going upon the tender and train, there being no evidence to authorize the submission of such issue; (4) because it submits the issue as to plaintiff's getting upon defendant's train by stepping upon a certain step located upon the cab of the train in question, whereas, there is no evidence that any step was attached to the cab of said train; (5) because it submits the issue as to plaintiff's stepping upon a step and slipping from a step maintained on the tender of said train, when there was no evidence that any step was so maintained; (6) because it submits the issue of whether or not the said step slanted downward and rendered it easy and more likely than otherwise for one's foot to slip from the same, when there was no evidence in the record authorizing the submission of such issue; and (7) because the charge authorized a recovery on behalf of plaintiff, even though the defendant had exercised ordinary care to equip the engine or tender with the proper step and to keep the same in repair.

The charge of the court is not subject to the criticism that it was upon the weight of the evidence, authorized a verdict in favor of the plaintiff even though the defendant had exercised ordinary care to equip the tender with a proper step and to keep the same in repair, and submitted the issue as to plaintiff's getting upon defendant's train by stepping upon a step attached to the cab of the train in question. As will be observed, the paragraph of the charge assailed said nothing about a "step located upon the cab of the train," but only to the step attached to the tender, and required the jury to find, in order to return a verdict in favor of the plaintiff, that the defendant had equipped the tender in question with a step made of wood, and that it had grown old and worn in such a way "that the same slanted and rendered it more likely and very easy for one's foot to slip from said step, and that by reason of such condition \* \* \* the said step was made dangerous and unsafe," etc., and that the maintenance of such a step was negligence, and such negligence the proximate cause of plaintiff's injuries. It conclusively appeared that the tender was equipped with a wooden step and not with a foot stirrup, and there was ample evidence to raise the issue that said step did not present a square surface, but that it was worn and slanted in such a manner as rendered it more likely that a person's foot would slip therefrom when used to board the train than if the step presented a square unworn surface or edge. Plaintiff testified: "That step was just a plain board step, not a foot stirrup. I think the step was about six inches wide and about 16, perhaps 18, inches long. The only thing I noticed with reference to the condition of the step at the time I attempted to board it was that it was rounding, not

square. It was worn. The edge of the step was rounding and did not present a square surface. A foot stirrup is made of iron. It would be impossible for your foot to slip from a foot stirrup. It could not slip from the side. It does not wear off rounding like wood." W. A. Harrison testified: "When this step, which was taken off of engine 192, and which was on the engine on the day that Mr. Martin slipped from it and was injured, was turned out of the shop and was first put on that engine, this top edge was not as rounding at it is at this time. It was just about as square as the bottom edge. The wear on it caused the rounding condition which I find here now." It appears from the statement of facts that this step had been taken off the engine and was exhibited before the jury, and, moreover, that a picture had been taken of the engine with the step on it, and that these were exhibited before the jury and the trial court. The picture was referred to in their testimony by several of the witnesses. The objection, therefore, that there was no evidence to warrant the submission of this issue, is without merit.

[4] From the evidence quoted it is clear that on account of use and wear the outer top edge of the step had worn off, and that, instead of presenting a square edge on top, it showed a rounded edge which necessarily caused the step to slant downward toward the front.

[5] Now, whether the step in this condition made it more likely that a person's foot would slip therefrom than if the step presented a square unworn surface or edge, and whether the maintenance of the step in such condition for the use of its employes was negligence, were questions of fact for the determination of the jury.

[6, 7] That the evidence was abundantly sufficient to warrant the conclusion that the plaintiff, at the time he slipped and received the injuries complained of, was in the discharge of his duty, and that the step in question was attached to the tender and provided for the use of defendant's employes in going upon said tender and train, there can be no question. Plaintiff testified that at the time of the injury he was a brakeman in the employ of defendant; that he was injured at or near Mertens, Tex., where the defendant's line crosses the line of the International & Great Northern Railway Company; that there was a gate across the track; that this gate was always closed over one of the tracks; that when a train wanted to cross the employes would pull the gate around over the other track; that no one was kept there to move the gate; but that it was the duty of train brakemen to operate it when their trains approached. He further testified that on the morning of the injury it was closed against his train, and that under such circumstances it was the duty of the brakeman to get off the train and open it; that that was the custom

on all defendant's trains; that on the morning of the injury they did some switching about a quarter of a mile from the crossing, putting some cars in on a siding; and that when the engine came onto the main track again to go back and get the train it was only about a hundred yards from the switch; and that it was then the custom for one of the brakemen to get off and open the gate while the engine went back after the train to bring it up; that he got off and swung the gate across the International & Great Northern track; and that, while he was doing this, the engine, as usual, went back after the train to bring it through the gate; that when the engine had gone back to the train it was about a half mile from the gate; and that always when they started they never stopped in coming through the gate, but went right on into the town of Mertens, west of the gate; and that when it came through the gate it always had up some speed probably five or six miles per hour; that he walked back toward the engine after opening the gate so he could catch it at a good place, and before it got to running too fast; that he caught the engine on the step provided on the tender; that this step was on the right-hand side and toward the front of the tender; and that, when he caught the handhold and lifted himself onto the step, his foot slipped off of it and he was injured. He further testified that the step was not provided with a foot stirrup, and that its edge was rounded off by use, and it did not present a square surface for the foot; that a foot stirrup was a contrivance such as a saddle stirrup, and that one's foot could not slip off of it; that it was necessary for him to get on the engine at the time he did because they had some cars to set out at Mertens, and because he knew that the train would be going faster if he waited for the rear of the train and then got on. Defendant introduced a rule showing that the proper position of the rear passenger brakeman was on the rear of his train. The evidence is undisputed that Martin was not a rear passenger brakeman. The train was a mixed train, and it appears without dispute that Martin had nothing to do with the passengers. It was his duty to assist with the freight cars. In this connection appellant makes the following statement in its brief of the evidence: "The undisputed evidence shows that the step was made of wood, and that on or about the 7th day of December, 1912, the plaintiff was a brakeman in the employ of defendant, and that he attempted to get upon defendant's train by stepping, and that the step was provided by defendant company for the use of employes in going upon the tender and train, and that the plaintiff's foot slipped, and that on said account his foot was caught underneath the wheel of the train."

[8] Appellant's fourth assignment of error relates to the question of contributory negli-

gence and is not followed by a sufficient statement of the evidence tending to support the same as required by rule 31 (142 S. W. xiii) and is not entitled to consideration.

[9] The error complained of, however, is one of omission in the court's general charge, and the omission should have been supplied by a correct special charge requested by defendant.

Appellant's fifth assignment of error presents a question raised by its third assignment, just discussed, and is disposed of by what we have already said.

[10] The sixth assignment complains of the third paragraph of the general charge, which informs the jury that, unless they find from a preponderance of the evidence the existence of all the facts enumerated in the second paragraph of the charge, to return a verdict for the defendant. The complaint appears to be that many of the things submitted in the third paragraph of the charge were undisputed, and the jury were bound to believe their existence, and under said charge, if the jury believed the existence of any of said admitted things, they could not find for the defendant, whereas, the defendant was entitled to a verdict unless they believed that the step in question was negligently maintained and that such was the proximate cause of the injury, irrespective of whether they believed or did not believe the other matters submitted in said charge; that said charge is confusing and improperly presents the defendant's theory of the case. The charge is substantially a correct application of the law to the facts, is not confusing, and, nothing appearing indicating that the jury was misled by it, was not affirmative error.

[11, 12] In *Railway Co. v. Haberlin*, 104 Tex. 50, 133 S. W. 873, it is held that a charge correct in law, which directs a verdict for the defendant on the finding of certain facts, is not ground for reversal though the defense could be supported by a finding of fewer facts than were embraced in the hypothesis submitted; that such a defect is one of omission unavailable in the absence of a requested charge. Likewise, in *Railway Co. v. Hill*, 95 Tex. 629, 69 S. W. 136, our Supreme Court, following *Railway Co. v. Wood*, 69 Tex. 679, 7 S. W. 372, and *Railway Co. v. Brown*, 78 Tex. 402, 14 S. W. 1034, held that a charge which grouped conjunctively facts establishing distinct defenses and authorized a finding in favor of the defendant only on the establishment of all such facts, there being nothing in the record to indicate that the jury was misled by the charge, was not affirmative error; that the defect was one of omission which should have been corrected by a request for instructions submitting the defenses disjunctively.

[13] Touching the proposition that the charge is objectionable because it submitted to the jury matters of fact about which there was no dispute under the evidence, it may be

said that if this be true the error, if any, was favorable to appellant, and it has no just ground of complaint on that score. As argued by appellee's counsel, the charge in the respect referred to may have been prejudicial as to the appellee, since it instructed the jury that, unless appellee had proved certain things in said charge enumerated, he could not recover, whereas, in fact he had proved those things by the undisputed evidence. At all events, the error, if error at all, was not of such a character as was calculated to cause the jury to render a verdict which they otherwise would not have rendered.

[14] The court charged the jury that "when plaintiff, F. M. Martin, entered the service of the defendant company, he assumed the risks and dangers ordinarily incident to the service in which he was engaged, but he did not assume any risks growing out of the negligence of the defendant, if there was such negligence." This charge is objected to on the ground that it merely states an abstract proposition of law without applying it to the facts in evidence. If the charge was objectionable for the reason claimed, which is not admitted, yet when considered in connection with special charge No. 9, given at the request of appellant, it sufficiently and correctly submitted the issue of assumed risk. In said special charge No. 9 the jury were instructed that if they believed from the evidence that plaintiff was injured, and that his injury was the result of a risk ordinarily incident to the character of his employment, to find for defendant.

[15] The eighth assignment complains of that portion of the court's charge on the measure of damages wherein the jury were told, in effect, that in estimating plaintiff's damages to take into consideration the reasonable value of the time lost by him in consequence of his injuries. It is claimed that this portion of the charge was error because there was no evidence authorizing a finding that plaintiff had lost any time as a result of his injuries. Clearly, this view of the evidence is incorrect. Plaintiff testified that he was injured on the 7th day of December, 1912; that he had lost all the time since the day he was injured to the date of the trial of this case; that at the time he was injured he was earning from \$100 to \$115 per month; that a portion of his foot was amputated; and that he was not at the time of the trial, and had not been since he received his injuries, able to stand on his foot, and had not been able since the accident to earn anything. He further said: "I had been employed as a brakeman from October 1, 1912, up to the time of my accident and intended to continue in that line of employment."

[16, 17] The ninth and tenth assignments of error complain, respectively, of the court's refusal to charge the jury, as requested by appellant, that under the laws of the United States and the laws of the state of Texas defendant was not required to maintain foot

stirrups upon its engines, tenders, or trains; that the steps provided and maintained on the engine in question complied with the laws relating to safety appliances; and that if the jury believed the defendant used ordinary care to keep such steps in a good state of repair, to find against the plaintiff on these issues. The court did not err in refusing to give these charges. The failure of the defendant to equip its train with foot stirrups was not submitted to the jury as a ground of negligence upon which a recovery could be based. It is a well-settled rule of practice in this state that where two or more grounds of negligence are alleged, as the basis of the plaintiff's action, and the court submits the case to the jury only upon one of those grounds, the same constitutes a sufficient withdrawal of the other ground or grounds of negligence from the consideration of the jury, and the defendant is not entitled to have any special charge relating to the question withdrawn read to the jury. *Railway Company v. Ames*, 94 S. W. 1112; *Railway Company v. Archambault*, 94 S. W. 1108. But in the instant case the court went further and gave, at the instance of appellant, an instruction to the effect that all grounds of negligence alleged and not expressly submitted to the jury, and all evidence relating to such grounds, were withdrawn from their consideration, and that they would only consider such issues as were submitted in the charge. The special charge, the refusal of which is made the basis of the tenth assignment, was an incorrect statement of the law. Under the laws of the state of Texas, it is made the duty of railway companies to equip their engines, cars, and tenders with foot stirrups, and the evidence was undisputed that this duty had not been performed by appellant. Article 6713, Rev. Civ. St. 1911.

[18] Nor did the court err in refusing to give the special charges requested by appellant and made the basis of assignments of error Nos. 11, 12, 13, and 14, because, if for no other reason, the court, in the general charge or special charges requested by appellant, had already sufficiently instructed the jury on the subjects to which said refused charges relate.

[19] The special charge referred to in the twelfth assignment was properly refused for the additional reason that it was erroneous, in that it instructed the jury in effect that if they should find that plaintiff did certain things, and that in doing them he was guilty of negligence, and such negligence caused or contributed to his injury, to find for the defendant, whereas, under the law of this state, although the jury might have believed the plaintiff was guilty of contributory negligence, the same would not bar his right of recovery absolutely, but would merely diminish the damages suffered by him in proportion to the amount of negligence attributable to him. Article 6649, Rev. Civ. St. 1911.

The other assignments of error are not followed by a sufficient statement, as required by rule 31, showing the evidence requiring the giving of the charges, the refusal of which is complained of, and will not be considered. Some, if not all, of them, however, have been disposed of against appellant by what we have said heretofore.

The evidence supports the verdict, the law of the case was fairly charged, and, no reversible error appearing, the judgment is affirmed.

### WILSON et al. v. CARTER.

(Court of Civil Appeals of Texas. Galveston. Nov. 1, 1913.)

#### 1. MUNICIPAL CORPORATIONS (§ 14\*)—ORGANIZATION — POPULATION — TERRITORY — STATUTES.

Sayles' Ann. Civ. St. 1897, art. 386a, provides that no city or town having less than 2,000 inhabitants shall be incorporated under the general charter act with a superficial area of more than two square miles. *Held*, that a city could not be legally incorporated under such section so as to include more than two square miles of territory in which there was less than 2,000 population, and an attempt having been made to do so, the defect was not cured by a resolution of the city council attempting to reduce the area by eliminating the excess over two square miles.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 34-39; Dec. Dig. § 14.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 15\*)—ORGANIZATION — TERRITORY — EXCESS — RELINQUISHMENT.

Sayles' Ann. Civ. St. 1897, art. 386b, enacted in 1895, providing for the relinquishment of territory in excess of two square miles illegally brought within the limits of a certain organized city, applies only to cities incorporated prior to 1895.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 40; Dec. Dig. § 15.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 15\*)—ORGANIZATION — PROCEEDINGS — VALIDATION — STATUTES.

Sayles' Ann. Civ. St. 1897, art. 386c, validating the incorporation of cities which had included within the territory sought to be incorporated more than two square miles, where their various city councils had restricted the limits to prescribed bounds, only applied to cities which had so acted prior to the adoption of the act in 1897, and had no effect on a city so incorporated in 1911.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 40; Dec. Dig. § 15.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 15\*)—ORGANIZATION—DEFECTS—STATUTES.

Rev. Civ. St. 1911, art. 776, validating the organization of cities which have included within their territory more than two square miles, etc., had no application to a city subject to such defect incorporated in April, 1911, but the corporation of which had been dissolved by an election prior to the taking effect of the act in September, 1911.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 40; Dec. Dig. § 15.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 17\*)—DEFECTIVE INCORPORATION — CORPORATION DE FACTO.

Where the proceedings for incorporation of a city of less than 2,000 inhabitants were in-

valid because more than two square miles of territory were included in violation of Sayles' Ann. Civ. St. 1897, art. 386a, but the city elected officers who assumed to act for it and in the regular discharge of their assumed duties incurred debts, the city became a corporation de facto, so that on the subsequent dissolution the court was authorized to appoint a receiver to collect its assets and pay debts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 34-39; Dec. Dig. § 17.\*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Suit by Mark M. Carter against Charles Wilson and others. From an order appointing a receiver for the City of Dayton in Liberty County, defendants appeal. Affirmed.

Marshall & Harrison, of Liberty, for appellants. Carter & Wilson, of Dayton, for appellee.

McMEANS, J. This is an appeal from an order of the district judge of the Ninth judicial district, made in vacation, appointing a receiver for the city of Dayton, in Liberty county. The appointment was made on the petition of Mark M. Carter, the appellee, who alleged in substance that the city of Dayton had been duly incorporated on the 17th day of April, 1911, under chapter 11, tit. 18, Revised Statutes of Texas, as containing more than 1,000 and less than 2,000 inhabitants, and that the corporation was thereafter abolished by an election duly held on the 29th of August, 1911, and that during the existence of the corporation it incurred debts, and that he was its creditor to the amount of \$302.25. Charles Wilson and W. B. Jones, by permission of the court, intervened and resisted the appointment of a receiver, pleading that there never was a valid incorporation of the so-called city of Dayton for the reason that the city, as attempted to be incorporated, included a superficial area of more than two square miles, and further that under the facts the city of Dayton was never a de facto corporation and had no authority to incur indebtedness.

On the issues thus joined the following facts were proved: That on the 10th day of February, 1911, an election was held by qualified voters in the town of Dayton, to determine whether or not the town of Dayton should be incorporated under title 11, c. 18, of the Revised Statutes of the State of Texas, as a city having more than 1,000 and less than 2,000 inhabitants. All prerequisites and formalities were duly and legally complied with save and except that the proposed area or territory of the proposed city embraced and included 400 acres in excess of two square miles. That all qualified voters living in said territory participated in said election. That thereafter the city council ascertained that more than two square miles was included within its limits, and by an ordinance or resolution passed reduced the area or terri-



tory of the said city of Dayton to two square miles. And that thereafter the said city of Dayton, acting through its duly elected and qualified city officers, proceeded to exercise the functions of a city under title 18, c. 11, of the Revised Statutes of the State of Texas, until the 29th day of August, 1911, on which date an election was duly held, having been ordered by the county judge of Liberty county, Tex., for the purpose of abolishing said city of Dayton, and the qualified voters of the said city of Dayton, by a majority of votes abolished said city of Dayton as an incorporated city under title 18, c. 11, of the Revised Statutes of the State of Texas, and upon the result of said election having been duly declared by the county judge of Liberty county, Tex., the said city of Dayton ceased to exercise any functions of an incorporated city. The evidence further showed that the applicant, Mark M. Carter, is a creditor of the said city of Dayton, in the sum of \$302.25, and that there is approximately \$1,100 indebtedness due and owing by said city of Dayton, incorporated as aforesaid, which includes the \$302.25 due the applicant, Mark M. Carter. The said indebtedness was contracted during the time said city of Dayton was operating and acting as a city. It is further proved that the interveners herein, Charles Wilson and W. B. Jones, are residents of the original incorporation and the reduced incorporation of the said city of Dayton, and owned real estate within the limits of the original incorporation and the reduced incorporation subject to taxation, and that they are qualified voters under the Constitution and laws of the state of Texas.

We will not consider appellants' assignments of error in detail.

[1-5] The city sought to be incorporated had a population of less than 2,000 inhabitants and included a territory of more than two square miles; and the incorporation of this area was not authorized by article 386a, Sayles' Civil Statutes. After the attempted incorporation, the city council of Dayton caused a survey to be made, and, upon ascertaining that the area included 400 acres more than two square miles, attempted to reduce the area by eliminating therefrom the 400 acres improperly included. This was not authorized by law. Article 386b, Sayles' Civil Statutes, provides for the relinquishment of territory in excess of two square miles; but this article was adopted in 1895, and permits such action by only those cities that were theretofore incorporated. In 1897 the Legislature adopted an act (Acts 1897, c. 59; Rev. Civ. St. 1911, art. 776) validating the incorporation of cities which had, at the time of incorporation, included within the territory sought to be incorporated more than two square miles, but where city councils had theretofore restricted the limits to the prescribed bounds. Sayles' Civil Statutes, art. 386c. Manifestly this act did not authorize such action on the part of the city council of Dayton after

its attempted incorporation in April, 1911. The same may be said of the validating act of 1897, brought forward in Sayles' Statutes as article 386e. All of these validating acts were re-enacted by the Thirty-Second Legislature in the act adopting the Revised Civil Statutes of 1911; but this act did not go into effect until September 1, 1911 (Rev. Civ. St. 1911, p. 1721, § 19), which was after the election by which the corporation of Dayton was declared abolished. The facts thus standing, the incorporation of the city of Dayton with a territory exceeding two square miles was without the authority of law, and the attempted reduction of the territory was not authorized by the statutes and did not cure the invalidity of the original incorporation. But notwithstanding the irregularity or invalidity of the corporation, a mayor, city council, and other officers were elected, and these officers assumed to act for the city, and in the regular discharge of their assumed duties incurred debts, among others being the one due the appellee. As said by this court in *City of Carthage v. Burton*, 51 Tex. Civ. App. 195, 111 S. W. 441, an exactly similar case: "The election to determine whether the city should be incorporated, the result of that election, the organization and election of officers of the corporation, and the assumption of such officers to act for it, created a corporation *de facto*"—citing *White v. Quannah*, 27 S. W. 840; *Ewing v. Commissioners' Court*, 83 Tex. 663, 19 S. W. 280. We quote further from the opinion: "Even if a municipality has been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter. When the question arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law and recognized by the state as such. *Graham v. City of Greenville*, 67 Tex. 67, 2 S. W. 742; *City of El Paso v. Ruckman*, 92 Tex. 89, 46 S. W. 25. During the existence of the corporation it incurred debts, which are not questioned as being such as that the corporation could have made had it had a legal existence. By an act approved April 13, 1891 (Laws 22d Leg. p. 95, c. 77), it is provided that: 'When any corporation is abolished as provided in the preceding article, or if any *de facto* corporation shall be declared void by any court of competent jurisdiction, or if the same shall cease to operate and exercise the functions of such *de facto* corporation, all the property belonging thereto shall be turned over to the county treasurer of the county, and the commissioners' court of the county shall provide for the sale and disposition of the same and for the settlement of the debts due by the corporation, and for this purpose shall have power to levy and collect a tax from the inhabitants of said town or village, in the same manner as said corporation would be entitled to under the provisions of this chapter.' It



seems that before the adoption of this act the property of the citizen could not be subjected to the payment of the debts incurred by a de facto corporation. But since its passage a municipal corporation which is brought into existence by the voluntary action of persons living in the territory sought to be incorporated, by reason of its being a town or city in fact, might be made liable for the debts of what is termed the de facto corporation. *Ewing v. Commissioners' Court*, 83 Tex. 666, 19 S. W. 280. The reason given for the rule in the case cited is that, by the act of incorporating with knowledge of the terms of which the law permitted them to do so, the citizens might be held to voluntarily assume the payment of the debts of the de facto corporation. The city of Carthage was sought to be incorporated subsequent to the adoption of the act in question, and it was then a city in fact which might have been legally incorporated, and it was therefore at least a de facto corporation, and the property of its citizens was liable for the debts incurred by it. This being true, the act of 1905 (Acts 1905, p. 325, c. 134) authorized the district court of Panola county to appoint a receiver of the abolished corporation on the petition of any creditor, and upon a showing, which was made in this case, that the property owned by the city was not of sufficient value to pay all claims legally established against it, to yearly levy a tax upon all real and personal property situated within the limits as previously incorporated, sufficient to discharge the same, not to exceed the rate allowed by existing law for such purposes in said city."

We do not think it would be profitable to add anything to what is said in the opinion from which we have quoted at such length. We think there was no error in the appointment of the receiver under the facts stated, and that the judgment should be affirmed and has been so ordered.

Affirmed.

#### AUTREY v. COLLINS.

(Court of Civil Appeals of Texas. Texarkana. Nov. 24, 1913. On Motion for Rehearing, Dec. 18, 1913.)

#### 1. LIBEL AND SLANDER (§ 112\*)—ACTIONS FOR LIBEL—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for libel in publishing a statement during plaintiff's campaign for state senator, that he had not paid a certain note given by him to defendant held to sustain a finding that the debt evidenced by the note had been satisfied at the time, and that both plaintiff and defendant so considered it.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 325-341; Dec. Dig. § 112.\*]

#### 2. BILLS AND NOTES (§ 429\*)—PAYMENT.

A note for \$200 was satisfied and discharged if the maker afterwards presented to the payee a bill for \$200 for services in satis-

faction of the note and requested that the note be returned, and the defendant impliedly acquiesced in such means of payment, though the note was not returned.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 2168-2172; Dec. Dig. § 429.\*]

#### 3. APPEAL AND ERROR (§ 499\*)—BILL OF EXCEPTIONS—EXCLUSION OF EVIDENCE.

A bill of exceptions to the exclusion of evidence, which does not state what the objection to the evidence was, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

On Motion for Rehearing.

#### 4. APPEAL AND ERROR (§ 835\*)—REHEARING—QUESTIONS CONSIDERED.

An objection to an instruction, in an action for libel, that it erroneously submitted certain publications as a ground for recovery because the petition did not justify such submission cannot be first raised in a motion for rehearing on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3243; Dec. Dig. § 835.\*]

Appeal from District Court, Tyler County; W. B. Powell, Judge.

Action by V. A. Collins against R. L. Autrey. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Mooney, of Woodville, and Lane, Wolters & Storey, of Houston, for appellant. J. A. Harper and Joe W. Thomas, both of Woodville, V. A. Collins, of Beaumont, and H. W. Vaughan, of Texarkana, for appellee.

HODGES, J. The appellee sued the appellant to recover damages, both actual and exemplary, resulting from certain alleged libelous publications made by the appellant concerning the appellee, during the race of the latter for the state Senate in 1910. We here copy from appellant's brief the substance of the allegations of the petition:

"Plaintiff alleged that he was a practicing attorney residing at Beaumont; that on or about September 1, 1905, defendant employed him in a certain suit, involving the title to a tract of land in Hardin county, Tex., in which the defendant was interested; that in pursuance of his employment, he, in company with the defendant, made a trip to Sherman, and upon his return to Houston from Sherman, on December 5, 1905, procured a 15-day loan of \$200 from the defendant, and executed therefor his promissory note, due 15 days after date; that in further pursuance of his employment he made two trips to Louisiana, and gathered sufficient evidence to ultimately defeat the action; that upon the completion of the work contemplated by his employment he rendered to the defendant a bill for his services about December 15, 1905, in the sum of \$200, which he alleged to be reasonable, and which he also alleged was in full settlement and satisfaction of said \$200 note; that the defendant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

never returned the note to him, and did not thereafter demand payment of the same; that the \$200 represented by the said note was the amount he charged the defendant for the services rendered, and said amount was all the defendant had ever paid plaintiff for said services.

"It was further alleged that the plaintiff was a candidate for the office of state senator from the Fourteenth senatorial district of Texas, in the primary election held July 23, 1910; that the defendant wickedly and maliciously, intending to injure him in his good name, fame and credit, and to bring him into public scandal, infamy, and disgrace amongst his neighbors and all good and worthy citizens of said senatorial district, and to cause him to be suspected and believed by his said neighbors and other citizens to have been guilty of dishonesty and unfit for the office to which he aspired, published and circulated, or caused to be published and circulated, in the counties which comprised said district, certain libelous matter, as follows, to wit:

"His Bluff Is Called.

"At San Augustine, on the sixth day of July, 1910, Collins said in a speech that if it could be proven that he owed a saloon keeper or brewery any money he would withdraw from the race. He is now called on to prove that it has been paid or make good his bluff.

"\$200.00 Houston, Texas, Dec. 5, 1905.

"Fifteen days after date, for value received, I, we, or either of us, promise to pay to the order of R. L. Autrey, two hundred dollars at their office in Houston, Texas, with eight per cent. interest per annum from date until paid.

"And in the event default is made in the payment of this note at maturity and it is placed in the hands of an attorney for collection, or suit is brought on the same, then an additional amount of ten per cent. on the principal and interest of this note shall be added to the same as collection fees. This note is one of a series of notes, and in event default is made in the payment of this note at maturity all remaining notes shall be and become due at once at the option of the holder.

"No. ——— Due ———. V. A. Collins.

"Address."

"R. L. Autrey is secretary and manager of the Houston Ice & Brewing Company of Houston, Texas. Collins has never paid this note and it is now in the possession of Beaumont Enterprise. He cannot produce one single circumstance of proof that he ever paid it."

"Also:

"Bulletin No. 2.

"Collins Borrows from Brewery.

"In 1905 Collins approached R. L. Autrey, secretary and managing officer of the Hous-

ton Ice & Brewing Company of Houston, Texas, and from him borrowed \$200.00, giving his personal note; which note is long since due and unpaid."

"Also:

"Houston Ice & Brewing Co. Incorporated 1901. Manufacturers of Richlieu Beer. High Class Beers Exclusively. Houston, Texas, July 13, 1910. Mr. H. B. Whitmeyer, Cleveland, Texas—Dear Sir: Your letter of July 11th, addressed to the Houston Ice & Brewing Co., has been received by me. Mr. V. A. Collins owes me \$200.00 on a note loaned him in 1905. This note is past due long ago and not paid. Yours truly, R. L. Autrey. A—RH."

"Also:

"Houston, Texas, July 19th, 1910. J. J. Fenn, Cleveland, Texas. V. A. Collins has never paid me anything on his note, and never rendered any bill or wrote anything claiming anything. There are other parties interested in the suit involved in some oil lands residing in Beaumont, who must have paid Collins. I know he went to Sherman, Texas, but know nothing of any other service in connection with the suit, and he never claimed to offset the note with his services. R. L. Autrey."

"It was alleged that by each of said publications the defendant meant, and it was understood by all persons who read said statements to mean, that the statements so published and distributed by the defendant were true; that in addition thereto the defendant gave said note to one P. I. Hunter and other persons, who exhibited the same to the public as a genuine existing note; that each of said publications was distributed by means of and in the form of pamphlets, letters, and telegrams, and by exhibiting the note, as hereinbefore stated."

Then follow allegations as to the damages sustained.

The principal defense relied on was the truth of the matter published. The trial before a jury resulted in a verdict in favor of the plaintiff for \$1,000 actual damages and \$500 as exemplary damages.

The first assigned error is based upon the refusal of the court to give the following special charge: "You are instructed that if plaintiff executed his note to the defendant for money borrowed, payment of same could not be made or offset by services rendered by the maker thereof, unless such payment or offset was agreed to by the owner thereof. If, therefore, you believe from the evidence that plaintiff executed his note to defendant for \$200 and afterwards sought to pay same with services as an attorney, such services would not in law amount to payment of said note without being agreed to by defendant, and you are therefore instructed that the note of plaintiff to defendant for \$200 has not been paid." Applying this charge to the testimony, it in effect amounted to a peremp-

tory instruction to return a verdict for the defendant.

The appellee testified as follows: "I reside in Jefferson county, Tex., where I have been engaged in the practice of law since 1901, at Beaumont. I was in the active practice in 1905. There was pending, during that year, in the federal court at Beaumont, a suit involving title to a tract of land in Hardin county. It involved the Frank Milhome 177-acre tract of land at Batson. I bought this tract from old man Jos. Le Bleu, of Calcasieu parish, La., for Mr. Autrey, or it was represented to me it was for Mr. Autrey, and I took the deed in Mr. Autrey's name. \* \* \* Soon after there was a suit brought in the federal court involving Mr. Autrey's title. We bought from old man Joe Le Bleu, who was the owner, as we construed the law, and the title was adverse to Mr. Autrey's title. The deed showed to have been made by Little Joe Le Bleu himself, and the question involved in the suit, and about the only question, was whether the Little Joe Le Bleu deed was adverse to Mr. Autrey's deed. The suit had been pending some time before I got into it. I do not know how long I had known Mr. Autrey before. I went to Houston to see Mr. Autrey about this suit some time after it was brought. Mr. Autrey and I went to his attorney's office, and I told his attorney, Mr. Jesse Andrews, of the firm of Baker, Botts, Parker & Garwood, all I knew about the heirship of Little Joe Le Bleu, and all that came to me from my investigation when I purchased the land for Mr. Autrey, and I am not sure, but I think it was while I was there in Houston that his attorney requested me to make this trip to Sherman to get a modification of certain orders that had been made by the court. Mr. Autrey and I did not go to Sherman together. He came back from Sherman when I did. We were on the train together all of the day from Sherman to Houston. It was when I got back to Houston, in Mr. Autrey's office, he requested me to make the trip to Louisiana with reference to the forged deed, and I said I had been out of my office several days, and I would have to have some money before I could go over there, and I gave him my 15-day note, and borrowed from him \$200, and I went to Louisiana and made this investigation." After detailing his services in connection with his claimed employment by Mr. Autrey on the two trips to Louisiana, he further testified: "In a few days, I don't remember just what time, how long afterwards, I inclosed Mr. Autrey a bill for my services in that case. I don't know whether he ever received it or not. I sent it in a letter. I mailed it and sent him a bill for \$200 for my services in the suit. I stamped the letter and mailed it. I never heard from Mr. Autrey from that day until this note was published here during the campaign in 1910. He never sent the note back, and I had forgot-

ten about the existence of the note. \* \* \* Some time during the month of January, 1906, I rendered Mr. Autrey a bill for \$200 for my services in the federal court case, and I never heard from Autrey and the note until that day, when Mr. Hunter exhibited it in San Augustine. \* \* \* I paid that note in doing some of the best legal services I ever did in my life for a man in connection with a suit of Allen against Smith et al. in the federal court at Beaumont, the same suit about which I went to Sherman and to Louisiana, and in which the photograph referred to was taken. I am a practicing attorney, and I thought \$200 a very reasonable fee for the services rendered by me in that suit. If my fee wasn't paid, as above stated, I never received any pay for my services. Mr. Autrey never made any demand for the payment of that note after I rendered those services. I never saw him in person, nor received a scratch of a pen from him from the time I rendered him a bill for my services until the time I came out for the state Senate. \* \* \* I rendered Mr. Autrey a statement for the amount of \$200. I don't know whether he received it or not." On cross-examination he testified: "It is my recollection that I made a trip to Sherman, and the \$200 paid for my trip to Sherman and the trip to Louisiana. Mr. Autrey came back from Sherman with me, and while in Houston at that time he loaned me the \$200. *We did not discuss at that time when and how this \$200 was to be paid.* He did not make any reference at the time that he was due me something for the Sherman trip. \* \* \* Mr. Autrey himself got me to go on that trip at Houston. I am not sure whether the arrangement was made in Mr. Autrey's office or in Jesse Andrews' office. Mr. Autrey defrayed my expenses on that trip, but the matter of expenses was not formally discussed. I don't remember that it was discussed at all as to who was to pay me. My mission on the trip to Lake Charles was to procure evidence of the forgery of a deed antagonistic to Mr. Autrey. \* \* \* After the suit in the federal court was dismissed, I rendered my bill for \$200 to Mr. Autrey, and have received no reply, and I did not then, nor at any time, make further demand for the note. Since the publication of the note I have not made demand of Mr. Autrey for it, and as to my preference to take chances on the libel suit, I thought I had the right in court. When I presented my bill to Mr. Autrey I requested the note to be returned, but in these 4½ years I did not have the note, and I had not thought about it."

[1, 2] In this state of the evidence it would have been improper for the court to have given the charge requested. While it is true the evidence conclusively shows that the note was not in fact paid in money and surrendered or marked "Paid," there was testimony from which the jury might have con-

cluded that the obligation evidenced by the note had been satisfied, and that each party to the transaction so considered it. If the letter which appellee says he wrote to the appellant was received by the latter, and its terms tacitly agreed to, that would have amounted to a satisfaction of the debt—in legal effect a payment—and the note should have been canceled or surrendered. The jury had a right to believe that the letter was written and properly addressed and mailed as testified to by the appellee, and that in due course of time it was received by the appellant at its destination. They also had a right to infer, from the failure of the appellant to thereafter present the note, or to in any manner demand payment, for more than four years after its maturity, that he had acquiesced in the terms of the communication above referred to, and had agreed to the settlement of the debt in the manner there proposed. It is seldom that one person will hold the subsisting obligation of another to pay money till it is barred by the statute of limitation, without making some effort to enforce its collection. It is not claimed by the appellant that the appellee was insolvent, or that there was any practical hindrance in the way of enforcing the collection of the note. So far as the record discloses, nothing existed which would excuse its presentation and a demand of payment, except the counterclaim referred to by the appellee. The first notice given of the continued existence of the note, after the lapse of more than four years, was its promiscuous circulation for the purpose of injuriously affecting the reputation and standing of the appellee in the senatorial district where he was a candidate for office. From all of these facts the jury had a right to reach the conclusion they did.

The court committed no error in the charges complained of in the second, third, and fourth assignments. The particular objections there made appear to be directed against the action of the court in submitting to the jury the issues of fact, upon the ground that there was no evidence to authorize it.

[3] The last assignment of error complains of the ruling of the court in excluding certain proffered testimony. The bill of exceptions fails to state what the objection to this testimony was, and for that reason it will not be considered. *Ry. Co. v. Gage*, 63 Tex. 568; *G. C. & S. F. Ry. Co. v. Pearce*, 43 Tex. Civ. App. 387, 95 S. W. 1133.

The judgment of the district court is affirmed.

#### On Motion for Rehearing.

[4] The only question presented in appellant's motion for rehearing which was not considered in the original disposition of the case refers to a paragraph of the court's charge in which the court permitted the

jury to consider publications made in the Beaumont Enterprise as a basis of liability. It is claimed that there were no allegations in the plaintiff's original petition which justified the submission of those publications as a ground of recovery. A more careful perusal of the petition has convinced us that the objection is not well taken. While in the main that instrument specifies in detail other characters of publication of the offensive documents, there are sufficient general allegations concerning the publications to include those specified in the charge. Moreover, this objection is not tenable because it is raised for the first time in the motion for a rehearing. It does not appear that it was called to the attention of the trial court or of this court in the original submission of the case.

The motion is overruled.

#### STANDLEY v. CURREY et al.

(Court of Civil Appeals of Texas. Texarkana. Nov. 13, 1913.)

#### 1. JUSTICES OF THE PEACE (§ 36\*)—ACTIONS—JURISDICTION.

An action for \$137 rent due from defendant, as plaintiff's tenant, is within the jurisdiction of the justice court; the rule estopping a tenant from disputing the title of his landlord rendering the question of title immaterial.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 83-97; Dec. Dig. § 36.\*]

#### 2. LANDLORD AND TENANT (§ 61\*)—OBLIGATIONS OF TENANT.

A tenant is estopped to deny the title of his landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 151, 152, 187-196; Dec. Dig. § 61.\*]

#### 3. JUSTICES OF THE PEACE (§ 141\*)—ACTIONS—APPEAL.

In determining the jurisdiction of the county court upon an appeal from the justice's court, averments in plaintiff's supplemental petition, filed in answer to defendant's plea to the jurisdiction first filed in the county court, cannot be considered.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 467-476; Dec. Dig. § 141.\*]

Appeal from San Jacinto County Court; Jno. C. Browder, Judge.

Action by J. Standley against Zack Currey and others. From a judgment dismissing the action in the County Court on appeal from a justice's court, plaintiff appeals. Reversed and remanded.

Wm. McMurrey and F. O. Fuller, both of Cold Springs, for appellant. J. M. Hansbro, of Cold Springs, and Dean, Humphrey & Powell, of Huntsville, for appellees.

WILLSON, C. J. The suit was commenced in a justice court by appellant as plaintiff. He sought a judgment against appellee Zack Currey for the sum of \$137 as the value of one-fourth of crops grown by said Currey as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his tenant on land described in his complaint. Currey and appellee Cleveland, who, it seems, voluntarily made himself a party defendant, answered, denying they were appellant's tenants. A trial in the justice court resulted in a judgment that appellant take nothing by his suit, and that defendants recover of him the costs of the suit. In the county court, to which appellant appealed, appellees filed a plea in which they alleged that neither of them was ever appellant's tenant, but that appellee Cleveland was the owner of the land under a deed or deeds made by appellant, and that the crops grown thereon were grown by appellee Currey as his (Cleveland's) tenant. They then alleged "that," quoting, "the question of title to said premises is in controversy in this suit, by reason whereof neither the justice court, in which this suit originated, nor this court on appeal has any jurisdiction to determine the issues involved in this suit." The court sustained this plea and, on the ground that he was without jurisdiction to try it, dismissed the suit.

[1, 2] The sole purpose of appellant's suit, as commenced in the justice court, being to recover \$137, the sum alleged to be due to him from appellee Currey as his (appellant's) tenant, as the rent of the land, it is clear that court had power to hear and determine it. The issues in that court made by the pleadings were: (1) Did the parties occupy the relationship of landlord and tenant? (2) If they bore that relationship to each other, what was the sum, if any, due by Currey to appellant as rent? As a result of the rule which estops a tenant from disputing the title of his landlord to the leased premises, it was not necessary to the recovery appellant sought that he should prove that he owned the land. 18 A. & E. Enc. Law, p. 420; *Juneman v. Franklin*, 67 Tex. 411, 3 S. W. 562; *Hintze v. Krabbenschmidt*, 44 S. W. 39. For, if Currey occupied the relationship of tenant to appellant, the latter was entitled to recover any sum due to him by Currey as rent, whether he (appellant) owned the land or not.

[3] Appellees' contention in support of the action of the trial court is that it appeared from the face of the pleadings that the main issue in the suit was one of title to the land. This contention is based on allegations in a supplemental petition filed by appellant (in reply to an averment in appellees' plea to the jurisdiction of the court that Currey was not the tenant of appellant but of Cleveland, who, they alleged, owned the land under a deed made by appellant), charging that the execution of the deed from him, under which Cleveland claimed title, was procured by means of a fraud practiced on him by Cleveland. Appellant did not ask that the deed referred to be canceled, or for any relief, because of the fraud practiced on him as he alleged. The character of his suit was not

changed by the allegations in the supplemental petition. It remained as it was commenced, a suit solely for the purpose of recovering a debt of \$137 which he claimed was due to him from Currey. Such being its nature, the justice court had power to hear and determine it in the first instance, as stated before, and we think it is clear the county court on the appeal to it had power to do likewise.

The judgment is reversed, and the cause is remanded for a new trial.

ADAMS et al. v. WM. CAMERON & CO.,  
Inc., et al.

(Court of Civil Appeals of Texas. Texarkana  
Nov. 20, 1913.)

1. MARRIAGE (§ 40\*)—PRESUMPTIONS.

While persons seeking to trace their title to land through a marriage of the former owner have the burden of proving a marriage, it is presumed that the marriage was valid, and the burden of proof is upon those contesting its validity; the law presuming morality and innocence rather than their opposites.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.\*]

2. MARRIAGE (§ 52\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

While there is a presumption in favor of the validity of a marriage, that presumption is not conclusive, and hence, where there is testimony tending to rebut the presumption, an instruction on the presumption is properly refused; the whole matter being for the jury.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 91; Dec. Dig. § 52.\*]

3. HUSBAND AND WIFE (§ 267\*)—SALE OF COMMUNITY ESTATE BY WIFE.

Where a husband deserts his wife, she may sell the community estate to provide necessities for herself, even though she has no minor children.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 896, 929-938; Dec. Dig. § 267.\*]

4. APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR—NECESSITY.

Where plaintiffs claimed as the purchasers of a community estate from the wife, the impropriety of the charge, in making her right to sell the land to provide necessities after the husband's desertion contingent upon her having minor children to support, will not authorize a reversal, where the error was not assigned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.\*]

5. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL.

The refusal of a requested charge covered by the charges given is not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

6. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A requested charge having no basis in the evidence should be refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

7. TRESPASS TO TRY TITLE (§ 35\*)—EFFECT—ADMISSIBILITY OF EVIDENCE.

In trespass to try title, where defendants stipulated that plaintiffs held whatever title John E. Adams had at his death, and it appeared

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
161 S.W.—27

that he died in 1870, evidence tending to show the acquisition of an adverse title thereafter is inadmissible.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 50-52; Dec. Dig. § 35.\*]

#### 8. BASTARDS (§ 47\*)—HEARSAY.

In trespass to try title, where plaintiffs claimed as the purchasers of a community estate from the wife, and defendants contested the validity of the marriage, a witness cannot testify that he heard his father, the alleged husband, say that he fell out with his first wife, and took the vendor of the community estate and left the country with her, such evidence being pure hearsay.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 125-137; Dec. Dig. § 47.\*]

#### 9. EVIDENCE (§ 317\*)—ESTABLISHMENT.

In trespass to try title, plaintiffs claimed the land as purchasers from the wife of the owner, and defendants contended that there was never any legal marriage. *Held*, that evidence of subsequent declarations by the owner that he took the woman, who sold the land, and left the country with her, deserting his first wife, is not competent to show that there was no marriage.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

Appeal from District Court, Trinity County; S. W. Dean, Judge.

Consolidated actions by A. J. Adams and others against Wm. Cameron & Co., Incorporated, and others and against R. L. Glover and others. From the judgment, plaintiffs appeal, and the first-named defendants cross-appeal. Reversed and remanded.

A. J. Adams and others, heirs of John E. Adams, deceased, by a statutory suit of trespass to try title against Wm. Cameron & Co., Inc., C. L. Threadgill, B. A. Platt, and A. A. Allen, appellees, and C. C. Adams and others, and another suit of the same nature against R. L. Glover and others, sought to recover the J. B. Hartin survey of 640 acres of land in Trinity county. The two suits were consolidated. A trial of the consolidated suit resulted in a judgment as follows, so far as it needs to be stated: In favor of C. C. Adams for costs, on his disclaimer of any claim of an interest in or title to any part of the land; in favor of appellants against Wm. Cameron & Co., Inc., on their disclaimer, for all except 206.7 acres of the land; in favor of appellants against Polly Johnson, on her disclaimer, for all except 50 acres, and in her favor for the 50 acres; in favor of appellants against R. L. Glover, on his disclaimer, for all the land except 98 acres, and in his favor for the 98 acres; in favor of appellants against S. W. Magee, on his disclaimer, for all the land except 103 acres, and in his favor for the 103 acres; in favor of appellants against A. J. Walker and Azelline Walker, on their disclaimer, for all the land except two acres, and in their favor for the two acres; in favor of appellants against C. L. Threadgill, on his disclaimer, for all the land except 40 acres; in favor of appellants against B. A. Platt, on his disclaimer, for all

the land except 29½ acres; in favor of appellants against Wm. Cameron & Co., Inc., for one-half of the 206.7 acres mentioned, and in their favor for the other one-half thereof; in favor of appellants against C. L. Threadgill for one-half the 40 acres claimed by him, and in his favor for the other one-half thereof; in favor of appellants against B. A. Platt for one-half the 29½ acres claimed by him, and in his favor for the other one-half thereof; and in favor of appellants against all the other parties defendant, on whom service was had, for all the land.

The parties to the appeal as appellants are said A. J. Adams and others, plaintiffs in the court below, and as appellees said Wm. Cameron & Co., Inc., C. L. Threadgill, A. A. Allen, and B. A. Platt, defendants in that court.

From agreements of the parties and testimony heard at the trial it appeared that Solomon Adams, also known as Solomon Stone, in 1818, in Tennessee, married Vicy McIlhaney, by whom he had three children. In 1824 or 1825 he abandoned his said wife and their children, leaving them in Tennessee, and going with a woman named Frances Schafer to Alabama. As explanatory of the conduct of said Solomon Adams in so abandoning his wife, appellees were permitted to prove by the witnesses C. C. Adams and J. W. Upton, over appellants' objection, which is assigned as error, that Solomon Adams after he married Matilda Waters, as hereinafter stated, and his wife Vicy after she married W. B. Bowen, as hereinafter stated, declared in effect that Frances Schafer was a hired girl in their family, and that Solomon Adams became offended at his wife and thereupon deserted her and left with Frances for Alabama. What, if any, relation Solomon Adams and Frances Schafer thereafter had, and before 1837, bore to each other does not appear from the record. But it does appear that on November 11, 1837, they, as husband and wife, in Dallas county, Ala., by their deed of that date, in consideration of \$11,380 paid to them, conveyed a tract of land in said Dallas county to one John Heard. According to the certificate of an officer of said Dallas county, attached to the deed, the execution thereof was acknowledged before him by said Frances on November 11, 1837. In the certificate Frances is described as the wife of Solomon Adams, and it is stated therein that as his wife she acknowledged the execution of the deed, after she had been examined by the officer with reference thereto, apart from her husband. After the execution of this deed, during said year 1837, Solomon Adams, with Frances as his wife, came to Houston county, Tex., where they lived together as husband and wife until 1856. They had six or more children born to them, among the number being said John E. Adams, deceased. During the time they so lived together, they claimed and were reput-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed to be husband and wife, and were recognized as such by all their neighbors and acquaintances. In 1856 Solomon Adams killed a man named Tyler, in Trinity county. A short time thereafter, to avoid arrest and trial for the homicide, it seems, he abandoned his wife and children by Frances, leaving the state and going to Virginia, where, on October 27, 1857, he married Matilda Waters, by whom he had three children. After Solomon Adams abandoned his wife Vicey, and while he was living in Texas with his wife Frances, to wit, on December 6, 1841, he acquired by purchase the certificate by virtue of which the land in controversy was surveyed. He never returned to Texas during the lifetime of his said wife Frances, but for several years lived with his wife Matilda in a community in Arkansas, where his former wife Vicey lived with said Bowen as her husband, by whom she had several children. It was shown that Bowen abandoned a wife and children he had by her in Tennessee, and, accompanied by said Vicey, moved to Arkansas; but when this occurred was not shown. After Solomon Adams had abandoned her, as stated, and while he was living out of this state with Matilda as his wife, to wit, on October 29, 1866, Frances, by her deed of that date, for a consideration as recited therein of \$500 paid to her and for love and affection she had for him, conveyed the land in controversy to appellants' father, said John E. Adams, who, on August 5, 1870, died intestate. It was shown that Solomon Adams, when he left Texas after killing Tyler, was in debt, and that his son, said John E. Adams, paid a part, if not all, of his indebtedness; and it was further shown that said John E. Adams during his father's absence from the state furnished to his mother, said Frances, supplies needed by her to live on. It was agreed by the parties that appellants "held whatever title to the land in controversy that John E. Adams and his wife, Matilda Adams, had at the time of the death of John E. Adams." It was further agreed that Solomon Adams died intestate in or about the year 1873; that his wife Vicey died intestate about the year 1870; that his wife Frances died intestate about said year 1870; that his wife Matilda died intestate "in or prior to the year 1897"; and that defendants held the title, if any they had, to the land of the children of Solomon Adams by his marriage with Vicey McIlhaney and Matilda Waters. It was further agreed that the "deed records, court records, and marriage records of Warren county, Tenn., where Solomon Adams and his wife Vicey lived, Trinity and Houston counties, Tex., where he and his wife Frances lived after they came to Texas, and Madison county, Ark., where his wife Vicey lived with Bowen after they left Tennessee, were destroyed by fire in or about the year 1870; and that the marriage records of Dallas county, Ala., where Solomon Adams and his wife Frances,

it seems, lived before they came to Texas, were lost or destroyed in or about the year 1862.

Crow & Phillips, of Groveton, for appellants. Sleeper, Boynton & Kendall, of Waco, and J. A. Platt, of Groveton, for appellees.

WILLSON, C. J. (after stating the facts as above). On the case made by the facts recited, the court told the jury there were three ways in which the existence of a marriage might be established: "First," he said, "by proof of a ceremonial marriage under the laws of the state in which such marriage is contracted; second, by family history; third, by proof that the parties lived together as husband and wife and held themselves out as such and were reputed to be husband and wife." He then told the jury that "when a marriage is once shown to have been contracted between parties, same is presumed to continue until same is dissolved by the death of one of the parties or by a decree of divorce entered by a court of competent jurisdiction." He then instructed the jury to find for appellants for all the land, if they believed "that subsequent to the time of their marriage the said Solomon Adams and his wife Vicey were divorced by a court of competent jurisdiction, and that thereafter Solomon Adams and Frances were married," and if they believed "that the said Frances Adams sold and deeded the land to J. E. Adams to pay the community debts of herself and Solomon Adams, or to provide necessities for herself and her minor children"; and to find for appellants for an undivided one-half of the land if they failed to find "that the said Solomon Adams and Vicey Adams were divorced, and that thereafter the said Frances Adams and Solomon Adams were lawfully married," yet believed "that the said Frances Adams in good faith believed that she was the wife of Solomon Adams, and that together they acquired the property in controversy in this suit, and that the said Solomon Adams abandoned said Frances, and thereafter she sold the property." The verdict returned by the jury for only one-half of the land indicates they found that Solomon Adams was never divorced for his wife Vicey, and therefore that Solomon Adams and Frances Schafer were never lawfully married. On the issues as to whether Solomon Adams was divorced from his wife Vicey or not, and as to whether he married Frances Schafer or not, the court instructed the jury that the burden was on appellants to show by a preponderance of the evidence "that such a decree of divorce was entered by a court of competent jurisdiction, and that thereafter such marriage was contracted between Solomon and Frances Adams," and refused a special charge requested by appellants as follows: "You are instructed that when a marriage has been shown in evidence, whether regular

or irregular, and whatever the form of proofs, the law raises a presumption of its legality, not only casting the burden of proof upon the party asserting its invalidity, but requiring him throughout in every particular plainly to make the fact appear that such marriage is illegal and void. The strength of the presumption of the legality of a marriage increases with the lapse of time through which the parties are cohabiting as husband and wife. Now, in this connection, you are instructed that if you find from the evidence that a marriage between Solomon and Frances Adams, prior to December 6, 1841, has been proved by any of the methods of proof which the law recognizes as set out for your guidance in the court's general charge, then the law presumes the legality of said marriage, and the burden is upon the defendants, who in this case are attacking it, to establish their contention by clear evidence. This they may do by showing that Solomon Adams, one of the contracting parties, if such a marriage was consummated, was under the continuing disability of a previous valid marriage; but, unless they so show, the law will presume that such disability was terminated by divorce, and you will find in favor of the validity of the marriage."

[1] The action of the trial court in instructing the jury that the burden was on appellants to prove that Solomon Adams was divorced from his first wife before he married Frances Schafer is complained of as erroneous. The contention must be sustained. The burden was on appellants to prove a marriage between Solomon and Frances, but not to prove that such marriage was a valid one. A presumption that the marriage was valid would arise from proof that it was contracted, and the burden of proving to the contrary would be on appellees. This they might do by showing that Solomon had not been divorced from his first wife at the time he married Frances. The rule is a well-established one, and is based on the principle that the law will presume morality and innocence rather than immorality and guilt. *Nixon v. Wichita Land & Cattle Co.*, 84 Tex. 408, 19 S. W. 560; *Wingo v. Rudder*, 120 S. W. 1076; *Carroll v. Carroll*, 20 Tex. 741; *Ross v. Sparks*, 79 N. J. Eq. 649, 83 Atl. 1118; *Gamble v. Rucker*, 124 Tenn. 415, 137 S. W. 499; *McCord v. McCord*, 13 Ariz. 377, 114 Pac. 968; *Lyon v. Lash*, 79 Kan. 342, 99 Pac. 598; *Parsons v. Grand Lodge*, 108 Iowa, 6, 78 N. W. 676; 19 A. & E. Enc. Law, pp. 1208, 1209.

[2] We do not think the court erred when he refused the special charge set out in the statement, to the effect that the burden was on appellees to prove the invalidity of the marriage, if there was one, existing between Solomon and Frances at the time Solomon acquired title to the land in controversy. While it is true that, to sustain the validity of a marriage shown to have been contracted,

a presumption will be indulged that one of the spouses was divorced from a spouse living at the time it was contracted, the presumption is not a conclusive one. "If," said the court in *Stooksberry v. Swan* (Sup.) 22 S. W. 967, "the law declares the weight that shall be given to certain evidence, a court may so inform a jury; but, if that may be overthrown by other evidence, then it becomes the duty of the court, if evidence tending to a contrary conclusion be introduced, to leave the whole question of fact to the jury." And see *Hammond v. Hammond*, 43 Tex. Civ. App. 284, 94 S. W. 1068, where the court, in disposing of a contention that the jury should have been instructed that it was a presumption of law that the party had been divorced from his first wife, shown to have been alive when the second marriage was contracted, said: "Whatever might be the right of a jury to indulge such presumption as a matter of fact, we cannot sanction the contention that the presumption exists as a matter of law."

[3, 4] As noted in the statement above, the court in his charge to the jury predicated the right of Frances Adams, if she was lawfully the wife of Solomon Adams, to convey the land to John E. Adams, on the fact that she did so "to pay the community debts of herself and Solomon Adams, or to provide necessities for herself and her minor children." Error is not assigned on this portion of the charge, but it is nevertheless urged that it was erroneous in that it did not recognize a right in Frances Adams, after she had been permanently abandoned by Solomon Adams, to sell the land to provide necessities for herself, but required the jury also to find that she sold it to provide necessities for her minor children. It is insisted, and we think correctly, that there was no testimony showing she then had minor children. Undoubtedly the charge in the particular specified, for the reason suggested, was erroneous, but, in the absence of an assignment presenting it, we would not because of the error be warranted in reversing the judgment. But error is assigned on the refusal of the court to give a charge requested, telling the jury if she and Solomon were lawfully married at the time title to the land certificate was acquired, Frances had a right, after he abandoned her, to sell and convey the land to John E. Adams to provide means necessary for her support. On another trial the charge of the court should not be limited as specified, but should be so framed as to require the jury to find in appellants' favor, if they believe Frances and Solomon were lawfully married, that he afterwards permanently abandoned her, and that she sold and conveyed the land to John E. Adams for the purpose of providing means necessary to her support.

[5] By their fourth assignment, appellants complain of the refusal of the court to give to the jury their special charge No. 3. Because we think the phase of the case present-



ed by the charge refused was sufficiently covered by instructions the court gave, this assignment is overruled.

[6] The fifth assignment, in which appellants complain of the action of the court in refusing to give to the jury their special charge No. 4, with reference to a ratification (as claimed) by Solomon Adams of the act of his wife Frances in conveying the land to John E. Adams, also is overruled. We do not think the testimony made a question as to estoppel against Solomon Adams and those claiming under him.

[7] Over appellants' objection thereto on the ground that same was "incompetent, immaterial, and irrelevant," the court permitted appellees to prove by the witness C. C. Adams, whose title they had, that the land in controversy was not occupied by any one until 1881, and to prove that he (witness) and other parties thereafter lived on and cultivated portions of it. Appellees justify the action of the court on the ground that the testimony was admissible, in support of their plea setting up title in themselves, under the statute of limitations. But we think their contention cannot be sustained, and that the court erred in admitting the testimony, in view of the agreement on the part of appellees that appellants held "whatever title to the land in controversy that John E. Adams had at the time of the death of John E. Adams," which, it was further agreed, occurred August 5, 1870. In the face of this agreement, appellees did not have a right to show title in themselves by force of the statute of limitations, based on occupancy, etc., of the land subsequent to the date of the death of said John E. Adams. Therefore the sixth and seventh assignments are sustained.

[8, 9] As noted in the statement above, appellees were permitted to prove by the witness C. C. Adams, a son of Solomon Adams by Matilda Adams, his third wife, that, at some time not stated, he heard his father and Vicy Adams, his first wife, declare, with reference to their separation, that "they fell out, and that he (Solomon) taken the girl (Frances Schafer) and left the country and left her." Appellants objected to this testimony and to testimony of the witness Upton to the same general effect, on various grounds, and assign as error the action of the court in admitting same. Without inquiry as to whether other objections urged to it were tenable or not, we think the testimony was inadmissible because hearsay, and not within rules rendering such testimony competent. The only purpose for which there could be even the pretense of a reason for admitting it was to prove the existence of an illicit relationship between Solomon Adams and Frances Schafer in 1824 or 1825. In view of the fact that the record is silent as to what relationship, if any, existed between Solomon and Frances from 1824 or 1825, when they went from Tennessee to Alabama, until De-

cember, 1837, when it was shown they joined as husband and wife in the conveyance of land they owned in Dallas county, Ala., a majority of the court think the testimony referred to was wholly without probative force for the purpose indicated, when considered alone, as it must have been; for there was no other testimony which can be said to have tended to make such an issue.

For the errors pointed out the judgment is reversed, and the cause is remanded for a new trial.

## PRUITT v. FROST-JOHNSON LUMBER CO. OF TEXAS.

(Court of Civil Appeals of Texas. Texarkana. Nov. 20, 1913.)

### 1. MASTER AND SERVANT (§ 103\*)—MASTER'S LIABILITY—SERVANT'S KNOWLEDGE OF DEFECT—TOOLS AND APPLIANCES.

Where plaintiff, a foreman's helper in a planing mill, with the duty of keeping the machines adjusted and repaired, knew that a jam nut was defective and a wrench slipped from it, in consequence of which he was injured, defendant's liability could not have been predicated on the defect in the nut.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.\*]

### 2. MASTER AND SERVANT (§ 233\*)—MASTER'S LIABILITY—TOOLS AND APPLIANCES.

Where a master furnished a servant wrenches free from defects and reasonably safe for use in repairing machines in a planing mill, and the servant, instead of using one of them, chose and used a defective wrench, the master discharged his duty to use reasonable care to provide a reasonably safe wrench.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.\*]

### 3. MASTER AND SERVANT (§ 217\*)—MASTER'S LIABILITY—ASSUMPTION OF RISK.

A servant who knew and appreciated the danger involved in the use of a wrench so defective as to slip, while he was endeavoring to loosen a nut, yet who chose such a wrench when he might have chosen one without defect and which would not have slipped, assumed the risk of injury from the defect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from District Court, Nacogdoches County; Jno. I. Perkins, Judge.

Action by J. A. Pruitt against Frost-Johnson Lumber Company of Texas. Judgment for defendant, and plaintiff appeals. Affirmed.

King & King, of Nacogdoches, for appellant. Blount & Strong, of Nacogdoches, for appellee.

WILLSON, C. J. Lee Johnson had charge of the operation of appellee's planing mill near Nacogdoches. Appellant was Johnson's "helper." In his petition appellant alleged it was his duty, as such helper, to assist Johnson in the work of keeping the several planing machines adjusted and repaired. January 24, 1912, while appellant was at-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tempting, with a wrench, to adjust one of said machines, as a result of a failure of the wrench to hold on a jam nut it became necessary to turn, appellant's right hand and a portion of his right forearm were thrown against knives revolving in the machine, and he was injured. In his petition he alleged as negligence on the part of appellee, which entitled him to the damages he sought to recover, (1) that the wrench "was old and worn and out of adjustment by wear and tear, so that it would not fit tightly around said nut, the mouth of said wrench being so worn as to become too wide to hold closely upon said nut when placed thereupon, and so worn that when the plaintiff attempted to use the same upon the nut the wrench refused to catch or hold the nut and slipped from around the same, which said defect in said wrench was unknown to him, but was known to defendant or its foreman (said Johnson), or could have been known to them by the exercise of proper care in the examination and inspection of said wrench, which said duty the plaintiff charges the defendant had negligently refused to perform"; and (2) that the jam nut had "become corroded, worn, and covered with resin, so as to make it difficult for the wrench furnished to hold upon said nut, and said condition permitted the wrench in its worn and defective state, when placed upon said nut for the purpose of moving the same, thereby to slip from off said nut, thereby throwing his hand into said machine as aforesaid, which said fact was unknown to this plaintiff, but which said fact was known to the defendant, or could have been known in the exercise of the duty of examination and inspection imposed upon it by law, which said examination and inspection this plaintiff charges the defendant carelessly and negligently failed to perform."

The court below, after hearing the testimony, told the jury same did not warrant a verdict in appellant's favor, and instructed them to find for appellee. The jury so found. The appeal is from a judgment in accordance with their finding. The complaint here is that the court erred in peremptorily instructing the jury as stated.

At the time he was injured appellant was 46 years old. He had worked in planing mills during more than 20 years of his life, and during the 4 or 5 years immediately preceding the time when he was injured had worked in appellee's mill as "helper" to the foreman in charge thereof. It was a part of appellant's duty to adjust the machines, and if he found a jam nut in a bad condition to put in a new one, and if he found a wrench to be in a bad condition to either have it repaired or make a report as to its condition to the foreman. He had frequently adjusted the machine in question. The jam nut was defective in that, as appellant testified, it was "worn on the end." Appellant knew it was so worn before he attempted to turn it on the occasion when he was injured. The

wrench is described in the record as "a 34 wrench, an open set wrench at both ends." The defect in it, appellant testified, was that it "was spread at the mouth—it was spread about  $\frac{1}{16}$  of an inch or a little better." It was one of several wrenches furnished by appellee for use in turning the nut. Appellant knew that some of the wrenches were defective and that others of them were not defective. "I knew," he testified, "that there were wrenches there that were in bad shape and wrenches that were in good shape." He made no examination before using the wrench to see if it was one of the defective ones or not. "When," he testified, "I went down to that machine and went to work and found this wrench on the machine, I went immediately to using it. I never made any examination of it. I made no examination of it at all." Both the wrench and the nut were exhibited to the court and jury, and, it seems, admitted in evidence, though they were not sent to this court. Lee Johnson, the foreman, testified that the wrench "if properly put on the jam nut will not slip off." This was not denied by appellant. He testified that he "could not get a good hold on the nut" because of its being close to the wall of the machine, and he did not know what kind of a hold he had on it when the wrench slipped. Appellant knew the danger he incurred in attempting as he did to turn the nut while the machine was in operation. "Those knives," he said, referring to the ones with which his hand and arm came in contact when the wrench slipped, "are revolving knives. The knives are in the open where you can see them when the hood is off. The jam nut and set screw are about 6 inches, I guess, from those knives. In putting the wrench on the jam nut to loosen it, if you would turn it, your hand would go in towards the knives. My hand on the wrench to turn the jam nut would be approximately 8 or 10 inches from the knives. On that day when I pushed the wrench, I was pushing my hand directly towards the knives."

We think the testimony referred to suggests sufficient reasons why the judgment should not be disturbed.

[1] Negligence on the part of appellee, of which appellant had a right to complain, could not have been predicated on the defect in the jam nut, because, as he testified, he knew it was defective, and because, as he further testified, it was his duty, knowing it was defective, to replace the nut with a new one. Therefore negligence, if there was any on appellee's part, must have been predicated on the defect in the wrench.

[2] It conclusively appeared that appellee had furnished appellant wrenches free of defects and reasonably safe for use in doing the work he was engaged in doing, and that appellant, instead of using one of them, chose and used the one in question. It would

seem that appellee, having furnished such wrenches, had discharged the duty it owed to appellant to use reasonable care to provide for his use in turning the jam nut a wrench reasonably safe for the purpose, and that, if it violated a duty it owed to him, it was one he did not rely upon as a ground for the recovery sought—that is, either to separate and remove the defective wrenches from those not defective, or to instruct him how to distinguish between them. Had negligence in this respect been alleged, a sufficient answer to the charge, perhaps, would have appeared in testimony showing the wrenches to have been simple tools, with the use of which appellant was entirely familiar, and defects in which he should have discovered.

[3] There is another view to be taken of the testimony, which, it seems to us, justified the course pursued by the court, and that is that it conclusively appeared that appellant was in the attitude of having assumed the risk he incurred in using the defective wrench. He knew and fully appreciated the danger involved in the use of a wrench so defective as to slip while he was endeavoring to loosen the nut, yet he chose such a wrench when he might have chosen one without defects which would not have so slipped.

We think the court did not err as claimed. Therefore the judgment is affirmed.

#### GRISWOLD et al. v. COMER et al.

(Court of Civil Appeals of Texas. Galveston. Oct. 24, 1913. On Motion for Rehearing Nov. 13, 1913.)

#### 1. ADVERSE POSSESSION (§ 79\*)—COLOR OF TITLE—SUFFICIENCY OF DEED.

A tax deed which correctly described a tract of land by metes and bounds and which further identified it by reference to the correct abstract number was not insufficient as a basis for prescription under the five-years statute because it referred to the survey thereof as in the name of S., whereas the patent was issued to the heirs of S.'s assignee, and incorrectly referred to the certificate number; especially where it did not appear that the survey was not marked on the county map as the S. survey.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.\*]

#### 2. ADVERSE POSSESSION (§ 95\*)—SUFFICIENCY OF EVIDENCE—PAYMENT OF TAXES.

Where in trespass to try title it did not appear that no other evidence was introduced to show the payment of taxes, the evidence was not insufficient to show such payment merely because the tax receipts, which otherwise correctly described the land, gave a wrong certificate number, as the payment of taxes could have been shown by circumstances.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530-532; Dec. Dig. § 96.\*]

#### 3. ADVERSE POSSESSION (§ 79\*)—COLOR OF TITLE—SUFFICIENCY OF DEED.

Where the heirs of the holder of a duly recorded tax deed by partition deed partitioned

his land, the possession of one of the heirs thereafter was under a registered deed within the meaning of the five-years statute, though she did not record her own deed, since she could prescribe under her ancestor's deed as to the whole tract and not merely as to her distributive share thereof.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.\*]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 152\*)—ACCOUNTING AND SETTLEMENT—EVIDENCE OF SETTLEMENT.

Where in 1874 the property of an estate was partitioned by the probate court among the heirs, except as to a particular tract, as to which the administration was kept open, and the court retained jurisdiction, which tract was sold under the order of the court in 1876, the administrator in 1877 filed his application for final discharge, and the records of the court showing what other proceedings were taken were destroyed by fire, the facts sufficiently showed that the administration had been closed before 1881, when the administrator bought land awarded to one of the heirs in the partition of 1874, at a tax sale, and that no fiduciary relation then existed between him and such heir.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 621-628; Dec. Dig. § 152.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 152\*)—PURCHASE OF PROPERTY BY ADMINISTRATOR.

Where certain land of a decedent was partitioned among his heirs by the probate court, that set apart to one of the heirs ceased to be the property of the estate, the administrator ceased to have any control thereover, and was not bound to pay the taxes thereon, or do anything to protect the rights of the heir, even though the administration had not been closed; and hence he could purchase the property at a tax sale thereof.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 621-628; Dec. Dig. § 152.\*]

#### 6. ADVERSE POSSESSION (§ 31\*)—CONCEALMENT OF POSSESSION.

Where a tax sale was publicly made, the tax deed promptly recorded, and the heirs of the holder of the deed thereafter partitioned his land, the failure of one of the heirs to record the partition deed or to put leases thereof by her under which her lessees took actual possession on record, did not show fraud or a concealment of her claim of ownership.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 128-133; Dec. Dig. § 31.\*]

#### 7. ADVERSE POSSESSION (§ 79\*)—COLOR OF TITLE—SUFFICIENCY OF DEED.

For a tax deed to be sufficient as a basis for prescription under the five-years statute, all the prerequisites of the law need not be complied with in making the tax sale.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.\*]

#### 8. ADVERSE POSSESSION (§ 22\*)—SUFFICIENCY OF POSSESSION.

A person who fenced land and used it continuously, exclusively, peaceably, and notoriously for a pasture for live stock had sufficient possession thereof within the five-years statute.

[Ed. Note.—For other cases, see Adverse Possession; Cent. Dig. § 111; Dec. Dig. § 22.\*]

## On Motion for Rehearing.

**9. ADVERSE POSSESSION (§ 80\*)—COLOR OF TITLE—SUFFICIENCY OF DEED.**

Under the five-years statute of limitations, which requires the adverse possession relied upon to give title to be under a deed duly registered, the deed must describe the land with sufficient certainty to identify it.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 463-467; Dec. Dig. § 80.\*]

**10. DEEDS (§ 111\*)—DESCRIPTION OF PROPERTY—REPUGNANCY.**

Where by the rejection of a false and impossible part of a description which is repugnant to the general intention of a deed a perfect description will remain, the false part should be rejected and effect given to the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309-315, 334, 335; Dec. Dig. § 111.\*]

Appeal from District Court, Chambers County; L. B. Hightower, Judge.

Trespass to try title by D. E. Griswold and others against Mrs. C. C. Comer and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

R. J. McMurrey, of Anahuac, and Marshall & Harrison, of Liberty, for appellants. W. R. Anderson, of Carthage, and E. B. Pickett, Jr., and Stevens & Stevens, all of Liberty, for appellees.

REESE, J. This is an action of trespass to try title, instituted by D. E. Griswold and others against Mrs. C. C. Comer, the Old River Rice & Irrigation Company, J. T. Bayliss, Joseph Raper, and Oscar J. Petty, to recover a certain 320 acres of land, the east half of a section patented to the heirs of Elias Griswold. The plaintiffs also claimed damages by way of rents for two years preceding the institution of the suit.

Old River Rice & Irrigation Company answered by general denial, and alleged that it had cultivated the land, for the term during which rents were claimed, through its tenants. Other defendants adopted this as their answer, except C. C. Comer, who pleaded not guilty and the statute of limitation of five and ten years. Mrs. Comer claimed the title. The other defendants were her tenants. The case was tried without a jury, resulting in a judgment for defendants on Mrs. Comer's limitation plea of five years. From the judgment, plaintiffs appeal. The court prepared and filed conclusions of fact and law. The findings of fact are supported by the evidence and are adopted by us. They are as follows:

"I find that the land described in plaintiffs' petition was patented to the heirs of Elias Griswold on the 17th day of January, 1862. I further find that S. A. Miller was administrator of the estate of Elias Griswold, and that as such administrator, on the — day of September, 1874, in the district court of Houston county, Tex., where said administration was pending, a partition was had of all the property and lands of said estate,

save and except a claim of 640 acres of land situated in Madison county, Tex., known as the A. Boatwright survey.

"I find that said court, at the time of said partition in September, 1874, retained jurisdiction of said estate in order to litigate a claim to said Boatwright survey, and that the remainder of the estate, including the land in controversy, was partitioned as aforesaid by said court in September, 1874, and that said land in controversy was set aside to Ambrose Griswold, an heir and son of Elias Griswold, deceased, as his distributive share of said estate thus partitioned.

"I find that Ambrose Griswold died about the 6th day of December, 1906, and that the plaintiffs are lawful heirs. I further find that neither Ambrose Griswold nor his said heirs have ever resided in Texas, but have always resided in the states of Missouri and Illinois. I further find that during the year 1877, S. A. Miller, administrator of said estate, filed his application for final discharge, and that in 1876, acting under an order of the court having jurisdiction of said estate, the said S. A. Miller, as administrator, sold the A. Boatwright survey of land situated in Madison county, Tex.

"I further find that all of the probate records and court records of Houston county have been destroyed by fire, save and except said decree of partition and said application by said administrator for final discharge.

"From the foregoing facts the presumption arises that the administration of said estate was closed and the administrator discharged prior to the 3d day of May, 1881. I further find that S. A. Miller, on the 3d day of May, 1881, purchased the land in controversy at tax sale, and that a deed properly describing the land was executed to him by the tax collector of Chambers county on the 3d day of May, 1881, which deed was duly recorded upon the deed records of Chambers county, Tex., the same year. I further find that none of the plaintiffs had any actual knowledge of said tax sale until shortly before the institution of this suit.

"I find that after the death of S. A. Miller, about the 17th day of August, 1897, the estate of S. A. Miller was partitioned among his several heirs by partition deed, and the land in controversy described by said tax deed was conveyed by the other heirs of S. A. Miller to one of his heirs, to wit, Amelia Miller, who is now the defendant Mrs. C. C. Comer, and that said deed was duly registered in Chambers county, Tex., on the 4th day of September, 1911.

"I further find that from the — day of October, 1904, the defendant Mrs. C. C. Comer has had enclosed, used, and held in peaceable adverse possession the land in controversy up to the present time, and that said defendant, Mrs. C. C. Comer, formerly Amelia Miller, has paid all taxes on said land annu-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ally as the same accrued during said occupancy by her."

[1] The first assignment of error assails the judgment on the ground that the tax collector's deed to S. A. Miller does not describe the land in controversy and did not afford a basis for prescription under the five-years statute. The findings of fact do not show the facts with regard to this deed which are urged as a basis for this assignment, but simply that the deed properly described the land. The record shows that the land was patented to the heirs of Elias Griswold, assignee of George L. Short, patent No. 370, certificate No. 436, issued to George L. Short. The tax collector's deed to S. A. Miller, under whom Mrs. C. C. Comer claims title, describes the land as "320 acres, the east half of a 640-acre survey in the name of George L. Short, abstract No. 228, certificate No. 426," followed by a full description of the 320 acres by metes and bounds, definitely and accurately describing the east half of the 640 acres described in the patent. This particular description, if taken alone, clearly and unmistakably identifies the land. Appellants' contention, as presented in the assignment, is based upon the reference in the deed to the survey as in the name of George L. Short, when the patent was issued to the heirs of Elias Griswold, assignee of George L. Short, and the further fact that the certificate is referred to as No. 426, while the correct number is 436, as shown by the patent. These mistakes are unimportant in view of the unmistakably correct description and identification of the land by the particular description contained in the field notes. It may be that the survey was marked on the county map as the George L. Short. The record does not show. All of the witnesses refer to it as the George L. Short survey. The tax collector so speaks of it, identifying further by giving the correct abstract number and the particular description by field notes, showing metes and bounds. The description was clearly sufficient to convey the land in controversy, and the record thereof was sufficient notice to the true owner, under the five-years statute of limitation. In construing the deed the "falsa demonstratio" would be discarded, and regard only had to the correct description afforded by the field notes. *Armbula v. Sullivan*, 80 Tex. 619, 16 S. W. 436. In the light of the evidence, the reference to the survey as in the name of George L. Short really serves more clearly to identify the land. In all the cases cited by appellants in support of their contention there was no particular description by which the land could be identified. They have no application to the present case. The assignment and the several propositions thereunder are overruled.

[2] It is contended by appellants under their second assignment of error that the evidence was insufficient to support appellee's claim of title under the five-years stat-

ute, because in the tax receipt a wrong certificate number is given. The receipts otherwise correctly described the land, and the evidence was sufficient to show payment of taxes under the statute. The court finds that the taxes were paid. This could have been shown by circumstances. *Watson v. Hopkins*, 27 Tex. 642; *Irvine v. Grady*, 85 Tex. 120, 19 S. W. 1028. No objection was made to the introduction in evidence of the tax receipts, so far as is shown by the briefs, nor does it appear that no other evidence was introduced to show such payment. The assignment is overruled.

[3] It appears from the court's findings that the defendant Mrs. Comer was one of the children of S. A. Miller, the grantee in the tax deed, who was dead, and one of the distributors of his estate, and that after Miller's death, "and about August 17, 1897, his estate was partitioned among his several heirs by partition deed, and the land in controversy described by said tax deed was conveyed by the other heirs of S. A. Miller to one of his heirs, to wit, Amelia Miller, who is now the defendant Mrs. C. C. Comer, and that said deed was duly registered in Chambers county on September 4, 1911." This was after the institution of this suit. The actual possession of the land upon which the limitation claim is based began in October, 1904. The suit was begun June 5, 1911. By appropriate assignments of error appellants present the contention that under the facts stated, except as to her distributive interest as one of the heirs of S. A. Miller (either one-sixth or one-eighth), Mrs. Comer could not prescribe under the deed to Miller, which was duly registered in 1881; but that, as to the remainder of the tract, she held title under the deed from the other heirs, which was not registered until after this suit was filed, from which the legal conclusion is asserted that, except as to her distributive share, her possession was not under a registered deed as required by the five-years statute.

We think this case falls within the general principle which was relied on in the case of *McLavy v. Jones*, 31 Tex. Civ. App. 354, 72 S. W. 407, decided by this court, the opinion being by Chief Justice Garrett. Writ of error was denied by the Supreme Court. Stated generally, the facts in that case were as follows: The land in controversy was part of the estate of Byrd Eastham, who died leaving a widow, who was his executrix without bond with power to sell real estate, etc., and several children, among them Mrs. Jones, the appellee. The deed of the land in controversy to Byrd Eastham was recorded in 1878. He died in 1883. By his will Eastham devised one half of his estate as community property to his widow, and the other half, share and share alike, to his children. On August 17, 1886, the probate court approved a report of partition filed in the estate by the executrix, setting apart to Mrs.

Jones the land in controversy, and ordered that all the right, title, and interest of the other heirs in and to said land be divested out of them and be vested in her, and that the executrix deliver the same to her as her share of the estate. About March 1, 1886, the executrix took possession of this tract by tenant. This tenant so held possession until the land was set apart to Mrs. Jones, when he continued to hold it for her until 1897. The taxes were paid up to 1886 by the estate, and from 1886 to 1897 by Mrs. Jones. We quote from the opinion: "We are of the opinion that the plea of the statute of five-years limitation was sustained by the evidence. Byrd Eastham claimed the land under a deed duly acknowledged and recorded. The deed was dated February 14, 1876, and was filed for record May 29, 1876. Payment of taxes by him was shown to have been made from 1880 to his death, and by his executrix to 1886, when the land was set apart to his heir and devisee, the defendant Helen M. Jones, as a part of her share of the estate. The taxes were shown to have been paid by the defendants from 1886 to 1897, inclusive. Possession under the deed to Byrd Eastham was commenced by his executrix March 1, 1886, and on August 17, 1886, the date of the order of the probate court, it was commenced by the defendants, and continued for more than ten years, accompanied by payment of taxes. Helen M. Jones, as the heir and devisee of Byrd Eastham, could prescribe under the deed to him without regard to the order of the probate court. *Motley v. Corn* (Tex. Sup.) 11 S. W. 850; *Carothers v. Covington*, 27 S. W. 1040; *Foster v. Johnson*, 89 Tex. 640, 36 S. W. 87; *Fossett v. McMahan*, 74 Tex. 546, 12 S. W. 324; *Olive v. Bevil*, 55 Tex. 423; *Cochrane v. Farris*, 18 Tex. 850. The purpose of the statute requiring possession under a recorded deed is to give notice of the character of the adverse possession, and it must be such as is required in the registration of deeds, and the right of the party in possession to prescribe may be derived from a deed to a predecessor in title in privity with whom he holds."

The court in the opinion recognizes fully the doctrine of the cases cited by appellant. (*Sorley v. Matlock*, 79 Tex. 306, 15 S. W. 261; *Porter v. Chronister*, 58 Tex. 56, and others) but in distinguishing the case under consideration proceeds: "Helen M. Jones was the heir and devisee of Byrd Eastham. As such she took the legal title by devise and inheritance. The will disposed of the property in accordance with the statute of descent and distribution, but this fact does not affect the principle involved, as the will is not such a muniment of title as is required by the law of registration to be recorded in the record of deeds."

There are only two grounds upon which this case can be distinguished from the present case. And those are the possession

of the executrix prior to the partition, and the fact that the partition in that case was made in probate proceedings, while in the present case it was done by a deed of the other heirs to Mrs. Comer. So far as this prior possession is concerned the court seems to lay no stress upon it. The law has no regard to any possession except that which is held during the five years necessary to create the bar. The possession prior or subsequent to that is of no importance. We think it clear from the reasons given in the opinion that it would have made no difference if the first possession had been by Mrs. Jones after the property was set apart to her in the partition. As to the other point of difference, we do not think the case can be distinguished on that ground. Equally in that case as in this it might be said that Mrs. Jones only held her distributive interest as one of the heirs and devisees under the will, under the recorded deed to Byrd Eastham, and that as to the distributive interest of the other heirs, after the partition and when she took possession, she held under the partition decree. The law makes no concession in the matter of a claim of title under the five-years statute to one who claims under some title which is not capable of registration, if the partition decree comes within that class. He must hold under a registered deed. An equitable title, good against the world but not capable of registration, cannot be made the basis of prescription. The court held that in that case the registered deed to Byrd Eastham was sufficient basis for Mrs. Jones' claim under the five-years statute to the entire tract. By the same reasoning, we are unable to see why the registered deed to S. A. Miller, Mrs. Comer's father, in privity with whom she claims to exactly the same extent that Mrs. Jones claimed in privity with Byrd Eastham, her father, would not afford lawful basis for prescription under the statute. So far as the notice to appellants is concerned, and that is the purpose of this requirement, we think Mrs. Comer's possession, the fact that she was one of the heirs of S. A. Miller, together with the record of the deed to Miller and payment of taxes, afforded appellants all the notice required by the statute. We are of the opinion that the court did not err in the matter complained of in the assignment referred to.

[4, 5] S. A. Miller was administrator of the estate of Elias Griswold. In 1874 all of the property of the estate was partitioned by the probate court among his heirs, except a claim to 640 acres of land in Madison county, and the administration was kept open, and the court retained jurisdiction of the estate in order to litigate such claim. Thereafter in 1876, acting under the order of the court, the administrator sold this Madison county land. In 1877 the administrator filed in said court his application for final discharge. All of the records of said court were destroyed by fire in 1885. In the partition of

all the property of the estate in 1874, the tract of land in question was set apart to Ambrose Griswold. The plaintiffs are his heirs. The court did not err in finding from the above facts that the administration had been closed before 1881, when Miller bought the land in controversy, and that no fiduciary relation existed between Miller and the heirs that would prevent his buying this property at tax sale. The facts present a different and a much stronger case than a mere absence of any action taken in the administration. The affirmative facts that all of the property was partitioned in 1874, except the claim to the Madison county land, which was sold in 1876, leaving nothing farther to be done in the administration, followed by the filing of the application to be discharged by the administrator in 1877, in view of the further fact that the destruction of the records in 1885, rendering it impossible to furnish by the records proof of that fact, afforded sufficient grounds for the finding that such application was acted upon and the administration closed. Obviously this was the proper, and the only proper, thing to do. But the right of Miller to buy does not depend upon this. Whether the administration was closed and the administrator discharged, as found, or not, all the property of the estate was partitioned among the heirs in 1874, and the land in controversy was then set apart to Ambrose Griswold. By this act this property ceased to be the property of the estate. The administrator ceased to have any control over it, or the probate court to have any further jurisdiction of it. *Henderson v. Lindley*, 75 Tex. 185 [12 S. W. 979]. Having no control over the property, it was not the duty of the administrator to pay the taxes, or to do anything to protect the rights of the owner, whose absolute property it had become. So far as Miller was concerned, even if the administration had not been closed, he stood in no other relation to this property than he did to any other property belonging to Ambrose Griswold. Owing the owner no duty which the law could recognize in the matter, he had the same right to buy this property as any one else. There was no fraud, no concealment of any fact on his part. Miller had nothing to do with its being offered for sale, which was done by a public officer in the discharge of his lawful duty. "There is an exception to the general rule that one who occupies a fiduciary relation may not lawfully purchase the property of his correlate for his own benefit, as well established as the rule itself. It is that an agent or trustee may lawfully buy the property of his principal or cestui que trust at a judicial sale caused by a third party which he has no part in procuring and over which he can exercise no control." 39 Cyc. 185. But it is not necessary to invoke this principle in the present case. Under no view of the facts did Miller occupy towards the owner of this

property, at the time of the tax sale or with regard to the tax sale, any fiduciary or trust relation whatever. What we have said disposes of the questions presented by the fourth, fifth, sixth, and seventh assignments of error, and the several propositions thereunder, which are overruled.

[6] The eighth assignment of error is without merit. There was no concealment by appellees of any fact with regard to their claim of title. The tax sale was publicly made, and the tax deed promptly recorded. Certainly there is not a hint of fraud. No purpose to conceal her claim of ownership by Mrs. Comer can be inferred from the fact that she did not put her leases on record, under which the lessees inclosed the land and took actual possession. Nor from the fact that she did not put on record the partition deed. Certainly the facts show that the slightest diligence on the part of appellants would have enabled them to learn of this adverse claim, and of its active assertion.

[7] It is not necessary, to enable appellee to prescribe under the tax deed, that she should show that all of the prerequisites of the law had been complied with in making the sale. In such case she would not need to have resorted to the statute of limitation. The deed was sufficient to afford a basis for the claim under the statute as a registered deed. *Schleicher v. Gatlan*, 85 Tex. 273, 20 S. W. 120.

[8] The evidence was amply sufficient to show such adverse possession, use, and enjoyment in appellee, through her tenant, from October, 1904, up to the filing of the suit in April, 1911, as to fulfill the requirements of the statute. Such possession and use consisted in fencing the land and using it for a pasture for live stock, such use being continuous and exclusive and, without dispute, visible and notorious. There is no merit in the tenth assignment of error, complaining of the insufficiency of the evidence to support the claim under the statute.

We have carefully examined the several assignments of error, together with the propositions thereunder, and conclude that none of them presents any grounds for reversal. The judgment is therefore affirmed.

Affirmed.

#### On Motion for Rehearing.

In our original opinion it is stated that none of the cases cited in the brief of appellants, to support their contention that the deed from the tax collector to S. A. Miller was insufficient as a basis for prescription under the five-years statute of limitation, are based upon a deed in which there is a full description of the land by metes and bounds, as in the Miller deed, and this is true. However, in their motion for rehearing they cite the case of *McDonald v. Hamblen*, 78 Tex. 628, 14 S. W. 1042, in which the land sued for was described as a part of the George A. Campbell survey. It was, in fact,

part of a tract patented to De Cordova, assignee of Campbell. The tax deed described the land as a part of the R. A. Campbell survey, giving also metes and bounds. No objection was made to the description of the survey by giving the name of the original grantee of the certificate, but the objection was that the name of the survey was given as the R. A. Campbell instead of the George A. Campbell survey. In the opinion the survey is spoken of as the George A. Campbell survey. This appears to sustain our opinion on the point that the description of the land in the tax deed in the present case as the east half of a survey in the name of George L. Short, the original grantee in the certificate, was sufficient, as far as that part of the description is concerned. The tax deed in the present case further gives the correct abstract number, omits the number of the patent (which it was unnecessary to give) and gives a wrong certificate number. We quote so much of the opinion in the case cited as bears upon the question here presented: "In support of the plea of five-years limitation the defendants offered in evidence a tax deed by John P. Cox, tax collector of Hill county, to W. H. McDonald to 984 acres of land of the R. A. Campbell survey, and describing the land by metes and bounds. In connection with this deed it appears that the county map of Hill county was offered to 'show the locality of the George A. Campbell survey and surrounding surveys.' The deed was dated June 4, 1878, and duly registered on the 2d day of April, 1879. The petition was filed May 8, 1886. The plaintiff objected to its introduction, 'first, because it was void on its face, no authority appearing for the execution of the deed; second, because it does not support the plea of limitation, as the description fails to identify the land and is not sufficient to apprise the owner of the land of an invasion thereof by the grantee in the tax deed.' The court sustained the second objection and excluded the deed and the map. This is assigned as error. The assignment is not well made. The deed shows on its face that the tract of land against which the assessment was made, and which was sold to pay said assessment, was a different tract of land from that sued for. The deed recites that the land assessed was 984 acres of the R. A. Campbell survey, and the land which the field notes described as conveyed is a part of the said Campbell survey. The land sued for is a part of the George A. Campbell one-third league."

[9] It is not contended that the fact that it was not shown that the prerequisites of the statute were not complied with by the tax collector would be a valid objection to the deed as a basis of prescription under the five-years statute. *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120. One of the conditions for the acquisition of title under the statute is that the party setting up such title must have been in adverse possession for that

length of time, "claiming under a deed or deeds duly registered." It is not necessary that the deed convey good title (*Hunton v. Nichols*, 55 Tex. 217), but the deed must describe the land with sufficient certainty to identify it. *Murphy v. Welder*, 58 Tex. 235. A description of land in a deed otherwise identifying it is not vitiated by a mistake in giving the number of the certificate. *Stout v. Taul*, 71 Tex. 438, 9 S. W. 329.

[10] Appellant insists that the case of *Arambula v. Sullivan*, 80 Tex. 619, 16 S. W. 43, cited by us, has no analogy to the present case. It was cited merely in support of the general and well-settled rule in the construction of deeds that "where by rejection of a false and impossible part of a description which is repugnant to the general intention of the instrument a perfect description will remain, the false part should be rejected and effect given to the deed." 13 Cyc. 630. The general principle is thus stated in *Smith v. Chatham*, 14 Tex. 328: "Counsel do not differ as to the law applicable to this question; but only as to its application. It is ingeniously, and very justly, admitted by counsel for the appellee, that 'there are numerous cases in which it has been decided, that, where the body of the land is sufficiently described to identify it beyond doubt, and control, with sufficient certainty, erroneous particular descriptions, the latter may be rejected, to give effect to the former and uphold the deed.' Such unquestionably is the well-settled law; and such, we think, is this case. The description identified, beyond doubt, the land actually conveyed to the plaintiff by the sheriff's deed; and the court therefore erred in excluding the evidence."

The deed referred to was a sheriff's deed. See, also, *West v. Houston Oil Co.*, 46 Tex. Civ. App. 102, 102 S. W. 927; *Pinckney v. Young*, 107 S. W. 622.

Under these well-settled principles we think it requires no further citation of authority to show that the tax deed was, on its face, a sufficient conveyance of the land claimed by appellants to constitute it, when duly recorded, a "registered deed" to this land.

Appellants' main contention is that the registration of the deed was insufficient to give appellants notice that their possession was invaded under this deed. We do not understand by what course of legal reasoning it can be successfully contended that the registration of a deed, which on its face conveyed by definite and accurate description the land of appellants, when accompanied with actual possession and payment of taxes, was not such notice to them as they were entitled to under the statute, whether it be a tax deed or one voluntarily made by the grantor. If this deed, describing the land exactly as it is described, had been by a stranger to the title, who had not title, to appellee, and had been duly registered, we think it would hardly be contended that it would not have af-



forded a basis for prescription under the statute of limitation of five years, on the ground that the registration did not afford notice to the owner. The tax deed in this case, by field notes giving the metes and bounds, definitely and accurately described a tract of land which is, in fact, the east half of the 640 acres patented to Elias Griswold, assignee of George L. Short, and, under well-settled rules of construction of deeds, was, on its face, and not by reference to anything extrinsic of the contents of the deed, as stated in *Brokel v. McKechnie*, 69 Tex. 32, 6 S. W. 623, a deed to the land claimed by appellants. It was duly registered and we think satisfied this condition of the statute. Appellants have urged their contention of this point with so much earnestness that we have thought proper to state our views more fully.

### HAYS et al. v. TALLEY.

(Court of Civil Appeals of Texas. Texarkana. Nov. 11, 1913. Rehearing Denied Nov. 27, 1913.)

#### 1. LIMITATION OF ACTIONS (§ 47\*)—BREACH OF COVENANTS—WARRANTY OF TITLE.

Limitations against an action for breach of a covenant of warranty of realty do not commence to run until actual or constructive eviction under a superior outstanding title.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 254-258; Dec. Dig. § 47.\*]

#### 2. LIMITATION OF ACTIONS (§ 47\*)—LIMITATIONS—BREACH.

Where there was a conflict in the title or location of the land conveyed by defendant to plaintiff and county school land, which required a decision of the courts to determine the rights of the parties, limitations against an action by plaintiff against defendant for breach of warranty of title only began to run from the final judgment of the Supreme Court, adjudging that the county had title as against plaintiff in an action between them, and not from the date of plaintiff's deed or of the filing of such action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 254-258; Dec. Dig. § 47.\*]

Appeal from District Court, Delta County; Wm. Pierson, Judge.

Action by J. T. Talley against J. M. Hays and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Appellee brought the suit on June 25, 1912, against the appellants upon a covenant of general warranty contained in the deed of May 22, 1889, by which appellants had conveyed 80 acres of land in Delta county in the headright of J. J. Nidever to Martha Neathery, by whom, joined by her husband, R. E. Neathery, it had been conveyed by deed, with covenants of general warranty, on October 22, 1900, to appellee. The covenant of warranty, as alleged, is "to forever warrant and defend the title to said land unto the said Martha Neathery and her heirs and assigns against the claims of all others." Appellants answered by demurrer and by gener-

al denial, and specially pleading the statute of limitation of four years in bar of the action. Appellee, in a trial to the court, recovered a judgment against appellants on their warranty of title for \$500, with 6 per cent. interest from August 1, 1911.

The court overruled the following special demurrer: "(3) The defendants specially demur to said petition, and say the same shows on its face that if plaintiff ever had a cause of action against defendants, that the same is barred by the statute of limitation of four years, and that defendants are not required to further answer thereto." The particular allegations of the petition to which the demurrer was directed reads: "Plaintiff avers that since the conveyance from the defendants to Martha H. Neathery, and since the conveyance from Martha H. Neathery and R. E. Neathery to the plaintiff as set forth above, the title as attempted to be conveyed from the defendants to Martha Neathery and from her to the plaintiff herein has failed in whole. Plaintiff avers the facts to be: That at the time of each of the two conveyances above mentioned the superior and outstanding title to the said 80 acres of land was vested in Lamar county, Tex., and title to the same was not in the defendants or Martha Neathery at the time of each or either of the conveyances mentioned above. That Lamar county was the owner of said tract of land as and the same constituted a portion of the school land owned by Lamar county, which fact was unknown to the plaintiff herein at the time of his purchase from the Neatherys. That Lamar county, in the assertion of its claim of title to said land, instituted its suit in the district court of Delta county, Tex., on the ——— day of May, 1905, for the recovery against the plaintiff herein of the title and possession of said tract of land. Said suit was styled 'Lamar County v. J. T. Talley et al.', and numbered upon the docket of said court 1309; said suit was against other persons than this plaintiff and for the recovery of other lands not necessary here to mention. That upon a trial of said cause in the district court of Delta county on the 22d day of January, 1909, judgment was rendered in favor of this plaintiff and the other defendants in said cause and against Lamar county appealed to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas, which last-named court heard said cause on the 26th day of February, 1910 (127 S. W. 272), and rendered its judgment reversing the judgment of the district court of Delta county rendered therein, and entered judgment in favor of Lamar county and against this plaintiff for the title and possession of said tract of land. That this plaintiff and the other defendants in said cause appealed from the judgment rendered by the Court of Civil Appeals to the Supreme Court of the state of Texas, which last-named court heard said cause on the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

24th day of May, 1911 (Talley v. Lamar County, 104 Tex. 295, 137 S. W. 1125), and rendered its judgment affirming in all things the judgment as rendered by the Court of Civil Appeals in said cause, which last-mentioned judgment was final and from which there was no further appeal. On August 1, 1911, immediately after the final judgment of the Supreme Court, Lamar county took possession of the said tract of land and ousted the plaintiff herein from possession of the same. That plaintiff in good faith defended his title to said tract of land, expending in the defense of said suit the sum of \$500. That defendants have failed to defend the title to said property. That by reason of the covenant of warranty contained in the said conveyance from the defendants to Martha H. Neathery and the conveyance from Martha H. Neathery to the plaintiff as set out above, and by reason of the failure of the title to said land as set out above, the defendants are liable to the plaintiff upon their covenant of warranty as made to Martha H. Neathery and her assigns for the said sum of \$560, paid to Martha and R. E. Neathery by the plaintiff as purchase money for the said land, together with interest on said amount at 6 per cent. from August 1, 1911," etc.

Patteson & Patteson, of Cooper, for appellants. Newman Phillips, of Cooper, for appellee.

LEVY, J. (after stating the facts as above). The first assignment predicates error on the part of the court in overruling the special demurrer of limitation to the petition. According to the allegations in the petition, Lamar county ousted appellee from the actual possession of the land on August 1, 1911, after the decision and judgment of the Supreme Court on May 24, 1911, in the appeal of the cause of Lamar county against appellee, which finally decreed title to the land to be residing in Lamar county, and made evident the want of any title in appellee. The effect of the allegations is to show an actual eviction of appellee from the land on August 1, 1911, and a complete legal failure of title in appellee, claiming under deed from appellants relating to the time of such conveyance, as finally determined by a contest in the courts under judgment of the Supreme Court on May 24, 1911.

[1] It is laid down as a rule that the statute of limitations against an action on the breach of a covenant of warranty of realty does not commence to run until an eviction, actual or constructive, under a superior outstanding title. *Jones v. Paul*, 59 Tex. 41; *Westrope v. Chambers*, 51 Tex. 178; *Clark v. Mumford*, 62 Tex. 531; *Alvord v. Waggoner*, 29 S. W. 797; *Wood on Limitations*, § 173.

[2] And whatever may be said concerning the ultimate fact that Lamar county was the superior owner of the land as a part of her

public school lands, and about limitation not operating as in similar suits against private individuals, we think that in the instant suit limitation should not be held to have run against the suit on warranty of title against appellants until after the alleged eviction and failure of title. For the facts pleaded show, when properly construed, that the parties were dealing with each other about the land as being "in the headright of J. J. Nidever," and were not undertaking to contract about school lands belonging to Lamar county; and if there was any conflict of title or location of the land as between the Nidever survey and Lamar county school land, as we must presume from the facts, it was upon such facts and law as to require the courts to determine the rights of parties, and hence limitation began to run against the warranty of title only from the final judgment of the Supreme Court as pleaded, and not from the date of the deed or date of filing of the suit. *Alvord v. Waggoner*, 29 S. W. 797, approved by Supreme Court on limitations; *Eustis v. Fosdick*, 88 Tex. 615, 32 S. W. 872; *Williams v. Finley*, 99 Tex. 468, 90 S. W. 1087; *Trevino v. Cantu*, 61 Tex. 88; *Sievert v. Underwood*, 124 S. W. 721. Reference: *Selbert v. Bergman*, 91 Tex. 411, 44 S. W. 68.

The second assignment, which is the only other assignment, cannot be considered, for the motion for new trial does not contain such assignment.

The judgment is affirmed.

#### CAMPBELL et al. v. GIBBS et al.

(Court of Civil Appeals of Texas. Galveston. Dec. 4, 1913. On Motion for Rehearing, Jan. 27, 1914.)

#### 1. APPEAL AND ERROR (§ 989\*)—QUESTIONS REVIEWABLE—FINDINGS—EVIDENCE.

The court, in passing on an assignment that the finding was contrary to the evidence, will only determine whether there was sufficient evidence to authorize the finding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3897; Dec. Dig. § 989.\*]

#### 2. TRESPASS TO TRY TITLE (§ 41\*)—GRANTS—LOCATION—EVIDENCE.

In trespass to try title to recover land under ancient grants, evidence held to sustain a finding that the land claimed had not been located and surveyed on the ground, so as to embrace the land claimed by plaintiff.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

#### 3. TRESPASS TO TRY TITLE (§ 38\*)—TITLE OF PLAINTIFF—BURDEN OF PROOF.

A plaintiff suing in trespass to try title to recover land under an ancient grant, has the burden of establishing the location of the grant, so as to include the land sued for.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 53; Dec. Dig. § 38.\*]

#### 4. STIPULATIONS (§ 14\*)—OPERATION AND EFFECT—EVIDENCE.

An agreement of the parties in trespass to try title, which stipulates that the defendants claiming under junior patents have such title,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

if any, as was vested in the junior patentees, relieves defendants of the burden of establishing the consecutive links in their respective chains of title, and satisfies the requirement of the three-year statute of limitations as to title, or color of title, from the sovereignty.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

#### 5. ADVERSE POSSESSION (§ 7\*)—COLOR OF TITLE.

Where the state of Texas placed grants made by any former sovereign on the same footing as those made by the state, rights originating by treaty or under the Constitution or laws of the state were not violated, and such grants were not protected from the operation of the statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 12-16; Dec. Dig. § 7.\*]

#### 6. PUBLIC LANDS (§ 176\*)—CONFLICTING GRANTS.

Where the state of Texas placed grants made by a former sovereign on the same footing as those made by the state, any grant by the state of a part of lands embraced in a grant of a former sovereign was void in the same sense that a grant by the state of land covered by a prior valid grant from the state is void.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 571-575; Dec. Dig. § 176.\*]

#### 7. ADVERSE POSSESSION (§ 73\*)—COLOR OF TITLE—"SOVEREIGNTY OF THE SOIL."

Junior patentees of the state, or persons holding under the patentees, hold under the sovereignty of the soil within the three-year statute of limitations; the term "sovereignty of the soil" meaning, when the statute was first adopted in 1841, the then existing sovereignty.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 435-442; Dec. Dig. § 73.\*]

Error to District Court, Madison County; T. J. Ford, Special Judge.

Trespass to try title by Charlotte Campbell and others against Mrs. S. Gibbs and others. There was a judgment for defendants for the respective tracks claimed by them, which covered substantially all of the land sued for, and plaintiffs bring error. Affirmed.

Alex C. Bullitt, of San Antonio, for plaintiffs in error. Dean, Humphrey & Powell, of Huntsville, and E. A. Berry, of Madisonville, for defendants in error.

REESE, J. This is a suit in trespass to try title, by Charlotte Campbell and others against Mrs. Sallie Gibbs and others, to recover four leagues of land lying in Madison and Walker counties. The land sued for is in two tracts, one being all of a certain grant of four leagues in the name of Gordiano Badilla, lying west of the Trinity river, and the other two-league grant in the name of Badilla. Some of the defendants disclaimed as to all of the land except certain described tracts, as to which they pleaded not guilty and the statute of limitation of three, five, and ten years. Others pleaded not guilty and the statutes of limitation. Some of them

specially denied the validity of the so-called Badilla grants, and alleged that if there had ever been such valid grants the same did not cover or include any land in Madison or Walker counties. Plaintiffs dismissed as to some of the defendants. The case was tried by the court, without a jury. The plaintiffs had judgment on the disclaimers and partial disclaimers of certain of the defendants, and against W. L. Dean, who appeared to have claimed an undivided interest in the Gordiano Badilla grants. Substantially the judgment was in favor of the defendants for the respective tracts to which they asserted title, which covered substantially all of the land sued for. The plaintiffs prosecute error. The trial court filed conclusions of fact and law. The parties will be designated as appellants and appellees.

The appellants claim title under Andrew Dexter, as the owner of the two Gordiano Badilla concessions or grants, which were made by the government of Coahuila and Texas in 1832. The land claimed by appellants to be covered by these grants, in Walker and Madison counties, was afterwards covered by patented locations by the republic and state of Texas, and defendants claim title under these patents. The concession was for 11 leagues, under which was surveyed the following two tracts of land of 4 and 2 leagues, respectively: "Commencing the first corner on the black oak, eighteen inches in diameter, from there south 450 west, 1971 vrs. to the corner of the tract of Valentin Elquezaval; from there continuing the same course with his line, 14,140 vrs. to the River Trinity; passing the same and continuing with the line of the Citizen Jose Maria Musquiz 14,140 vrs. to the second corner; from there south 45 east, 3535 vrs. third corner; from there north 450 east 13,765 vrs. to the Trinity river, passing this and continuing the same course 14,915 vrs. to the fourth corner; from there north 450 east 3535 vrs. to where the survey commenced, containing four leagues. Beginning the first corner up the west margin of the Trinity river where the lower line crosses of a tract survey to the Citizen Jose Maria Musquiz; from there southwest with his line, 15,420 vrs. second corner; from there south 450 east, 3,252 vrs. to the third corner; from there north 450 east 15,329 vrs. to the fourth corner; on the west of the Trinity river; from there up the river to the corner where it was commenced, containing two leagues."

All of the land west of the Trinity river in Madison and Walker counties in the four-league tract is embraced in this suit, and all of the two-league tract, which also lies in Madison and Walker counties. The following agreement as to the facts was entered into by the parties and introduced in evidence:

"(1) That where heirship is a necessary link in the chain of title of any of the par-

ties, such heirship will stand admitted, and proof thereof is hereby expressly waived.

"(2) That subject to rights, if any they have, of the defendants under the statutes of limitation, the plaintiffs and defendant W. L. Dean are the owners of the Gordiano Badilla grant of land, and have such title, if any, to the land in controversy as was granted to Gordiano Badilla or Andrew Dexter, or any one holding title under either of them, and as the same relates to the Gordiano Badilla two-league survey of land referred to in plaintiffs' petition, the defendant W. L. Dean has an undivided one-half interest, and as to that part of the four-league survey referred to in plaintiffs' petition, said defendant W. L. Dean has an undivided <sup>5808/17712</sup>, and the plaintiffs have the remainder of such title, if any, as was vested in the said Gordiano Badilla or the said Andrew Dexter, or any one holding under them, to said tracts of land.

"(3) It is agreed that the plaintiffs may offer in evidence certified copies of the testimonio relating to said Badilla title now on file in the office of the commissioners of the general land office of the state of Texas, subject to the same objections only as might be made to said testimonio itself were it offered in evidence.

"(4) It is agreed that the several defendants claiming under so-called junior patents have such title, if any, as was vested in the junior grantees or patentees of the several tracts of land claimed by the said defendants, respectively, by their answers in this cause."

"(7) It is not intended hereby to agree that the said Badilla grant of land was located so as to cover or include the land in controversy, as claimed by plaintiffs, but the question of the original location of said land, and whether it includes the lands claimed by defendants, is a question to be determined by evidence introduced upon the hearing of this cause, and this agreement is without prejudice, either to the contention of plaintiffs that said Badilla grant of land was originally located as claimed by the defendants (plaintiffs), and is also without prejudice to the contention of the defendants that said Badilla grant of land was not located so as to cover and include the lands claimed by the defendants, respectively.

"(8) It is also expressly provided that this agreement is without prejudice to any of the pleas of limitation set up by the defendants herein, and without prejudice to the rights of the defendants, or any of them, under their respective pleas of limitations and the proof that may be offered in support thereof."

The case turned very largely upon the true location of the two Badilla grants, the appellants claiming that they were located, that part of the four-league grant west of the Trinity river in Madison and Walker counties, and the two leagues almost entirely

in Walker county, with a small portion thereof in Madison county, as shown by the delineation thereof on the present maps of said counties, covering the land in controversy, and the appellees denying that any portion of either grant was located in either of said counties, or covered any part of the surveys of land claimed by them or either of them. Beginning in 1838, by patents issued by the republic of Texas, and continuing until substantially all of the lands covered by the Badilla grants in Madison and Walker counties, as claimed by appellants, were taken up, all of said land has been covered by locations and patents from the republic and state, under which appellees hold title.

The following findings of fact of the trial court are substantially supported by the evidence, and are adopted by us as our conclusions of fact:

"Third. I find that the evidence fails to show that the lands and premises described in plaintiffs' petition were ever in fact located and surveyed on the ground as the place where plaintiffs claim said lands to be located. The evidence wholly fails to show any original marked lines or corners called for in the original field notes contained in the testimonios of title offered in evidence by the plaintiffs; and there was no evidence whatever tending to show that the Valentin Elquezaval grant was located adjacent to the line of the upper Gordiano Badilla grant, as called for in the original field notes of said upper Badilla grant, nor was there any evidence offered tending to show that the Jose Maria Musquiz survey was ever located adjacent to either of the Badilla grants, as called for in the field notes covering said Badilla grants, but there was evidence tending to show that the Valentin Elquezaval and Jose Musquiz surveys were located in different parts of the state of Texas, to wit, on Red river.

"Fourth. I further find that the lands claimed in plaintiffs' petition were never platted in the General Land Office and shown on the official map in use in the General Land Office, covering what is now Walker and Madison counties, until the year 1858, and the evidence fails to show by what authority said lands were then platted on the maps in the General Land Office as being originally located and surveyed where said grants are shown on the maps of Walker and Madison counties in use in the General Land Office from and after the year 1858, and where said lands are claimed to be located by the plaintiffs.

"Fifth. I further find that prior to the year 1858 other locations were made upon valid certificates issued by proper authority, and surveyed upon the very lands claimed by the plaintiffs to be covered by the Badilla grants, and that said locations and surveys were prior to the platting of said grants upon the land office maps of what is now

Madison and Walker counties, and that valid patents were issued by the republic and the state of Texas upon practically all of said locations and surveys.

"Sixth. I find that there has been continuous assertion of title by those holding under said locations and patents emanating from the republic and state of Texas, and including the lands claimed by the defendants in their several answers filed herein, and, on the contrary, the evidence fails to show a continuous and connected assertion of title under the original grants to Gordiano Badilla, or his agent Andrew Dexter, of the lands claimed by the plaintiffs.

"Seventh. I further find from the evidence that the following surveys of land patented by the republic and state of Texas, and which appear to be in conflict with the lands claimed in plaintiffs' petition, were settled on by the original grantees and patentees, and those claiming under the original grantees, more than 50 years ago, to wit: James J. Holcomb survey of 6,636,540 square varas; the B. F. Dyer 640-acre survey; the Wm. Garrett survey of 2,962 acres; the M. G. Clements 160 acres; the Jno. D. Murphy survey of 320 acres; the Christopher Edinburgh survey of 640 acres; the David Davis survey of 640 acres; the S. P. Reeves survey of 320 acres; the Henry L. White survey of 320 acres—and that the following surveys were settled on by the original grantees, or those holding under them, more than 30 years ago, to wit: The Chas. Hill 320-acre survey and the J. D. Baker survey of 160 acres; the John Henry Pierson survey; the John Montgomery survey; the Elizabeth Jones survey; the George Young survey; and the Antonio Herrera one-half league survey.

"Eighth. I further find that the following defendants have shown sufficient actual and adverse possession of the lands claimed by them and described in their respective answers to entitle them to recover under the statutes of limitation as follows: The defendants W. L. Hill, J. A. Elkins, W. A. Sims, B. F. Gibson, under the statutes of limitation of three, five, and ten years; the defendant C. M. Ford under the statutes of limitation of three, five, and ten years; the defendants A. Roundtree, Phil Terrell, Henry Barrett, Alonzo Young, Henry Tucker, and William Tucker under the statutes of limitation of ten years; the defendant M. D. Seay is entitled to recover the first tract of land described in his answer under the statutes of limitation of three, five and ten years, and the tract in his answer described which is neither a part of the J. S. Hunter nor John Spiller survey, under the statutes of limitation of ten years; the defendant R. E. L. Upchurch is entitled to recover the first tract of land described in his answer (being all the land claimed by said defendant in conflict with the lands described in plaintiffs' petition) under the statutes of

limitation of three, five, and ten years; the defendant Dan Manning is entitled to recover the lands described in his answer under the statutes of limitation of five and ten years; the defendant W. L. Dean is entitled to recover the 160 acres described in his answer under the statutes of limitation of five and ten years; the defendant J. A. Herring is entitled to recover under the statutes of limitation of three, five, and ten years; the defendant Mrs. Sallie E. Gibbs is entitled to recover the third, fourth, eighth, and ninth tracts described in her answer under the statutes of limitation of three, five, and ten years, and tract No. 6 in her said answer described, under the statutes of limitation of three and five years, and tracts Nos. 7 and 12 in her answer described, under the statutes of limitation of three and five years.

"I further find that all the defendants hold regular claims of title from and under the republic and state of Texas to the several tracts of land as claimed by them, respectively, and in their said answers described."

[1, 2] The first assignment of error goes to the heart of the case by attacking the conclusion of fact embraced in the third finding, as above set out, as to the location of the two Gordiano Badilla surveys, west of the Trinity river. Under this assignment appellants present the proposition that the evidence conclusively shows that the said grants were located upon the lands claimed by them, and embrace and include the lands claimed by appellees. In passing upon this assignment it will only be necessary to determine whether there is sufficient evidence in the record to authorize the finding complained of. After a careful examination of the evidence we have concluded, as shown by our conclusions of fact, that this conclusion of the trial court is sufficiently supported by the evidence, and have adopted the same.

There was evidence sufficient to show that these two surveys, although made in 1832, were never delineated on any map of Madison or Walker county until 1858. A. H. Wooters, who seems to have been interested in them, had a survey made in 1858, locating the surveys where appellants claim them to be, and it is fairly to be inferred from all the evidence that it was not until after this that they were so marked or delineated on the maps of these counties. Witnesses testified that no trace could be found on the ground of any line older than the one made by these surveys of 1858. Persons living on, or in the neighborhood of, the land testified that they had never heard of a Badilla grant, as covering the lands sued for, until about 10 or 12 years before this suit was filed (in 1911). The field notes of the four-league grant call to begin at the first or northeast corner, east of the Trinity river, and in Houston county, at a black oak 18 inches in diameter. It is not surprising that no trace

could be found, after this length of time, of this witness tree. From this point the field notes call to run 1,971 varas to the corner of the tract of Valentin Elquezaual. This was on the east side of the river in Houston county. Continuing, the line runs 14,140 varas to the Trinity river, crosses the same and continuing with the line of the citizen Jose Maria Musquiz 14,140 varas to corner. This makes two calls on the north line of the four leagues for older surveys. The field notes of the two leagues, lower down on the Trinity, and all except a small portion on the north side, which is in Madison county, lying in Walker county, call to begin "on the west margin of the Trinity river where the lower line of a tract surveyed to citizen Jose Maria Musquiz crosses the river." The call for this tract and the Trinity river as the eastern boundary are the only calls except those for course and distance. The testimony showed that there were no such surveys as the Elquezaual or the Musquiz anywhere in the neighborhood of either of the Badilla surveys, either in Walker, Madison, or Houston counties. There was nothing to indicate where either of these surveys was, or ever had been, located. On the contrary, the evidence tended to show that no such surveys had ever been shown by the records of the General Land Office, in either of these counties. These records showed or tended to show that the only survey in the name of Valentin Elquezaual was in Red River county, and the only reference to a Jose Maria Musquiz survey locates it on the Trinity river, above the old San Antonio road, and 10 or 15 miles above the Badilla four leagues as located by appellants. The evidence with regard to these Musquiz and Elquezaual grants is very vague and indefinite, but it is sufficiently clear that, so far as the location of these grants is connected with either of the Badilla grants, they rebut the inference that the last two grants were located as claimed by appellants, or touched or included any of the lands in controversy. Referring to what was shown about the Musquiz grant, M. M. Kenney, Spanish translator in the General Land Office and custodian of old Spanish records, testified that there was among these records a title in the name of Jose Maria Musquiz, and there was a pencil memorandum on the title papers as follows: "Five leagues on both sides of the Angelina above the San Antonio road, adjoining above the Gordiano Badilla." It is quite likely that the reference to the Angelina river was a mistake, and intended for the Trinity. It does appear that the Musquiz survey, called for in the field notes of both the Badilla grants, lay on both sides of the Trinity river. This memorandum on the title of the Musquiz above referred to is, we think, of much significance, when we consider the hazy condition of the evidence, as to the location on the ground of the Badilla surveys, when considered in connection with parts of the title

of the Badilla grant, introduced in evidence by appellants, as the foundation of their title. The application for the concession by Dexter designates the lands desired as a part of the vacant lands which front on the Trinity river, above the road that goes from this town (Nacogdoches) to San Antonio, and part in the neighborhood of the Neches river. The acting alcalde, who received the petition, in making his order thereon states: "I, the alcalde commissioned, having gone with the interested parties, with the surveyor appointed and witnesses of assistance, to the Trinity river, on the road which goes from this town to San Antonio de Bexar, and having made upon the left margin of said river measurements," etc. These statements are with reference to the four leagues, and would tend to corroborate the other evidence to show that this grant was located above the San Antonio road. The field notes of the two-league grant also call for a Musquiz grant, whose lower line was the upper line of this survey, while the lower line of the Musquiz grant called for in the four league was also upper line of the four leagues, from which it would appear that there were two Musquiz surveys. It is further to be noted that the two leagues follow in the title the four leagues, and that the field notes of the two league call, "Beginning the first corner up the west margin of the Trinity river," which would indicate that the two leagues were located above the four leagues on the Trinity, while of the two surveys, as claimed by appellants, the two leagues lie below the four leagues on the Trinity. It was shown that the old road from Nacogdoches to San Antonio de Bexar crossed the Trinity river more than ten miles above the upper of these two surveys, if located as claimed by appellants.

Now while this evidence does not show with any definiteness and certainty where, in fact, the two Gordiano Badilla surveys were located, it certainly cannot be said that it even tends in any degree to indicate that they were located where appellants claim, or so as to include any of the lands claimed by appellants.

But it was further shown that these surveys were never delineated on any map of Madison or Walker counties in use in the General Land Office until 1858, and to show that they were not recognized in the General Land Office as located where appellants claim, the entire body of lands covered by both of them has been taken up by patented locations, recognized as valid by the state. The patents issued for various tracts and at different dates extending from 1838 to 1858, and one tract in 1894, about 30 surveys in all. This shows that during all of these years this body of land was treated as vacant land. The grantees and those holding under them have, some of them, been living upon the land for 50 years with no knowledge or information on the part of the owners, until the be-

ginning of this litigation, that the land, or any part of it, was covered by the Badilla grants. It is a further circumstance, slight, it is true, that as claimed by appellants the upper line of the two leagues crosses the Bedias creek twice, and the lower line of the four-league survey crosses it once after crossing the Trinity river. It was shown that this was a well-known stream of considerable size, and it was in testimony that it was almost the universal custom, in making surveys, to call in the field notes for the crossing of streams of this size. This creek was not called for in the field notes of either survey. Taking this circumstance for what it is worth, it corroborates the theory that these surveys were originally located several miles above where appellants claim them to be.

[3] The only evidence of any importance in the record which sustains appellants' contention is the following: "It was shown that the field notes of several patented surveys, in both Madison and Walker counties, call for some of the lines of these Gordiano Badilla surveys, and these surveys are so located on the map as to show that the lines called for are the same as claimed by appellants. It was shown that prior to 1858, when the Badilla surveys were first delineated on the maps of Walker and Madison counties, a few surveys were made in those counties, and the field notes returned to the General Land Office in which the lines of the Badilla surveys, one or the other of them, were called for, and that, according to these calls, the lines of the Badilla grants can be located as claimed by appellants. There were several of such surveys in Houston county, in which about one-half of the four-league grant, according to the field notes introduced by appellants, lay, some before and some since 1858, and several made in Madison and Walker counties calling for the Badilla surveys made since 1858." We are not disposed to minimize the strength of this testimony as tending to show a location of the Badilla grants in Madison and Walker counties, corresponding to the location claimed by appellants. We do not think, however, that it is sufficient, when the evidence hereinbefore referred to is considered, to compel the conclusion on the part of the trial court that the grants were so located and were valid. In so far as these calls show or tend to show a recognition by surveyors of the location of the lines called for, it must not be lost sight of that the state and the republic through the General Land Office was all of the time recognizing locations made on this land, and issuing patents therefor. This can only be accounted for upon another theory which finds support in the evidence. It was shown that the Badilla grant of 11 leagues was located twice; once in 1832, by Andrew Dexter, attorney in fact for Badilla, and again in 1833 by Adolphus Sterne and Roberts in

to be recognized as valid in the General Land Office. The original of the grant or concession is attached to the papers of the Red River or Sterne title, while only a copy is so attached to the Dexter title. For some unexplained reason, it may be that with the consent of all parties interested, the locations on the Trinity were abandoned and the grants located in Red River county. Whether this be true or not does not affect the question presented by the assignment of error under consideration. Taking all of the evidence on this point in the entire record, we are unable to say that the trial court erred in the finding of fact, set out in the third paragraph thereof, that the evidence fails to show such location of the Badilla grants as would include any of the lands sued for. If this is true, appellants' case fails. The burden was upon them to establish this fact. This disposes of the first assignment of error, which is overruled. The second proposition under the assignment is not germane to the assignment. The court's finding of which complaint is made does not involve the question presented by the proposition.

If appellants failed to establish their right to recover any of the land sued for, the other assignments of error become immaterial. They can be disposed of without much discussion.

The second, third and fourth assignments of error complain of certain findings of fact on the ground that they are not supported by the evidence. We cannot undertake, in this opinion, to set out the evidence which supports and justifies these findings. We have examined all of the evidence with care before making our own conclusions, as stated. In adopting the trial court's findings of fact we disposed of these assignments, which are overruled.

[4] The other assignments of error relate to the trial court's conclusions as to the title of appellees under the statutes of limitation of three, five, and ten years. The court found that some of appellees had established their title under the three-year statute of limitation—that is, that they had been in possession of the tracts claimed by them for three consecutive years—and that they had title or color of title from the sovereignty. To establish their title from the sovereignty, appellees relied upon that part of the agreement hereinbefore set out wherein it was agreed that the several defendants claiming under so-called junior patents have such title, if any, as was vested in the junior grantees or patentees of the several tracts of land claimed by the said defendants, respectively, by their answers in this case. The appellees set up title under the several original grantees or patentees to whom the several tracts had been patented by the republic and state of Texas. The purpose of the agreement was to relieve appellees of the burden of establishing the consecutive links

in their respective chains of title, by an admission that they had such title. The case under the admission stands as though each of the appellees had established, by a regular unbroken chain, his title from the original grantee under whom he claimed. This satisfied the requirements of the three-year statute as to title or color of title from the sovereignty.

[5, 6] But it is contended by appellants that the land had been granted to Gordiano Badilla by a former sovereignty, and had never been subject to the sovereignty of the republic or state of Texas, and that therefore (1) the provisions of the three-year statute of limitation as to title or color of title from the sovereignty is not met by showing such title under the republic or state of Texas, and (2) that, if the provision of the statute were so construed as to meet this case, it was beyond the power of the Legislature thus to divest the title under the former sovereignty. Neither of these contentions is sound. The state has always shown a religious regard for valid titles emanating from any former sovereign. When such grants are placed upon the same footing as those made by the state herself, it certainly cannot be said that any rights, whether originating by treaty or under the Constitution or laws of this state, have been violated. There is nothing in the nature of those rights to protect them from the operation of the statutes of limitation adopted for the settlement of land titles. The "sovereignty of the soil" in the three-year statute meant, when the statute was first adopted in 1841, the then existing sovereignty. The change from the republic to the state wrought no change in this sovereignty except to transfer it to the state, the present sovereign. Any grant or patent by the state of any part of the lands embraced in the Badilla grants, if these grants had been valid grants of these lands, would have been void in no other sense, and certainly no further than would have been void patents by the state of lands covered by prior valid patents from the state. In either case the state would be without power to convey title to lands which had previously been disposed of by valid grants of a previous sovereign or patents emanating from itself.

[7] But in the case of junior patents, upon lands previously titled by the state, it seems to be well settled that such junior patentees or persons holding title under them hold under the sovereignty of the soil, and may prescribe under the statute of limitation of three years as against the holder under the senior patent. *Whitehead v. Foley*, 28 Tex. 14; *Smith v. Power*, 23 Tex. 29; *League v. Rogan*, 59 Tex. 431; *Galan v. Town of Goliad*, 32 Tex. 776; *Land Mortgage Co. v. State*, 1 Tex. Civ. App. 616, 23 S. W. 259.

We have concluded that the court's conclusions of fact with regard to the claim of

title by appellees under the statutes of limitation were supported by the evidence, and will not be disturbed. The remaining assignments of error have been examined and our conclusion is that none of them presents any ground for reversal of the judgment, even if material. None of them is, in fact, material in view of the court's findings, approved by us, that appellants failed to establish the one fact absolutely essential to their right to recover; that is that, assuming the validity of the Badilla grants, they are not shown to cover any part of the lands sued for. Finding no grounds for reversal, the judgment is affirmed.

Affirmed.

On Motion for Rehearing.

In plaintiffs in error's motion for rehearing attention is called to what is shown to be an erroneous statement as to the facts. It does not appear who made the survey of 1858 of this grant. The survey which was afterwards made by A. H. Wootters, or in which he assisted, was made in 1888 or 1889. Plaintiffs in error are in error in saying that it is stated we found as a fact that A. H. Wootters testified that no trace could be found on the ground of any older survey than the one of 1858. The opinion does not so state. The errors corrected are immaterial.

#### YOUNG et al. v. BANK OF MIAMI.

(Court of Civil Appeals of Texas. Amarillo. Oct. 25, 1913. On Motion for Rehearing, Dec. 13, 1913.)

#### 1. GUARANTY (§ 82\*)—ACTION AGAINST GUARANTORS—PARTIES.

Where defendants guaranteed certain assets of a bank on transferring the bank and its assets to plaintiff, the contract of guaranty being an independent undertaking, the principal debtors were not necessary parties to a suit on the guaranty.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 97; Dec. Dig. § 82.\*]

#### 2. GUARANTY (§ 82\*)—PARTIES—RIGHT TO SUE.

Where the assets of a firm operating a private bank were transferred to another partnership engaged in operating a new bank, and the latter contracted to collect certain paper, and, if it could not be collected, then defendants, the transferring firm, were to pay the same on transfer of the judgment therefor, and had the option to pay the same in cash and take a transfer thereof, and to designate the attorney who should conduct any suit, the suit on the guaranty was properly brought in the name of the new banking firm.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 97; Dec. Dig. § 82.\*]

#### 3. GUARANTY (§ 87\*)—ACTION—VARIANCE.

On the transfer of a bank's assets to plaintiffs, a partnership operating a new bank, defendants, the transferrors, guaranteed the collection of such assets, and in an action on the guaranty the petition alleged that plaintiffs were to turn over the paper not collected to an attorney designated by defendants for collection, and defendants were to sue on all of the paper so turned over and collect by execution. The contract for transfer of the assets provided that the new bank was to collect the same by demand or judgment, and, if not so collected, then defendants would pay the debt on the transfer of the judgment. Defendants also had the option, before the paper was placed in the hands of an at-



torney, to pay the same in cash and take a transfer, reserving the right to designate the attorney who should conduct the suit. *Held*, that the gist of the action was whether defendants had breached their contract of guaranty, and though it was alleged, as part of the breach, that the attorney so selected had refused to prosecute the claims to judgment, there was no material variance between the contract and the petition.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 101; Dec. Dig. § 87.\*]

#### 4. GUARANTY (§ 70\*)—PERFORMANCE OF CONDITIONS—REASONABLE TIME.

Where a contract, guaranteeing certain of the assets of a bank transferred to plaintiffs, provided that all paper due at the signing of the contract should be collected by plaintiffs in 30 days, or suit brought thereon, and, if prompt payment was not made, the paper should be placed in the hands of an attorney for suit thereon, but it was further provided that time was not of the essence of the contract, it was sufficient if uncollected paper was placed in the hands of an attorney within a reasonable time, and hence the guarantors were not relieved from liability because the uncollected assets were not delivered to the attorney within 30 days.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 78-80; Dec. Dig. § 70.\*]

#### 5. GUARANTY (§ 36\*)—ASSETS OF BANK—CONTRACT—BREACH—MEASURE OF DAMAGES.

Where defendants, on transferring the assets of a bank to plaintiffs, a new partnership operating a new bank, guaranteed the collection of the face value of certain notes and overdrafts transferred, plaintiffs contracting to collect the same by demand or suit by an attorney of defendants' selection, and, if this was impossible, defendants to pay the same and accept a transfer of the assets so uncollected, defendants having repudiated the agreement, plaintiffs were not entitled to recover the face value of the notes and overdrafts so uncollected, in the absence of proof that the principal debtors were insolvent, but the measure of plaintiffs' damage was the difference between the face value of such indebtedness and its actual value.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 38-45; Dec. Dig. § 36.\*]

#### 6. GUARANTY (§ 90\*)—EVIDENCE.

In an action on a guaranty, made by the owners of a private bank, to a partnership, consisting of one of their number and others who were to operate a new bank, that certain of the assets of the bank transferred were collectible, evidence of one of such partners as to representations made by the continuing partner to him as to the collectibility of the paper in the bank was admissible.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 103; Dec. Dig. § 90.\*]

#### 7. GUARANTY (§ 77\*)—BREACH — WAIVER OF PRECEDENT CONDITIONS.

Where defendants repudiated a guaranty of collection of certain of the assets of a bank and declared that they would no longer be bound thereby, plaintiffs were entitled to accept such declaration as final and as a waiver of all conditions precedent to suit, to be performed by them, and to sue at once for breach of the contract.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 87-90; Dec. Dig. § 77.\*]

Appeal from District Court, Hemphill County; C. E. Gustavus, Special Judge.

Action by the Bank of Miami against D. J. Young and others. Judgment for plaintiff, and defendants appeal. Affirmed.

H. E. Hoover, of Canadian, and Ewing & Dial, of Miami, for appellants. B. M. Baker, and G. O. McCrohan, both of Canadian, and J. A. Holmes, of Miami, for appellee.

HUFF, C. J. The statement of the allegations in plaintiff's petition by appellants is adopted by us, as the appellee concedes that it is substantially correct. The statement of exceptions and pleas of defendants will not be made, as we think our opinion will otherwise disclose the issues made thereby:

"This suit was filed in the district court of Hemphill county, on the 20th day of December, 1912, by T. M. Cunningham, L. B. Robertson, W. S. Martin, T. J. Boney, and others, a partnership engaged in a general banking business at Miami, Tex., under the firm name of the Bank of Miami, against D. J. Young, Robt. Moody, Thos. F. Moody, and W. S. Martin. The plaintiff alleged: That on and prior to the 21st day of September, 1912, the defendants were engaged in a general banking business as partners, at Miami, under the firm name of the Bank of Miami, and on that day the plaintiff organized the partnership and purchased the banking business of the defendants, and continued the business under the firm name of the Bank of Miami, and that the purchase included the banking business, real estate, books, notes, accounts, and overdrafts of the defendants. That a written contract was entered into between the parties, which included an obligation on the part of the defendants to guarantee the payment of all notes, overdrafts, accounts, and other paper due at the time of the sale to the Bank of Miami, but said guaranty being given in consideration of the purchase price paid by plaintiff for said banking business and under such conditions as follows: That all the notes, overdrafts, etc., due and to become due the bank were to be collected by the newly organized bank, in so far as collections could be made by notice and demand on the debtors; that, if same could not be so collected, plaintiff was to turn over the paper not collected to an attorney, selected by defendants, for collection by suit, and defendants were to sue on all of said paper so turned over and prosecute to judgment thereon promptly and collect by execution. If collection could not be thus made by execution, then defendants were to pay plaintiff all the money due on the paper not so collected. That thereafter they requested the defendants to designate an attorney, and the defendants designated H. E. Hoover, and thereafter they presented to said Hoover many of the notes, accounts, and overdrafts, and requested him for the defendants to bring suit upon and collect the same. That Hoover, acting for the defendants, accepted certain of the overdrafts and notes for collection, but rejected many others, and turned them to the plaintiff and notified the plaintiff the de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendants would not undertake the collection of the same and denied all liability and responsibility thereon under the contract. That, by their act in refusing to take charge of said collections and refusing to put same into judgment and denying liability thereon, the defendants broke their contract with plaintiff, and plaintiff alleged that, pursuant to the terms of said contract, it presented to said attorney certain overdrafts and notes which are set out in the pleadings; that the attorney accepted all of said notes and overdrafts so presented for collection except the note of G. C. Nickel, Geo. Nickel, H. C. Harris, five notes of Tom Cook, and the note of J. G. Ramsey, and the note of W. G. Crawford, and all of the overdrafts, except the overdraft of S. M. Bird, J. G. Ramsey, and H. E. Ratloff (these notes and overdrafts refused being the only items in controversy in this suit). In the seventh paragraph of the petition the plaintiff charges that the defendants, by breaching the contract and denying liability on said notes and overdrafts, had damaged plaintiff in the sum of \$25,000, and prayed for judgment for the amount due on the notes and overdrafts, attorney's fees and interest, and, if that should not be allowed, then it prayed for judgment for the amount due on all overdrafts, said notes, attorney's fees, and interest shown to have been rejected by the defendants, and, if same should be rejected, then the decree of the court fixing the liability of defendants; prayed for a writ of mandamus for costs of suit."

The trial court made the following findings:

#### "Findings of Fact.

"First. I find that on and prior to September 21, 1912, defendants D. J. Young, Robert Moody, Thomas F. Moody, and W. S. Martin were the owners of a banking business, located at Miami, Tex., conducted by them as copartners, under the firm name of the Bank of Miami, Tex., and will hereinafter be referred to as the 'Old Bank.'

"Second. That on September 21, 1912, said defendants sold said banking business to the defendant W. S. Martin and his associates, being the plaintiffs named in the petition, who continued to conduct the said banking business as copartners using also the firm name 'The Bank of Miami, Texas,' and will be hereinafter referred to as the 'New Bank.'

"Third. That the sale of said banking business by the old bank to the new bank was evidenced by a written contract, of date September 21, 1912, with two supplements thereto, admitted in evidence on the trial, and that said contract fixed the rights, duties, and liabilities of all of the parties.

"Fourth. That when said contract was entered into there was owned and in possession of the old bank, as a part of its assets, the following notes and overdrafts, which were owing to it, to wit: Note of H. C. Harris, for

\$206, dated July 6, 1909, due 90 days; interest 10 per cent. from maturity, bearing a credit of \$117, dated September 22, 1911. Note of G. C. Nickel and Geo. W. Nickel for \$51.25, dated March 3, 1910, due 90 days; interest 10 per cent. from maturity, bearing credit of \$20, dated October 3, 1910. Note of W. G. Crawford for \$37, dated August 15, 1910, due 90 days; interest 10 per cent. from maturity, bearing credit of \$2.43, undated; another credit, interest paid to January 20, 1911; another credit of \$15 dated September 13, 1911; and another credit 'interest paid to January 4, 1912.' Four notes of Thomas Cook, one for \$694.66, one for \$500, one for \$1,000, and one for \$1,500, all dated December 27, 1911, due six months after date, bearing interest at the rate of 10 per cent. after maturity, and one note of Thomas Cook for \$1,650, dated September 1, 1912, due one day after date, bearing interest at 10 per cent. from date. Overdraft against S. M. Bird for \$2,601.25 and overdraft against J. G. Ramsey for \$214.29. And that said notes and overdrafts are the only items involved in this suit, and were included within the terms of the contract of September 21, 1912.

"Fifth. That the evidence introduced did not show that the old bank held any security for the payment of said notes and overdrafts, except the Thomas Cook notes, upon which obligations it held collateral as follows: Two notes from Fred D. Kline and Ulricka Kline, payable to the order of Andrew E. Larson, indorsed in blank, without recourse, by the latter, and also indorsed by Thomas Cook, dated May 6, 1910, one for \$1,000 due on or before May 6, 1913, and the other for \$2,700, due on or before May 6, 1915, both bearing interest at 7 per cent. from date, and were secured, as the testimony showed, by a mortgage on some land in the state of Oklahoma, upon which there were some prior incumbrances of approximately \$4,000, and that the land was subsequently sold at sheriff's sale under foreclosure of one of the prior incumbrances; and four mortgages in the form of deeds executed by Thomas Cook to W. S. Martin for some town lots in Hereford, Tex.; and a tract of land in Castro county, Tex., containing 327 acres.

"Sixth. That the new bank, after its purchase of the banking business and the execution of the contract of September 21, 1912, and within 30 days, in substantial compliance of said contract, attempted to collect said notes and overdrafts, but failed to do so, and such indebtedness is still owing and unpaid.

"Seventh. That the new bank, in substantial compliance with the contract of purchase and within a reasonable time, and without breach or waiver of its rights under said contract, requested D. J. Young to select and designate an attorney to sue upon said notes and overdrafts, and collect them by judgment and execution if possible, with the end in view of complying with the terms of said contract of purchase, and holding the old

bank liable for the ultimate payment of all of said indebtedness, in accordance with the terms of said contract.

"Eighth. That in pursuance of the request of the new bank, for the selection and designation of an attorney, the defendant D. J. Young, acting for the old bank, under the terms of said contract, did on November 11, 1912, select and designate H. E. Hoover, Esq., an attorney of Canadian, Tex., to handle said indebtedness, and notified the new bank thereof, which was in substantial compliance with said contract.

"Ninth. That the said H. E. Hoover accepted the designation of himself, and thereupon and thereby became the agent and representative of the old bank to act for them in the premises, and defendants are bound by his acts in reference to the indebtedness mentioned.

"Tenth. That correspondence was conducted between the new and old banks during the months of October and November, 1912, prior to November 19, 1912, as shown by the letters offered in evidence; some of the letters referring to some of the items of indebtedness mentioned, but not to all of them.

"Eleventh. That on November 14, 1912, the old bank called upon the new bank to place in hands of H. E. Hoover all of the indebtedness then due, which the new bank would not release from the guaranty contained in the contract of September 21, 1912, and in pursuance to such request the new bank on or about November 19, 1912, delivered to the said H. E. Hoover a number of notes and overdrafts, including the notes and overdrafts involved in this suit.

"Twelfth. That in making delivery to H. E. Hoover, on or about November 19, 1912, of the notes and overdrafts involved in this suit, the new bank was acting in substantial compliance with the terms of the contract of September 21, 1912, and within a reasonable time, and the evidence offered in behalf of the old bank was not sufficient to show that there had been a breach or waiver, by the new bank, of the terms of said contract as to such items of indebtedness.

"Thirteenth. That the said H. E. Hoover, acting for the old bank, on or about November 21, 1912, returned the items of indebtedness involved in this suit to the new bank, and declined and refused to carry out the terms of the contract as applied thereto, as evidenced by the letter of said H. E. Hoover to W. S. Martin, cashier, dated November 21, 1912, read in evidence on the trial of this case, which letter I find to be a repudiation of the contract and denial of any and all liability on the items involved, which act has been fully ratified by the old bank.

"Fourteenth. I further find that the testimony offered by the old bank to show that there was loss of security, in the sale of the land in Oklahoma under prior incumbrances, was insufficient to show there had been a loss of security such as would release the old

bank from the guaranty as to the Thomas Cook notes.

"Fifteenth. I further find that the new bank, after the return, by the said H. E. Hoover, of the items of indebtedness involved in this suit on November 21, 1912, has not instituted suit upon any of them or taken any further action to enforce collection."

By clause 4 and the supplement to the contract, the Moodys and Young guaranteed  $10/20$  of the notes and overdrafts of the old bank, as shown by the books on the 21st day of September, 1912, "in case of failure to collect said notes, as hereinafter indicated." All notes and overdrafts guaranteed by the old bank were to be collected by the new bank. Demand for payment was to be made immediately upon the indebtedness becoming due, and, if not promptly paid, the paper was to be placed in the hands of an attorney for collection by suit and suit to be immediately instituted thereon. The attorney was to be selected by the old bank; suit was to be pressed to judgment as soon as possible; and, when judgment was obtained, execution was to be issued; and, if the money could not be made by execution, then the old bank was to pay the same upon a due transfer of the judgment to the parties composing the old bank. By the contract the old bank transferred to the new the entire property of the Bank of Miami, including the banking house and grounds, all bills, notes, and other property of whatsoever kind or character; the price was the capital stock, \$25,000, surplus \$15,000, and the net earnings of the business from January 1, 1912, to date of delivery of the property, and \$2,500 bonus and premium.

[4] By exceptions and plea in abatement, the appellant sought a dismissal of the cause for the reason that the principal obligors in the notes and overdrafts were not made parties, and no excuse in law was alleged, authorizing the suit against the guarantors, without joining the principals, on the ground that the appellants in the contract declared on were only sureties or guarantors. "The guarantor, being bound by a separate contract and only collaterally liable, cannot be joined in the same suit with the principal." Brandt, Surety & Guarantor, § 2; Shropshire v. Smith, 37 S. W. 174, and Id., 37 S. W. 470; Page v. White Sewing Machine Co., 12 Tex. Civ. App. 327, 34 S. W. 988. The contract of guaranty in this case is an independent undertaking on the part of the guarantors. They are not bound by the same instruments on which the principals are bound. This suit was upon an alleged breach of the contract of guaranty and for consequent damages. We are therefore of the opinion that it was not necessary to join the principals with the guarantors in this suit, and that there was no misjoinder of causes of action. We do not think articles 1204, 3818, and 3819, Sayles' Civil Statutes, apply to

cases of this character. All assignments complaining of the court's action in overruling exceptions and in not sustaining the plea of abatement, on the grounds above specified, are overruled.

[2] We think the terms of the contract clearly indicate that the suit should be brought in the name of the new bank. The paper was transferred to the new partnership, and it was to collect the same by demand or on a judgment and execution, and, if not so collected, then the old bank would pay the debt upon the transfer of the judgment. By the eighth provision, the old bank had the option, before the paper was placed in the hands of an attorney for collection, to pay the same off in cash and take a transfer; in the fifth paragraph the old bank reserved the right to designate the attorney who should conduct the suit. The evidence would warrant the court in finding that the appellants had the right to direct the bringing of the suit or to prevent one being brought.

[3] A perusal of the correspondence between the parties is at least suggestive that the parties to the contract so interpreted it. The necessity of bringing the suit under the terms of the contract was left to the option of the old bank. Doubtless the suit should have been prosecuted in the name of the new bank, yet both parties were vitally interested in the collection of the indebtedness under the contract. Appellants objected to the introduction of the contract in evidence, because there was a variance between the allegations of the terms of the contract declared on and in the contract offered in evidence. The allegation in the petition that "plaintiff was to turn over the paper not collected to an attorney selected by the defendants for collection by suit, and defendants were to sue on all of said paper so turned over, and prosecute to judgment thereon promptly, and collect by execution," we think presented no material variance in the allegation and the contract. Whether the suit should be brought was largely in the hands of the defendants, and the parties, as above suggested, apparently at least so interpreted the contract; but, if there was a variance from the strict letter of the contract, it was immaterial and would not affect the rights of the parties in this suit. The real question at issue was whether appellants breached the contract. True, it is alleged as a part of the breach that the attorney for appellants refused to take charge of the collections and prosecute to judgment; but the gravamen of the breach alleged is a denial of liability and responsibility thereon under the contract. We think there was no error in admitting the contract in evidence.

The court found from the evidence before him that appellants repudiated the contract and denied any and all liability on the contract involved, which act was afterwards ratified by the old bank. It is urgently con-

tended there was no evidence supporting this finding. We are inclined to believe there is testimony supporting the findings of the trial court; but, as the case will be reversed, we will refrain from discussing it.

[4] Appellants appear to have based their denial of liability on the contract, on the ground in part that suit was not brought in 30 days after the date of the contract. The seventh paragraph of the contract stipulates that all paper due at the signing of the contract shall be collected in 30 days or suit brought thereon in the same manner as mentioned in paragraph 5. The fifth paragraph stipulates that, if prompt payment is not made, it shall be placed in the hands of an attorney and suit immediately instituted. The thirteenth provision declares the terms of the contract are to be complied with and fully settled and terminated as soon as possible, taking into consideration the conditions to be met consistent with good business and the best interest of all concerned, "but it is expressly understood that time is not the essence of this contract." We have concluded, under the provisions of the contract, that appellants were not justified in breaching the contract, because of the thirty day clause; but, under the provisions of the contract, the papers should be placed in the hands of the attorney within a reasonable time, taking into "consideration the conditions to be met," and that it was not the intention of the parties to make time the essence of the contract. "If a party desires to make time of the essence of a contract, he should leave no doubt of the intention of the contracting parties so to make it." *Kirchoff v. Voss*, 67 Tex. 320, 3 S. W. 548.

The appellants assail the findings of the court, to the effect that the appellee was acting in substantial compliance with the terms of the contract and within a reasonable time, in requesting Young to designate an attorney to bring suit, and in placing the paper in the hands of the attorney so designated, and that in so doing it did not breach or waive its right under the contract, because appellants assert the facts did not warrant the finding. We overrule all assignments bringing into question the findings of the court on this point.

[5] As seen from the above, we do not believe appellants were justified in renouncing liability. Having done so, what are the rights of the respective parties? Appellee, upon the breach, could sue for damages. The appellants, by the twenty-first assignment, assail the judgment of the court in holding that appellee might sue for damages for such breach and were entitled to recover thereunder the face value of the notes and overdrafts sued upon. The trial court, in his conclusions of law, held appellee is "entitled to recover, as measure of damages, the amount due on each of said notes, with interest thereon as stipulated in said notes, to the date of judgment, and the amount of

the overdrafts on September 21, 1912, with interest thereon to the date of judgment, at the rate of 6 per cent. per annum, and have accordingly rendered the judgment." The pleadings do not allege that the parties executing the notes or owing the overdrafts were insolvent, or that the debts involved in this suit were valueless or noncollectible. The evidence does not show such to be their condition. The trial court does not find such to be the fact. Appellees allege and prove a breach of the contract and ask for damages for the breach. The appellants deny their liability on the guaranty, in effect announcing they would not take the indebtedness after it was reduced to judgment and pay for it. Upon the repudiation of such executory agreement by appellants, the appellee could have made its choice between the two courses open to it, but can neither confuse them together nor take both. Appellee was entitled to recover the damages which it sustained from the breach alleged, which in this case perhaps was the face value of the indebtedness. This, however, was subject "to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

When appellants renounced liability, the appellee in effect agreed to such renunciation, and was therefore remitted to its action for damages. In other words, they retained the indebtedness as their property and did not hold appellee to the contract to pay for the same after judgment. Whatever that indebtedness was worth was not a loss. If it was collectible, then the indebtedness was not a loss, and no damage resulted therefrom. By the judgment of the court, appellee recovered the face value of the debt, with interest, and may still retain the indebtedness itself and recover on it, if there is security, or if the parties or any of them are solvent. For such amount which may be collected, appellee is not damaged in that sum, whatever it is. The pleadings and evidence should not only show a breach, but it must also show the damage. As we understand the record in this case, that is not shown. *Greenwall v. Markowitz*, 97 Tex. 479, 79 S. W. 1069, 65 L. R. A. 302. In the above case, Judge Williams, speaking for the Supreme Court, said: "The following statement of the principles governing such cases in *Frost v. Knight*, L. R. 7 Exch. 112, has commanded the acceptance of most of the text-writers and courts in England and America: 'The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour*, and *The Danube & Black Sea v. Bowden*, *Reld v. Hoskins*, and *Barwick v. Buba*, on the other, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed,

and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring an action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.' When the promisee adopts the latter course, treating the contract as broken, and himself as discharged from his obligations under it, he resolves his right into a mere cause of action for damages. He is no longer concerned with the disposition which the promisor may make of the subject-matter of the contract."

The contract of guaranty, as we interpret it, is that the indebtedness is collectible by law. The burden in such case is on the plaintiff to show the noncollectibility of the indebtedness. *Brandt, Suretyship & Guarantor*, §§ 111-113; *Evans v. Bell*, 45 Tex. 555. If there is any presumption to be indulged in, it should be presumed that the debtor will and can pay his obligation, and, in the absence of proof to the contrary, that the appellee can and will collect the indebtedness declared upon. If they do so, then they have lost nothing, in so far as the debts are concerned, and are not damaged in that sum by the breach of the contract. The appellee cites us to the case of *Young v. Dalton*, 83 Tex. 497, 18 S. W. 879, as authority sustaining the measure of damages adopted by the trial court. In that case the contract and breach stipulated for the payment of a note—the contract price of the cattle. This the purchaser failed to do. The court held that the aggrieved party could sue for the contract price at once upon the breach, and that the measure of damages was the amount of the note agreed upon or the contract price. The guaranty in this case is collection—not payment. When the contract was breached, the damages then recoverable are to be measured by the contract. Such indebtedness not collectible would ordinarily measure the appellee's loss or damage. We think the court was in error, under the pleadings and evidence in this case, in fixing the measure of damages at the amount due on the notes and overdrafts. The measure of damages, in our opinion, was the difference between the face

value of the indebtedness and its actual value to be ascertained from the evidence.

[6] We are inclined to think the trial court was in error in excluding the offered testimony of Young, as to certain representations made by Martin to him, with reference to the collectibility of the paper in the bank. We shall content ourselves by referring to the authorities cited by appellants. *Collinson v. Jefferies*, 21 Tex. Civ. App. 653, 54 S. W. 28; *Byers Bros. v. Maxwell et al.*, 73 S. W. 437; *Griswold v. Hazard*, 141 U. S. 280, 11 Sup. Ct. 972, 35 L. Ed. 679; *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731. As to whether Young was misled or ought to have known the condition of the bank paper, or did know, will be determined after hearing all the evidence by the court or jury trying the case. If there had been no other error, in the present condition of the record, we would not have reversed the case; but, in view of another trial, we express our opinion on the admissibility of the evidence offered and rejected. The twelfth assignment of error is therefore sustained.

[7] We regard the findings of the trial court, to the effect that appellants renounced liability under the contract on the indebtedness declared upon in this case as a breach of the contract, which had the effect, in so far as appellants were able to do so, to repudiate the contract itself and to terminate the contractual relation between the parties. This afforded the appellees an opportunity to accept the declaration if they chose to do so, and thus make effective the declaration of intention not to perform, rendering the contract thereby one that is broken on the part of appellants. The appellee, having accepted the declaration, could at once sue to recover the damages. It was not then necessary to show that all the precedent conditions had been complied with, for appellants, by their renunciation, dispensed with such showing. Appellee then had a cause of action on the breach for the damages sustained. *Kilgore v. Northwest Texas Baptist Educational Society*, 90 Tex. 139, 37 S. W. 598; 9 Cyc. 635 (3) a.

All assignments not herein mentioned are overruled. We have given our views upon the whole case, without expressing our opinion upon each assignment separately.

For the errors pointed out, the case is reversed and remanded as to the appellants herein, but will be affirmed as to W. S. Martin, as he does not complain in this court at the action of the trial court, and the judgment as to him will be affirmed.

#### On Motion for Rehearing.

The earnestness of counsel for appellee, as well as the ability and research which they have put forth upon the motion for rehearing, has induced us to again go over the case carefully and to examine the authorities cited in the motion. In citing *Greenwall v.*

*Markowitz*, 97 Tex. 479, 79 S. W. 1069, 65 L. R. A. 302, in the original opinion, we did not do so on the measure of damages, but as to the rights and remedies of the parties, when the contract is breached by one. The case of *Mudgett v. Texas Tobacco Growing Co.*, 61 S. W. 149, cited by appellee, illustrates the principle involved. Judge Gill there said: "Conceding, however, the correctness of his contention that he was wrongfully discharged, what right accrued to appellant, and what was his remedy? Clearly, not a suit upon the contract; for that had been breached, and his remedy was either an action for damages for its breach, or to treat the contract as rescinded and sue for his wages already earned and due. The action for the breach of contract is not for wages, but for damages. The policy and purpose of the law in such a case is to compensate the servant for the damages suffered as a proximate result of the breach." This is not a suit on the contract; neither is it one treating the contract as rescinded and a suit to recover the money paid in the purchase of the bank; but it is simply a suit for damages occasioned by a breach—compensation for the damages suffered as the result of the breach. What contract is breached? A guaranty of the collectibility of the indebtedness. What will compensate appellee for this loss? A payment of such indebtedness as is noncollectible. What facts must appellee allege and prove, showing damage and measure the compensation? The indebtedness not collected and that which cannot be. We certainly understand the rule to be that the burden is on the plaintiff in the first instance to allege and prove the breach, the injury, and the amount necessary to compensate him.

The case of *Johnston v. Mills*, 25 Tex. 704, cited by appellee, is one in which Johnston and Dewberry occupied the position of Young or the old bank, and R. D. and D. G. Mills occupied the position of Martin or the new bank, with reference to the contract. It should also be borne in mind that was a suit on the contract—not for damages for its breach. Johnston and Dewberry bound themselves ultimately to pay certain indebtedness. Judge Roberts said in that case: "Johnston and Dewberry in effect guaranty the note to be good, and that it can be collected so as to complete the extinguishment of their debt to R. and D. G. Mills. Such a guaranty imposes on R. and D. G. Mills the duty to use reasonable diligence in the collection, by due process of law, in its ordinary and regular course, in the absence of any stipulation to the contrary." In that case R. and D. G. Mills reduced to judgment the debt guaranteed and by agreement granted a stay of execution. The court, in that case, further discussing it, said: "It was incumbent on R. and D. G. Mills, in order to recover, to show they had not collected the money on this note, and having shown that, in the steps taken by them, they had departed from the regular

course of the law by giving a stay to Cox, that imposed upon them the burden of showing that their failure to collect was not in whole or in part caused by the stay which they gave."

The contract by appellants in this case was that they guaranteed  $10/20$  of the indebtedness so transferred; "that is, in case of failure to collect said notes as hereinafter indicated." The fifth clause of the contract follows the above stipulation, and is headed "Collection of Guaranteed Notes—How to be Made." They must be collected by the appellees Martin and his associates. Demand is to be made immediately upon same becoming due. If not promptly paid, placed in the hands of an attorney for collection by suit. Young and his associates reserving the right to designate the attorney. The suit was to be pressed to judgment, and when obtained execution to be issued, and, if the money could not be made by execution, then appellants were to pay the same upon the transfer of the judgment to them. If this was a suit on the contract to enforce it according to its terms, as was in *Johnston v. Mills*, supra, then appellees, before they could recover, would have to show that they had not collected the indebtedness and had taken all the steps which the contract stipulated they should, and that they were ready to transfer the judgment after a failure to collect on execution. This contract only stipulated what the law required of appellees without the contract. In *Texas City Improvement Co. v. Griswold*, 41 S. W. 513, the court said: "The question is whether or not appellant, having guaranteed collection of notes, and not their payment, was subject to suit until a failure to collect from the principals by legal proceedings. As stated before, we have no doubt that if it was alleged and proved that the notes were, for some cause, uncollectible, resort could be had on appellant, and the same would be the case where the uncollectibility of the notes from the maker is demonstrated by judgment and return of *nulla bona*." If this had been a suit on the contract instead of for damages occasioned by its breach, the burden would have been on appellees to show the notes had not been collected and were not collectible after prosecuting to execution and by failure to collect under execution. If, after a return *nulla bona*, appellants failed to pay, then they could be sued on the guaranty for the sum so due under the terms of the contract.

Under the breach of a contract upon sale of property, if the warranty is breached, or the thing sold is not as represented, the party aggrieved has two remedies: He may rescind and recover the price paid, or he may retain the thing sold and recover the difference between its value and the agreed price. If it should prove absolutely worthless, the measure of his damages would be the price paid

and such additional special damages as may have resulted therefrom.

The appellees cite a line of authorities holding that, when the plaintiff alleges and proves damages resulting from the breach of a contract or from a wrong, then the burden is on the defendant to show that the plaintiff could have mitigated or lessened the damages by the exercise of ordinary care or diligence. This rule is not denied or controverted; but we think it will be hard to find a case where plaintiff's cause of action, whether *ex contractu* or *ex delicto*, is made out by simply showing a breach or wrong without showing any injury or damage. Appellees assert simply that appellants must affirmatively prove the negative of the proposition in order to escape liability. The affirmative proposition resting on appellees was that appellants executed a guaranty that the indebtedness could be collected, and that they denied liability, and therefore breached the contract. That this action damaged them. If the indebtedness was paid, they were not damaged. This appellees knew better than appellants, for they had the paper. If not paid, if they could collect, no damage would result under the guaranty of the collection. If not collectible, they should allege and prove that fact in order to show the damages. If it became noncollectible, because of negligence or the want of ordinary care on the part of appellees, then the burden would shift to appellants to show such want of diligence or care. The case of *Foster County State Bank v. Hester*, 18 N. D. 135, 119 N. W. 1044, cited by appellees, we think sustains our view. Other cases by appellees, we think, can be easily distinguished, either on the facts proven or the contract upon which same is based. We believe the proper measure of damages was stated by us in the original opinion. *Brightman v. Reeves*, 21 Tex. 70. The case, in our opinion, was properly reversed on the grounds stated in the opinion.

The motion for rehearing is overruled.

#### BAKER v. HAHN.

(Court of Civil Appeals of Texas. Galveston.  
Nov. 22, 1913. Rehearing Denied  
Dec. 18, 1913.)

#### 1. BILLS AND NOTES (§ 462\*)—PLEADING (§ 8\*)—CONCLUSIONS.

A petition alleging that a note was transferred to plaintiff, followed by a copy of the note, which apparently was signed by defendant, and that by the terms of the note and by reason of the transfer defendant became liable and bound to pay plaintiff according to the terms of the note, does not state a cause of action and will not support a default judgment because not alleging that defendant executed or delivered the note; the allegations that he became bound to pay plaintiff being a mere legal conclusion.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1444, 1445-1461, 1464-1466; Dec. Dig. § 462; \* *Pleading*, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**2. JUDGMENT (§ 17\*)—PROCESS TO SUSTAIN—PERSONAL SERVICE—NECESSITY.**

Execution as in a personal judgment should not be awarded by the judgment in an action against a nonresident commenced by substituted service and attachment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.\*]

**3. ATTACHMENT (§ 211\*)—FORECLOSURE—PLEADINGS TO SUSTAIN.**

Where an action against a nonresident is commenced by attachment, a default judgment on a petition, not stating a cause of action will not warrant a foreclosure of the attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 706-721; Dec. Dig. § 211.\*]

**4. ATTACHMENT (§§ 119, 122\*)—ISSUANCE—VALIDITY.**

Where the affidavit and bond for the issuance of an attachment were sufficient, the fact that the petition was subject to general demurrer will not render the issuance and levy of the attachment void, and the petition may be amended without suing out a new writ of attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 214, 323-337; Dec. Dig. §§ 119, 122.\*]

**5. JUDGMENT (§ 17\*)—PLEADINGS TO SUSTAIN—AMENDMENTS—EFFECT.**

Under district court rules 13 and 14 (142 S. W. xviii), providing for amendments and that, unless the substituted instrument shall be set aside, the instrument for which it is substituted shall no longer be regarded as a part of the pleading, an original petition after an amendment is no part of the pleading, and a service of the original petition, together with notice, upon a nonresident, where the action was begun by attachment, will not support a judgment; the original having been supplemented by an amended petition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.\*]

**6. PROCESS (§ 66\*)—SERVICE BY PUBLICATION.**

Under Rev. St. of 1911, art. 1869, providing that, where the defendant is absent from the state or is a nonresident, the clerk shall upon the application of any party to the suit address a notice to the defendant requiring him to answer plaintiff's petition and that a certified copy of the petition shall accompany the notice, the service of a copy of the amended petition is not authorized where the notice made no reference to the amendment.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 53; Dec. Dig. § 66.\*]

**7. CONSTITUTIONAL LAW (§ 312\*)—DUE PROCESS OF LAW—NONRESIDENTS—ATTACHMENT—EFFECT.**

The issuance and levy of an attachment on the property of a nonresident gives the court jurisdiction to enforce a judgment recovered against the nonresident upon the property, and the enforcement of such judgment is not a deprivation of property without due process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 928; Dec. Dig. § 312.\*]

Error to District Court, Colorado County; M. Kennon, Judge.

Action by A. W. Hahn against N. A. Baker. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. G. Love, of Houston, for plaintiff in error. Townsend, Quin & Townsend, of Columbus, for defendant in error.

REESE, J. In this case A. W. Hahn sued N. A. Baker in the district court of Colorado county on a promissory note for \$1,300, payable to P. Hahn, administrator, and alleged to have been by him transferred to plaintiff. The original petition was filed October 16, 1909. Defendant, Baker, is alleged to be a resident of Cook county, Ill. On July 19, 1910, the plaintiff made affidavit and executed bond as required by statute in such proceedings and sued out an attachment based on the fact that defendant was a nonresident, which was issued July 23, 1910, and levied on July 28, 1910, on two lots in the city of Houston in Harris county, Tex. Thereafter, on January 10, 1912, plaintiff filed an amended petition adopting, without repeating them, the allegations of his original petition as to the debt and alleging the facts with regard to the issuance and levy of the attachment and praying for foreclosure of the attachment lien. Up to this time no service of any kind had been had upon Baker. On January 10, 1912, a notice was issued under the provisions of the statute for service upon nonresidents out of the state. This notice refers to the original petition filed October 16, 1909, and sets out substantially the allegations thereof, and states that a certified copy of this petition accompanies the notice. No reference is made to the amended petition or to the attachment. A true copy of this notice was on January 16, 1912, delivered to Baker in the city of Chicago, Cook county, Ill., by a person duly qualified to make such service, who in his return states that he delivered this copy of the notice "with certified copies of the plaintiff's petition accompanying the same." Thereafter, on February 6, 1913, judgment was rendered in favor of plaintiff against the defendant for the amount of principal, interest, and attorney's fees due on the note, amounting to \$2,001.09, and foreclosing the attachment lien. The defendant brings the case to this court for review by writ of error. The parties will be referred to as plaintiff and defendant as in the trial court.

[1] Under his first and second assignments of error defendant, Baker, assails the judgment on the ground that the pleadings of plaintiff are legally insufficient to authorize the judgment. These assignments will have to be sustained. The allegations of the petition are in substance that on the \_\_\_\_ day of \_\_\_\_, 19—, P. Hahn, administrator of the estate of \_\_\_\_, for a valuable consideration transferred to the plaintiff a certain promissory note, followed by a copy of a note for \$1,300, dated May 9, 1905, payable December 1, 1905, to P. Hahn, administrator, or order, with interest and attorney's fees, and signed N. A. Baker. It is further alleged that P. Hahn transferred the note to A. W. Hahn, and that by reason of such



transfer plaintiff became the owner, and that "by the terms of said note, and by reason of the transfer of same to plaintiff, the said defendant, N. A. Baker, then and there became liable and bound to plaintiff and promised to pay plaintiff the said sum of money according to the terms, reading, and effect of said note." There is no allegation that Baker executed or delivered the note to P. Hahn or to anybody. We have set out every material allegation of the petition on this point. The petition was insufficient to authorize the judgment by default. It stated no legal cause of action against the defendant. The decisions on the point are numerous and uniform. We cite a few of them: *Jennings v. Moss*, 4 Tex. 453; *Fortune v. Kerr*, 25 Tex. Supp. 310; *Malone v. Craig*, 22 Tex. 609; *Gray v. Osborne*, 24 Tex. 157, 76 Am. Dec. 99; *Sneed v. Moodie*, 24 Tex. 159; *Moody v. Bengé*, 28 Tex. 545. The allegation that defendant was indebted to plaintiff is a legal conclusion. No facts are stated from which such liability would result. Setting out the note in the petition, including the signature "N. A. Baker," is not equivalent to an allegation that the defendant executed it. The first and second assignments of error are well taken and must be sustained.

[2] The judgment was also erroneous in awarding execution as upon a personal judgment, which was unauthorized. The court could go no further in enforcing payment of the judgment than by a sale of the attached property.

[3, 4] As the petition was insufficient to authorize a judgment for the debt, it did not authorize a foreclosure of the attachment. The judgment of foreclosure must also fail. If the affidavit and bond for attachment were sufficient to authorize the issuance of the writ, and there is no suggestion that they were not, the fact that the petition was subject to general demurrer did not render the issuance and levy of the writ of attachment invalid. *Boyd v. Beville*, 91 Tex. 439, 44 S. W. 287; *Tarkinton v. Broussard*, 51 Tex. 550. The case of *Thomas v. Ellison*, 102 Tex. 354, 116 S. W. 1141, inferentially approves this doctrine, though the attachment was quashed in that case, on the ground that the cause of action set up in the amended petition did not accrue until after the attachment was sued out. The fourth assignment of error presenting this question is overruled.

[5, 6] Appellant complains of the fifth assignment of error that the notice served upon him was not sufficient to authorize the foreclosure of the attachment lien. This assignment must be sustained. The notice was accompanied by a certified copy of the original petition, which had been superseded by the amended original petition, and could be no longer regarded as a part of the pleadings in the record. Rules 13, 14, District

Court (142 S. W. xviii). No reference is made in the notice to the amended petition, and it afforded no authority for a delivery of a certified copy of that also. R. S. 1911, arts. 1869-1871. Other questions presented by propositions under this assignment need not be decided. This is not a collateral attack upon the judgment, and questions which might be material in case of such collateral attack need not be now decided. *Bowers v. Chaney*, 21 Tex. 368.

[7] We overrule the sixth assignment, which assigns as ground of error that the court was without jurisdiction over either the person or property of defendant, and the judgment is an attempt to deprive defendant of his property without due process of law, in violation of the Constitution of the United States. *Cooper v. Reynolds*, 10 Wall. 319, 19 L. Ed. 931. The issuance and levy of the attachment gave the court jurisdiction of the property, but the court could proceed no further towards enforcing such attachment by decreeing a sale of the property until service was had upon the defendant in some one of the modes of service provided by statute, or there was a personal appearance in some way. *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295; *Barelli v. Wagner*, 5 Tex. Civ. App. 445, 27 S. W. 17.

It is only necessary for us to say, on this record, that the judgment must be reversed for the errors indicated. This does not affect the issuance and levy of the attachment, if plaintiff amends his petition so as to state a good cause of action, and the affidavit and bond are sufficient. *Boyd v. Beville*, *Tarkinton v. Broussard*, supra.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

#### TEXAS MIDLAND R. R. v. WIGGINS.

(Court of Civil Appeals of Texas, Dallas.  
Nov. 29, 1913. Rehearing De-  
cided Dec. 18, 1913.)

##### 1. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICTS.

Where there is any evidence sustaining a verdict, it will not be disturbed on appeal; and hence the only matter for the appellate court to consider upon an assignment challenging the sufficiency of the evidence is whether there was enough evidence to go to the jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

##### 2. RAILROADS (§ 327\*)—CROSSING ACCIDENT—LOOK AND LISTEN.

Persons about to cross a railroad track must look and listen for approaching trains, and a failure to do so bars recovery.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

##### 3. RAILROADS (§ 350\*)—CROSSING ACCIDENT—JURY QUESTION.

In an action by one run down by a train, the question whether he looked and listened is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

one for the jury whenever the evidence is conflicting.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

#### 4. APPEAL AND ERROR (§ 1003\*)—REVIEW—VERDICTS.

A verdict may be overruled on appeal, when it is so against the preponderance of the evidence as to be manifestly wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

#### 5. RAILROADS (§ 307\*)—CROSSING ACCIDENTS—FLAGMAN.

When an ordinarily prudent person would have maintained a flagman or watchman at the railroad crossing where an injury occurred, a failure on the part of the railroad company to keep such flagman or watchman was negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 972-977, 979, 980; Dec. Dig. § 307.\*]

#### 6. RAILROADS (§ 350\*)—CROSSING ACCIDENTS—FLAGMAN.

In an action by one run down by a railroad train, the question of the railroad company's negligence in failing to keep a watchman at the crossing *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

#### 7. EVIDENCE (§ 117\*)—ADMISSIBILITY—POSSESSION OF LIQUOR—PROOF OF INTOXICATION.

In an action by one run down by a train, evidence by a witness, several blocks away from the accident, that when he reached the place of the accident he found a pint whisky bottle, one-third full, in the debris of plaintiff's wagon, is not competent, standing alone, to show intoxication.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 186; Dec. Dig. § 117.\*]

#### 8. TRIAL (§ 106\*)—ARGUMENT OF COUNSEL—DISCRETION OF COURT.

The scope of the argument of counsel rests largely in the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 267; Dec. Dig. § 106.\*]

#### 9. APPEAL AND ERROR (§ 1060\*)—REVIEW—HARMLESS ERROR—NECESSITY OF SHOWING PREJUDICE.

In an action by one run down at a railroad crossing, argument of counsel, based on the failure of defendant to prove plaintiff's intoxication after alleging it in its answer, and on the fact that one of defendant's witnesses testified in another case for defendant, will be considered harmless, when no showing of prejudice is made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.\*]

#### 10. TRIAL (§ 242\*)—INSTRUCTIONS—CONFUSED INSTRUCTIONS.

In an action by one run down on a railroad crossing where the court charged that if any of the things alleged to have caused the accident existed, and their existence was negligence and the proximate cause of the injury, the finding should be for plaintiff, a further charge that if plaintiff was guilty of contributory negligence which proximately caused or contributed to the accident, verdict should be for defendant, even though also guilty of negligence, was not improper or misleading in denying a verdict for defendant, even though it was not negligent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.\*]

#### 11. DAMAGES (§ 208\*)—ACTIONS—JURY QUESTION.

In an action by one struck by a train, evidence *held* sufficient to authorize the submission to the jury of plaintiff's loss of future earning capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

#### 12. DAMAGES (§ 208\*)—PERSONAL INJURY—LOSS OF FUTURE EARNING CAPACITY.

Where plaintiff, a negro, was only able to approximate his age at 50 years, the fact that his age was not absolutely established, nor his life expectancy proven, is no ground for refusal to submit to the jury the question of his loss of future earning capacity; it appearing that he was before the jury for inspection, and that testimony was offered as to his previous health and habits.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208.\*]

#### 13. DAMAGES (§ 132\*)—PERSONAL INJURY—VERDICT.

An award of \$3,500 damages to a negro 50 years old, who was run down by defendant's train, is not excessive, where it appeared that before the accident he was perfectly sound and able to earn from \$1.50 to \$2 a day, but after the accident he was permanently disabled, and could do nothing but the very lightest labor, and constantly suffered pain.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Action by John Wiggins against the Texas Midland Railroad. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry C. Coke and S. W. Marshall, both of Dallas, and Dashiell, Crumbaugh & Coon, of Terrell, for appellant. Ed. R. Bumpass, of Terrell, for appellee.

RASBURY, J. Appellee was struck and injured by one of appellant's locomotives attached to a passenger train at a point in Terrell, Tex., where the appellant's railroad crosses Moore avenue. Suit was instituted in the court below, the complaint alleging such injuries to be the result of the negligence of appellant in: (1) Failing to sound the whistle and ring the bell for the crossing; (2) moving the train at a high and dangerous rate of speed; (3) the presence of buildings and platforms upon appellant's right of way and the permitting of cars to stand upon its side track, thereby obstructing appellee's view of the approaching train, and preventing him from hearing signals; and, (4) failing to place a watchman at said crossing, which was alleged to be a dangerous and hazardous one. Appellant met the charges of negligence by the general denial, allegations of contributory negligence on the part of appellee in: (1) Not looking for the train, and in not listening for the signals; for that, had he done so, he could have seen the approaching train and heard the signals in time to have avoided the accident; (2) in that appellee had been imbibing intoxicants

the morning of the accident, and as a result was inattentive and drowsy, and failed to look for the train; (3) that the buildings complained of were not on appellant's right of way, and had not been erected by its permission, but were the property of others, and that the side tracks or switches adjacent to the buildings had been placed there to serve the owners in loading and unloading freight; and, (4) that after discovering appellee was about to cross its track ahead of its approaching train, appellant used every effort in its power to stop its train in time to avoid the accident, but was unable to do so. Upon trial by jury verdict for \$3,500 was awarded appellee, followed by judgment in accordance therewith, from which this appeal is taken.

The evidence introduced upon trial of the case was conflicting, but in deference to the verdict of the jury it sustains the following conclusions of fact: Terrell has 7,000 or 8,000 inhabitants; Callie street runs north and south through the town, and appellant's line of railway is laid upon and in the center thereof; Moore avenue runs through Terrell east and west. The injuries were inflicted upon appellee at the point of intersection of said streets. Said Moore avenue is about one mile in length in the city, and is the important business street of Terrell. Practically all of its business houses, stores, and other institutions front said avenue, and surround as well the place of the accident. Over the avenue and across appellant's railway, not only all the east and west local traffic passes, but the east and west traffic from the surrounding country, as well as distant traffic, which is heavy, passes over said avenue and across appellant's railway. At the intersection described the four corners are occupied as follows: South of Moore avenue and west of Callie street is the Union Depot (used by appellant and the Texas & Pacific Railway Company, which runs parallel with and south of Moore avenue). South of Moore avenue and east of Callie street is the Starr-Mayfield building, used for wholesale purposes, and to reach which appellant has built a switch from a point north of Moore avenue, which extends south on Callie street across Moore avenue to said building. North of Moore avenue and east of Callie street is the city waterworks building; some sort of coalhouse, the calaboose, and other buildings built and maintained by the municipality. North of Moore avenue and west of Callie street and appellant's line of railroad is the Carter-Jandrews building. Since it is in and about this building that the accident occurred, we describe its situation and surroundings particularly. The structure fronts 85 feet on Moore avenue, and extends back on Callie street on a line with appellant's railroad 115 feet. It was not built by, and is not upon the appellant's right of way. On the east or Callie street side of the building the owners thereof have erected an elevated platform. North

of and beyond this platform at some point appellant built a switch branching from its main line, for the purpose of serving those who occupy said building in unloading freight. There is about 13 feet of space between the switch and the building. From the switch to the main line is 19 feet. This switch not only parallels the Carter-Jandrews building and the platform to the end thereof, but projects into the north side of Moore avenue. In the front of the building or on the Moore avenue side there is between the building and the curb a 12-foot sidewalk. The switch just mentioned projects past the sidewalk into Moore avenue from 3 to 6 feet. Said Moore avenue is about 76 feet wide between curbs. Deducting for the gutters at each curb, there is available for traffic about 68 feet. In addition to the two wholesale houses, the Union Station, and the city waterworks, there was in close proximity to said point the electric light plant, ice plant, compress and oil mill. From these institutions much noise and resultant confusion emanates. On the morning of the accident, or prior thereto, a freight or "box" car had been placed by appellant upon the switch that served the Carter-Jandrews building, which projected into and upon Moore avenue from 15 to 18 feet, or from 3 to 6 feet beyond the sidewalk in front of said building on Moore avenue. Appellee, who was the driver of a wagon belonging to a local merchant in Terrell, was directed by his employer to go to the Starr-Mayfield building herein described, for purposes unimportant to mention here. In doing so he entered Moore avenue west of Callie street, and while proceeding on his way, and just after passing the freight or "box" car, and as his horse was stepping upon appellant's railroad track, or was thereon, the horse and wagon were struck by an incoming passenger train, appellee thrown therefrom upon the ground, and seriously and permanently injured.

[1] The first and second assignments of error, in effect, challenge the sufficiency of the evidence to sustain the verdict and the judgment. It is vigorously maintained by the appellant that appellee could have seen the train in time to have avoided the accident (notwithstanding the presence of the car in the street), that the signals were given, and that the train was not moving at a dangerous rate of speed, and sets out at length the testimony of its witnesses sustaining such claim. Just as vigorously appellee urges and maintains the contrary theory, and substantiates his claim by quoting in like manner the testimony of his witnesses. As to whether appellee could have seen the train, or the signals were given, or the train was moving at a dangerous rate of speed are questions to be determined by the jury, and our sole function is to read the evidence and determine if it is sufficient to carry to the jury the determination of such issues as

questions of fact. *G., H. & S. A. Ry. Co. v. Michalke*, 90 Tex. 276, 38 S. W. 31; *Receivers H. & T. C. Ry. Co. v. Stewart* (Sup.) 17 S. W. 33; *G., H. & S. A. Ry. Co. v. Harris et al.*, 22 Tex. Civ. App. 16, 53 S. W. 599. We have done so, and conclude there was no error in submitting such issues to the jury. In connection with the assignments under discussion the rule is firmly established in this state that where there is evidence in the record which sustains the verdict of the jury, it will not be disturbed by the appellate court. It is only where the verdict of the jury is manifestly against the evidence, or inadequate with or contrary thereto, that it becomes our duty to set it aside. We have not set out the testimony of both sides by way of comparison in order to sustain our conclusions, since there is no occasion to do so. Having reached the conclusion we have, and counsel being familiar with the rule in such cases, we anticipate such a course will not be expected of us.

[2, 3] It is, of course, the duty of persons about to cross a railroad track not to walk or drive carelessly into a place of possible danger, and to do so is not merely an imperfect performance of duty, but an entire failure of performance, which will bar the right to recover damages if such failure contributed proximately to an injury. But whether the complaining party did so contribute to his injury is, as we have said, always a question of fact for the jury to determine when the evidence on the point is conflicting. On the other hand, where the evidence of negligence on the part of the injured party is undisputed, it then becomes the duty of the trial court to instruct a verdict as illustrated by the following cases: *Haass v. G., H. & S. A. Ry. Co.*, 24 Tex. Civ. App. 135, 57 S. W. 855; *M., K. & T. Ry. Co. v. Martin*, 44 S. W. 703; *Bennett v. S. L. S. W. Ry. Co.*, 36 Tex. Civ. App. 459, 82 S. W. 333; *G., C. & S. F. Ry. Co. v. Townsend*, 82 S. W. 804. In consonance with what we have said the assignments are overruled.

[4] Under the third and fourth assignments of error appellant asserts that the verdict and judgment are against the preponderance of the evidence. These assignments cannot be sustained. While it is the right and duty of this court to reverse a judgment and grant a new trial when the verdict is so against the weight and preponderance of the evidence as to be manifestly wrong (*G., C. & S. F. Ry. Co. v. Walters*, 49 Tex. Civ. App. 71, 107 S. W. 372; *I. & G. N. Ry. Co. v. Brice*, 111 S. W. 1097), yet, as we have said at another place, the evidence in this case does not warrant such a conclusion.

[5, 6] By the seventh and eighth assignments of error appellant asserts that the evidence was insufficient to authorize the court to submit to the jury for their determination whether appellant should have sta-

tioned a flagman at the Moore avenue and Callie street crossing. The settled rule in reference to the issue here raised is that if a person of ordinary prudence would, under all the circumstances, have maintained a flagman or watchman at the crossing where the plaintiff was injured, then the failure on the part of the railroad company to keep such flagman or watchman was negligence. *M., K. & T. Ry. Co. v. Magee*, 92 Tex. 616, 50 S. W. 1013; *Id.*, 49 S. W. 156; *C. T. & N. W. Ry. Co. v. Gibson*, 35 Tex. Civ. App. 66, 79 S. W. 351; *C. T. & N. W. Ry. Co. v. Gibson*, 83 S. W. 862. The court below submitted the issue under the rule announced in the authorities cited, and no complaint is made of the charge. Accordingly, the issue narrows as to whether there was evidence which warranted the submission of the issue. At another place in this opinion we have detailed the population of Terrell, and the conditions surrounding the crossing and the traffic passing over same, and that from such conditions much noise and confusion resulted at the crossing. As to whether the conditions surrounding the crossing made it difficult to hear an approaching train and rendered the crossing dangerous and hazardous, the several witnesses differed. The solution of the conflict was with the jury, and, their findings on that issue being within the rules we have hereinbefore stated; we are not authorized to disturb same, and the assignments are accordingly overruled.

[7] The ninth assignment of error complains of the refusal of the court below to permit appellant to prove by the witness Clark that after the accident he found a pint bottle in the wagon which appellee was driving containing whisky, about one-third full. On this issue appellant alleged that appellee contributed to his injury by inattention to the approaching train, due to the fact that he was drowsy as the result of drinking intoxicants. Some of appellant's witnesses testified that appellee "seemed to be in a deep study," "he was sorter bent over," "John was stooped over, looking at his horse," "he was driving along with his head down, not paying any attention; seemed in a deep study." Each of the quotations from the evidence was by different witnesses. The bill of exception was signed by the district judge, with the explanation that the witness Clark was two blocks away when the accident occurred, and before he arrived there other parties had arrived and were removing appellee; that the collision had crushed the wagon, and the bottle found by the witness was either in the debris, or that portion of the wagon bed left intact, and further that there had been no proof that Wiggins had been drinking, or any that in any manner connected him with the whisky. We conclude that the testimony quoted, while admissible on other theories, in no sense established that

appellee was intoxicated on the day of the accident, and that the finding of the bottle of whisky in the manner and at the time we have detailed was a circumstance too remote to prove intoxication, in the absence of other connecting facts or circumstances.

[8, 9] The tenth assignment complains of the action of the trial court in permitting counsel for appellee to discuss and draw deductions from the allegation by appellant that appellee was drunk on the day of the accident, and appellant's failure to prove such allegation. The court qualified the bill of exception presenting the alleged error by the statement that while no sufficient proof of drunkenness had been offered, yet the allegation had been read to and in the presence of the jury.

The eleventh assignment complains of counsel for referring to the fact, after being admonished by the court to desist, that John Maule, a witness then on the stand and being examined by appellee's counsel, had testified for appellant on the trial of another case to facts similar to those testified to in this case.

Aside from the fact that whether matters similar to those covered by the assignments above occurring upon trial are to be permitted or not is largely within the discretion of the trial court, it is not made to appear, nor can we say from an examination of the record, that the same did or was calculated to bias or prejudice the jury against appellant, or that as a result thereof the verdict is either excessive or against the weight of the evidence. *Banner v. Thomas*, 159 S. W. 102.

[10] The seventeenth assignment of error complains of paragraph 9 of the court's charge, which is as follows: "If you find from the evidence that plaintiff was guilty of contributory negligence as explained to you in the preceding paragraph of this charge, which proximately caused or contributed to the accident, which resulted in his injury, you will find for the defendant, even though you believe that the defendant is also guilty of negligence." The criticism of this part of the charge is that before the jury could find for appellant, they must believe that the negligence of appellee caused or contributed to the injury. In short, that under this charge the jury could not find for appellant, even though they believed that appellant did, in reference to the accident, that which an ordinarily prudent person would have done under the same or similar circumstances. We cannot agree with the criticism. The trial court, with much particularity and singular clearness, informed the jury that if any of the things alleged to have brought about the injury did in their opinion exist, and their existence was negligence, and in addition were the proximate cause of the injury, then to find for appellee, or if they did not exist, or if their existence was not negligence, to find for appellant. The court then, in order to present appel-

lant's claim that appellee contributed to his injuries, told the jury they could look to all the evidence to determine if appellee had used such care as a person of ordinary prudence would have used under the same or similar circumstances, and that if by looking he could have seen the train, or by listening he could have heard same, etc., and failed, he would be guilty of contributory negligence, and could not recover. The court then adds, by paragraph 9, here objected to, that if appellee was so guilty of contributory negligence, they should find for defendant, even though defendant was also negligent. This charge, in our opinion, is not only not misleading and confusing, as maintained by counsel, but in our opinion, accentuates the defense of contributory negligence. The charge does not permit the jury to compare the negligence of the parties, but directs the jury unequivocally that, in the event appellee's own negligence contributed to the injury, then to return a verdict against him even though appellant was also negligent.

[11] By the eighteenth and nineteenth assignments of error appellant asserts that the court should not have submitted to the jury the appellee's right to recover for loss of earning capacity, since there was no evidence in the record authorizing same, or showing impaired earning capacity. Appellee testified that before the accident he was in good health, as sound as a dollar, had never been ill, nor had the services of a physician, and had been earning \$1.50 to \$2 per day. His employer, in substance, testified to the same facts, based upon an acquaintance with appellee of 25 years, and adds that since the accident he has been feeble and unable to do any manual labor other than feed horses and deliver light packages. Upon the trial of the case, which was two years after the accident, appellee testified that there was still soreness in his injured parts, that he suffered day and night, at times could not sleep at all, and was compelled to use a crutch. His injuries are a crushed and broken instep and an injury to his side. His physicians say his injuries are permanent. The facts related above are, in our opinion, sufficient to authorize the submission of the issue of the loss of future earning capacity.

[12] But it is urged that neither appellee's age nor his life expectancy were proven. Appellee, who is a negro, was uncertain about his age, but placed it at 50 years, as the best approximation he could make of it, and in this statement he was not substantially discredited. Having shown appellee's injuries, his past earning capacity, and his age and present condition, together with his health, habits, and appearance before the injury, it cannot be said, in the absence of other evidence, that the failure to prove appellee's expectancy in a more precise manner prevents the submission of the issue of the loss of or impaired earning capacity in the future. G.,

**H. & W. Ry. Co. v. Lacy**, 86 Tex. 244, 24 S. W. 269. The evidence did establish that before the injury appellee was in perfect health, was strong and capable, abstemious, and earned from \$1.50 to \$2 per day.

[13] By the twentieth assignment of error it is urged that the verdict is excessive. Our right to disturb jury verdicts is so limited and so surrounded with limitations and so well understood that it is unnecessary to here state the rule. Under the facts just recited under the eighteenth and nineteenth assignments of error, and those stated in other portions of this opinion, we conclude it cannot be fairly said that the verdict is excessive.

We have carefully examined all the other assignments of error in the brief not here specifically discussed, and because in our opinion they present no reversible error, same are overruled.

The judgment is affirmed.

#### STAMP v. EASTERN RY. CO. OF NEW MEXICO.

(Court of Civil Appeals of Texas. Amarillo. Nov. 10, 1913. On Motion for Rehearing, Dec. 13, 1913.)

##### 1. CARRIERS (§ 286\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A railroad company which maintains an unlighted and unguarded station platform elevated four or five feet above the ground is guilty of negligence towards its passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 236.\*]

##### 2. CARRIERS (§ 327\*)—CARRIAGE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.

A passenger who, without being familiar with a railroad station, walks around the platform in the dark, without any particular precautions to avoid a fall, is guilty of contributory negligence barring recovery for injuries caused in a fall from the unlighted and unguarded platform.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1363-1366; Dec. Dig. § 327.\*]

##### 3. CARRIERS (§ 323\*)—CARRIAGE OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.

That a railroad company owes the highest degree of care to a passenger upon its premises will not excuse the contributory negligence of the passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1346; Dec. Dig. § 323.\*]

##### 4. COMMERCE (§ 47\*)—INTERSTATE COMMERCE—WHAT CONSTITUTES.

In case of a passenger traveling on a pass good from one point in the territory of New Mexico to another point, there is no interstate carriage or question of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 47.\*]

##### 5. EVIDENCE (§ 35\*)—FOREIGN LAWS—PROOF—NECESSITY.

A foreign law is required to be proven just as any other substantive fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.\*]

##### 6. EVIDENCE (§ 34\*)—JUDICIAL NOTICE.

The courts will take judicial notice that before statehood the decisions of the Supreme Court of the United States were the law of the land in the territory of New Mexico.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 49, 50; Dec. Dig. § 34.\*]

##### 7. CARRIERS (§ 307\*)—CARRIAGE OF PASSENGERS—CONDITIONS IN PASS AGAINST LIABILITY—VALIDITY OF CONDITIONS.

Where, before statehood, a railroad company in the territory of New Mexico gave plaintiff a pass for an intrastate trip, a condition in the pass exempting the company for all liability, whether caused by its own negligence or not, was valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259, 1491; Dec. Dig. § 307.\*]

##### 8. CARRIERS (§ 307\*)—CARRIAGE OF PASSENGERS—FREE PASS.

A pass given as a gratuity is none the less a free pass because the carrier requires the person using to sign an agreement exempting it from liability for injuries.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259, 1491; Dec. Dig. § 307.\*]

On Motion for Rehearing.

##### 9. CARRIERS (§ 307\*)—CARRIAGE OF PASSENGERS—FREE PASS.

A pass given by a railroad company to the mother of one of its employes is none the less a free pass because the giving of such pass was customary, where the employe could not have sued and recovered in case of the carrier's refusal.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259, 1491; Dec. Dig. § 307.\*]

##### 10. COURTS (§ 96\*)—DECISIONS—PRECEDENTS.

The binding effect of decisions of the Supreme Court upon the territory of New Mexico was not changed by act of Congress of March 3, 1911,† providing that the amount in controversy, upon which the right to appeal to the federal Supreme Court depended, should be ascertained under oath; that being a mere matter of pleading and procedure.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 328, 334; Dec. Dig. § 96.\*]

##### 11. COURTS (§ 95\*)—PRECEDENTS—RIGHT TO CHANGE.

While all courts may change their decisions, the court, in determining the law of a foreign state, must presume that an authoritative announcement of the law will not be changed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 322, 323; Dec. Dig. § 95.\*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by Mrs. Annie Stamp against the Eastern Railway Company of New Mexico. From judgment for defendant, plaintiff appeals. Affirmed.

J. A. Stanford, of Waco, and Synnot & Underwood, of Amarillo, for appellant. Madden, Trulove & Kimbrough and F. M. Ryburn, all of Amarillo, for appellee.

**HENDRICKS, J.** The appellant, Mrs. Annie Stamp, a feme sole, sued the Eastern Railway Company of New Mexico in the district court of Potter county, Tex., alleging in substance that she was a passenger upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† U. S. Comp. St. Supp. 1911, p. 229.

appellee's line of railway, traveling from a point in New Mexico to a point in Texas, and while at a station of the appellee, and upon a part of the platform of said station intended for passengers, she fell from said platform at a point where it was about five feet in height from the ground, and that the railway company was guilty of negligence in failing to have the depot and platform properly lighted and in failing to have banisters or guard rails around the edge of the platform where she fell. The defendant railway company, among other things, pleaded the contributory negligence of the plaintiff in walking out upon the platform at a place where she was not required to go and in stepping off of the same without taking any precaution whatever for her own safety; defendant further specially answering that the injury to plaintiff occurred in what was then the territory of New Mexico, and that plaintiff at said time was in possession of a free pass, issued by it, with stipulations upon the back of same, agreed to and executed by her, whereby she released the appellee of all damages, whether caused by the defendant's negligence or otherwise, and agreed to assume all the risk of accident or damage to her person or baggage while in the use of said pass, and that plaintiff was at the time of her injury domiciled and residing in the territory of New Mexico, and that defendant had its domicile and line of railway in said territory, and that the rights and liabilities of the parties should be determined under the rules of law prevailing in the territory of New Mexico or in the United States courts, and that, under said rules prevailing in either jurisdiction, the said contract as to release from liability was valid and binding; the defendant further alleging that plaintiff was a mere licensee upon defendant's premises and the defendant owed her no other care than not to willfully and wantonly injure her. At the close of the testimony the district court instructed a verdict for the defendant railway company and entered judgment accordingly.

The evidence discloses that Mrs. Stamp, the appellant, was in the possession of the pass, through the solicitations of her son, who was a "pumper" and in the employment of the railway company at the station of Becker, where she was injured, and the following recitation appears on the reverse side of the pass, signed by her: "This pass is not transferable; it must be signed in ink by the holder named, who, by accepting it, agrees to assume all risk of accident and damage to person or baggage under any circumstances, whether caused by negligence of agents or otherwise. [I] accept the foregoing conditions. [Signed] Annie Stamp."

At the station where the injury occurred, the railroad track in front of the waiting room extended east and west and the depot was parallel thereto. The appellant, her son, and the latter's wife went to the depot in

time to catch a train leaving for the east about 4:30 in the morning and walked into the waiting room at the east end of the depot, which was not lighted at the particular time, with a light only in the office of the agent or operator. Her son left the waiting room for the purpose of looking for the train, and Mrs. Stamp testified: That, after her son walked out, "I walked out on the platform myself. I do not know why I went out there. It was then dark and it was kind of cold and it had been raining the fore part of the night. \* \* \* It was chilly and damp in the depot and one purpose was to walk around a little and exercise. I had no special motive in going out there. The door to the waiting room is right in the southeast corner. I walked out that door and I got turned around on the platform. I turned around the southeast corner. \* \* \* I walked along the platform at the east end of the waiting room. I do not know how far I walked, I probably went to the edge, I did not think I did. \* \* \* I turned then and started back toward the waiting room door. I went, I suppose, too close to the edge of the porch and fell off of it into the hole. There was no light on the platform at the time. I did not know that the platform was built up off of the ground. I did not know there was any jump-off there from the platform to the ground. I do not know whether I just walked right straight off the platform or not. I did not know how near the edge of it I was. My left foot went off of the platform first. I turned going back with my side this way (we presume indicating), and that threw my left side to the outer edge of the platform. My left foot went off first. I do not know anything that happened after my foot went off of the platform." The son who accompanied Mrs. Stamp on this particular occasion testified in her behalf: "This platform extends somewhere about 30 feet from the east end of the depot."

The best we are able to ascertain from the testimony it seems that the platform at the east end of the depot was covered by a hood-shaped porch—a prolongation of the roof of the main building with arches and supporting pillars either at the edge or very close to the edge of the platform, where the accident and injury occurred.

[1, 2] We conclude that it was quite dark and for this purpose only, regarding her as a passenger under the law of this state, that the railroad company had not exercised the degree of care obligatory upon it under the circumstances. But we are inclined to think that this woman was guilty of contributory negligence. When she walked out of the door of the waiting room and turned at right angles and proceeded into the dark, along the platform of the appellee, the railway company, to the edge of the platform, precipitating herself off the platform to the ground, that inherently her act is indicative of a degree of carelessness and negligence as

to preclude a recovery. We quote from the Supreme Court of Virginia: "The law duly imposes upon a railroad company the duty of keeping its stations and premises in such safe condition as that its passengers, in the exercise of ordinary care, can get upon or leave the same, and to go wherever they are expressly or impliedly invited to go thereon, without injury; and this embraces suitable steps and platforms, as well as suitable light. *Keefe v. Railroad Co.*, 142 Mass. 251, 7 N. E. 874; 2 Wood, *Railway Law*, § 310, and cases cited. In the present case, however, the appellant has not exercised such care as entitled her to recover. The case, as disclosed by the record, is simply this: Upon her alighting at the station, she was shown by the light of the lamp up the steps of the platform and into the reception room where a light was burning. The hour was late, and no other trains were to pass the station that night. After being shown into the reception room, she declined the offer of an employé of the company to conduct her to a hotel near by, preferring, as she said, to spend the residue of the night at the depot; and while the platform lamp was being trimmed, presumably, from the evidence, in her presence, she walked out upon the platform and, without taking the precaution to inquire or ascertain whether or not she could safely do so, turned at right angles upon stepping upon the platform from the lighted reception room and walked in the dark to the end of it, where she fell off and was injured. This, all the circumstances considered, was not only negligence but recklessness on her part, which clearly defeats a recovery. It was contended, in the argument, that she went out to obey a sudden and urgent call of nature, but of this there is no positive proof in the record; and, even if it were so, that could not affect her duty to take ordinary care in walking upon the platform or elsewhere upon the defendant's premises. It is unnecessary, therefore, to inquire whether or not it was the duty of the company to have provided a railing at the outer edge of the platform or whether or not it has been negligent in any particular." *Reed v. Axtell*, 84 Va. 231, 4 S. E. 587.

We also refer to the case of *Gulf, Colorado & Santa Fé Railroad Co. v. Hodges*, 24 S. W. 563, decided by the Court of Civil Appeals of the Second District. That court said: "It seems that the place where appellee fell from the platform was, at the time, enveloped in almost total darkness; that he [meaning the passenger] got off the train on the east side of the depot and immediately started in a northwest direction along the depot platform and walked off of it at a place where it was between four and five feet high." We also quote a part of the testimony quoted by the court in that case as follows: "I got on the platform so easy that I thought I could leave it as easy. When I got to the top of the platform where I fell, I did not change my

gait, but my right foot went out, and I did not touch the platform, and in consequence thereof I fell. I do not remember looking for the top of the platform. It was too dark to look for anything. \* \* \* I was walking along regardless of everything, until I received the injuries. \* \* \* I thought I was on level ground. \* \* \* I was not thinking anything about steps but was walking as though I was going to some place; and the first thing I knew I fell off." The court concludes as a matter of law that: "It seems to us for a man 76 years old to proceed along a railroad platform in the dark, in the manner described, necessarily conveys the idea of negligence"—citing the Virginia case, *supra*, quoted from by us.

It is true that in the Hodges Case the passenger was attempting to leave the depot and the platform but, oblivious of his surroundings and the darkness enveloping him, regardless of his own welfare, without any precautionary measure on his part as to the situation in which he was placed, was injured, and the intrinsic culpability of the act was such as to ally itself to this case and the act of culpability manifested here.

[3] Because a railroad company may owe a higher decree of care than its passenger, upon whose premises the latter may be situated, does not, we think, tend to soften or destroy culpability upon the part of the passenger, if actually manifested. Contributory negligence, as a standard, should be the same, except, of course, that it may vary on account of the relationship existent between the parties. A servant may rely under certain conditions upon the master having done his duty, and the passenger may rely, as indicated in the Virginia case, upon the performance of the duty of the carrier. But this is not to be confounded with an act itself, as indicated in this record, where, although the duty may not have been performed, the passenger proceeds into the dark, with the degree of carelessness indicated here, and practically walks off the edge of the platform without knowledge of surroundings; surely such manifestations under such conditions do not constitute ordinary care.

[4-7] On the question of the free pass and the law of New Mexico becoming a part of the contract, one W. A. Havener testified that he had been practicing law in New Mexico for 24 years and was familiar with the statutes and decisions of the higher courts of New Mexico and said that: "There was no statute in reference to or that in any way affects provisions on passes, wherein plaintiff assumes all risks of injury from any cause and that defendant *in any event* (the emphasis is ours) be liable for any such injuries, whether caused by reason of negligence of the defendant or not; the consideration for said release being the issuance of said pass. This precise question has never been passed upon by the appellate courts of New Mexico so far as I know or have been



able to ascertain." The question evidently put to this witness was one of entire exoneration of the railway company as to liability for injuries in any event. He further said "that the question as to the validity of this release had never been passed upon by the courts of New Mexico"; that the federal courts, however, "announce the rule in this character of cause that such a release of liability is binding. They hold that, since the pass is a mere gratuity, the person proposing to use it has the opportunity to use it or reject it as he sees fit, and if he accepts it he accepts it with all its conditions; and the federal courts hold that a condition on the back of a pass releasing the carrier from liability, even for his own acts of negligence, is valid and enforceable." It will be remembered that this accident occurred when New Mexico was a territory; and this witness further stated that: "The principles and rules of law announced by the United States courts and the decisions announced by the United States Supreme Court would, of course, have been the supreme law for the territory. The rules of law announced by the United States courts relative to the validity of the conditions upon the pass referred to would control the decision of the question and the appellate courts of New Mexico concerning an accident happening at that time. It is a fact that, under the decisions of the courts of New Mexico, a party in possession of a gratuitous pass and having signed a release of liability, like this case, or similar thereto, would be considered a mere licensee while on the premises of the railroad company and would not be considered a passenger. \* \* \* The railroad company owes no duty to a licensee other than not to willfully and wantonly injure him. That is, the railway company might be guilty of some degree of negligence, and yet if it had no knowledge that a licensee was in any danger, and therefore could not have knowingly and willfully caused injury, the railway company would not be liable for damages for any injury that might have resulted to him." The witness then quotes the substance of the case of Northern Pacific Railway Co. v. Adams, reported in 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, wherein a passenger was riding upon a gratuitous pass, containing practically the same stipulations indorsed on the back of this pass, and which precluded a recovery upon the part of the passenger.

It is agreed in this case that the parties may resort to the decisions introduced in evidence; the appellant, of course, objecting to their admissibility upon the facts of this particular case. It is noted that the Supreme Court in that case held that, when the gratuitous transportation was extended, the company was not as to the passenger a carrier for hire, and that it waived its right as a common carrier to exact compensation and extended to him the privilege of riding in its coaches without charge if he would

assume the risks of negligence, and that the passenger was not in the power of the company and not obliged to accept its terms, and that if he desired to hold the railroad company to its common-law obligations, he should have paid his fare and compelled the company to receive and carry him, and, having freely and voluntarily chosen to accept the privilege offered, he cannot repudiate its conditions. This same witness also testifying in substance to the language herein used by us as to this opinion, with reference to which he also testifies was the law of New Mexico when this injury occurred and this pass was issued and delivered.

We do not see any question of interstate commerce involved, as the pass was from a point in New Mexico over a railroad in New Mexico to another point in New Mexico, or that the acts of Congress, upon a study of the same, which prevailed at that time, with reference to the issuance of free passes, would have any application to the case. Of course a foreign law is required to be proved as a substantive fact as any other matter of evidence. We are inclined to think, while not specifically decided, that we could take judicial knowledge of the fact that the decisions of the Supreme Court of the United States would be the law of the land in the territory of New Mexico at the time indicated. A perusal of the United States statutes at large and of the decisions of the Supreme Court of the United States indicate to such an extent the status of the territory as a component part of this nation, with its causes appealable to the Supreme Court of the United States, under the acts of Congress and the rules of that court regulated by the matter of amount as any other cause from the federal inferior court to the higher tribunal. Appellant answers that, the law of Texas being different, this testimony and the condition which arises in this record is not sufficient to overcome the presumption ordinarily existent that the law of another state upon the same subject-matter is the same as the law of our state. We believe that this condition is met in this record, and that the decision of the Supreme Court of the United States, with the additional testimony of this particular witness, settles as a fact the law of New Mexico existent at the particular time and which became a part of the contract between Mrs. Stamp and the railway company and should be applied in this forum.

[8] There is a statement in the brief of appellant that this is not a free pass and that conditions here place it in the domain of a contract and take it out of the domain of a gratuity. A close analysis of this evidence, we believe, does not warrant this position, and that, when it was shown that no money was paid for this intended transportation, we are unable to see, as measured by the rules of a contract applied to the testimony here, that a contractual obligation exists, based upon consideration flowing from

Mrs. Stamp to the railway company, and find that it is a mere gratuity.

Believing that the district court correctly disposed of the case, its judgment is affirmed.

#### On Motion for Rehearing.

The appellant in this case attempts to distinguish between the facts which we concluded showed contributory negligence and the facts in the two cases, quoted by us in our original opinion for the purpose of sustaining that position. We did not intend to convey the suggestion that the two cases cited were "blanket" cases, in every respect similar to the cause under consideration. We thought they were similar to the extent as that the principle to be deduced therefrom, based upon the facts therein exhibited, with reference to the culpability of the plaintiff, were so analogous as to preclude a recovery. It is often hard for the briefmaker, as well as for the courts, in attempting to present a principle applicable to a record, to find a "receipt," so to speak, which would preclude discussion—to always have an absolute similitude of facts to sustain the position attempted to be maintained. In considering the cause on the original hearing, we thought then, and we are very strongly impressed now, that a careful consideration of the acts of the plaintiff concludes the cause. Neither the appellant nor the appellee has attempted to assist us with reference to the serious and important question of contributory negligence involved in this record by any citation of authorities; the former contended with a discrimination of facts and condemnation of the authorities and principles attempted to be invoked by us.

It may be that we have overlooked some authorities upon this question, but upon investigation we are inclined to think that, as to the direct question involved (this woman proceeding into the dark and stepping into unknown danger), the case of *Buenemann v. Railway Co.*, 32 Minn. 390, 20 N. W. 380, decided by the Supreme Court of Minnesota, is rather in point in appellant's favor. In that cause the passenger was upon the platform of the railway company intending to take passage upon defendant's train, which had just arrived. He walked to the rear of the train for the purpose of obtaining a seat in the rear car, which, of course, was a legitimate purpose, and it appeared that he did not go further than was necessary. It seems that in this cause the passenger knew that the platform was elevated but the night was dark and there were no lights, with the exception of the lights in the building (the same as in this record), to light the platform or approaches. The Supreme Court of Minnesota said in that cause; "He was a stranger and was not familiar with the ground; but conceding, as we must, that he saw that it was dark and knew that the platform was elevated, and, as counsel say, ended some-

where, yet might he not assume, when he saw that the company had left the platform unlighted, that they would not leave a passenger coach so near the end of the platform as to endanger the safety of passengers who might be seeking to approach either end of the car." The court, however, further said: "So far as we can arrive at a conclusion from the imperfect manner in which the evidence is brought before us, we admit *we are personally strongly impressed with the idea that plaintiff was negligent* but by no means so clearly as to so hold as a matter of law against the verdicts of two juries and the opinion of both of the learned judges who presided at the respective trials in the court below"—and upon this history of this case this Supreme Court thought that these facts with reference to the action of the two juries and the trial judges in the court below was "entitled to some weight as tending to show that at least there is reasonable ground for a difference of opinion on the question." The first trial resulted in a verdict in favor of the plaintiff; and we presume the trial judges, on account of the great preponderance of the testimony, indicating contributory negligence, granted a new trial but permitted a second verdict to stand, which the Supreme Court sustained. It was with considerable misgiving and reluctance that the able court in that instance affirmed the judgment of the trial court; and there is apparent in that cause an element not existing in this record, as stated, that the passenger might assume that the railroad, in bringing its train into a depot, would not leave a passenger coach so close to the end of a platform as to endanger the safety of passengers who might be seeking to approach either end of said car. The passenger in that cause "was in the act of turning upon the platform when he missed his step and fell therefrom to the ground, having evidently in the darkness gone too near the edge," and which was the immediate act manifested by Mrs. Stamp here. If that court, impressed by the weakness of plaintiff's case and the strength of the proof of contributory negligence, reluctantly affirmed a judgment of recovery, based to some extent upon the verdict of two juries and the final action of the trial court, in overruling the motion for a new trial, what would have been its opinion if the trial court, had peremptorily instructed the jury, as in this cause, and the evidence had been the same? The contributory negligence in this record is grounded by us upon what we deem to be the heedless action of the appellant in walking near the edge of the platform in the dark, knowing that the same must end somewhere, without knowledge of surroundings.

We cite the case of *Bennett v. Railway Co.*, 57 Conn. 422, 18 Atl. 688, by the Supreme Court of Connecticut, not upon the similitude of facts in that record to this cause, but for the applicability of an observation in that case upon an element we considered quite

potent and suggestive in this record. The appellant, Annie Stamp, in this cause testified that after proceeding upon the platform a certain distance, and while in the dark, she lost her bearings and became turned around, evidently not knowing the course that she was pursuing. In the Bennett Case, *supra*, it seems that plaintiff knew the premises, which, with the fact of passing three lighted stairways, distinguishes it from this cause, and knew that passengers were accustomed to indiscriminately use three of the stairways at the station, and passed the three which were lighted and missed his calculation in approaching the fourth, which was unlighted, and was injured. The court said; "He has now passed from a place of safety into one of great danger," and "the law, instead of being satisfied with slight care, requires the utmost care. Slight negligence became gross negligence, because none will be tolerated." We are not prepared to adopt this statement in full as a legal principle but think the following observation quite relevant and pertinent: "Every one knows how difficult it is in walking in utter darkness to correctly calculate courses and distances even in very familiar localities. The record does not disclose that any precautions were taken to know and keep in mind his whereabouts, except perhaps to reply upon his general knowledge of the premises, to inform him when he reached the stairs. If that is so, he was inexcusable." The court further said that the appellant in that cause disregarded "the instinct of self-preservation," and the darkness, coupled of course with the other acts of plaintiff, was a moving consideration, evidently, in the opinion of that Supreme Court in concluding contributory negligence as a matter of law.

We cite the case of *Massey v. Sellar*, 45 Or. 267, 77 Pac. 399, not wholly applicable, it is true, upon the facts, it being a case where a visitor was by invitation, and where the owner of premises had an unguarded elevator, and where the visitor had stepped aside and was seeking a water-closet in a dark corner. The observation of the court which we think pertinent is as follows: "Now, if it was so dark in there that he could 'see nothing,' it was certainly an act of folly on his part to enter on a cruise of exploration and discovery without determining whether it was safe to proceed. To bolt headlong into a place little known, and where the senses cannot take note of it, is not the act of a prudent man, and there is no chance for any other inference or deduction concerning it. Reasonable minds could not come to any other conclusion touching it, so there is nothing for the jury to determine," etc.

Also the case of *Emery v. Railway Co.*, 77 Minn. 465, 80 N. W. 627, is cited, where a lady was a visitor upon the premises of the railway company and fell from the platform of the defendant upon her return home, after

having accompanied a relative to the train, and was familiar with the platform, and, the court said, "hence must have known the danger of walking off the north end of it in the darkness, for she testified it was the darkest night she ever saw. If so, the danger was proportionate to the darkness; but she made not the slightest effort to avoid danger and secure her safety, for she testifies she walked right off the end of the platform and was thereby injured." We believe it will be readily understood, without attempting to discriminate, the purpose of the quotations and the limit of their applicability to the record here.

In regard to the matter of the foreign law and the question of a free pass concluding a recovery, the appellant again vigorously insists that the foreign law is not proven, and that further the pass on which appellant rode was not a free pass, and upon the latter question cites the following authorities: *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 870; *Grand Trunk Ry. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 536; *B. & O. Ry. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 774; *Doyle v. Railway Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 845, 55 Am. St. Rep. 417; also *a. c.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335; *U. S. Statutes Annotated*, Supplement of 1912, p. 114 (Act June 18, 1910, c. 309, § 7, 36 Stat. 547 [U. S. Comp. St. Supp. 1911, p. 1286]). The case of *Railway Co. v. Stevens*, *supra*, decided by the federal Supreme Court, was one where the plaintiff was the owner of a patented car coupling; the railway company, negotiating for its adoption as an appliance upon its road, had agreed to pay plaintiff's expenses if he would make a "joint errand for himself and the company," as the appellant expresses it, and the Supreme Court said: "His expenses in making that journey were to be paid by the defendant, and of these expenses the expense of his transportation was a part." Also holding the transportation an express contract: "The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement in which the mutual interests of the parties were consulted." "Drovers passes" are of course part of the consideration of the transportation and are also contracts.

[9] The case of *Doyle, Adm'r, v. Railway*, decided by the Supreme Court of Massachusetts, *supra*, involved a ticket or pass which was issued to the holder monthly, clearly in consideration and as a part of his employment. The facts of this case are explained by a reading of another case between the same parties, *Doyle, Adm'r, v. Railway Co.*, the latter reported in 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417, showing that the issuance of the transportation to the deceased was an express ingredient of the contract of employ-

ment, by virtue of which the defendant, by the issuance of this character of transportation, "was enabled to obtain the services of those who did not live in Boston and thus draw its employes from a larger body, subject only to the expense of transportation, and the plaintiff's intestate was enabled to enter the defendant's employment on equal terms as to wages with those living in Boston," and held that "the ticket (in both cases) could not properly be regarded as a gratuity." This transportation is by virtue of a contract, express or implied, or lacks the elements of one; if there is no consideration to the company by virtue of such contract, there is no contract and it is in the nature of a gratuity.

In this cause, upon the whole testimony, we are unable to say that the mother was a dependent member of the family, if that was a requirement for the successful solicitation of a pass; nor that the custom to give passes to the employes, or rules to that effect, extended to the son for the benefit of his mother and was a part of the employment, express or implied; the proof is too uncertain. Could the son, upon refusal to issue the pass, have sued and recovered for the transportation if he had paid the fare for his mother under the proof here? We clearly do not think so.

[10] In this cause the appellant sues for \$12,000. In the case of *Sims v. Sims*, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. Ed. 117, the Supreme Court of the United States, with reference to appeals and writs of error to the Supreme Court of the United States from the Supreme Court of a territory, said: "Under the existing acts of Congress, therefore (except in the cases so transferred to the Circuit Courts of Appeals, and in cases of habeas corpus, cases involving the validity of a copyright, and cases depending upon the Constitution or a statute or treaty of the United States, none of which classes includes the case at bar), the appellate jurisdiction of this court to review and reverse or affirm the final judgments and decrees of the Supreme Court of a territory includes those cases, and those cases only, at law or in equity, in which 'the matter in dispute, exclusive of costs, shall exceed the sum of \$5,000.'" With reference to the jurisdiction of the Supreme Court of the United States over causes upon appeal or writs of error from the Supreme Court of a territory, the statutes governing the matter, since the rendition of the opinion of the *Sims* Case, *supra*, have been modified by the additional prescription in procedure requiring ascertainment of the sum in dispute to be under oath; the last change directly applicable to New Mexico is indicated by the congressional act of March 3, 1911 (chapter 231, § 245, 36 Stat. 1158 [U. S. Comp. St. Supp. 1911, p. 229], Federal Statutes Annotated, vol. 1 [Supplement] p. 233), as follows: "Sec. 245 (writs of error and appeals from the Supreme Courts of Arizona and New

Mexico). Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the territories of Arizona and New Mexico may be taken and prosecuted to the Supreme Court of the United States in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under the United States, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars."

The matter of the ascertainment of the sum in dispute under oath as a condition of the jurisdiction of the Supreme Court of the United States is a mere matter of pleading and procedure and could not affect the proposition of the rule of law prevailing in New Mexico, as evidenced by the decisions of the Supreme Court of the United States in two cases.

[11] Appellant argues quite ingeniously that the law as announced by courts is subject to change, and on account of its mutability it should not overcome the presumption that the law of New Mexico is the same as we interpret it. True, the courts change their decisions, but the logic, pushing it to a forced conclusion, lands appellant upon the proposition that the rule of law decided in this state that the law of another state is presumed to be the same as ours is a fallacy, because our own courts may change the law at any time, when in reality it is a salutary rule where applicable.

The case of *Boering v. Railway Co.*, *infra*, and the last case by the Supreme Court, uses very strong language in regard to a free pass, and we would not be any more at liberty in believing that that court would change its decision than that our Supreme Court would change its decisions when several years previously it had twice decided the same proposition. If we are correct and this transportation is not a contract, we think the law of this case as a part of the law of New Mexico is that introduced in evidence by appellee contained in the cases of *Railway Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, and *Boering v. Railway Co.*, 193 U. S. 449, 24 Sup. Ct. 515, 48 L. Ed. 742, where transportation of this character was held to be gratuity. The case of *Western Union Telegraph Co. v. Etta White*, 162 S. W. 905, decided by us December 6, 1913, is clearly distinguishable from this case, patent upon reading the two cases, and does not apply. The question of diverse citizenship is not in this record. If this transportation was not based upon a consideration, the law of the Supreme Court of the United States is the law of this very case, and, if sued upon in New Mexico, we believe the result there would have been the result here. A further

inspection and consideration of the congressional act with reference to free passes causes us to reiterate that the same is not applicable to the record here.

The motion for rehearing is overruled.

#### Ex parte HUNT.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

#### HABEAS CORPUS (§ 3\*)—MANDAMUS (§ 57\*)—BOND—COMPELLING APPROVAL.

Where a person, desiring to appeal from a conviction in the corporation or mayor's court, presents a sufficient bond to perfect his appeal, which the mayor refuses to approve, his remedy is by mandamus to force the mayor or other officer to follow the law, and not by habeas corpus to procure his discharge.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 8; Dec. Dig. § 8; \* Mandamus, Cent. Dig. §§ 68, 114-120; Dec. Dig. § 57.\*]

Appeal from Scurry County Court; C. R. Buchanan, Judge.

Habeas corpus proceeding by W. I. Hunt. From a judgment adverse to him, petitioner appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of vagrancy in the corporation or mayor's court in the town of Snyder. He sets up, in substance, that he was in charge of the city marshal, and that he had employed an attorney to appeal his case; that he was taken to jail and not given time to make his bond, which had been fixed in the sum of \$50. The city marshal had a check of his for \$100. Appellant had deposited this amount with him, which it seems was intended to operate as a guaranty that he would not run away, or perhaps to act in place of the bond. However, appellant did not give bond. He asserts some of the papers were informal; that they show he was convicted in the mayor's court, when in fact it was the corporation court.

On the trial of the case Wolfe, the city marshal, testified that he had relator in jail under a commitment issued by the mayor of the town of Snyder, which commitment he had and identified. This commitment, however, is not in the record. He states he had made no return on the commitment. The docket of the corporation court was identified, and the complaint was also identified as against relator. It is also shown by this witness there was never any bond presented to him for approval, nor was he asked by relator's attorney to accept any bond. There was a check given him for \$100, but no bond; but this check was given the officer after the time relator's right to make a bond had expired. He further testifies he had \$30.27 of applicant's money that he had on him at the time of arrest, which money he placed in the bank, and is now held by him at the

relator's request for safe-keeping; that relator had never at any time presented him any bond; that his bond was first fixed at \$50, and then the mayor set same at \$100; that all the cost was not in at the time the bond was fixed at \$50. This witness further states he saw relator sign a bond for \$50, and when Mr. Payne, his attorney, and witness went to the mayor's office, the amount of the fine and costs being run up, showed it was more than \$25, and the mayor raised the bond to \$100. He further testifies he was under the impression that he was told by the attorney representing relator that the bond was raised to \$100, and saw relator sign this bond, but no other person signed it; that he never had any kind of bond presented to him for approval; he only had the \$100 check, and that was after the time for relator to file bail bond had expired. This is the case on the facts.

This leaves the matter in doubt as to what appellant was seeking. If he was seeking to be discharged under these circumstances because he had been deprived of his right of appeal for the failure of the court to approve his bond, even had he presented one, and it had been sufficient, it would not justify a resort to writ of habeas corpus. He had a remedy against the mayor with reference to approving the bond; but it seems appellant did not even present an appeal bond for approval, either to the mayor or to the city marshal. Had he desired to consummate his appeal, he should have followed the statute, and in case the officer refused his legal rights, his duty then was to apply to the county judge for mandamus proceedings to force the mayor or other officer to follow the law. A case directly in point is *Ex parte De Loche*, 50 Tex. Cr. R. 525, 100 S. W. 923.

Under the authority of that case, this judgment will be affirmed.

#### HALL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

#### 1. CRIMINAL LAW (§§ 1092, 1099\*)—APPEAL—STATEMENT OF FACTS.

Where the term at which defendant was convicted of a misdemeanor adjourned May 28th, a statement of facts and bill of exceptions, not filed until July 30th, could not be considered, either in passing on alleged errors or as the basis for supporting the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2820, 2834-2861, 2866-2880, 2919; Dec. Dig. §§ 1092, 1099.\*]

#### 2. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTION—INSTRUCTIONS.

Where the court cannot consider the statement of facts, it must presume that the trial court submitted the law as applicable to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. CRIMINAL LAW (§ 814\*)—TRIAL—ISSUES AND VARIANCE.

Under an information for keeping a disorderly house in a house owned by another and leased by the defendant, an instruction authorizing a conviction if defendant himself was the owner was reversible error, since he could not be charged with committing an offense in one way and be convicted for its commission in another way.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

Appeal from Upshur County Court; W. H. McClelland, Judge.

Martin Hall was convicted of keeping a disorderly house, and he appeals. Reversed and remanded.

Warren & Briggs, of Gilmer, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. [1] Appellant was tried at the May term of the county court of Upshur county, which adjourned on the 28th day of May. The statement of facts and bills of exceptions were not filed until the 30th day of July. This is a misdemeanor case, in which appellant was prosecuted under an information which charged him with "keeping and being concerned in keeping a disorderly house, in a house leased, occupied, and controlled by him, the said Martin Hall, and which said house was owned by Taylor Martin, etc."

[2] Under all of our decisions neither the statement of facts nor bills of exceptions can be considered, nor made the basis for supporting the judgment any more than they can be considered in passing on the alleged errors, and while, if we could look to the statement of facts, the error complained of in the charge as a fundamental error might be immaterial, in that it might appear there was no evidence that appellant was the owner of the house, yet, as we cannot consider the statement of facts, we must presume the court submitted the law as applicable to the evidence, and under such circumstances the charge of the court would authorize the conviction of appellant as owner of the house when the information charged that Taylor Martin was the owner.

[3] The court instructed the jury: "Before the state will be entitled to a conviction in this case it will be necessary for the jury to believe from the evidence, beyond a reasonable doubt, that defendant, Martin Hall, was the owner, lessee, or tenant," etc. Again, in submitting the case specifically, the court instructed the jury: "If you believe from the evidence, beyond a reasonable doubt, that defendant was the owner, or lessee, or tenant of a house," etc., he would be guilty. It is thus seen that while the information charged that appellant was the lessee or tenant, and that Taylor Martin was the owner, yet the charge authorized his conviction if he, and not Taylor Martin, was the owner. The

information could have charged that he was owner, lessee, and tenant; but this it did not do, but specifically alleged ownership in another, and yet the charge authorized this conviction if he was the owner. He cannot be charged with having committed an offense in one way, and be convicted of having committed it in another way.

Under such circumstances, the case must be reversed and remanded.

### PEGRAM v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

#### CONTEMPT (§ 66\*)—APPEAL.

Appeal will not lie from a judgment in proceedings in accordance with Code Cr. Proc. 1911, art. 528 et seq., fining one for contempt of court in refusing to obey a subpoena.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.\*]

Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge.

W. P. Pegram was fined for contempt of court, and appeals. Dismissed.

Woods & Harris, of Houston, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. The appellant was fined by the lower court for contempt of court in refusing to obey a subpoena. The record shows that the proceedings were strictly in accordance with article 528 et seq., C. C. P., and that on the proper final hearing the judgment nisi was made final.

It has been the uniform holding of this court and our Supreme Court, when it had criminal jurisdiction, that appeals did not lie in such proceedings. It is unnecessary to cite all the cases; but see *State v. Thurmond*, 37 Tex. 341; *Carter v. State*, 4 Tex. App. 165; *Crow v. State*, 24 Tex. 12; *Borror v. State*, 63 S. W. 1133.

As this court has no jurisdiction of this appeal, the case is ordered dismissed.

### HART v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

#### CRIMINAL LAW (§§ 1092, 1099\*)—APPEAL—PROCEEDINGS TO PERFECT—TIME FOR FILING STATEMENT OF FACTS AND BILLS OF EXCEPTION.

Where a term of the county court adjourned on May 31st, a statement of facts and bills of exception filed June 30th could not be considered, since such papers must be filed within 20 days after adjournment of court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2868-2880, 2919; Dec. Dig. §§ 1092, 1099.\*]

Appeal from Upshur County Court; W. H. McClelland, Judge.

Man Hart was convicted of false imprisonment, and he appeals. Affirmed.

Warren & Briggs, of Gilmer, for appellant.  
C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. As this case is presented, we are of opinion it must be affirmed. The case was tried in the county court, the charge being false imprisonment. Court adjourned on the 31st day of May; the statement of facts was filed on the 30th day of June; the bills of exception were filed the same day. In this condition of the record, none of the matters set up in bills of exception or pertaining to statement of facts can be considered. Under the decisions construing our statute, all these papers must be filed within 20 days after adjournment of court. Without the statement of facts, none of the grounds of the motion for new trial can be considered.

The judgment is therefore affirmed.

#### BOYD v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

CRIMINAL LAW (§ 1095\*)—APPEAL—STATEMENT OF FACTS—TIME OF FILING.

Bills of exceptions not filed in the trial court in a criminal prosecution until the sixtieth day after adjournment for the term, and after appellant had, within 30 days allowed for filing a statement of facts and bills of exceptions, attempted to extend the time for another 30 days, were too late, and will be stricken on motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2847; Dec. Dig. § 1095.\*]

Appeal from Upshur County Court; W. H. McClelland, Judge.

Fritz Boyd was convicted of crime, and he appeals. Affirmed.

Warren & Briggs, of Gilmer, for appellant.  
C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. From a conviction of false imprisonment, appellant prosecutes this appeal.

The term of the county court at which this trial occurred adjourned for the term May 31, 1913. The court at that time entered an order allowing 30 days thereafter to file a statement of facts and bills of exceptions. Within that 30 days he attempted to extend the time for another 30 days. What purports to be a statement of facts and bills of exceptions were not filed in the lower court until on the sixtieth day after the court adjourned for the term. The Assistant Attorney General has made a motion to strike out said purported statement of facts and bills of exceptions because not filed within time.

Almost every week for the last few years this court has uniformly struck out such papers, when filed without an order allowing 20 days or less, or where such papers are not filed, in accordance with such order, within 20 days from the adjournment of the court. It would be a useless task to undertake to col-

late and cite these various cases. We merely cite *Durham v. State*, 155 S. W. 222, and cases therein cited. Under the law, this court must of necessity strike out and not consider said papers. Without these, no question is raised which we can review.

The judgment will therefore necessarily be affirmed.

#### PHILLIPS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

CRIMINAL LAW (§§ 1095, 1102\*)—STATEMENT OF FACTS—TIME OF FILING.

A statement of facts and bills of exception, not filed until 60 days after the adjourning of court in a misdemeanor prosecution, will be stricken on motion, in view of the stenographer's act of 1911.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2847; Dec. Dig. §§ 1095, 1102.\*]

Appeal from Upshur County Court; W. H. McClelland, Judge.

E. Phillips was convicted of false imprisoning, and appeals. Affirmed.

Warren & Briggs, of Gilmer, for appellant.  
C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of the offense of false imprisoning one W. O. Hayles, and his punishment assessed at a fine of \$200, and 90 days' imprisonment in the county jail.

The term of county court at which he was tried adjourned May 28, 1913, while the bills of exceptions and statement of facts were not filed until July 30, 1913, 60 days after the adjournment of court. This being a misdemeanor conviction, the motion of the Assistant Attorney General to strike out the statement of facts and bills of exceptions must be sustained. This question has been so thoroughly discussed in a number of opinions since the passage of the stenographers' act in 1911 (*Laws 1911, c. 119*), we do not deem it necessary to do so again. *Durham v. State*, 155 S. W. 222; *De Friend v. State*, 153 S. W. 881. The opinions in both those cases were handed down before the convening of the Upshur county court.

The motion for new trial contains no ground that we can review, in the absence of a statement of facts.

The judgment is affirmed.

#### BELCHER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 12, 1913. Rehearing Denied Dec. 10, 1913.)

1. CRIMINAL LAW (§ 564\*)—VENUE—PROOF.

Venue may be proved by other than positive testimony, and need not be established beyond a reasonable doubt; it being sufficient if

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from the evidence the jury may reasonably conclude that the offense was committed in the county alleged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 726, 1277-1284; Dec. Dig. § 564.\*]

## 2. CRIMINAL LAW (§ 1144\*)—APPEAL—VENUE—PROOF—PRESUMPTIONS.

Laws 25th Leg. c. 12, amending Code Cr. Proc. 1895, art. 904, provides that the appellate court shall presume that the venue has been proved in the trial court, unless it was made an issue there, and it affirmatively appears that it was not proved by a bill of exceptions properly signed and allowed by the judge, or proven by bystanders, and incorporated in the transcript. The question of venue was not contested at the trial, nor until motion for a new trial, and the court, in approving appellant's bill of exceptions overruling the motion on that ground, stated that the venue was shown circumstantially in numerous ways throughout the record, more particularly by certain evidence specified as to the place where the killing occurred and the body found. *Held*, that the Court of Criminal Appeals was required to presume that the venue was sufficiently proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766; Dec. Dig. § 1144.\*]

## 3. CRIMINAL LAW (§ 414\*)—EVIDENCE—IDENTITY.

Where two witnesses testified that they passed decedent's home on the morning of the day on which the killing was alleged to have occurred, and saw defendant and decedent, and heard loud talking and swearing between them, and one of the witnesses testified that he heard defendant say to decedent, "I guess, by G—, you are about the last G— man that had it," and recognized his voice, the evidence was admissible, though the other witness was not familiar with defendant's voice, and could not testify that he was the one who made the statement testified to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 936; Dec. Dig. § 414.\*]

## 4. CRIMINAL LAW (§ 656\*)—TRIAL—SUGGESTION BY COURT.

Certain testimony having been given in the absence of the jury in order to determine its admissibility, and the court having ruled that it was, the jury were returned, and during the examination the court suggested to the district attorney that, in order to connect it, "You might ask him the questions I did while the jury was out." *Held*, that such suggestion was not objectionable as on the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2120; Dec. Dig. § 656.\*]

## 5. CRIMINAL LAW (§ 338\*)—EVIDENCE—"RELEVANCY"—"PERTINENT HYPOTHESIS."

"Relevancy" as applied to evidence means that which conduces to prove a pertinent hypothesis, a pertinent hypothesis being one which, if sustained, will logically influence the issue, so that it is relevant to put in evidence any circumstance which tends to make a proposition at issue either more or less probable, and whatever is a condition either of the existence or nonexistence of a relevant hypothesis may be shown; but no circumstance is relevant which does not make more or less probable the proposition at issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6062; vol. 6, p. 5368.]

## 6. CRIMINAL LAW (§ 517\*)—EVIDENCE—CONFESSIONS.

When decedent's body was found, decomposition was well advanced, and from an examination before burial there was doubt as to his identity, and no one was able to state exactly how he was killed; some thinking he was shot with a shotgun in the breast, some that he was shot in the throat, and others that he was shot in the back of the neck or head. There was also no agreement as to the kind of weapon used. After accused was arrested, he made an oral statement to the sheriff that he shot deceased with a shotgun, a little to the rear of the right of the head, with small shot, and also that decedent had had one of his teeth pulled, and that the tooth next to that pulled had a decayed place in the center of it. The body was then exhumed, and it was found that the confession of accused was true. *Held* that, such confession having been voluntarily made, it was properly admitted to establish the identity of deceased, and to show how and by what means he was killed, under Code Cr. Proc. 1911, art. 810, providing that voluntary oral confessions of accused while in custody are admissible, when in connection therewith he makes statements of fact that are found to be true, and which conduce to establish his guilt, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146-1156; Dec. Dig. § 517.\*]

## 7. CRIMINAL LAW (§ 736\*)—CONFESSIONS—ADMISSIBILITY—QUESTION FOR COURT OR JURY.

Whether an oral confession or statement by accused while in custody is admissible is a question of law for the court; it being only when the voluntary character of the confession is contested or the making thereof denied that the court is required to submit such issue to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1210-1221, 1701, 1702, 1705, 1716; Dec. Dig. § 736.\*]

## 8. CRIMINAL LAW (§ 459\*)—EVIDENCE—NON-EXPERT OPINION.

Persons not experts were properly permitted to testify that on the next day and for a few days after the killing they went to the home of deceased, and found blood at various places on the ground, the side of the house, and floor thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1048-1050; Dec. Dig. § 459.\*]

## 9. CRIMINAL LAW (§ 781\*)—TRIAL—CONFESSIONS—EXCULPATORY STATEMENTS.

Where the state did not rely on an entire confession of accused to prove guilt, but exculpatory statements contained therein were proved by defendant, the court was not required to charge that such statements must be regarded as true, unless the state proved the falsity thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1864-1871, 1893; Dec. Dig. § 781.\*]

## 10. HOMICIDE (§ 300\*)—EVIDENCE—THREATS.

Evidence that just prior to the killing decedent said to defendant, "I will fix you right now," and grabbed for an axe, whereupon defendant immediately killed him, did not require a charge on threats.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

## 11. HOMICIDE (§ 300\*)—SELF-DEFENSE—EVIDENCE—INSTRUCTIONS.

Where, in a prosecution for patricide, accused proved that decedent was a violent and dangerous man, that he had had fights with various persons, and had killed one man, that he



had a general reputation as a dangerous and violent person, and that defendant was not his equal in weight or physical strength, an instruction on self-defense was not erroneous as hypothesizing defendant's knowledge of the character and disposition of deceased and their relative strength as a condition of his right to rely on self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

Appeal from District Court, Hardeman County; J. A. Nabers, Judge.

Percy Belcher was convicted of patricide, and he appeals. Affirmed.

Fires & Diggs, of Childress, and Decker & Clarke and J. C. Marshall, all of Quanah, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was indicted for the murder of his father, W. R. Belcher, in Hardeman county on or about May 31, 1912. He was convicted of murder in the second degree, and his punishment fixed at 60 years' confinement in the penitentiary.

On June 7, 1912, the dead body of a man was found in a secluded place in Norton's pasture in said county, which was about 13 miles distant from said W. R. Belcher's home, where he had lived for some time prior to May 31, 1912, and where he was seen alive on that date. Whether this dead body was that of W. R. Belcher or not was one of the main contested questions in the case; the state contending that it was, while the appellant contended that it was not. Much testimony was introduced by both sides on this issue.

Appellant contends that the judgment must be reversed, because the evidence does not show that the killing occurred in Hardeman county. This question was first raised by appellant in his motion for a new trial. The record shows that the issue of venue was not fought out nor contested on the trial of the case. It merely shows that the indictment charged the killing to have been in Hardeman county, and that the appellant pleaded not guilty to the indictment.

[1] As we correctly said in the recent case of Reynolds v. State, 160 S. W. 362, from Shackelford county: "It is the settled law of this state that it is not essential to prove venue beyond a reasonable doubt; that the doctrine of reasonable doubt does not apply to the issue of venue. Barrara v. State, 42 Tex. 260; McReynolds v. State, 4 Tex. App. 327; Deggs v. State, 7 Tex. App. 359; Achterberg v. State, 8 Tex. App. 463; McGill v. State, 25 Tex. App. 499 [8 S. W. 681]; Cox v. State, 28 Tex. App. 92 [12 S. W. 493]; Abrigo v. State, 29 Tex. App. 143 [15 S. W. 408]. It is unnecessary to cite any later decisions. Venue may be proved by other than positive testimony, if from the evidence the jury may reasonably conclude that the

offense was committed in the county alleged it is sufficient. Hoffman v. State, 12 Tex. App. 406; Bowman v. State, 38 Tex. Cr. R. 14 [40 S. W. 796, 41 S. W. 635]. It may be effectively proved by circumstantial as well as by direct evidence. McGill v. State, supra; Cox v. State, supra; McGlasson v. State, 38 Tex. Cr. R. 351 [43 S. W. 93]; Kugadt v. State, 38 Tex. Cr. R. 681 [44 S. W. 989]; Nance v. State, 17 Tex. App. 385."

[2] Prior to the act of 1897, p. 11, now article 938, C. C. P., this court had uniformly held that the record on appeal must affirmatively show venue, whether contested in the lower court or not. In making out statement of facts theretofore, when venue was not an issue, frequently the testimony on that subject was inadvertently or otherwise omitted, and the statements of facts were prepared more particularly with reference to the contested issues fought out in the trial court. The Legislature, therefore, for the express purpose, among others, of preventing reversals, because the record on appeal did not affirmatively show the venue, passed said act of 1897, whereby it is provided that in all cases this court *shall presume* that the venue was proven in the court below, unless that was made an issue in the court below, and it affirmatively appears that venue was not proven by a bill of exceptions properly signed and allowed by the judge of the court below, or proven up by bystanders, and incorporated in the transcript as required by law. Very soon after the enactment of this law the question came up in McGlasson v. State, 38 Tex. Cr. R. 351, 43 S. W. 93. In that case the question was attempted to be raised by a special charge requested by defendant to find him not guilty on the ground that no venue had been proved. The court refused that charge, and he took a bill of exceptions thereto. On this point the court in that case said: "The question presented as to this bill of exceptions is, Does it sufficiently comply with the amendment to article 904 adopted by the Twenty-Fifth Legislature? See Laws 25th Leg. p. 11. The act in effect provides that, as to the venue in all cases, the court shall presume that it was proved in the court below, unless it was made an issue there, and it affirmatively appears to the contrary by a bill of exceptions, properly signed and allowed by the judge, or proved up by bystanders, as is now provided by law, and incorporated in the transcript, as required by law. It occurs to us that this statute requires this court to indulge the presumption that the venue was proved in the court below, unless the bill of exceptions shows affirmatively that it was not proved. This would seem to apprehend that, before we can treat the venue as not proved, the court must either certify that the evidence did not establish the venue or that said bill of exceptions should contain all the testimony in the case tending to show venue, and certify

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that same was all the testimony bearing upon that issue; and from this statement of the testimony it affirmatively appears that the venue in the case was not proved. If this be a true construction of said article, then the bill in question does not comply with the requirements of the law." Again, in *Scott v. State*, 42 Tex. Cr. R. 607, 62 S. W. 419, the appellant in that case sought to raise the question by his motion for new trial, and by affidavits appended thereto, showing that venue was not proved in the court below. This court in that case said: "Appellant, in his motion for new trial, and by affidavits appended thereto, raises the question of venue; that is, he adopts this mode of insisting that the venue was not proven in the court below. Under article 904, as amended by the Twenty-Fifth Legislature (see Acts 1897, page 11), it is provided that the failure to prove venue in the trial court can only be raised by a bill of exceptions properly signed and allowed by the judge or proven up by bystanders, as is now provided by law, and incorporated in the transcript, as required by law. This mode of procedure was not pursued by appellant, and consequently we cannot consider the matter as presented in the motion for new trial." See, also, *Barker v. State*, 47 S. W. 980; *Washington v. State*, 77 S. W. 810; *Brantly v. State*, 42 Tex. Cr. R. 296, 59 S. W. 892; *Munger v. State*, 57 Tex. Cr. R. 384, 122 S. W. 874; *Wynne v. State*, 41 Tex. Cr. R. 504, 55 S. W. 837. It is needless to cite the other cases. In approving appellant's bill of exceptions to the court overruling his motion for new trial on that ground, the court qualified and explained it by stating: "That no question was raised as to the venue until the motion for a new trial. The venue is shown circumstantially in numerous ways throughout the record, and more particularly in this, that the killing occurred at the Belcher farm, and the body was found at a point in the Norton pasture about 13 miles from there, and about one-half mile south of Red river, and in Hardeman county. G. W. Patton testifies (statement of facts, page 41; stenographer's notes, page 33) that he now lives in Johnson county; 'lived in this county last year, about one-half mile south of where W. R. Belcher lived.' W. M. Middleton testified that he moved to this county, to the Belcher farm, etc.; V. P. Foster, that the Belcher farm was 3.4 miles north of Goodlet."

The Legislature, by said act and the proper construction thereof by this court, as shown above, intended that this court should only consider the question of venue on appeal when presented by the proper bill as required thereby. The wisdom of it is well illustrated in this case. Here we have a statement of facts of 150 typewritten pages, and, if not shown by a bill as required, we would be under the necessity of searching out from one end to the other of this 150 pages to ascertain whether or not the evidence was

sufficient to show that venue was proved. However, in addition to the court's qualification above quoted, we have found in this statement of facts ample evidence from which the jury were authorized to find that if the body found was that of W. R. Belcher, he was killed in Hardeman county.

There was no error in the court overruling appellant's challenge of L. J. Tankersley, who was one of the veniremen, because he showed, as claimed by appellant, that he was disqualified to serve. His examination and testimony on his voir dire showed clearly that he was not disqualified but qualified in full accordance with subdivision 13 of article 692, under which the challenge was made. This question has been so often decided against appellant that we deem it unnecessary to collate the authorities, but see those cited under this subdivision of the article in the 1911 Revised C. C. P., and also under the same subdivision in White's Ann. C. C. P.

Appellant has preserved a large number of bills of exceptions and raises a large number of questions. We have carefully considered all of them. They can best be understood, discussed, and decided by grouping those that pertain to the same matters.

[3] Among other witnesses introduced by the state were B. R. Foster and D. Mullins. The substance of their testimony was that on May 31, 1912, they lived at the town of Goodlet, which was about three-quarters of a mile distant from where said W. R. Belcher's home was, and where he lived at that time; that about 8:30 on the morning of May 31st they, together, passed said Belcher's house about 50 yards therefrom; that they then saw W. R. Belcher, and Foster said he saw appellant, and heard appellant at that time do some pretty loud swearing; Mullins heard the same, but could not identify appellant as the party who used the language; that appellant at the time was standing just in the door five or six feet from his father, W. R. Belcher, who was passing from one door to the other at the time, and that they heard him say, "I guess, by God, you are about the last God-damn man that had it." Mullins could not be so certain whether it was appellant who was talking or not, as he did not know him so well, and was not familiar with his voice; but this was at the same time and the same loud cursing and talking that Foster heard and testified about. Foster was more familiar with appellant's voice, and in his judgment it was appellant who was doing the loud cursing and talking, and who said what is stated above. This testimony was admissible. It was not essential to its admissibility that these witnesses must know positively that it was appellant who was doing the talking and cursing; but Foster does show by his testimony a sufficient knowledge of appellant's voice, the situation of the parties, and all, so that it was admissible. The fact, if it be so, that they could not be certain about the matter would go to

the weight of the evidence, and not to its admissibility.

[4] It seems that a part of Foster's testimony was first heard by the court in the absence of the jury, so that the court could determine whether the testimony was admissible over appellant's objections; that, when the jury was brought back, and the witness was testifying before them, and appellant was making objections thereto, which were overruled, the court stated to the district attorney that, in order to connect it up, "You might ask him the questions I did while the jury was out." Thereupon the district attorney stated to the court that he was not through with the witness, and intended to ask said questions. The appellant objected to the suggestions of the court to the district attorney, claiming that his remark was upon the weight of the evidence. The court, in allowing the bills, among other things, qualified it by stating that the testimony showed that the witness knew defendant by his voice. No error is shown in this matter.

[5] Our statute (article 1, C. C. P.) says that the object the Code seeks is: "4. To bring to the investigation of each offense on the trial all the evidence tending to produce conviction or acquittal." Judge White, in his Ann. C. C. P. § 1070 et seq., among other things, says: "Evidence may be given in any proceeding of any fact in issue, and of any fact relevant to any fact in issue. Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although, if it were not part of the same transaction, it might be excluded as hearsay. Whether any particular fact is or is not part of the same transaction as the fact in issue is a question of law, upon which no principle has been stated by authority, and on which single judges have given different decisions. Again, facts necessary to be known to explain or introduce a fact in issue, or relevant or deemed to be relevant to the issue, or which support or rebut an inference suggested by any such fact, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively. Morrison v. State, 37 Tex. Cr. R. 601, [40 S. W. 591]. Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less probable. Whatever is a condition either of the existence or of the nonexistence of a relevant hypothesis may be shown. But no circumstance is relevant which does not make more or less probable the proposition at

issue. McGuire v. State, 10 Tex. App. 125. No testimony should be offered by the prosecution which is not legal and relevant. Gazley v. State, 17 Tex. App. 267; Nalley v. State, 28 Tex. App. 387 [13 S. W. 670]. But evidence, though not bearing directly on the issue, nor sufficient per se to support a conviction, is admissible if it tends to prove the issue or constitutes a link in proof of it. Marshall v. State, 5 Tex. App. 273; Francis v. State, 7 Tex. App. 501. All the circumstances of a transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. McMahon v. State, 16 Tex. App. 357; Grimmitt v. State, 22 Tex. App. 36 [2 S. W. 631, 58 Am. Rep. 630]."

Again, in section 1072, he says: "However remote from the main issue in point of time, place, or other circumstances a fact may be, if relevant and tending to explain the main issue, the safer practice is to admit evidence thereof, leaving the question of the weight to the jury. Russell v. State, 11 Tex. App. 288. Facts tending to show a motive, though remote, are admissible in evidence. Dill v. State, 1 Tex. App. 278; Jones v. State, 4 Tex. App. 436; Rucker v. State, 7 Tex. App. 549."

These principles are applicable to some of the questions raised in this case.

The state showed by a large number of witnesses, and, in fact, it seems not to have been controverted, that no one in that whole community and county ever saw W. R. Belcher after May 31, 1912; that either on that day or the next the Belcher family, including appellant, left the said Belcher home, and did not return thereto; that the appellant, either that day or the next, was seen to drive a wagon from this Belcher home, with some of the small children therein, and something lying in the wagon resembling a roll of bedding; that all the bed clothes were taken off of the bed in the home, and the situation of the house, of the furniture, and surroundings of the house showed that it had been hastily abandoned by the Belchers; that on June 7, 1912, some 13 miles from this home the body of a dead man was found in a secluded place, lying on a part of a wagon sheet and a common cheap blanket, covered up with two quilts; that the tracks of a wagon were at the time shown to have passed right over where this body was found, and the evidence was clearly sufficient to show that this dead body was the body of said W. R. Belcher; that a day or two later appellant left Hardeman county, and went to Oklahoma City, where he was arrested, and brought back a few days after this body was discovered.

Outside of the confession or statement of the appellant hereinafter mentioned, and even therewith, the state was under the necessity, by circumstantial evidence very largely, of establishing the identity of this dead body as that of W. R. Belcher, and that the appellant had murdered him. In such case as

this, courts and text-writers all say: "The mind seeks to explore every possible source from which any light, however feeble, may be derived." *Noftsinger v. State*, 7 Tex. App. 301; *Cooper v. State*, 19 Tex. 449; *Barnes v. State*, 41 Tex. 342; *Hamby v. State*, 36 Tex. 523; *Black v. State*, 1 Tex. App. 388. "And in such cases the nature of the case in many instances demands a greater latitude in the presentation of the evidences of the circumstances than where a conviction is sought upon direct and positive testimony." *Noftsinger v. State*, supra.

The state claimed the flight of appellant and his attempt to disguise his whereabouts and prevent detection by changing his name. Without objection, the state proved that on May 31, 1912, or the next day, Mrs. Belcher, with her children other than appellant, took up her residence in the said town of Goodlet, and did not thereafter live at said farm home, where W. R. Belcher and his family had lived up to that time, and that she (Mrs. Belcher) rented out that farm on June 5, 1912, to Mr. Middleton. It was also, without question, shown, as stated above, that appellant in a day or two after May 31st left Hardeman county, buying a ticket for the train on which he took passage to some nearby town in Oklahoma; that when he reached that town he did not get off, but paid his fare to the conductor from there to Oklahoma City, where he was found a few days after the said dead body was found, going under an assumed name, and at first denied that he was the appellant, Percy Belcher.

It took the testimony of several witnesses to independent facts known and testified to by them respectively to show or seek to show, as the state did, appellant's flight, and the change of his name, and going under an assumed name. On this point, over appellant's objections, the state proved by Mr. Vernon, the agent and manager of the Western Union Telegraph Company at Quanah, Texas, in May and June, 1912, and by Horton Murphy, the messenger boy of said telegraph company at Quanah, that a day or two after appellant reached Oklahoma City Mrs. Belcher received a telegram at Quanah, signed G. W. Pendergraf, which said, "Please send me \$16.45 to finish paying fine at once;" that on June 5th, just after the receipt of this telegram, said Mrs. Belcher went to the telegraph office, and had said operator to remit for her to said Pendergraf \$20 by telegraph. Miss Williams, who was the long distance telephone operator at Quanah in June, 1912, testified that there were two long distance calls from a party in Oklahoma City, which the data in her office showed were from Pendergraf, and that Mrs. Belcher did have a long distance telephone conversation from Quanah with some party at that time in Oklahoma City; that Mrs. Belcher did not come to the telephone office to do the talking, but talked from the phone at Mrs. Goodner's residence. Mrs. Goodner testified that Mrs. Belcher at this

time did have a long distance conversation with some one from her residence, in which she told the party that she was Mrs. Belcher, and she called the party to whom she was talking detective; that she had two such long distance conversations over her phone from her residence. In one of them she heard Mrs. Belcher say that the body was brought in, and that they seemed to think it was Mr. Belcher's body, and that she heard her also tell this party to go to the office, and inquire for G. W. Belcher's mail and another party's mail; and that Mrs. Belcher left with her at the time the charges of the telephone company for said two conversations. Roy Stovall testified that he was toll lineman for the said telephone company at Quanah in June, 1912, and that on June 8, 1912, he heard a conversation on the telephone line between Oklahoma City and Mrs. Goodner's house in Quanah; that he did not know the voice of either party talking, but that one was a man's, and the other was a woman's, and that he heard the woman's voice call the name of Clark in that conversation, and that it was about a letter; that the male voice said that he did not receive the letter, and that the woman's voice said go to the post office, and call for a letter under the name of Clark; he could not remember the initials, nor could he tell, being on the line, which voice was in Oklahoma City, and which was at Quanah. Mr. Middleton testified that shortly after he had rented said Belcher's farm from Mrs. Belcher on June 5th, in moving back and forth, and, while he could not be certain, he thought it was before the said dead body was found on June 7th, he, for Mrs. Belcher, appellant's mother, mailed a letter on the train for her, which train was going towards Eldorado in Oklahoma. He could not remember, as it was not impressed upon him, the name or the address of the person to whom the letter was addressed. Mr. Morris, who was a city detective at Oklahoma City in May and June, 1912, testified that he went to the post office, and watched for a party to come there to call for a letter addressed to W. M. Clark; that about 1:05 p. m. the appellant called at the post office in Oklahoma City for this letter, and that he at once arrested him; that at the time the post office clerk became excited, and did not deliver the letter to appellant; that he arrested appellant, asked if his name was not Percy Belcher, which he first denied; upon being told by Morris that he knew him, he then admitted his identity and name; that Morris then got said letter addressed to said Clark, and turned it over to appellant, and that he saw appellant take a \$20 bill out of it. Appellant did not object to the said testimony of Morris, but did object, on various grounds, to the testimony of each of the above-named witnesses when they respectively gave their testimony in substance as given above. We have carefully considered appellant's respective objections to this testimony with the explanation and qualification made

by the court in approving the respective bills. The respective bills themselves, if taken alone, are each too meager and do not comply with the well-established rules so as to require consideration thereof by this court. But we have gone over them all, as stated, and, in our opinion, the testimony of the respective witnesses was admissible in this case, and none of appellant's objections thereto should have been sustained, and none of them present any reversible error in this case.

As stated above, one of the main contested points in this case was whether or not said dead body was that of W. R. Belcher. Another was whether or not, even if it was his body, he was murdered, and by whom? The state contended that it was his body, that he was murdered, and that appellant had committed the offense. The appellant contended the reverse of this. Another contested point was, even if this body was that of W. R. Belcher, and that his death was brought about by unlawful violence, by what means was his killing effected?

[6] When this body was first found, as stated above, decomposition had taken place to a considerable extent. Holes made by worms in the body or some external objects were shown in various locations on the body. Many persons viewed the body from the time it was found until it was interred the next day, on June 8th. No one knew from such examination or otherwise whether this body was that of W. R. Belcher, or whether he came to his death by violence at the hands of another, or, if so, what means were used to effect it. Various opinions and guesses were indulged. Some thought it was his body; others thought not. Some thought that he had been killed with an axe; others that he had been shot, but with what kind of gun was unknown and guessed at variously by said persons. Some thought he was shot with a shotgun in the breast; some in the throat; others that he was shot in the back of the neck or head; some with some kind of gun; others with another. No one knew, and no one could definitely tell.

Appellant had been arrested about June 10th in Oklahoma City, and within the next day or two turned over by the authorities of Oklahoma to the sheriff of Hardeman county, and by him brought back to Hardeman county, and placed in the jail there on or about June 14th. While thus confined in said jail on this charge, the court permitted the state to introduce the testimony of the sheriff, B. Frank Walker, to an oral confession or statement by appellant to him, which was made on the Sunday following his return from Oklahoma City, and after the said body had been interred, to this effect: That he (appellant) had shot his father, W. R. Belcher, with a shotgun a little to the back of the right of the head with small shot; he said with either No. 6 or No. 7½ shot; that his father

had had one of his teeth pulled out, and that the tooth next to that one had a decayed place in the center of it.

The state then introduced evidence showing that the next day after this confession or statement by appellant it had this dead body disinterred, and an accurate examination thereof made, which showed that the dead body had been shot at the place, and with small shot, as stated by appellant, and that there was one of the teeth missing, and that the one next to it had a hole in the center. In the previous examination of this body no one had ascertained and no one knew that this body had been shot at the exact location stated by appellant, though some thought perhaps this had been done. No one knew and no one could testify that prior to this confession and the examination of the body, after it was disinterred, that he had been shot at this location with small shot. This examination developed with certainty that this was the location, and that he was shot with small shot, and then for the first time were small shot seen and extracted from the body of the deceased where shot. It was known before that this body had a missing tooth; but, while this was true, it was not known prior to then that the tooth next to the missing tooth had a hole in the center of it. Still, again, while it was known before that this body had a missing tooth perhaps at the same location that W. R. Belcher had had a missing tooth, yet whether or not that was his body was not known with certainty by any one.

There can be no question that, from the testimony in this case, all of it, whether this was the body of W. R. Belcher before this confession and subsequent verification was unknown; that he had been shot in the location fixed with small shot was not known; that the tooth next to the missing tooth had a hole in the center of it was not known. The confession or statement of the appellant was without doubt the means and the cause of the discovery of these respective facts with certainty.

Our statute (article 810, C. C. P.) expressly provides in substance, and it has uniformly been so construed by many decisions of this court, that the oral confession or statement of an accused while in custody, when voluntarily made by him, when in connection therewith he makes statements of facts or circumstances that are found to be true, and which conduce to establish his guilt, or the instrument with which he states the offense was committed, is admissible.

[7] It is also the settled law of this state that whether or not such statement or confession is admissible is a question of law to be decided by the judge and not left to the jury. However, if it should be contested that the confession was not voluntarily made, or the making of such confession should be de-

nied by the appellant, the court should submit such issue to the jury; but, if these matters are not in issue, then the court should not submit them to the jury. In this case the confession was shown to have been voluntarily made by appellant after being duly warned, and he did not dispute that he had made said confession. Therefore, as said by this court in *Jordan v. State*, 51 Tex. Cr. R. 146, 101 S. W. 247, and many other cases: "A confession is criminative evidence like the facts that other witnesses in this case testified about, and it is not proper for the court to single out the confession under the facts in this case for any purpose." For other cases along this line, see section 236, Branch's Criminal Law, and cases there cited. For a collation of some of the cases under the said statute above cited, to the effect that the oral confession of an accused in custody which results in statements of facts and circumstances that are found to be true which conduce to establish his guilt, and the instrument with which he states the offense was committed has been found, are admissible, see section 1034 et seq. of White's Ann. C. C. P.

So that we think in this case the appellant's confession was clearly admissible, and the court should not have charged thereon in any particular as contended by appellant.

[8] The court correctly permitted several witnesses to testify that the next day and for a few days thereafter they went to the former home of said W. R. Belcher, and found blood at various places on the ground, the side of the house, and the floor thereof as testified to by them. They did not have to be doctors nor experts to determine whether or not what they saw was blood. None of them attempted to state whose blood it was, or in any way analyze it.

The court's charge as a whole, and neither paragraph thereof, is on the weight of the evidence as complained by appellant. The charge, in every instance, leaves everything necessary to have been found by the jury to them without any intimation by the court as to the weight of the evidence to establish any fact in the case. We cannot understand how the judge could have more fairly submitted all these questions to the jury, without any intimation of his opinion, if he had one, for or against the appellant.

[9] The state did not prove or offer to prove the confession or statement of the appellant otherwise than as, in substance, has been shown above. The appellant, in cross-examination of the state's witness said Sheriff Walker, when the state introduced his testimony showing said confession by appellant, did not show or attempt to show any other confession containing exculpatory statements or otherwise by him at that time. Subsequently, after the state had rested, and the appellant had introduced considerable other testimony, he introduced said Walker, the sheriff, and himself proved another confes-

sion or parts of said confession which would be termed exculpatory and in his favor. It is only when the state introduces such exculpatory statements in the confession, and relies upon such confession, practically wholly, for the purpose of proving an appellant's guilt, that makes it necessary or proper for the court, under any contingency, to charge in effect that such exculpatory statement is to be taken as true, unless the state proves the falsity thereof. So that appellant's contention that the court committed reversible error in not so charging in this case, and (citing *Pharr v. State*, 7 Tex. App. 472, and other authorities along that line) even if they were applicable, and laid down the law as contended by appellant, could not be maintained in this cause, and the court did not err in not charging on the subject as contended for by him.

[10] Appellant contends that the court should have submitted a charge in his favor on the question of a threat. There is no evidence in this case of any threat by W. R. Belcher against appellant at any time. The only thing that could be contended was a threat is that of appellant in introducing his confession that he killed his father; that his father right then said, "I will fix you right now," and grabbed for an axe; and that he immediately killed him. Even if that could be construed to be a threat, it was at the very time of the killing, and it was not necessary to charge the law of threats at all because thereof. *Hancock v. State*, 47 Tex. Cr. R. 9, 83 S. W. 696; *Armstrong v. State*, 50 Tex. Cr. R. 27, 96 S. W. 15; *Dobbs v. State*, 54 Tex. Cr. R. 552, 113 S. W. 923; *Davis v. State*, 52 Tex. Cr. R. 149, 106 S. W. 144.

Appellant has some criticisms of the court's charge on the subject of self-defense. The only question in the whole record that suggests any self-defense is that part of appellant's confession introduced by him to the effect that his father told him immediately before or at the time of the killing that he and his mother had separated, and that he himself was going to take some of the younger children; that thereupon he (appellant), by his motions and what he said to his father, stated that he would forbid and not permit his father to take the children; that thereupon his father said, "I will fix you right now," and started to pick up an axe. The distance between appellant and his father at this time was shown by the sheriff to have been 15 feet. Appellant claims that immediately when he started to pick up this axe, with his said declaration, that he thereupon shot and killed him, claiming he did so in self-defense. As stated, it was demonstrated that this shot took effect in the back of the neck and lower part of W. R. Belcher's head behind the right ear. The court submitted, we think, self-defense in appellant's favor in every way favorable to him

that was raised or suggested by this testimony, and that there is no error in the court's charge on the subject.

[11] The appellant himself, and he alone, introduced testimony showing that his father was a violent and dangerous man, and had had fights with various persons, and had killed one man; in addition, that his general reputation was that of a dangerous and violent man; in addition, he expressly proved that he (appellant) was a young man 19 or 20 years of age, and weighed about 145 or 150 pounds, that his father was a man 45 or 46 years of age, about 6 feet tall, and weighed from 170 to 185 pounds, and a very active man. Under these circumstances, the court did not err in submitting appellant's claimed self-defense by, among other things, using the expression, "or if by the acts, words, or conduct, or threats then made, if they were, of W. R. Belcher, at the time it reasonably appeared to the defendant that said W. R. Belcher was about to attack him, and from the manner of such attack or threatened or apparent attack, and defendant's knowledge of the character and disposition of said W. R. Belcher, and relative strength of the parties, caused him to have a reasonable fear or expectation of death or serious bodily injury," etc. The part of this charge complained of is the words "and defendant's knowledge of the character and disposition of said W. R. Belcher, and relative strength of the parties." This was very appropriate, and in no way the subject of adverse criticism by appellant, under the facts and circumstances of this case.

In concluding his printed brief in this case, which is a vigorous and forcible one, appellant, by his able attorneys, among other things, says: "The evidence shows that W. R. Belcher was a most violent and dangerous man, having killed a man himself, when the defendant was a baby. Human experience teaches us that, when the mother is assailed, a true and loving son flies to her rescue. Again we say, if the confession was made, then it was true, being unimpeached, that a vicious father was attempting to take from that mother by force her children, and that in the effort on part of the defendant to prevent this distress being brought upon the mother the unfortunate difficulty arose." Evidently this contention was made by the appellant before the jury, and this evidence was introduced by him for the purpose of showing the violent and dangerous character of his father, which was unquestionably known to him, if it was true, and their relative size, age, and strength was proved by him; it was appropriate for the court to charge, as he did, on this issue, and it was entirely applicable to the question as made by the appellant himself.

Notwithstanding this record is a voluminous one, containing hundreds of pages of typewritten matter, we have carefully read

and considered the whole of it, and, in our opinion, appellant presents no question that would authorize or require this court to reverse this case, and it will therefore be affirmed.

#### DUNN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

#### 1. GAMING (§ 72\*)—PUBLIC PLACE—APPURTENANCE.

A private residence cannot be an appurtenance to a public road, near which it is, so as to authorize prosecution for permitting gaming therein, as in a public place.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 168-186; Dec. Dig. § 72.\*]

#### 2. CRIMINAL LAW (§ 421\*)—EVIDENCE—HEARSAY.

Testimony that defendant was reputed to be in control of a private residence is hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 976-983; Dec. Dig. § 421.\*]

#### 3. CRIMINAL LAW (§ 634\*)—TRIAL—PRESENCE OF COURT.

The court should not absent itself during the trial, and lose control of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1461-1464; Dec. Dig. § 634.\*]

#### 4. CRIMINAL LAW (§ 718\*)—ARGUMENT OF COUNTY ATTORNEY.

The county attorney, in argument, should not go outside of, and talk about things not in, the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1668; Dec. Dig. § 718.\*]

#### 5. CRIMINAL LAW (§ 862\*)—JURORS—GIVING INFORMATION ABOUT DEFENDANT.

Under the statute prohibiting reception of evidence after the jury has retired, one of the jurors should not tell the others what he knows about defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2055; Dec. Dig. § 862.\*]

Appeal from Rockwall County Court; J. W. Reese, Judge.

Gertrude Dunn was convicted, and appeals. Reversed and remanded.

C. E. Lane, Asst. Atty. Gen., for the state.

DAVIDSON, J. The complaint and information charge that appellant unlawfully permitted a game of cards to be played upon premises then and there under her control; the said premises then and there being appurtenances to a public place, to wit, a public road. Under the recent decisions of this court, this complaint would not charge a violation of the statute. The article which would justify or authorize this prosecution was held in the Robertson Case, 159 S. W. 713, recently decided, to be invalid; that the Legislature did not intend to bring it forward in the Revised Penal Code of 1911, art. 559, and in doing so they made a mistake. That seems to be the only statute under which this prosecution could have been instituted. The writer did not agree with that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

opinion and entered his dissent, which speaks for itself.

[1] But aside from this, this prosecution cannot be maintained, because a private residence cannot be an appurtenance to a public road, and the evidence shows this was the home and private residence of appellant, which was situated between two public roads. We have searched for some authority which would justify or authorize the holding of a private residence to be an appurtenance to a public road, but have failed to find it. In fact, we do not believe such authority can be found. Mr. Webster defines "appurtenance" in legal acceptation as "something belonging to another thing as principal, and which passes as incident to it, as a right of way, or other easement to land; a right of common to pasture, an outhouse, barn," etc. We do not understand how a private residence can be an appurtenance to a public road.

[2] The state asked the following question: "What was the general repute as to who was in possession and control of these premises where defendant stayed?" Many objections were urged by appellant, but overruled by the court, which we deem unnecessary to recapitulate, and the witness answered, "It is reputed that defendant and Henry Tillman were in control of said premises." As urged by appellant, this was not proper testimony; it was hearsay, opinion of the witness, and was not admissible for the purpose of proving control in the defendant. These objections, we think, are well taken. There was no allegation that the house was a public house of prostitution or disorderly house, but simply the private residence of the appellant.

[3, 4] The county attorney used the following remarks in his closing speech: "This negro, defendant, is but a common prostitute, and that is the reason Bud Sebastian was hanging around there. She has run a regular whorehouse, and it is time the juries were breaking it up and putting a stop to it. The jury may turn her loose and license such conduct, but as long as I am county attorney I will continue to prosecute them, and it is up to the jury to do their duty." Exception was promptly taken to these remarks, and an effort made to have the county attorney stopped and the jury instructed not to consider same; but the judge presiding was not present in the courtroom or in hearing of defendant's counsel or in view of the trial, but was at the time downstairs in the back room of the sheriff's office talking over the telephone. That the judge returned, and the attorney for defendant told the judge of the remarks the county attorney had made, and that he had gone out of the record and made remarks prejudicial to defendant and such as would tend to inflame their minds; that the court told defendant's attorney that he could not hear the remarks for the reason that he was downstairs at the time in the

back room of the sheriff's office talking over the phone and out of sight of the courtroom and not in view of same, and that he did not and could not hear the remarks and could not instruct the jury about same, because he could not and did not hear them on account of being downstairs, and for that reason would not instruct the jury. Appellant then took his bill of exceptions. The court qualifies this bill as follows: "At the time it is claimed the county attorney made the alleged statements, the court was downstairs in sheriff's office talking over the telephone and could not see or hear remarks. That sheriff's office is out of hearing and view of courtroom, and the court not hearing remarks and not knowing, only from information, as to what was said, and not being requested to instruct the jury as to not considering remarks of county attorney. The court did not understand that defendant asked for any instructions, but merely complained that he desired to object to remarks, and the court was not present. With this qualification same is approved." He further qualifies the bill as follows: "The court was not asked to give instructions to jury to not consider alleged improper remarks, and for that reason did not instruct jury not to consider said alleged remarks." The latter was the second qualification to the bill. This bill seems to present two errors: First, that the court was absent during the trial and lost control of the case, which has been held to be erroneous; and, second, that the county attorney went out of the record and talked about things that were not in the record.

[5] Another bill recites that Meridith, being sworn, states: He was in the jury room that tried defendant in this cause. That he was foreman of the jury. "I remember while we were out considering the case that Mr. Ferguson, one of the jurors, stated that some time ago he was deputy sheriff in this county, and that he got well acquainted with defendant. That she gave them lots of trouble, and that she was a bad character. That the other officers went to her house in Rockwall county and come mighty near catching them gambling. That he made other remarks about what he knew of defendant. That he could not remember what they were. That same did not influence him in his verdict. That he believed that at time remarks were made that the jury had voted her guilty, but had not voted the penalty. That some of the jurors wanted to fine her \$100." C. C. Ferguson, being sworn, testified: "I was on the jury that tried defendant in this case. I remember stating to jury that when I was deputy sheriff I went to this house of defendant, and we liked to have caught them gambling; that I knew defendant and she was a tough character. This was after we had voted her guilty. I made the statement in the jury room to the jury, but it did not influence any of them. We had not voted the



penalty at the time I made the statement. We had agreed not to say anything about me saying that in jury room." This was urged in connection with the motion for new trial. The statute prohibits the reception of testimony after the jury has retired to consider of their verdict. This is made by statute a ground for new trial. This testimony seems to be pretty much along the same line as the county attorney's argument. We call attention to these matters so that they will not occur in the trial of other cases. Our statutes were solemnly passed by the Legislature, or supposedly so at least, for observance, and the legislative department had the authority to enact this legislation and demand respect and obedience to such enactment by all the constituted authority of the state. The courts will take due notice and govern themselves in obedience to the legislative will where they have authority to enact such legislation. We hope these matters will cease to occur in the trial of cases.

The judgment is reversed, and the cause is remanded.

#### DAWSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 19, 1913. Rehearing Denied Dec. 17, 1913.)

##### 1. HOMICIDE (§ 250\*)—SUFFICIENCY OF EVIDENCE—MANSLAUGHTER.

Evidence, on a trial for homicide committed with a knife in a fight, held sufficient to support a conviction for manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.\*]

##### 2. HOMICIDE (§ 63\*)—DEGREE OF OFFENSE—MANSLAUGHTER.

Where, in a fight between accused and deceased, deceased, who had no weapon, had accused down, but voluntarily got off of him when accused called for help, and two other encounters were then caused by accused continuing the quarrel, and, when one knife was taken away from him, opening another, and advancing on deceased with a threat to cut his throat, the fact that he was a smaller man than deceased did not reduce the grade of the offense below manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 86, 87; Dec. Dig. § 63.\*]

##### 3. HOMICIDE (§ 156\*)—EVIDENCE—ADMISSIBILITY.

On a trial for homicide, where accused contended that he acted in self-defense, and that, if not, as the knife he used was not a deadly weapon per se, he was guilty of no higher grade of offense than aggravated assault, the testimony of a physician as to the location and extent of the various wounds inflicted on deceased was admissible on the issue of whether an intent to kill was manifest from the mode and manner of the use of the knife, though it had already been proved that deceased died from wounds inflicted by accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 286, 287; Dec. Dig. § 156.\*]

##### 4. HOMICIDE (§ 174\*)—EVIDENCE—DECLARATIONS OF INJURED PARTY.

On a trial for homicide committed in a fight, evidence that deceased, after receiving the fatal injuries, and while being taken to a doc-

tor, asked where "the son of a bitch" (meaning accused) was, was properly excluded, since it would have shed no light on the actions of either party during the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.\*]

##### 5. CRIMINAL LAW (§ 866\*)—CONDUCT OF JURY—MANNER OF ARRIVING AT VERDICT.

That some of the jurors, after it was ascertained that the jury were unanimous in finding accused guilty of manslaughter, but disagreed as to the punishment, added up the number of years each desired to inflict, and that the result so obtained was subsequently agreed upon as the verdict, did not render the verdict one arrived at by lot within the meaning of the statute, where there was no previous agreement to abide the result, and such punishment was agreed upon only after much further discussion, and after the taking of several ballots.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2063; Dec. Dig. § 866.\*]

##### 6. CRIMINAL LAW (§ 885\*)—TRIAL—SUSPENSION OF SENTENCE—SUBMISSION.

That the court at accused's request submitted the question of suspending the sentence, and that the jury made no recommendation or return on that issue, did not present error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2108; Dec. Dig. § 885.\*]

Appeal from District Court, Mitchell County; W. W. Beall, Judge.

Jim Dawson was convicted of manslaughter, and he appeals. Affirmed.

W. A. Anderson, of San Angelo, and L. W. Sandusky, of Colorado, for appellant. C. R. Lane, Asst. Atty. Gen., for the State.

HARPER, J. This is the second appeal in this case; the opinion on the former appeal being reported in 155 S. W. 266. The case being reversed, he was tried again, and again convicted of manslaughter.

[1, 2] The evidence is recited in brief form in the former opinion; but, as appellant insists that the evidence is insufficient to convict, we will state the evidence a little fuller as to the state's witness J. H. Williams. It having been shown that appellant had had a quarrel that morning in which appellant cursed deceased, claiming that he had told a lie on him, when deceased said that it was not him who lied. Subsequently they both went to the gravel pit to haul sand, when deceased approached appellant and said "he guessed it was about time for them to settle their little trouble." Appellant replied, "All right," pulled off his gloves, and went meeting deceased; they met and fought, deceased getting appellant down, when he called for Williams to pull deceased off. At this deceased got off of him, when the quarrel was renewed, appellant having a knife in his hands; deceased knocked it out of his hands, when they again fought, deceased again getting appellant down on the ground. Appellant again called to Williams to pull deceased off of him, when deceased again got off of appellant. The quarreling continued, but, Williams said, had quieted down, when appellant remarked, "I am a damn good notfion

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to cut your throat," in an angry tone, speaking as if he meant it. Deceased replied for him not to do that; that he could not afford to do it, and commenced backing, when appellant advanced on him with an open knife in his hands, and when appellant got near to deceased, deceased struck appellant with his fist and knocked him back. They then again began to fight, when appellant inflicted the knife wounds which resulted in the death of deceased. Deceased at no time had any weapon of any kind, while it appears that appellant was armed with two knives. This certainly would support a verdict of manslaughter, if the jury believed that appellant had the intent to kill, or the knife from the mode and manner of its use was calculated to produce death. Williams says that, after deceased had gotten off appellant twice, the cursing kept on; Dawson, appellant, doing the most of it. Under such circumstances, it would be immaterial that appellant was the smaller man. At least, after the first encounter, when deceased had voluntarily gotten off of him when appellant called for help, two other encounters were produced by appellant continuing the quarrel, and, when one knife was taken away from him, he opened another, and advanced on deceased with the threat he had a good mind to cut his throat.

[3] Dr. Willis R. Smith testified he examined the body of deceased and said: "The wounds I found were on the anterior surface of the body, on the front surface of the body, between the fifth and sixth ribs; just below the nipple on the left side, there was a stab or punctured wound about an inch or an inch and a half in length; just below that, between the seventh and eighth ribs, there was a wound that went to the rib about 2 inches in length; over the anterior surface of the belly, over the region of the liver, there were two cuts, the principal one being the longer one of the two, about 2½ inches, the lower one being about 2 inches, the lower one being through the abdominal cavity, cutting about the same length into the liver, being a very shallow wound into the liver. On the left hand, over the ribs, over the abdominal cavity, there was one that went into the abdominal cavity, but not into the intestines; over the right groin there was also a wound there, and a wound, the one on the back, which was nothing but a skin wound, reaching from the point of this shoulder [indicating] around under the shoulder blade [indicating], cut through the— underneath and through the skin; yes, sir. That was in the direction of the shoulder blade. There were none of his intestines cut at all, there was a cut in the liver, just a casual wound, but there were no wounds at all in the intestines. The first wound which I described, the depth of that wound, it punctured into and went into the heart sack, and went clear through the heart cavity, the outside of the heart, into the heart cavity. As to what was the depth

of that wound into the heart, the heart, of itself, is about, ordinarily about five-eighths of an inch \* \* \* and then there is the abdominal wall that it had to go through it and into the pockets of the heart. The abdominal wall there, I should say, is an inch, or an inch and a quarter—the chest wall there; that is the only spot where the heart comes against the chest wall, where you can feel the heart beat; the depth of that would then be about an inch and five-eighths. That was a fatal wound; it punctured into the heart, and the heart just simply bled itself to death. The wound that I have described on the liver wasn't fatal at all, there was nothing about it that would have been serious. None of the other wounds were fatal, except the wound in the heart. Let's see, there were one, two, three, four, five, six, seven—seven wounds in all. I have not thought about it since that time, since a year ago." Appellant objected to this testimony, on the ground that the testimony before Dr. Smith was called already proved that deceased died from wounds inflicted by appellant; that such testimony would prejudice the jury against appellant. Appellant's contention on the trial was: First, that he acted in self-defense; and secondly, if not in self-defense, then the knife, not being a deadly weapon per se, he would be guilty of no higher grade of offense than aggravated assault. Such being his contention in the case, this testimony was admissible on the issue of whether, from the mode and manner of the use of the knife, the intent to kill was manifest, and the court did not err in admitting it.

[4] After deceased was cut, he requested Mr. Williams to place him in the wagon and carry him to a doctor. Mr. Williams did this, and while on the way to town, asked Mr. Williams, "Where is the son of a bitch?" meaning appellant. Appellant desired to introduce this quære in evidence; but, as it was some time after the difficulty, and could shed no light on the action of either of them during the difficulties, there was no error in excluding it.

[5] Appellant alleges misconduct of the jury, in that they arrived at their verdict by lot. The evidence shows: That the jury at first were unanimous in finding appellant guilty of manslaughter, but they were not in accord as to punishment. Some favored five years, some two and three, and one four, years' imprisonment. That several ballots were taken. Some added up the number of years each desired to inflict, and a result of 3½ years obtained. All the jury say there was no previous agreement to abide by the result. That when the result was obtained, all the jury would not at first agree to it, some still contending for five years, but that finally they agreed to 3½ years. This is not arriving at a verdict by lot within the meaning of our Code. There must have been a previous agreement to abide the result, and the evidence must show they felt bound by it,

and for this reason acceded to the result. The evidence in this case discloses there was no such agreement, and an agreement obtained only after much discussion and several ballots had been taken after the addition had been made.

There was no evidence calling for a charge that "if defendant approached deceased to demand an explanation," etc. The evidence excludes the idea that the meeting was brought on this way at the time death was inflicted.

[0] The fact that the court, at the request of appellant, submitted the question of suspending the sentence, and the jury did not recommend it, nor make any return on that issue, presents no error.

We have carefully considered the record, and each ground of error assigned, and, there being no error, the judgment is affirmed.

### COWLEY v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

#### 1. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTIONS—EVIDENCE.

On a trial for selling intoxicating liquors in prohibition territory, evidence as to the receipt by accused of shipments of liquor about and prior to the time of the alleged sale was admissible to show his possession of the article alleged to have been sold.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. § 233.\*]

#### 2. CRIMINAL LAW (§ 338\*)—EVIDENCE.

On a trial for selling a half pint of whisky in prohibition territory, where the state showed the receipt by accused of shipments of whisky about and prior to the time of the alleged sale, the waybills for which described the shipments as a specified number of quarts and pints, the testimony of the express agent that he had examined shipments so marked, addressed to other parties, and found them to contain half pint bottles should have been excluded, though, if he had examined any of the shipments addressed to accused and found such condition to exist, he could so testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.\*]

#### 3. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTIONS—EVIDENCE.

On a trial for selling intoxicating liquor in prohibition territory, where accused testified that he was asked by the prosecuting witness to get him some whisky from D, and that he did so, it was error to exclude evidence of a witness that accused, just prior to the alleged sale, asked him if he knew where D. was, telling him that he wished to get some whisky from D. for a sick person, that he directed accused to D., and that accused left in that direction, and immediately thereafter delivered a half pint of whisky to the prosecuting witness, since this would have strongly supported accused's theory.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. § 233.\*]

#### 4. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS — CONFORMITY TO EVIDENCE.

On a trial for selling intoxicating liquors in prohibition territory, where, though accused

testified that he procured a half pint of whisky from D. for the prosecuting witness, there was no evidence that in doing so he was D.'s agent, an instruction that if he unlawfully sold such liquor as the agent of D. he was guilty, was improperly given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

#### 5. INTOXICATING LIQUORS (§ 169\*)—CRIMINAL PROSECUTIONS—SALES—ACTING AS PURCHASER'S AGENT.

A person who was not interested in a sale of whisky at the time of the prosecuting witness' demand therefor and its delivery to him, but who merely acted as such witness' agent in procuring the whisky was not guilty of selling it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.\*]

Appeal from District Court, Bowie County; H. F. O'Neal, Judge.

John Cowley was convicted of selling intoxicating liquors in prohibition territory, and he appeals. Reversed and remanded.

J. S. Crumpton, of New Boston, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of selling intoxicating liquors in prohibition territory, and his punishment assessed at one year's confinement in the penitentiary.

Appellant earnestly insists that the evidence in this case will not sustain a conviction. To this we cannot agree, but think the evidence offered in behalf of the state ample to justify a conviction, but, as it will be necessary to reverse the case on other grounds, we will not give it in detail, nor discuss it further.

[1, 2] The state proved by the agent of the express company at New Boston that appellant received and receipted for the following shipments of liquor about and prior to the time he is charged with having made a sale in this case: October 12, 12 quarts of whisky; October 13, 12 quarts of whisky; October 19, 12 quarts of whisky; October 20, 12 quarts of whisky; October 26, 120 pints of beer; November 4, 24 pints of whisky; November 13, 12 quarts of whisky; November 21, 24 pints of whisky. This testimony was objected to. This question has often been before this court, but finally it was determined that it was admissible to show that appellant was in possession of the article alleged to have been sold. See *Wagner v. State*, 53 Tex. Cr. R. 307, 109 S. W. 169; *Starbeck v. State*, 53 Tex. Cr. R. 192, 109 S. W. 162; *Myers v. State*, 52 Tex. Cr. R. 558, 108 S. W. 392. Since the rendition of those opinions this has been the unbroken line of decisions in this court, and is no longer an open question. However, after proving the reception of this liquor, as the evidence offered in behalf of the state showed the sale of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

only one-half pint, the state was permitted to show by the express agent that, although the waybills showed quarts and pints of whisky received, yet he had occasion in the past to examine some packages thus marked, and they would really contain pint and half pint bottles. He was asked if he had examined any packages received by appellant and found this condition to exist, and he answered, "No." We do not think that what he found in packages addressed to other people, and with which appellant is in no way shown to have had any connection, was admissible against appellant, and the court erred in permitting the witness to thus testify. If he examined packages addressed to appellant and found such condition to exist, he could so testify.

[3] Defendant testified that the prosecuting witness had approached him and asked him to get him some whisky from Oliver Daniels, and that he did procure the whisky from Oliver Daniels. He offered to prove by Milam Johnson the following facts, as shown by the bill: "That on or about 3:30 or 4 o'clock on the day of the alleged sale, defendant approached witness, and asked witness if he knew where Oliver Daniels was, also stating to witness that he wished to get some whisky from Daniels for an old negro who was sick. That witness directed defendant to Daniels. That defendant left witness in the direction of Daniels. And that immediately thereafter the defendant delivered to witness John Smith one half pint of whisky." This all took place prior to the alleged sale, and would have a strong tendency to support appellant's theory of the case. When he testified that he went in search of Oliver Daniels and got the whisky from him and delivered it to the prosecuting witness, if Milam Johnson knew as a fact that appellant was searching for Oliver Daniels, and went in the direction where Oliver Daniels then was, and immediately thereafter delivered the whisky to the prosecuting witness, we cannot understand by what rule of law this much of the evidence was excluded, and the court erred in doing so.

What Oliver Daniels may have told the witness Tom Morris would be clearly hearsay and inadmissible, and the court did not err in so holding.

[4, 5] The court instructed the jury: "If, however, you believe from the evidence beyond a reasonable doubt that the defendant was the agent of Oliver Daniels, and that defendant unlawfully sold the intoxicating liquor described in the indictment to John Smith as such agent of said Daniels, in Bowie county, Tex., on or about November 23, 1912, then, in that event, if you so believe beyond a reasonable doubt, the defendant would be guilty, and you should so find." As there was no evidence raising the issue that, if appellant did procure the whisky from Oliver

Daniels, he was the agent of Daniels, this part of the charge should not have been given; but, under the facts of this case, the issue was correctly presented in the following special charge, requested by appellant: "You are instructed the law to be that if defendant at the time of the delivery of this whisky, and of the demand therefor, the defendant was not interested in said sale, but was merely acting at the time as agent for the purchaser of said whisky, you will acquit him." While this special charge may be said to have been sufficiently covered by the charge, as given, if the above excerpt presenting the reverse of the special charge had not been given, yet, as there was no evidence that appellant was the agent of Oliver Daniels, the charge, as given, was erroneous.

The remainder of the motion for a new trial presents no error.

Reversed and remanded.

#### JAMES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

#### 1. SEDUCTION (§ 50\*)—INSTRUCTIONS—CORROBORATION OF FEMALE.

On a trial for seduction, an instruction that no conviction could be had upon the testimony of the female alleged to have been seduced, unless corroborated by other evidence tending to connect accused with the offense charged, that the corroborative evidence need not be direct and positive, independent of the prosecutrix, that such facts and circumstances as tended to support her testimony, and which satisfied the jury that she was worthy of credit as to the facts essential to constitute the offense, were sufficient, and that it was for the jury to say from all the facts and circumstances in evidence whether she had been sufficiently corroborated, was erroneous, and the court should have charged that the jury must find that her testimony was true, and also find that there was evidence, independent of her testimony, tending to connect accused with the commission of the offense.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 89-92; Dec. Dig. § 50.\*]

#### 2. SEDUCTION (§ 46\*)—EVIDENCE—CORROBORATION.

On a trial for seduction, there must be some fact, independent of the testimony of the prosecutrix, tending to connect accused with the offense, to justify a conviction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

#### 3. SEDUCTION (§ 46\*)—EVIDENCE—CORROBORATION.

On a trial for seduction, letters purporting to have been signed by accused did not corroborate the testimony of prosecutrix, where there was no testimony except hers to show that they came from accused.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

#### 4. CRIMINAL LAW (§§ 763, 764\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—CORROBORATION.

On a trial for seduction, where there was no evidence except the testimony of prosecutrix to show that letters purporting to have been written by accused came from him, an instruction that if the jury found that she testified that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

she received such letters from accused and that he wrote them, but should further find that there were no other facts showing that accused wrote them except prosecutrix's testimony, then the letters would not be sufficient to corroborate, if they did corroborate, her testimony, and that, unless they found other facts outside of her testimony and the letters tending to connect accused with the offense, they should acquit, was erroneous, as it was on the weight of the evidence, assumed that the prosecutrix's testimony as to the letters was true, permitted the jury to judge for themselves whether they would consider the letters as corroborative, and allowed them to consider the letters, though not identified by other evidence than that of prosecutrix, in connection with other evidence, in determining the sufficiency of the corroboration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 768, 764.\*]

##### 5. SEDUCTION (§ 50\*)—INSTRUCTIONS—CORROBORATION.

On a trial for seduction, there was no evidence, except the prosecutrix's testimony, to show that letters in evidence came from accused. The court charged that if she testified that she received such letters from accused and that he wrote them, but the jury should find that there were no other facts showing that he wrote them, then they would not be sufficient alone to corroborate her testimony; that unless there were other facts, outside of her testimony and the letters, tending to connect accused with the crime, they should acquit; that if they should find that there were other facts showing that accused wrote the letters, and if the letters corroborated her testimony, they might be considered for that purpose; and that if they should not consider the letters as corroborative evidence but should find, beyond a reasonable doubt, that accused, by promise to marry, seduced the prosecutrix, and that her testimony had been corroborated by other evidence, outside of the letters, connecting accused with the offense, they should convict. It refused an instruction that the prosecutrix must be corroborated by testimony other than her own tending to connect accused with the offense, and that, unless the jury found from testimony, other than that of prosecutrix, that accused wrote the letters, then they alone would not furnish the corroboration required to warrant a conviction. *Held*, that the instructions given were erroneous, and that requested improperly refused, since the jury should have been pointedly told that the letters could not be used as corroborative evidence unless there was evidence, independent of that of prosecutrix, tending to show that accused wrote them, and that she could not be corroborated by her own statements regarding them.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 89-92; Dec. Dig. § 50.\*]

Appeal from District Court, Wood County; R. W. Simpson, Judge.

Lynch James was convicted of seduction, and he appeals. Reversed and remanded.

C. O. James, of Sulphur Springs, and Jones & Jones, of Mineola, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of seduction; his punishment being assessed at eight years' confinement in the penitentiary. The application for continuance will not be discussed in view of the reversal of the judgment. The evidence may be obtained upon another trial.

[1, 2] The court charged the jury: "The

law provides that in prosecutions for seduction, under the provisions of the Penal Code, the female alleged to have been seduced shall be permitted to testify, but no conviction shall be had upon the testimony of the said female, unless the same is corroborated by other evidence tending to connect the defendant with the offense charged. You are, however, instructed that the corroborative evidence need not be direct and positive, independent of the prosecutrix, Cora Tucker, but such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense of seduction, as defined and explained in this charge, will fulfill the requirements of the law as to corroboration, and it is for you to say from all the facts and circumstances in evidence before you whether she has been sufficiently corroborated." It is urged that this charge is on the weight of the evidence and assumes that the testimony of the prosecutrix is true. It does not first require the jury to believe the testimony of the prosecutrix true, and that she be corroborated by other evidence tending to connect the defendant with the commission of the offense; and the court nowhere in its main charge makes such requirement of the jury. That this charge also instructs the jury to consider the corroborative evidence in satisfying their minds as to whether the prosecutrix is worthy of credit. It instructs the jury that they might apply the corroborative evidence to her and not to the defendant, whereas the law requires that the corroborative evidence should relate to the guilt of defendant and not to her testimony to show whether she is worthy of credit, and that it is further erroneous in that it leaves the jury free to consider the question of corroboration in connection with the testimony of prosecutrix, as though her testimony could be considered in deciding upon necessary corroboration. This charge is erroneous. The court should have charged the jury that they must find the testimony of the prosecutrix true, and in addition they must find there was evidence, independent of her testimony, tending to connect the defendant with the commission of the offense, if committed. The criterion, as we understand our law of corroboration, is that there must be some fact, independent of her testimony, which tends to connect the defendant with the offense committed. This charge is not in accord with the well-settled rule of jurisprudence of this state. See *Campbell v. State*, 57 Tex. Cr. R. 302, 123 S. W. 583; *Lemmons v. State*, 58 Tex. Cr. R. 269, 125 S. W. 400; *Garlas v. State*, 48 Tex. Cr. R. 451, 88 S. W. 345. This is a sufficient number of cases to cite on this proposition.

[3-5] Complaint is made that the court erred in admitting certain letters purporting to have been signed by appellant. We are of opinion under the attendant circumstances,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that these letters were admissible for what they were worth, but they did not afford any corroboration of the prosecutrix, as shown by this record. There is no evidence, outside of hers, to show these letters ever came from the defendant. *Carrens v. State*, 77 Ark. 16, 91 S. W. 30; *Smith v. State*, 58 Tex. Cr. R. 106, 124 S. W. 919; *Bishop v. State*, 151 S. W. 821. In this connection the court charged the jury: "If you shall find that Cora Tucker testified that she received from the defendant certain letters, which have been introduced in evidence, and that the defendant wrote them, but if you shall further find that there are no other facts and circumstances in evidence which shows that defendant did write the letters, except the testimony of Cora Tucker, then you are charged that the letters would not be sufficient within themselves and alone to corroborate, if they do corroborate, her testimony; and, unless you find there are other facts and circumstances in evidence outside of her testimony and the letters which tend to connect the defendant with the commission of the offense charged, you will acquit. Or if you shall find that there are facts and circumstances in evidence which show that the defendant wrote the letters introduced in evidence, and if you find such letters do corroborate Cora Tucker's testimony, you may consider them for that purpose. If, under the foregoing instructions, you shall not consider the letters as corroborative evidence, yet if you find, beyond a reasonable doubt, that the defendant, by promise to marry, did seduce and have carnal knowledge of Cora Tucker, as charged, and that the testimony of Cora Tucker has been corroborated by other evidence, outside of the letters, which tends to connect the defendant with the commission of the offense, you will convict."

Various objections are urged to these charges. To the first clause of the charge it is urged it is on the weight of the evidence, permitted the jury to judge for themselves whether they would consider the letters as corroborative, and because the court told the jury that said letters would not be sufficient "within themselves and alone to corroborate, if they do corroborate, her testimony," when in truth and in fact, if they had not been corroborated by some other witness than that of prosecutrix, they could not be considered at all as corroborative of the testimony of prosecutrix, because an accomplice cannot corroborate herself. It is contended, under this paragraph of the charge, the jury was in effect told that, though the letters were not identified by other evidence than that of Cora Tucker, yet they might link in the letters with other evidence in the case, so to speak, in determining the sufficiency of the corroboration. This paragraph assumes what prosecutrix testified about the letters was true. We are of opinion these criticisms are correct.

To the second clause of the charge it is

urged that the court assumes that Cora Tucker testified truthfully; is upon the weight of the evidence. It instructs the jury that they might consider certain facts testified by Cora Tucker against the defendant; that the court in said paragraph nowhere tells the jury that they could not consider the letters as corroborative evidence but left the jury to determine for themselves whether they regarded the letters as corroborative or not, thereby giving the jury the power to determine the competency of the evidence.

As to the third clause of the above-quoted charge it is urged that it is confusing, contradictory, uncertain, and on the weight of the evidence, and assumes the prosecutrix testified truthfully, etc., and that the court was in error in not informing the jury that they could not consider the letters at all as corroborating the testimony of the prosecutrix inasmuch as there was nothing in the record to corroborate her statement in regard to the letters. Appellant asked, in this connection, the following instruction: "The law requires that the prosecutrix, Miss Cora Tucker, must be corroborated by other testimony than her own and by such testimony as tends to connect the defendant with the commission of the offense with which he is charged, and, unless you find from the testimony, other than that of said Cora Tucker, that the defendant wrote her the letters introduced in evidence, then in such event the letters within themselves and alone would not furnish the corroboration which the law requires in order to warrant a conviction of the defendant." This was refused, and improperly so. The court should have pointedly told the jury that these letters could not be used as corroborative evidence of the testimony of the prosecutrix unless there was other evidence, independent of hers, tending to show that defendant wrote these letters. This record does not show corroboration of the prosecutrix, as we understand the record on this question. The charges given by the court were erroneous, and that requested by appellant was correct.

We have taken up these charges and thrown them together in a general way so as to inform the trial court that upon another trial the jury must be pointedly instructed that prosecutrix cannot be corroborated by her own statements in regard to these letters, and that, in order to show these letters in any way corroborative of her testimony, it must come from matters and things outside of her statement. *Curry v. State*, 151 S. W. 319; *Bishop v. State*, 151 S. W. 821; *Smith v. State*, 58 Tex. Cr. R. 106, 124 S. W. 919; *Carrens v. State*, 77 Ark. 16, 91 S. W. 30.

Appellant asked special instructions in substance that unless there is evidence outside of and independent of prosecutrix's tending to connect the defendant with the alleged seduction or act of intercourse, as testified by her, on 18th of May, 1912, the jury should acquit. This was a pointed presentation of

the matter, and, in our judgment, this charge should have been given. It is not the purpose of this opinion to go over the testimony in detail. The state's case in brief was that made by prosecutrix to the effect that on 18th of May he asked to hug and kiss her, which she permitted, and in a few moments he requested final favors, which were granted. She says it was under the promise of marriage. At intervals of from one week to three or four weeks after that until September or October he went with her, amounting to about a half dozen times. We have examined the record with some degree of interest and care and fail to find any corroboration as to a promise of marriage from any source. This is not as strong a case, in our judgment, as the Bishop Case, cited supra.

For the errors indicated, the judgment is reversed, and the cause is remanded.

#### POULTER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

##### 1. PERJURY (§ 32\*)—EVIDENCE—ADMISSIBILITY—MATERIALITY OF TESTIMONY.

Since in a perjury case, where defendant was charged with testifying falsely before the grand jury as to his brother's age, it was incumbent on the state to show that the grand jury was inquiring into an alleged violation of law, evidence showing that an action was pending against the brother in the justice court, in which he had entered a plea of minority and swore that he was only 19 years of age, was admissible, but the result of that trial was inadmissible, as defendant was not bound thereby.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108-116; Dec. Dig. § 32.\*]

##### 2. PERJURY (§ 32\*)—EVIDENCE—ADMISSIBILITY.

In a perjury case, where defendant was charged with testifying falsely before the grand jury, the testimony of grand jurymen was admissible to show that defendant acted deliberately and willfully and did not testify through misapprehension or agitation.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 108-116; Dec. Dig. § 32.\*]

##### 3. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

Where defendant was on trial for perjury, evidence of other offenses committed by him in other counties, under different circumstances, and for which he had never been indicted, was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

##### 4. CRIMINAL LAW (§ 338\*)—EVIDENCE—CHARACTER OF DEFENDANT'S FATHER.

Where, in a perjury case, defendant's father was not a witness, it was error to admit evidence showing that he had left another county under suspicious circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.\*]

##### 5. WITNESSES (§ 286\*)—REDIRECT EXAMINATION—EXPLANATORY OF TESTIMONY ON CROSS-EXAMINATION.

Where, in a perjury case, defendant, in questioning a witness as to having also ap-

peared against a relative of his in the commissioners' court, elicited the fact that other citizens had also appeared for the same purpose, it was not error to permit the state's attorney on redirect to ask about these other citizens, though, if defendant's question had related only to the witness, it would not.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 994-999; Dec. Dig. § 286.\*]

##### 6. CRIMINAL LAW (§ 338\*)—EVIDENCE—CHARACTER.

In a prosecution for perjury, it was prejudicial error to admit evidence that defendant's father, several years before, had stolen a log chain; the father not being a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. § 338.\*]

##### 7. CRIMINAL LAW (§ 596\*)—CONTINUANCE—CUMULATIVE EVIDENCE.

In a first application for continuance in a perjury case on the ground of absence of witnesses, the fact that the testimony of such witness was cumulative does not render the application insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. § 596.\*]

Appeal from District Court, Parker County; F. O. McKinsey, Judge.

Walter Poulter was convicted of perjury, and he appeals. Reversed and remanded.

Lattimore, Cummings, Doyle & Bouldin, of Ft. Worth, and Hood & Shadle, of Weatherford, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of perjury, and his punishment assessed at two years' confinement in the penitentiary.

It appears from the record that appellant's brother, Ed Poulter, was sued in the justice court on a note, and he then filed a plea of minority and testified he was 19 years of age in March, 1911. The grand jury of Parker county, at the next term of the district court, was investigating the question of Ed Poulter's age to determine whether or not it would indict him for perjury in connection with his testimony in the justice court when he swore he was only 19 years of age. Appellant was summoned before that body and testified that his brother, Ed Poulter, was born in 1892 or 1893, consequently not more than 19 years of age at the time Ed Poulter testified in the justice court. This testimony of appellant before the grand jury is the basis of the charge of perjury in this case.

[1] Mr. H. C. Shropshire was a material witness for the state; he having been the attorney for plaintiff in the suit in the justice court against Ed Poulter. The state proved by him that Ed Poulter testified in the justice court that he was only 19 years of age. There was no error in admitting this testimony, as it was incumbent upon the state to show that the grand jury was inquiring into an alleged violation of the law at the time appellant testified before it. If the grand

jury had not been investigating an alleged violation of the law, the question asked appellant by the grand jury would not have been as to a material matter. However, the fact that after Ed Poulter had filed his plea of infancy or minority, and testified he was only 19 years of age, the further fact that plaintiff withdrew his announcement and the case was continued, and thereafter plaintiff recovered a judgment on the notes and foreclosure of the mortgage lien, was not admissible in this case, and neither was the judgment entry. This would and could but have the tendency to show that the plea of minority was not true, and Ed Poulter was in fact 21 years old at the time. Whatever decision may have been rendered in that case could not be binding on this appellant, as he was not a party to that suit, was not even a witness in the case. Of course the citation and the plea filed by Ed Poulter would be admissible as showing the issues involved and going to show the materiality of the testimony, but the result of the trial and the steps taken after Ed Poulter's testimony as to this plea ought to have been excluded on objection of appellant. Neither can we see what purpose the introduction of the mortgage given by Ed Poulter would serve. In this case against Walter Poulter it is not a question of whether or not the plaintiff was entitled to recover judgment against Ed Poulter. The only part of the proceedings of the Ed Poulter suit in the justice court which would be admissible in this case, as hereinbefore stated, would be the citation in that suit, and this would show what issues were tendered by plaintiff. Then defendant's plea showing what issues were tendered by him, his testimony, or rather so much thereof as would show what he testified to in regard to his age. The merits of the justice court suit are not to be tried over in this case.

[2] The testimony of the grand jurymen was properly admitted, and these bills present no error. The allegation in the indictment is that a suit was pending in justice court against Ed Poulter; that to avoid liability on the notes he entered a plea of minority and swore he was under 21 years of age, or only 19 years; that the grand jury was investigating the truth of this testimony to determine whether or not to indict Ed Poulter for perjury; that, while making such investigation, appellant, Walter Poulter, was summoned before them and duly sworn and then testified his brother, Ed Poulter, was born 1892 or 1893. All the testimony of these grand jurymen was admissible to show that appellant acted deliberately and willfully in the matter, and that he did not testify through misapprehension or under agitation.

[3, 4] The bill of exceptions as to what Walter Poulter testified on cross-examination is not complete enough to bring that question before us on review, as only four questions and four answers are in the bill, and these would not show enough of the pro-

ceedings to enable us to pass on the matter. But, as the case will be reversed, we will say that, if it was an effort on the part of the state to show that appellant had left another county under suspicious circumstances, the testimony should not have been admitted. He was on trial for the offense of perjury in this case, and other offenses, if any he had ever committed in other counties under different circumstances, and for which he had never been prosecuted nor indicted, would not be admissible. Neither would the fact that his father had left Denton county at night and under suspicious circumstances be admissible. His father was not a witness in this case.

[5] The defendant in cross-examination of state's witness Temple, to show bias, elicited from the witness that he appeared before the commissioners' court to prevent John L. Poulter from getting a recommendation upon which to apply for license to practice law, and at the same time elicited the fact that a number of other citizens of Parker county also appeared for the same purpose. Under such circumstances, it was not error to permit the state on redirect examination to ask the witness in regard to "these others" whom defendant had elicited had appeared. If defendant on another trial narrows his questions down to the witness Temple alone to attempt to show his bias, then this testimony as to other "good citizens" also appearing would be inadmissible. But, if he makes his cross-examination as broad as on this trial, then there will be no error in admitting the testimony on redirect examination.

[6] It was also error to permit the state to show by the witness Hardin that appellant's father a number of years before had taken Mr. Hardin's log chain and denied having possession of it. Whether or not appellant's father had stolen a log chain from Mr. Hardin would not be a legitimate inquiry in this case. He could not be held responsible for the acts and misconduct of all the members of his family. His father was not a witness in his behalf in this case, and such testimony could and would be prejudicial to his cause, for you cannot show that a man's father was a thief without, to some extent at least, creating prejudice against him. If the purpose of the state was to tie the witness' memory to some circumstance after a rigid cross-examination, he might be permitted to state that he went to Mr. Poulter's to see about a log chain that was at his house, but not state facts which would tend to show that appellant's father had stolen the chain.

There are a number of other matters presented, but we do not deem it necessary to discuss them. The indictment is not subject to the objections made, and there is no variance in the proof and the material allegations contained in the indictment, as contended by appellant.

[7] The only other matter called to our attention which would present error is the



application for a continuance. This being the first application, the fact that Mr. Moran's testimony would be cumulative of that of other witnesses who did appear and testify would not render the first application insufficient in law. The application states this witness would testify to facts material to the real issue in the case, the age of appellant's brother at the time appellant testified before the grand jury, and that the testimony of Mr. Moran would tend to show that what he testified was true. There are other witnesses named in the application for continuance, but, as this matter will not likely be presented on another trial, we will not discuss it further.

The judgment is reversed, and the cause is remanded.

### SMITH v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

#### REVERSAL—CONVICTION OF MURDER—INSTRUCTIONS.

Conviction for murder in the second degree held unsustainable for error in the charge.

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Jasper Smith was convicted of murder in the second degree, and he appeals. Reversed and remanded.

M. B. Briggs, of Gilmer, R. M. Briggs, of Ashland, and Maberry & Maberry, of Gilmer, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. The jury gave appellant 45 years as a punishment under conviction for murder in the second degree.

The court submitted murder in the first degree, murder in the second degree, manslaughter, and self-defense. Murder in the first degree, and the objections connected with that phase of the record will not be discussed, because of the acquittal of that degree of murder.

With reference to murder in the second degree, the court gave this charge: "The next lower grade of culpable homicide than murder in the first degree is murder of the second degree. Malice is also a necessary ingredient of the offense of murder in the second degree; the distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proven to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing." Objection was urged to this, predicated upon the statement in the charge that "*malice will be implied from the fact of an unlawful killing.*" Applying the law of this grade of the offense to the facts the court thus instructed the jury: "If you shall find, beyond a reason-

able doubt, that the defendant, Jasper Smith, killed Henry Cornett, in Upshur county, Tex., on or about June 1, 1913, by shooting him with a gun, then if you find, beyond a reasonable doubt, that the defendant was not justifiable in such killing, under the law of justifiable homicide hereinbefore given to you in charge, then if you find that the defendant did not act with his express malice aforethought, or if you have a reasonable doubt as to whether he acted upon his express malice aforethought, you will convict him of murder in the second degree, and assess his punishment at confinement in the penitentiary for any term of years not less than five."

Objection was urged to this matter because the court did not in this connection instruct the jury with reference to manslaughter and justifiable homicide. In other words, the court instructed the jury that he would be guilty of murder in the second degree if the jury should find he killed Cornett, and was not justifiable under the law of self-defense, and that he did not act with his express malice aforethought, then they should convict him of murder in the second degree. This is not correct. In submitting murder in the second degree he should have plainly told the jury that, if he was not justifiable, they must find he was not guilty of manslaughter before they could convict him of murder in the second degree. It is not all unlawful killings that will imply malice. Manslaughter is an unlawful killing. Under this charge the jury could have readily convicted appellant of murder in the second degree, although they might believe he was guilty of manslaughter. The only exception placed in the charge is that if appellant was not justified on the one hand, and not guilty of murder in the first degree on the other, then he would be guilty of murder in the second degree. Therefore, if he was guilty of manslaughter, the jury could well have convicted him of murder in the second degree. This question underwent investigation and decision in the case of *Roberts v. State*, 156 S. W. 651.

While Eula Cornett was testifying for the state, she was permitted to testify that defendant had had carnal knowledge of her and caused her to become pregnant; the bill reciting the following circumstances in connection with it: "Q. Eula, what relation are you to the defendant? A. He is my brother-in-law. Q. Has he ever had carnal knowledge with you? A. Yes, sir. Q. Are you in a family way now? A. Yes, sir. Q. Who is the cause of you being in a family way; that is, who did that job? A. The defendant, Jasper Smith." This all went before the jury over appellant's objection that it was immaterial, irrelevant, and very prejudicial to his rights. The objections are in the nature of a general demurrer, and would not be well taken if this testimony could be admitted before the jury for any purpose;

but if the testimony was not admissible for any purpose, then the general objections or general demurrers would be sufficient, and would be sustained, provided the testimony was not admissible, as before stated, for any purpose. No specific objections are urged, nor is the evidence set out further than detailed, showing the connecting facts, or what brought about its introduction, and the consequent ruling of the court. The testimony may have been admissible for some purposes; if it entered into the trouble between deceased and the defendant, and was the occasion of appellant killing him, or served to show motive, intent, or purpose on his part, it might be admissible. If this evidence entered into the reasons why the deceased should have made an attack upon the defendant, or threats against his life, it might have been beneficial to the defendant from that standpoint, as tending to show the intensity of the threats, or to sustain the contention of appellant that deceased was attacking him, or threatening to do so, or to render more probable before the minds of the jury the fact that deceased had made threats to take his life, and was seeking to execute them at the time of the homicide. This much is said in view of the fact, if we look to the statement of facts, it will be shown the witness Eula Cornett was the daughter of the deceased, and the sister-in-law of appellant; he having married Eula's sister. We say this much in view of the fact, and hold the exceptions too general, as they are presented, to require revision of the question.

The matter with reference to newly discovered testimony is not discussed. The witness can be obtained at another trial.

On account of the charge held erroneous, the judgment is reversed, and the cause is remanded.

PRENDERGAST, P. J., and HARPER, J. We do not agree to all the reasoning and statements in connection therewith, but do concur in the disposition of the case.

#### CURRINGTON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

##### 1. PROSTITUTION (§ 1\*)—OFFENSES—STATUTE.

Acts 32d Leg. c. 23, providing that any person who shall procure, attempt to procure, or be concerned in procuring, with or without her consent, a female inmate for a house of prostitution, or who by promises, threats, violence, shall cause any female to become an inmate of a house of prostitution, shall be guilty of a felony and be punished, etc., was intended to cover all acts, devices, etc., to induce any female to submit her body to other men for the purposes of prostitution, whether they succeeded or not, and it is immaterial whether she prior thereto, was virtuous or not; and to reach solicitors for such houses, as well as those acting on their own initiative and behalf, wheth-

er they were connected, either directly or indirectly, at the time, with any such house.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

##### 2. PROSTITUTION (§ 4\*)—EVIDENCE—REASONABLE DOUBT.

In a prosecution under Acts 32d Leg. c. 23, for endeavoring to procure a woman to enter a house of prostitution, the jury must find beyond a reasonable doubt the requisites of the offense.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.\*]

##### 3. PROSTITUTION (§ 4\*)—EVIDENCE—BURDEN OF PROOF.

In a prosecution under Acts 32d Leg. c. 23, for attempting to procure a woman to enter a house of ill fame, the burden of proof was on the state.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.\*]

##### 4. CRIMINAL LAW (§ 308\*)—EVIDENCE—PRESUMPTION OF INNOCENCE.

In such prosecution there was a presumption of innocence in defendant's favor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 781; Dec. Dig. § 308.\*]

##### 5. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

Independent and disconnected crimes cannot ordinarily be proven against an accused on his trial for another different and distinct crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

##### 6. CRIMINAL LAW (§ 371\*)—EVIDENCE—RELATED OFFENSES.

In a prosecution under Acts 32d Leg. c. 23, for attempting to procure a woman to enter a house of prostitution, evidence of defendant's other acts, though tending to prove other crimes, was admissible as being so connected with the crime charged that it would tend to establish his intent therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.\*]

##### 7. CRIMINAL LAW (§ 800\*)—INSTRUCTION—DEFINING OF TERMS.

Acts 32d Leg. c. 23, makes procurement a felony punishable by imprisonment. Code Cr. Proc. 1911, art. 58, and Pen. Code 1911, art. 10, declare that all words used in the Code are to be taken and understood in their usual acceptance in common language, except when particularly defined by law. Held that, as the word "procured" had no other meaning than that in which it was commonly understood, there was no error in failing to define it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1808-1810, 1812; Dec. Dig. § 800.\*]

##### 8. CRIMINAL LAW (§ 829\*)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

In a prosecution the refusal of defendant's requested instruction, that if he did not attempt to procure her as an inmate of a house of prostitution to acquit him, was proper, where that part of the case had been covered by the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from District Court, Collin County; G. R. Smith, Special Judge.

Higgins Currington was convicted of pandering, and he appeals. Affirmed.

G. E. Carpenter and J. F. Harrington, both of Plano, and H. M. Peak, of Farmersville, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PRENDERGAST, P. J. Appellant was convicted of the offense of pandering, and his punishment fixed at 12 years in the penitentiary.

The evidence shows that he was a young man about 20 years old, and his wife, Ludie Currington, was about a year older than he; that they were married on May 15, 1912, and lived together for about one year. At the time this offense is charged to have been committed, and for some time prior thereto, they were engaged in farming and lived on a farm in Collin county. Ludie Currington, appellant's wife, testified: That shortly before May 17, 1913, he went from where they were living to Greenville, in Hunt county. That soon after he returned from Greenville he accused her of having intercourse with other men, which she denied. That he told her she had to tell him with whom she had had intercourse, and where the money was, and that he made suggestions to her with reference to having intercourse with other men for pay. "He said that I had to make him some money; he said I had to go to f—k—g." She objected to this and would not consent thereto. That he told her he "would take her to Dallas to make him a living, he said, f—k—g." That was the first time he ever made the suggestion to her. She then testifies that by force and threats he made her tell him that she had had intercourse with several different persons. That this was not a fact at any time, but that by actual force and threats to kill her, in order to save her life, she told him that she had. That on May 16, 1913, he went to Dallas and returned the next day with Oscar Allen, with whom she was not acquainted and had never met before. That they reached her house early in the evening, and when appellant first came he told her that he had brought her a "good piece." That they all three, she, her husband, and said Allen, sat around the house and conversed the balance of that evening, and after supper the three went to a small town some few miles distant in a wagon, and that they got back home near midnight. That appellant then told her she had to have sexual intercourse with said Allen. She declined to permit this, and begged him not to make her do so, but that he told her she had to, cursed her, and threatened to kill her if she would not permit it. That he then forced her to sit in Allen's lap, and then to lie down on the bed, in his presence, and have Allen to have sexual intercourse with her. That she permitted this at the time, because of fear of her husband and his threat to kill her if she would not permit it. This was Saturday night. Allen stayed at appellant's house the balance of that night and the next day until after dinner. That just before Allen left in the afternoon on Sunday appellant again forced her to have sexual intercourse with said Allen. That at the time appellant was in an adjoining room with the door open. That she objected to this and

begged him not to require her to submit, but that because of his threat she again permitted this act of intercourse with Allen. That he further told her that he had gotten a place down in Dallas in a whore house, and he was going to carry her there to that house; that it was a nice place; that she would have to pay \$10 a week board, and everything was furnished and all license paid; that the charges for sexual intercourse was \$3 for each act. That she told him she did not want to go there and would not go. That she, half of the next Monday, all of Tuesday, and until noon Wednesday worked in the field with appellant and some of their neighbors, chopping cotton. That after dinner on that day, Wednesday, he accused her of having intercourse with Mr. Martin, the neighbor with whom and for whom they at this time chopped cotton. That he thereupon carried her in the room and locked her up, took a rope out of his pocket, tied her hands and wrists, then went out of the room himself and procured another rope, came back and tied her legs around the ankles and her hands behind her. That at this time he had her down on the bed, and that he then also stuffed small handkerchiefs in her mouth and tied a cloth over her mouth and around her head so that she could not talk or give any alarm. That while he was tying her he told her she had lied to him about having intercourse with other men, and that he was going to punish her for it. He then asked her if she had not had intercourse with some men, and if she had not had a baby before by some man, and that, while she could not talk, she nodded her head indicating that she had so as to prevent his killing her as he threatened to do if she did not so acknowledge. That she had not had intercourse with any man, except the two acts with Allen forced by appellant, and that she had at no time had a baby. That she told him this to keep him from killing her, which she believed he would have done if she told him she had not. In connection with all this at this time, "he spoke of taking me to Dallas. He says, 'I have got you now, and I am going to carry you and put you where you can't get out,' and says, 'I will get the money for it.' He told me where that was, but I don't just remember where it was; he told me just what place. As to what kind of place it was, he said it was a nice house, was all he told me. He said something about it being a whore house and said I had to be his whore." She then testified that he rolled her off the bed on the floor, otherwise mistreated her, and left the house, locking her therein, thus tied and gagged; that as soon as he left, in some way, she managed to untie her hands, get an old razor and cut the ropes off her legs, and then grabbed up her dress, hat, and shoes, partially buttoned her shoes, got on the bed, standing, raised a window, knocked out the screen, and ran as fast as she could to her mother and father, who lived something like 2½ miles from her. She then told

her mother, and her mother called her father, who was at the town at his blacksmith shop, and, it seems, proceedings were soon afterwards instituted and appellant arrested.

Appellant went before the grand jury when it was investigating these charges against him, and, after being duly warned, made and signed a written statement, which was proven up, identified, and introduced in evidence. It corroborates said witness Ludie Currington in many particulars, among others, that, soon after his return from Greenville, he accused her of having intercourse with other men, which she denied, and that he told her such things had been going on, and demanded that she should tell him the truth; that if she would he would treat her right and everything would be all right. He claims: That she wrote off in a notebook, which he furnished her for that purpose, telling of various persons with whom she had had such intercourse. That he later burned up this book and told her they would go on and live together and he would treat her right. That she then and theretofore both had helped him in the field working therein. That on Friday May 16, 1913, he went to Dallas, and while there went to a whore house with said Oscar Allen. That he did not, but that Allen did, have sexual intercourse with some women in the whore house at that time. "I told Oscar Allen that I had married a woman who was wrong. I invited him home with me and told him to help me find out if she was wrong. I told him that I did not object to him having intercourse with her." That he and Allen then went from Dallas to his home, where his wife was; they reaching there about 2 o'clock that Saturday evening. That his wife was in the kitchen taking a bath at the time. That he went in there and told her "I had brought her a nice man, and I wanted her to treat him nice." That the three, he, Allen, and his wife, stayed at home that Saturday afternoon and laughed and talked together. That night the three went to the little town where his wife's parents lived and returned to his home that night between 11 and 12 o'clock. That when they returned "I told her that she could sit in his (Allen's) lap, and she sat down in his lap, and I told them that they could go on and have intercourse, and she laid down on the bed, and he had intercourse with her. I sat there in a chair and watched them." That Allen stayed with them until Sunday afternoon. "I told him at dinner before he left on Sunday afternoon that he could get another piece before he left, and they went in the room and had intercourse." He then tells that he stayed right there with his wife, and she helped him to do the work in the field, and her household work, until Wednesday at noon, when he again told her she had to tell him the truth about other men having sexual intercourse with her, and if she lied to him he would punish her. "She said she loved me and

would tell the truth." He claims: That she then told him that she had intercourse with her father, and named several other persons who lived at Farmersville with whom she had intercourse. That he told her on Sunday that he was going to punish her and told her after she gave these names that he was going to punish her for lying to him. That he took her in the bedroom and put handkerchiefs in her mouth, tied a napkin around her mouth and head, and tied her hands and feet, and caught her by the neck and head, and forced her then to tell him that she had had a baby. That he took her off the bed on the floor, refused to let her have a pillow, and then left the room, and when he returned, after 25 or 30 minutes, found that she was gone. He further says: "While I was in Dallas I spoke to the whore house proprietor about my wife coming there, and she said that her girls got \$2 for an act of intercourse with a man, and that the girls paid her \$10 a week room rent. I told my wife what the whore house woman said when I got back." He stated that he was under the influence of whisky from Saturday until Wednesday.

[1] The indictment in this case charged that appellant in said state and county "did then and there unlawfully attempt to procure and was then and there concerned in procuring Ludie Currington, a female, as an inmate for a house of prostitution, \* \* \* and did then and there unlawfully by promises, threats, and violence persuade and encourage the said Ludie Currington to become an inmate of a house of prostitution. \* \* \*" The statute under which this prosecution and conviction was had is the act approved March 1, 1911 (page 29, c. 23), passed at the Regular Session of the 32d Legislature. It is unnecessary to quote it all. The first section, which applies to this indictment, is: "Any person who shall procure or attempt to procure or be concerned in procuring with or without her consent, a female inmate for a house of prostitution, or who, by promises, threats, violence or by any device or schemes, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution \* \* \* shall be deemed guilty of a felony and shall be punished by confinement in the penitentiary for any term of years, not less than five." This court has already held "that this act was intended to cover all those acts, conduct, device, etc., on the part of any person to induce any female to submit her body to other men for the purpose of prostitution, whether they succeeded in inducing her to do so or not." And it would make no difference, whether the woman, prior thereto, was virtuous or not.

Appellant moved to quash the indictment because the offense was not set forth in plain and intelligible words, and that no crime was charged against him, and that it does not show that Ludie Currington ever entered a house of prostitution, and that it

was too indefinite, inconsistent, and repugnant. He takes the position that the first clause of the two clauses quoted above of this statute was intended to reach only that class of individuals who are engaged in the business of soliciting or obtaining recruits or inmates for houses of prostitution, as representatives of such houses, and that it must be alleged and shown that appellant was acting in the interest of or on behalf of some house of prostitution. We cannot agree to appellant's contention. This statute, and the purpose of it, was to reach both classes of such persons, and does so; that is, those who are the solicitors for such houses, as well as those acting on their own initiative and on their own behalf, whether they are connected, either directly or indirectly, at the time, with any such house.

Appellant also contends that the evidence of Ludie Currington as to what was done and said in her having the two acts of intercourse with Allen, shown above, and that also what was done and said by appellant to her on the Wednesday afternoon in tying and gagging her, and what he said to her and told her at the time, was inadmissible, because appellant was not charged with those offenses, and that they were separate and distinct offenses from that charged against him, and calculated to prejudice and injure him before the jury. And he objected to the introduction in evidence of that part of appellant's confession on the same matters. On this point the court charged the jury: "Evidence has been admitted which may tend to show, if it does, that the defendant compelled Ludie Currington, under threats, to have intercourse, if he did, with one Oscar Allen, and that defendant tied his wife, if he did, and otherwise mistreated her, if he did. You are instructed that the defendant is not upon trial for any of said offenses, and you cannot consider said evidence for any purpose except in so far as the same may tend to prove and disprove, if it does, the offense for which the defendant is being tried, to wit, pandering, and you will not consider said evidence for any other purpose whatever."

[2-4] In addition to the court, in submitting the case for a finding, requiring the jury to believe beyond a reasonable doubt the necessary requisites, as prescribed by the first clause of the statute above quoted, before they could find him guilty, he also told them that unless they so believed to find him not guilty. He also charged that the burden of proof was on the state, and the presumption of innocence in appellant's favor, and if they had a reasonable doubt as to his guilt to acquit him. In addition to this, appellant requested, and the court gave, this further instruction: "That before you can convict this defendant, you must believe from the evidence beyond a reasonable doubt that it was the specific intent and purpose of this

defendant to secure his wife as an inmate for a house of prostitution, and if you should find that he was willing to prostitute his wife, and did prostitute her, yet have a reasonable doubt that his specific purpose was to place her in a house of prostitution, you should acquit this defendant."

[5, 6] It is undoubtedly the settled law of this state that independent and disconnected crimes cannot ordinarily be proven against an accused when on trial for another different and distinct crime. It is equally well settled that proof is admissible, even if it should tend to prove, or prove another distinct crime, if it is so connected with that charged and for which an accused is on trial as to be a part of the transaction and crime for which the accused is on trial, and for the purpose of proving the intent of the accused when necessary to prove intent. It is unnecessary to cite the authorities on either of these propositions. This testimony, both of Ludie Currington and appellant's confession, tends to show that soon after his return from Greenville continuously, and including when he tied and gagged her and she escaped from him, his purpose and intention was to get her completely under his influence, control, and power. One means of accomplishing this was first by threats and force have her falsely confess to him that she had had sexual intercourse with others. Another means was by threats and force make her have such intercourse with said Allen in his presence—he brought Allen to his home for that purpose. And still not satisfied that he had her completely under his control and power, so that she herself would go to the whore house in Dallas where he wanted and intended she should go, by his already worse than brutal outrages of her, he on Wednesday following again forced her to falsely confess to him that she not only had had sexual intercourse with others, but had had a baby by another, tied and gagged her, so that if she would not then herself go and become an inmate of said Dallas whore house he would, by force, himself take her, and place her therein—all that, by therein selling her person sexually to all male frequenters of such houses, he could and would make money for himself. This testimony, tending as it did to show his said purpose and intention, and as limited by the court's charge, was admissible under the circumstances of this case.

[7] The record shows that appellant was arraigned and pleaded not guilty on July 1, 1913; that on that day the case was tried and a verdict of guilty found by the jury, and the judgment of the court had thereon on that date. However, we think that the record, as a whole, shows that the trial began a day or two before that time. Appellant requested no other special charge other than the one above quoted and given at his instance. No exception was taken to the

charge of the court at all during the trial. For the first time, in his amended motion for a new trial filed on July 10th, he complains in the sixth ground in this language: "Because the court erred in not specifically defining the word 'procure' in this charge to the jury, and in not specifically informing them of what said offense would consist, whereby the said jury were misled and induced to find said defendant guilty contrary to the law, and contrary to the evidence adduced in said trial to defendant's damage." The charge did tell the jury what constituted the offense, and required the jury to believe all the facts necessary to constitute it, beyond a reasonable doubt, before they could convict him. The court did not err in not defining the word "procure." Article 58, C. C. P., is: "All words and phrases used in this Code are to be taken and understood in their usual acceptation in common language, except where their meaning is particularly defined by law." Article 10, P. C., is: "Words which have their meaning specially defined shall be understood in that sense, though it be contrary to their usual meaning; and all words used in this Code, except where a word, term or phrase is specially defined, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject-matter relative to which they are employed." The word "procure" in said statute "has no significance attached to it other than is usually and commonly understood, and it is easily comprehended by every one who is at all familiar with the English language," taking into consideration the context and subject-matter relative to which it is employed. *Humphreys v. State*, 84 Tex. Cr. R. 434, 30 S. W. 1066; *Austin v. State*, 51 Tex. Cr. R. 329, 101 S. W. 1162; *Harris v. State*, 64 Tex. Cr. R. 605, 144 S. W. 232.

[8] As shown above, the court not only required the jury to affirmatively believe from the evidence, beyond a reasonable doubt, all of the necessary requisites of the offense before they could find him guilty, but also told them, "unless you so believe, you will find the defendant not guilty." Then charged the burden of proof on the state, and the reasonable doubt in appellant's favor. And, in addition, gave his special charge, above quoted. So that any further charge that if he did not attempt to procure Ludie Currington as an inmate for a house of prostitution, to acquit him, was not called for. This was substantially and fully embraced in the court's charge. *Thurmond v. State*, 37 Tex. Cr. R. 422, 35 S. W. 965.

There are no other questions necessary to be discussed.

The judgment will be affirmed.

DAVIDSON, J., not present.

## PERALES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

### 1. CRIMINAL LAW (§ 1151\*)—APPEAL—DISCRETION OF TRIAL COURT—CONTINUANCE.

Where defendant moved for a continuance on the ground that he was too unwell to undergo trial, and the state controverted the motion by affidavit of the jailer tending to show that defendant was not unwell, the denial of such motion was an exercise of the trial court's discretion, which should not be disturbed in the absence of a showing of abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.\*]

### 2. HOMICIDE (§ 300\*)—INSTRUCTIONS—SELF-DEFENSE—THREATS.

Where accused alone testified that deceased had threatened to kill him, there was no error in a charge that deceased had made "a threat" against defendant "as testified to by defendant," even if his testimony might be construed as showing another threat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

### 3. HOMICIDE (§ 300\*)—INSTRUCTIONS—DEFENDANT'S BELIEF AS TO THREAT.

In such case, where there was no question of any other threats, a charge as to defendant's honest belief as to the making of such a threat by deceased was not called for.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

### 4. CRIMINAL LAW (§ 1144\*)—APPEAL—DISCRETION OF COURT—MOTION FOR NEW TRIAL.

Where the trial court, in overruling defendant's motion for a new trial on the ground of local prejudice, stated that it heard the motion and the evidence submitted thereon and was of the opinion that the same should be overruled, the appellate court, in the absence of the evidence from the record, must presume that the evidence heard did not sustain the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

Appeal from District Court, El Paso County; Dan M. Jackson, Judge.

Juan Perales was convicted of murder in the first degree, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of murder in the first degree, and his punishment fixed at life imprisonment. It is unnecessary to recite the evidence. The state's case, by several disinterested witnesses, shows a willful, premeditated killing.

[1] Appellant made a motion for a continuance on the ground that he was too unwell to undergo trial. This was controverted by the state, and the affidavit of the jailer, where appellant was confined and had been for about a month, tends to show that appellant was not unwell as claimed. The trial court must necessarily have large discretion in such matters, and this court would not reverse unless the record showed a clear abuse of this discretion. There is nothing in this record which tends to show that the court in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any way abused this discretion in his action in forcing appellant to trial at the time. Appellant has no other bill of exceptions. His other complaints are in his motion for new trial.

Nothing in the record called for a charge on temporary insanity, produced by the voluntary recent use of ardent spirits, as provided for in article 41, P. C. Lucas v. State, 155 S. W. 529; Clore v. State, 26 Tex. App. 629, 10 S. W. 242; Ex parte Evers, 29 Tex. App. 563, 16 S. W. 343.

[2] The court submitted a charge on self-defense, based on appellant's testimony. There is no complaint to this charge. He also, in another paragraph, separately submitted self-defense on the ground of threats. Appellant alone testified that the deceased had threatened to kill him. No other witness testified to any such threat. The court, therefore, did not err in telling the jury that if they believed from the evidence "deceased had made a threat against the life of defendant, as testified to by defendant," for he alone so testified; and the court did not err in saying "a threat," as appellant himself testified to only one such threat. Even, if his testimony bore the construction that he made another, such charge of the court, taken as a whole, would show no error on this point.

[3] Neither did the court in that charge err in charging, as above quoted, and in not charging in that connection that if defendant honestly believed he made such a threat. He alone so testified, and no witness contradicted him. There was no question of other threats communicated or uncommunicated. Hence such a charge of honest belief was not called for.

The only other question is: Appellant claimed in his motion for new trial that, while the sheriff was summoning the second special venire of 40 men, a local newspaper in El Paso published an inflammatory article about the killing of certain persons in that country by Mexicans, and that he did not ask any of these veniremen on their voir dire anything about this for fear that, by thus questioning these special veniremen, he might thereby give information to the eight jurors who had already been selected and prejudice them; and that said newspaper article had been read by many persons on the streets in El Paso, and the most intense anti-Mexican feeling was aroused and expressed by that other murder.

[4] The judgment of the court in overruling appellant's motion for a new trial states, after showing the appellant and his attorney were in court, and the state, by her district attorney, "And the court, having heard the said motion and the evidence thereon submitted, is of the opinion that the same should be overruled," and thereupon overruled said motion. What evidence was introduced is in no way shown by the record. Under the circumstances, we must presume that the evi-

dence heard on the motion for new trial did not sustain appellant's allegations in his motion for new trial.

The judgment is affirmed.

## BORDERS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913.)

### 1. JURY (§ 107\*)—COMPETENCY OF JURORS—CONSCIENTIOUS SCRUPLES.

In a homicide case, where the state depended upon circumstantial evidence, the court properly sustained the state's challenge to jurors who had conscientious scruples against inflicting the death penalty upon such evidence.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 486-488, 495; Dec. Dig. § 107.\*]

### 2. CRIMINAL LAW (§ 715\*)—TRIAL—ARGUMENT OF COUNSEL.

Where, in a homicide case, the defense was that deceased killed herself, it was not reversible error for the prosecuting attorney, in his argument, to hand the pistol to a juror and ask him if it were possible for deceased to have shot herself in the place where she was shot, although such practice should not be indulged in.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1666; Dec. Dig. § 715.\*]

### 3. CRIMINAL LAW (§ 728\*)—ARGUMENT OF PROSECUTING ATTORNEY—ABUSIVE LANGUAGE—EVIDENCE JUSTIFYING.

While a prosecuting attorney ought never to use epithets, yet it was not error for him, in his argument in a homicide case, to point his finger at accused and call him a "cold-blooded brute" and "an animal," as the record showed the murder to have been very brutal, and there was no requested charge on the point.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.\*]

### 4. CRIMINAL LAW (§ 789\*)—TRIAL—INSTRUCTIONS.

Where the court, in a homicide case, after defining the different degrees of homicide, required the jury to find the facts, constituting each degree, to exist beyond a reasonable doubt, and to give the defendant the benefit of a reasonable doubt between the different degrees, it was not error to fail to charge the negative of the facts constituting each degree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Bud Borders was convicted of murder in the first degree, and he appeals. Affirmed.

Farrar & McRae, of Waxahachie, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of murder in the first degree, and his punishment assessed at imprisonment in the penitentiary for life.

[1] In the first bill of exceptions appellant complains that the court permitted the county attorney to ask the jurymen on their examination the following question: "Have you any conscientious scruples against in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

inflicting the death penalty as a punishment for crime, where the state depends upon circumstantial testimony for a conviction?" And when the jurymen answered they had, the court sustained the challenge of the state to such jurors. As it is not shown that any juror objectionable to defendant served on the jury, we might pass the question in this way; but under our decisions, beginning with *Burrell v. State*, 18 Tex. 713, when the Supreme Court had jurisdiction in criminal matters, on down to this date, it has been held that such question was a proper one, in cases where the state depended on circumstantial evidence to sustain a conviction, and the action of the court in sustaining the challenge was also proper. *Shafer v. State*, 7 Tex. App. 239; *Clanton v. State*, 13 Tex. App. 139; *Little v. State*, 39 Tex. Cr. R. 654, 47 S. W. 984.

[2] The next bill complains that the prosecuting attorney took the pistol, which had been introduced in evidence, and which was the pistol with which the woman was killed, and handed it to one of the jurymen, and said, "Try and see if Belle Borders could have inflicted the wound which killed her, in the place it was located." The length and size of the pistol are shown by the record; the evidence locates the wound just below the nipple in the breast, and its point of exit in the back; and as it was permissible for the prosecuting officer to argue and demonstrate that it was impossible for one to inflict the wound on one's self, instead of handling the pistol himself, to hand it to the juror and ask him to see if he could shoot himself at the point where the wound was shown to have been inflicted on the woman would present no reversible error under this record; but this practice should not be indulged in.

[3] The only other bill in the record complains that the prosecuting officer in his opening address pointed his finger at defendant and called him "a cold-blooded brute," and called him an animal. While the prosecuting officer ought never to use epithets of any character, yet the killing, as shown by the evidence in this case, was done in rather a deliberate and brutal manner, and under such circumstances the language used would not present reversible error, and especially is this the case when no special charge was requested in regard thereto.

[4] No special charges were requested, but there are several complaints in the motion for a new trial of the charges given. The first ground is that the court, in his charge on murder in the first degree, failed to charge "the negative of the facts constituting said degree." The same complaint is made as to the court's charge on murder in the second

degree, and the court's charge on manslaughter. The court in his charge defined murder in the first and second degree in terms frequently approved by this court, and required the jury to find affirmatively those facts to exist beyond a reasonable doubt before they would be authorized to convict, and then defined manslaughter as applicable to the facts of this case, and required the jury to find beyond a reasonable doubt those facts existed before they would be authorized to convict. He then instructed the jury: "If from the evidence you are satisfied, beyond a reasonable doubt, that the defendant is guilty of murder, but have a reasonable doubt whether it was committed upon express or implied malice, then you must give the defendant the benefit of such doubt, and not find him guilty of a higher grade than murder in the second degree; or, if from the evidence you believe, beyond a reasonable doubt, that the defendant is guilty of some grade of culpable homicide, but you have a reasonable doubt whether the offense is murder of the second degree or manslaughter, then you must give the defendant the benefit of the doubt, and in such case, if you find him guilty, it could not be of a higher grade of offense than manslaughter." In addition to this he gave the usual charge on presumption of innocence and reasonable doubt. Having instructed this jury to give the benefit of a reasonable doubt as between the degrees of unlawful homicide, it was unnecessary to so instruct them in the paragraphs submitting the different degrees.

The court did instruct the jury that they must find the exculpatory statements untrue, or they would acquit him. Defendant, as a witness, testified that deceased killed herself, and in the statement made to the county attorney he made the same statement. The court instructed the jury: "If you believe that Belle Borders killed herself, or if you have a reasonable doubt thereof, you will acquit the defendant." If they found that deceased did not kill herself, this necessarily included a finding that his exculpatory statement was not true.

The charge on circumstantial evidence does in terms instruct the jury that they must believe that defendant, and no other person, killed deceased. This charge is in language frequently approved by this court, and concludes: "Unless the evidence in this case has established to your satisfaction beyond a reasonable doubt, and to a moral certainty, that the defendant killed Belle Borders, and excludes every other reasonable hypothesis except that he killed her, then you will find the defendant not guilty."

The evidence amply supports the verdict, and the judgment is affirmed.



**NOE et al. v. MAYOR AND ALDERMEN  
OF TOWN OF MORRISTOWN.**

(Supreme Court of Tennessee. Nov. 22,  
1913.)

**1. MUNICIPAL CORPORATIONS (§ 611\*)—GOVERNMENTAL POWERS—EXCLUSIVE FRANCHISE.**

The ordinances of Morristown, providing for the selection of places for the inspection of animals to be slaughtered for food and for their sale at such places, and confirming a contract with a company, which ordinances, when construed together, made the premises of that company the only place for the inspection and slaughter of animals, are void as not being within the powers conferred by the charter of Morristown (Acts 1903, c. 103).

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1344-1349; Dec. Dig. § 611.\*]

**2. MUNICIPAL CORPORATIONS (§ 617\*)—LEGISLATIVE CONTROL—GRANT OF FRANCHISE.**

The power to grant an exclusive franchise, even of the limited class which may be granted within the city, must be expressly conferred upon the municipality by the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 617.\*]

**3. MONOPOLIES (§ 2\*)—POWER TO GRANT—CONSTITUTIONAL PROVISIONS.**

Under Const. art. 1, § 22, forbidding perpetuities and monopolies, the Legislature cannot confer upon a municipality the power to grant an exclusive franchise for the conduct of a business which is of common right.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**4. MUNICIPAL CORPORATIONS (§ 611\*)—GOVERNMENTAL POWERS—MUNICIPAL SLAUGHTERHOUSE.**

While the Legislature might authorize a municipal corporation to establish a single slaughterhouse, to be conducted by its own agents, it would have to provide that all persons having animals to be slaughtered should have the right to resort to that place to do their own slaughtering, or to have it done by their own agents, or the act would be unconstitutional.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1344-1349; Dec. Dig. § 611.\*]

**5. MUNICIPAL CORPORATIONS (§ 611\*)—POLICE POWER—REGULATION OF SLAUGHTERHOUSES.**

The original ordinance of Morristown, providing for the selection of one or more places for the inspection and slaughtering of animals intended for food, when dissociated from the second ordinance and the contract selecting only one such place, recognizes that there may be more than one place of slaughter and more than one inspector, and is in the main sound.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1344-1349; Dec. Dig. § 611.\*]

**6. MUNICIPAL CORPORATIONS (§ 591\*)—POLICE POWER—DELEGATION OF MUNICIPALITY.**

The provision of section 13 of that ordinance, conferring police power upon the inspector, is objectionable, as clothing him with powers which belong to the city, and not to an officer, except under ordinances defining his duty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.\*]

**7. MUNICIPAL CORPORATIONS (§ 591\*)—POLICE POWERS—DELEGATION OF MUNICIPALITY.**

The provision of section 13 of that ordinance, giving an inspector absolute power to dispose of condemned meat as he might deem best for the public health, is objectionable, since that matter should be controlled by law, and not by the mere will of the inspector.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.\*]

**8. MUNICIPAL CORPORATIONS (§ 591\*)—VALIDITY OF ORDINANCES—PRESCRIBING WEIGHT OF EVIDENCE.**

The provisions of that ordinance that certain acts should be "sufficient" evidence, rather than "prima facie" evidence, that the goods were on sale, are objectionable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1310; Dec. Dig. § 591.\*]

Appeal from and Error to Chancery Court, Hamblen County; Hugh G. Kyle, Chancellor.

Suit by B. A. Noe and others against the Mayor and Aldermen of Morristown. From the decree, the defendants appeal and plaintiffs bring error. Affirmed in part, modified in part, and reversed in part.

McCanless & Coleman, of Morristown, and J. O. Phillips, of Rogersville, for plaintiffs. Earnest R. Taylor and W. N. Hickey, both of Morristown, for defendant.

NEIL, C. J. The bill in the present case was filed by certain butchers engaged in their business in Morristown, challenging the constitutionality of certain ordinances of the town.

The first ordinance was passed March 7, 1913, and provided in substance that the board should select one or more places for the inspection of animals intended for slaughter in Morristown, and for sale there for local food purposes. A subsequent ordinance was passed confirming a contract made with the Morristown Produce & Ice Company, whereby, when construed in connection with the original ordinance, the premises of the company referred to were made in substance and effect the only place for the inspection and slaughtering of such animals. No provisions were made for complainants, or others situated in the like case, to slaughter their own animals. On the contrary, it resulted, as a necessary construction of the two ordinances and the contract made part of the second ordinance, that the place of slaughter was to be under the sole control of the Morristown Produce & Ice Company, and the work to be done only by them; the animals to be killed at that company's place by it, after first being inspected there by the inspector selected by the municipality, and the meat to be likewise there inspected and slaughtered. After this the owners were at liberty to remove and sell it.

Did the mayor and aldermen have power to pass such ordinances?

[1, 2] 1. While there is a limited class of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

exclusive franchises which may be granted within a city, the power to make such grant must be expressly conferred upon the municipality by the Legislature. There are no such special provisions in the charter of Morristown. Acts of 1903, c. 103.

That such power can exist in a municipality only when expressly conferred by the Legislature is clear under the authorities. 3 Abb. Munic. Corp. §§ 921-926; Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co. (C. C.) 24 Fed. 306; Detroit Citizens Street R. Co. v. Detroit R. Co., 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67.

[3] The same rule was laid down by this court in the case of Memphis Street Railroad Co. v. City of Memphis, 4 Cold. 406, and Railroad Co. v. Memphis, 3 Shan. Cas. 198. But we do not know any cases in which such power may be conferred upon a city, even by the Legislature, as to any occupation or business within common right, because even the Legislature is forbidden to create a monopoly. The only cases wherein such power is conceded to the Legislature in behalf of a city are those in which the business was not of common right. City of Memphis v. Memphis Water Co., 5 Heisk. 495. In that case, as in many other cases, the distinction was taken that it was not a matter of common right for any one to tear up the streets of a city to put in water mains and water pipes generally, a thing essential in establishing a water plant. We are referred to the case of Leeper v. State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167, as a case in opposition to the view just stated, but an attentive examination of that case will show the contrary. The fundamental reason running all through the opinion of the court in that case was that the public school system was an institution of the state, and the provision made for its schools in the way of making contracts with a single person for all the books to be used, and in fixing the prices at which they were to be sold, was merely a contract by the state similar to one under which supplies for one of its departments are secured. It was pointed out in that opinion that no restriction was placed upon the right of any one to sell to any private school, and no interference whatever was attempted in respect of that matter. It is immaterial that prior to that time the Legislature had not undertaken to provide for its schools. The same may be said of the penitentiary, and of the record books to be used in the offices of the secretary of state, the treasurer, and the comptroller. The fact that these officers have hitherto been permitted to buy from any one they might deem proper could not forestall the right of the state to purchase supplies for either one of these departments from any individual, or to give him the exclusive right of selling to these departments—that is, to the state itself—under bids open to all dealers. In this respect the state would have the same right any other individual would have to buy sup-

plies. In the case referred to the state advertised for bids, at which anybody that desired might offer books, with the understanding the state would select the books it deemed the best and the cheapest. The fact that the state did not itself pay for the books, but arranged for depots or depositories at which the patrons of the public schools themselves might buy the books at the price fixed by the contract between the state and the wholesale dealer, could not alter the principle. So we do not doubt that a city, like a private corporation, or like an individual, even, might buy its individual supplies of stationery, work tools, etc., from any dealer it might choose. That, however, is a different question altogether from one in which the city undertakes to take charge of a business, which before was of common right, declaring that this should be conducted at only a single place and by a single person, and thereby debar all of us from engaging in that business. This would be a pure monopoly forbidden by our Constitution, which reads:

"That perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." Article 1, § 22.

[4] We are referred to the Slaughterhouse Case, 16 Wall. (83 U. S.) 36, 21 L. Ed. 394, as an authority in support of such a monopoly. That case does hold that it was within the power of the Legislature of the state of Louisiana to establish such a monopoly as to the place where the slaughter was to be done, but distinctly pointed out that at that place everybody was permitted to do their own slaughtering, and the company in charge of the place was bound under heavy penalties to permit them. This distinction would render that case inappropriate as an authority here; likewise the fact that it was established by the Legislature and not by a municipal corporation. Moreover, we are not prepared to admit that it would be within the power of the Legislature of a state even to create such a monopoly. The following from section 192 of McQuillan on Munic. Ordinances, containing an excerpt from the opinion of Judge Cooley in *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80, seems to us to state the true doctrine, subject to the qualification we state at the close of the next excerpt hereinafter quoted: "A contract with a village to build a market house and to put it under control of the village for ten years, in consideration that the rents thereof would be paid to the grantee, to appoint a person to superintend it, permit no other market house to be erected or used, nor articles specified sold elsewhere in the village during the ten years, was held void by the Supreme Court of Michigan as against public policy. The reasons for the doctrine are thus clearly given by Cooley, J., who delivered the opinion of the court: 'If a municipal corporation can preclude itself in this manner from establishing markets whenever they may be thought desirable,

or from abolishing them when thought undesirable, it must have the right also to agree that it will not open streets, or grade or pave such as are opened, or introduce water for its citizens, except from some specified source, or buy fire engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interest, might, in various directions, engage it in permanent contracts, "which, while ostensibly for the public benefit, would impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For, if the village might bind itself to some market house for ten years, it might do so for all time to come; and if it might agree that improvements and conveniences of one class ought to be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or unscrupulous proprietor of town lots, that all improvements of every description should be so located or made as to conduce to his benefit, irrespective to the general good. \* \* \* It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government, with restrictions for the protection of individual or municipal rights, could long exist without its recognition." In *City of Chicago v. Rumpff*, 45 Ill. 90, it appeared that the city was authorized by its charter to regulate and license the slaughtering of animals within its limits. Under this ordinance a particular building was selected for the purpose, and the right to do the slaughtering was committed to one person, to whom certain charges were to be paid by the persons who applied to him for his services, and every one had the right to so apply. This was attacked as a monopoly. The court said:

"The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the nec-

essary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations; otherwise, the ordinance would be unreasonable and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of all such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the General Assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary, business. Whether we consider this as an ordinance or a contract it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner to be paid a specific sum for the privilege, what would prevent the making a similar contract with some other person that all of the vegetables or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot, and he receive a compensation for the privilege? We can see no difference in principle." See, also, 2 *Dillon on Munic. Corp.* (5th Ed.) § 668, and note.

We do not doubt that the Legislature might authorize a municipal corporation to establish either by purchase or rental a single slaughterhouse, to be conducted by the agents or employes of the municipal corporation itself. But such legislative acts, in order to be constitutional, would have to provide that all persons having animals to be slaughtered should have the right to resort to that place and do their own slaughtering, or have it done by their own agents, or by persons of their own selection.

It follows that the chancellor was correct in holding void the contract with the *Morristown Produce & Ice Company*.

[5] It is said that he was inconsistent in maintaining the validity of the original ordinance, and at the same time in stamping the contract, which is made a part of the second ordinance, as void. The original ordinance, while containing some objectionable features, is in the main sound. It does not, when dissociated from the second ordinance and the contract therein adopted, provide for the selection of a single place for the work, or the appointment of a single individual to do the slaughtering. It recognizes that there may be more places than one. It recognizes, also, that there may be more

inspectors than one, providing, as it does, for an assistant inspector, who, however, the bill charges, was not appointed, and that the corporation would not appoint him. So it was possible, under the original ordinances, standing alone, to have several places of inspection, and several places of slaughter.

[8, 7] There are some points, however, about this original ordinance that we think are worthy of special observation. For example, section 16 clothes the inspector with police powers. These powers belong to the city itself, and not to an officer of the city, except under ordinances defining his duty. Under the same theory section 13 gives to the inspector the absolute power to dispose of "condemned animals and meat as he may deem best for the good of the public health." This is a matter that also should be controlled by law, and not by the mere will of the inspector.

[8] We are of the opinion that the strictures made on section 1 of the ordinance of March 7th, that certain acts shall be deemed "sufficient" evidence that the goods are on sale, are well taken. It would have been proper to write, in the place of "sufficient evidence," "prima facie evidence." *Brinkley v. State*, 125 Tenn. 371, 384-385, 143 S. W. 1120.

It results that the decree of the chancellor is affirmed in part, modified in part, and reversed in part. The effect of all of which is that the demurrer is overruled, and that the case must go back to the chancery court for hearing on the answer, and for further proceedings. The defendants will pay the costs of the appeal.

#### INTERSTATE AMUSEMENT CO. v. ALBERT et al.

(Supreme Court of Tennessee. Nov. 28, 1913.)

1. COMMERCE (§ 16\*)—INTERSTATE COMMERCE. "Commerce" among the states consists of intercourse and traffic, including the transportation of persons and property as well as the purchase and exchange of commodities.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 2; Dec. Dig. § 16.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1287-1298; vol. 8, pp. 7606, 7607.]

2. COMMERCE (§ 16\*)—INTERSTATE COMMERCE.

Complainant operated a theatrical "circuit" by contracting as agent for the owners of various theaters to furnish theatrical talent in consideration of \$10 a week for certain weeks in the year, and of 5 per cent. of the amount paid by the owners to each troupe of actors furnished by complainant; complainant's contract with the owner stipulating against liability for failure of any actors to fulfill their contracts or for delay in arriving at the particular city. *Held*, that such a contract, made by complainant, whose general offices were in Chicago, with defendant, to furnish various troupes of actors for playing in defendant's opera house in Chattanooga, Tenn., did not involve interstate commerce, so that complainant was subject to Tennessee laws in executing such contract.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 2; Dec. Dig. § 16.\*]

#### 3. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—"DOING BUSINESS" WITHIN THE STATE.

Complainant, a foreign corporation, which maintained general offices in Chicago, Ill., was engaged in booking actors to play in various theaters, and received for its services a certain sum from the theater owner and a commission retained by him out of the actors' salaries and paid over to complainant. For the purpose of enlarging its business, complainant sent agents into Tennessee, and made such contracts from time to time with the owners of various theaters besides defendant, and had had much correspondence with the owners of various theaters in the state. The contract with defendant for furnishing theatrical troupes was finally signed and accepted by defendant in Tennessee. *Held*, that complainant was "doing business" within the state, within Acts 1877, c. 31, Acts 1891, c. 122, and Acts 1895, c. 81, prohibiting foreign corporations not complying with the statute from doing business in the state or maintaining any action, etc., so that complainant, not having complied with the statute, could not sue on the contract.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

#### 4. CORPORATIONS (§ 661\*)—FOREIGN CORPORATIONS—NONCOMPLIANCE WITH STATUTES—EFFECT.

A foreign corporation, which does not comply with Acts 1877, c. 31, Acts 1891, c. 122, and Acts 1895, c. 81, cannot maintain an action arising out of business transacted within the state, even though the illegality of such transactions only appears from the proof, and not from the pleading.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2536, 2539, 2542, 2543, 2544, 2546, 2563-2567; Dec. Dig. § 661.\*]

#### 5. CORPORATIONS (§ 642\*)—FOREIGN CORPORATIONS—"DOING BUSINESS."

A foreign corporation is "doing business" within the state when it transacts therein some substantial part of its ordinary business, and its operations within the state do not consist of mere casual or occasional transactions.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

Williams, J., dissenting.

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by the Interstate Amusement Company against W. S. Albert and others. From a decree for complainant, defendants appeal. Reversed, and suit dismissed.

Joe V. Williams and Coleman & Frierson, all of Chattanooga, for appellants. W. E. Drummond, of Knoxville, and W. B. Miller, of Chattanooga, for appellee.

BUCHANAN, J. The Amusement Company, when it made the contract on which this suit must stand or fall, when each item of the stated account on which it sued accrued, when it brought this suit, and at the trial thereof, was a foreign corporation guilty of noncompliance with our statutes in respect of "all corporations chartered or organized under the laws of other states or countries for any purpose whatsoever which may desire to do any kind of business in this state." The statutes above referred

to are chapter 31, Acts 1877, chapter 122, Acts 1891, and chapter 81, Acts 1895.

And so, by way of defense to this suit, W. S. Albert, one of the defendants, set up the above facts in bar of the right of the Amusement Company to maintain this suit. He also made the defense of set-off, which is not sustained by the proof, and will not be further noticed.

By article 1, § 8, of the Constitution of the United States, one of the powers conferred upon Congress is "to regulate commerce with foreign nations, and among the several states, and among the Indian tribes." This grant of power to Congress has been held by implication to exclude the several states from the exercise of such powers except by consent of Congress. *Railroad v. Harris*, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921, and authorities there cited.

In *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719, Mr. Justice Brewer, in the opinion of the court, said: "It must be considered, in view of the long line of decisions, that it is well settled that nothing that is a direct burden upon interstate commerce can be imposed by the state without the consent of Congress, and that silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

It is first insisted for the Amusement Company that the business out of which the account arose under the contract was commerce between different states, and therefore that our statutes referred to above have no application to, or effect upon, the contract, the account, the business done under the contract, nor upon the right of the Amusement Company to recover in this suit. This insistence, if sound, would result in our affirmance of the decree of the chancellor for \$1,693.86 in favor of the Amusement Company. To sustain the above insistence *Milan Milling Co. v. Gorten*, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135, is cited. We approve that case.

But can the first insistence of the Amusement Company be sustained under the facts of the present case? To answer this question requires a brief review of the facts.

The Interstate Amusement Company brought this suit by original bill in the chancery court of Hamilton county on February 5, 1913, against W. S. Albert, Fletch Catron, and the Tennessee Realty & Leasing Company, a corporation under the laws of Tennessee.

The bill shows that the complainant is a corporation with its situs in Chicago, and that each and all of the defendants are domiciled in the county and state where the suit is brought.

The defendants Fletch Catron and W. S. Albert were formerly partners doing business under the firm name of Catron & Albert, and as such firm became indebted to the In-

terstate Amusement Company in the sum of \$1,554, as shown by a statement of account certified to be correct by signature of the name of Catron & Albert, by W. S. Albert.

The corporate defendant was shown to have in its hands a certain sum of money more than sufficient to satisfy complainant's demand, and it was the purpose of the bill to impound that fund for the satisfaction of the decree prayed for against the other defendants. Before the suit was brought, Catron had become bankrupt, and, while he answered, made practically no defense to the suit. The corporate defendant made the usual answer of a mere stakeholder without other interest in the suit, and W. S. Albert set up the two defenses to which we have heretofore referred. The complainant relied on its account stated, and took no proof, and all of that which appears in the record was on behalf of the defendant Albert.

From the record, it is clear that, while the bill makes no reference to the existence of any written contract as the basis of the account stated exhibited with it, yet there was a written contract between the complainant and the firm of Catron & Albert, which was in fact the basis of that account.

It is clear from an examination of the contract that it created merely the relationship of principal and agent between the parties. By it the complainant became the agent of Catron & Albert, bound to render them the personal services called for by the contract in consideration of \$10 per week for certain weeks in each year, and the further sum of 5 per cent. of the amount paid by Catron & Albert to each troupe of actors in each play furnished to the principal by the services of the agent; and the consideration for which the agent rendered its services was to forward it by the principal on Monday of each week from Chattanooga, Tenn., to Chicago, Ill., where the office of the agent was located.

[1] "Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." *Mobile County v. Kimball*, 102 U. S. 702, 26 L. Ed. 241.

The same court, in a case very much in point here, held that agents engaged in hiring laborers in the state of Georgia to be employed beyond the limits of that state were not engaged in interstate commerce, and while it was admitted *arguendo* in the opinion in that case that transportation interstate must necessarily take place as the result of the contracts, yet it was held not to follow that the emigrant agent was employed in transportation. *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186.

[2] So it is clear that, under the contract in the present case, and under the proof as it

shows the execution of that contract, it was not contemplated that the complainant agent should engage, nor did it, in the execution of the contract, in fact engage, so far as this record shows, in the interstate transportation of the troupes of vaudeville actors. On the contrary, in clause 5, the agent especially stipulates against liability or responsibility for failure on the part of any artist or artists (as the actors are called) to fulfill their contracts, and against any accident or delay which may intervene to prevent their arrival in Chattanooga when scheduled there to appear.

The true question before us, it must here be borne in mind, is whether the business between the Amusement Company and Catron & Albert, whereby the former was merely acting as go-between, middleman, or agent, involved or was interstate commerce. True it is that such commerce might or might not, so far as this record shows, become an incident or factor in the execution of the contract, which is to say that it might or might not be necessary for the actors employed by the agent to cross the state line in traveling to Chattanooga; but such interstate commerce, if it accrued as a consequence of the contract, would only be incidental to its execution, and not a part of it as between the parties to the contract. Such incidental connection of interstate commerce with the business contemplated by the principal and agent does not stamp that business with the character of interstate commerce. Speaking to the exact point, the present Chief Justice of the Supreme Court of the United States in the next case cited below called attention to this distinction, and to its observance in the authorities cited in that opinion. He said:

"If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature." *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297.

Under the facts of the case before us and the authorities above referred to, we are convinced that the contract and business out of which this suit arises was subject to the laws of Tennessee, and complainant's insistence that it was free from state control because it was interstate commerce is, we think, unsound.

[3] The only remaining insistence for complainant is that this record does not disclose a doing by the company of business in Tennessee within the meaning of our statutes.

The contract was first signed by complainant in Chicago, but this signature did not make it a contract. It became a contract only when signed by Catron & Albert, and

their signature was affixed to it in Tennessee at Chattanooga.

The amount the Amusement Company claims the right to recover from Catron & Albert in this suit is made up of two elements, as we have seen, each of which depends on, and directly grows out of, business which, in contemplation of the contract, was to be done in Tennessee. This business was the appearance of actors at the theater of Catron & Albert in Chattanooga, for the booking and employing of whom the contract stipulated \$10 per week for certain weeks should be paid to complainant, and out of the salaries of the actors 5 per cent. was to be withheld by Catron & Albert and paid to complainant. It is clear from this record that, for the purpose of enlarging and extending its business in Tennessee, complainant had agents who came into the state and made contracts with other owners of theaters than Catron & Albert; and it is shown by this record that Albert had much correspondence with owners of theaters looking to the extension of complainant's business. A large part of this correspondence was with persons who were residents of this state, and who were interested in theaters located here. While the complainant appears to have had no person located in this state and resident here which it admits was its agent, yet it cannot be doubted on this record that, whenever the nature of its business required the same to be done, it sent an agent to look after its business.

The seventh clause of the articles of association of the complainant states its purpose to be "to conduct and operate a general theatrical and amusement business."

[4] This purpose it carried out, as is clearly shown in this record, by the establishment of what it called "circuits," on which were located theaters convenient each to the other, and its scheme contemplated the making of contracts with each of these theaters similar to that of Catron & Albert, and the collection of its revenues arising from booking fees and its percentages on actors' salaries. It was distinctly a middleman, levying tribute from the owner of the house where amusement was afforded and from the actors whose talents were employed. Its operations in Tennessee were manifestly employed for the general prosecution of its ordinary business, and clearly within the prohibition of our statutes. It has been too long settled to need discussion that a foreign corporation guilty of non-compliance with these statutes can have no remedy growing out of its transactions made in violation of them; and this is true, even in a case where the illegality is made to appear by proof alone without a pleading pointing it out. *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743. Also construing and applying these statutes are *Harris v. Water & Light Co.*, 108 Tenn. 245, 67 S. W. 811; *Louisville Property Co. v. Nashville*, 114 Tenn. 213, 84 S. W. 810; *Lum-*

ber Co. v. Moore, 126 Tenn. 313, 148 S. W. 212; Insurance Co. v. Kennedy, 96 Tenn. 714, 36 S. W. 709.

Our latest case upon this subject is *Lumber Co. v. Moore*, supra, in which we held that the foreign corporation there under consideration had not been engaged in doing business in this state within the meaning of our statutes; but that case, we think, is distinguishable from the present case. In that case, with respect to statutory restrictions upon foreign corporations doing business within the several states, it was said:

"These prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents or engaging in the general prosecution of their ordinary business therein, and they do not apply therefore to acts not constituting any part of their ordinary business."

In that case, upon its facts, we held that the foreign corporation did not maintain its agency in Memphis for the usual and ordinary prosecution of its business within the state, but that it maintained such agency as a matter of convenience for the prosecution of its business in other states. The distinction between that and the present case is that it was the ordinary business of the complainant Amusement Company to send troupes of actors from one theater to another in the state of Tennessee for the purpose of presenting plays to audiences assembled in each separate theater, and from the revenues derived by means of each performance the complainant Amusement Company in its turn under the contract sued on derived an income. The revenues it received arose directly from acts done in Tennessee in the several theaters where the troupes of actors appeared or performed. The contract sued on shows as many as 53 different items, each of which represents complainant Amusement Company's share of the revenues received from 53 separate and distinct performances by troupes of actors which complainant caused to appear in the one theater of defendants in the city of Chattanooga.

Just how many other theaters in Tennessee were operating under like contracts with the complainant company does not clearly appear in the record; but it is clear that complainant was using each of the troupes of actors for whose performance it seeks to recover in this case as an agency in the carrying on of its regular and ordinary business.

In *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 307, *Cone Export & Commission Co. v. Poole*, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289, *Penn Collieries Co. v. Edward J. McKeever*, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127, *A. Booth & Co. v. G. M. Weigand*, 30 Utah, 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693, and in the notes upon each of the above cases, an extensive collation of the authorities up-

on the question here involved, and kindred questions, will be found.

We do not think the present case falls within the doctrine announced in many of the authorities, which hold that an isolated business act within a state does not amount to the carrying on of business; nor do we think the present case falls within the principle announced in other authorities to the effect that business acts done in a state by a foreign corporation which are merely incidental to its business conducted at its domicile are outside of the prohibition of statutes similar in purpose to ours.

[5] On the contrary, we think the present case falls within the general rule that a corporation is doing business within a particular state when it transacts therein some substantial part of its ordinary business, continuous in character as distinguished from merely casual or occasional transactions.

A corporation can act only through an agent or agencies; but it does not follow that a foreign corporation can evade our statutes by an insistence that it has no recognized agent in this state, if, under the facts of the case, it is clearly apparent that it is by means of agencies organized as a part of its ordinary business conducting that business continuously and regularly in this state, and deriving therefrom an income.

It may be said that the troupes of actors, by means of whose performances the complainant corporation in the conduct of its business in this state planned to derive its income, were not employed or paid by the complainant corporation, but, on the contrary, were employed and paid by the defendant partnership; but nevertheless each troupe caused by the complainant corporation to appear at the theater of the defendant partnership was an agency used by the complainant corporation in the conduct of its ordinary business, for the purpose of producing for it an income out of the conduct of its ordinary business, and the agency thus used performed the acts from which the income to the complainant corporation resulted in the state of Tennessee.

It is therefore apparent that the income which the complainant planned to derive from the execution of the contract, and for which income it sues to recover in this case, resulted as a sequence of the following acts in the order named: First, the consent by complainant to the terms of the contract, which consent we must hold was given in Tennessee, since it is clear that the contract was consented to by the defendant partnership at Chattanooga, in that state; second, the engagement by complainant of the troupes of actors to appear on scheduled dates in the theater of the defendant partnership (this act was done, no doubt, by the complainant in its Chicago office); third, the actual appearance of the actors pursuant to this engagement in the theater at Chattanooga,

Tenn.; fourth, the collection of admission money from the several audiences by the defendant partnership, and the remittance by it of complainant's share of the money so collected, as that share was fixed by the terms of the contract.

Thus, it is clear that three of the four business acts from which the income sued for resulted were acts done in Tennessee, and done or to be done there under the terms of the contract by the complainant through agencies employed by it. We think this brings it clearly within the general rule already announced.

As bearing upon the subject under discussion, and generally sustaining our views thereof, we cite the following additional authorities: *Chattanooga Bldg., etc., Association v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; *Lumberman's Insurance Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 331; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

Without further discussion, we hold that the indebtedness evidenced by the account sued on arose out of business conducted in this state by the complainant Amusement Company without precedent compliance on its part with our statutes already cited, and therefore that it cannot maintain this suit.

It results that the decree of the chancellor will be reversed, and the suit dismissed.

**WILLIAMS, J. (dissenting).** I do not conceive that there is presented by this record a case of doing business in this state, under the statute cited, on the part of the Amusement Company. It had no plant, property, office, agent, or agency in this state. It was related to the resident firm of Catron & Albert as contractor to contractee, and to nonresident managers, or players in like manner, and was but an intermediary. I fail to see how the respective contractual relations, conceived of singly, or (if that were permissible) in conjunction, can be said to fix upon the company the status assigned it by the majority.

#### BAIRD v. SMITH.

(Supreme Court of Tennessee. Nov. 28, 1913.)  
CONTRACTS (§ 117\*)—LESSENING COMPETITION  
—SALE OF BUSINESS.

The provision of a contract, by which one sells his stock of goods and the fixtures of his store, that he will not in that town for five years engage in business in competition with the buyer, does not "tend to lessen free and full competition" in the sale of articles that had become a part of the mass of the property in the state, in violation of Acts 1903, c. 140,

§ 1; the meaning of "competition," or of undue or unreasonable restraint of trade, under the common law, not being changed by the statute.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 554-569; Dec. Dig. § 117.\*]

Appeal from Chancery Court, Campbell County; Hugh G. Kyle, Chancellor.

Suit by M. E. Baird against W. G. Smith. Decree for complainant. Defendant appeals. Affirmed.

H. K. Trammell, of Jellico, for appellant. John Jennings, Jr., of Jellico, for appellee.

**BUCHANAN, J.** On May 9, 1910, the parties above named entered into a written contract whereby Smith sold to Baird the entire stock of merchandise and fixtures located in a certain storehouse in Jellico, Tenn., known as the "Racket Store." The contract contains the terms of sale (which are not material to be set out here), and then proceeds as follows:

"Further considerations of this agreement are as follows:

"The said W. G. Smith binds himself in the sum of one thousand dollars (\$1,000.00), to be paid to the said M. E. Baird, due only under the following conditions: Should the said W. G. Smith enter into any business other than the business which he is now connected with, viz., the Smith Shoe & Clothing Company, in the town of Jellico, for a period of five (5) years, in any line of merchandise that would be considered in competition to the store sold to M. E. Baird, then the said W. G. Smith agrees to pay one thousand dollars (\$1,000.00) to said M. E. Baird for this privilege."

The contract was in duplicate, executed in the presence of two witnesses, and signed by the respective parties. Baird paid the consideration money, entered into possession of the stock and fixtures, and since the date of the contract has been doing business at the "Racket Store." On November 25, 1912, he brought this suit, seeking a decree against Smith for \$1,000 and interest upon an alleged breach of the above-quoted portion of the contract.

The chancellor decreed as prayed in the bill, and Smith appealed, and has assigned errors in this court.

It is the opinion of the majority of the court (in which the writer, however, does not concur) that the contract was breached by Smith, and that so far as this branch of the case is concerned there was no error in the decree. This branch of the case has been disposed of in an oral opinion and need not be further noticed.

The next and only remaining question arises upon Smith's insistence that the chancellor should have held the clause quoted from the contract void, because it was a contract tending to lessen full and free competition in the sale of merchandise, within the meaning of chapter 140, Acts of 1903. It is urged that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the lessening or restraint of competition need not, under the act, be unreasonable, as it must have been at common law, in order to invalidate the contract, but, on the contrary, under the act a mere tendency to lessen full and free competition invalidates the contract.

An analysis of section 1 of the act in question reveals a twofold purpose in the passage of that section.

The first was to preserve full and free competition in the sale of articles of merchandise which had become a part of the mass of property in the state.

The second was to preserve full and free competition in the sale and manufacture of articles of domestic growth and domestic raw material, and to prevent all combinations tending to affect the price or cost thereof to the consumer or producer.

With the second of these purposes we are not concerned in the present case. It is the first purpose of the act, and how far, if at all, it has changed the rules of the common law with respect to contracts of this character, that we must consider in the present case.

We think the only change in the common law the statute has wrought is accomplished by the use of the words "tend to" in the first section of the act. The test at the common law had been whether, in point of fact, the contract or other matter in question did in fact work an undue or unreasonable restraint upon full and free competition; the test under the statute is whether it "tends to" do so. The statute works no change in the meaning of the word "competition" as it was understood at common law, nor does it change what was at common law undue or unreasonable restraint of trade, or such restraint of the synonymous term, "full and free competition."

So the question before us narrows down to the point of determining whether the contract in suit, or that part of it quoted herein, tended within the meaning of the first section of the act to lessen full and free competition, and therefore contravened the public policy underlying the act.

Under the common law in force in this state prior to any legislation on the subject, only such combinations, contracts, or agreements as operated to the prejudice of the public interest by unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the act, injuriously restricted trade, were denounced as void on grounds of public policy.

Such was the holding of the Supreme Court of the United States in *U. S. v. American Tobacco Co.*, 221 U. S. 171, 174, 31 Sup. Ct. 632, 55 L. Ed. 693, 694, where it was said that the statute under consideration there should be so interpreted as not to restrain the power to make "normal and usual con-

tracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." And so we think the act in question in the present case must be read and interpreted. Every contract by which one person secures to himself the ownership, dominion over, and right to fix a price on or sell, or to keep for his use, a particular portion of the common mass of merchandise in the state, is to that extent an exclusion of the like rights in all others over that property during his ownership, and such person, if under no public duty or contract to part with the merchandise, may keep and use it, or sell it at such price as he sees fit. He is free to do as he likes in respect to it; and so was the vendor from whom he acquired title, if similarly circumstanced.

And, as we see the present case, Smith, who had gathered into his "Racket Store" a part of the common mass of merchandise in the state, and who by sale of merchandise of like character in that place had built up a good name or good will for his business in that particular class of merchandise, had a property right, not only in the merchandise and fixtures sold to Baird, but also in the good will or name of the business. The contract between Smith and Baird does not expressly convey the good will of the business; but, notwithstanding this fact, we think Smith's right was clear to sell the stock of merchandise and fixtures, and as an incident of his ownership of the stock and the business conducted by him, and as an element entering into and forming a part of the value thereof, to bind himself not to engage in business in competition with Baird in the town of Jellico for the period of time named in the contract. *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984; *Bradford v. Furniture Co.*, 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979; *Turner v. Abbott*, 116 Tenn. 725, 94 S. W. 64, 6 L. R. A. (N. S.) 892, 8 Ann. Cas. 150; *Smith v. Webb* (Ala.) 58 South. 913; 40 L. R. A. (N. S.) 1192.

We do not think the contract tended to restrain full and free competition within the meaning of the act of 1903. Our case of *Turner v. Abbott*, supra, is controlling authority in the present case.

The act of 1903, upon other phases than that involved in the present case, has been considered by this court in *State v. Witherspoon*, 115 Tenn. 138, 90 S. W. 852; *State ex rel. v. Woolen Mills*, 115 Tenn. 267, 89 S. W. 741, 2 L. R. A. (N. S.) 493, 112 Am. St. Rep. 825; *Standard Oil Co. v. State*, 117 Tenn. 642, 100 S. W. 705, 10 L. R. A. (N. S.) 1015; *State ex rel. v. Standard Oil Co.*, 120 Tenn. 138, 110 S. W. 565. And the act is considered by the Supreme Court of the United States in *Standard Oil Co. v. Tenn.*, 217 U. S. 413, 30 Sup. Ct. 543, 54 L. Ed. 817.

It results, from the views expressed, that the decree of the chancellor must be affirmed, with costs.

**AMERICAN ZINC CO. v. SMITH.**

(Supreme Court of Tennessee. Nov. 29, 1913.)

**1. MASTER AND SERVANT (§ 103\*)—MASTER'S LIABILITY—SERVANT'S DUTY TO OBEY RULE—"NONDELEGABLE."**

While in instances the giving of signals may be the nondelegable duty of the master, the term "nondelegable" does not mean that the master may not impose upon a servant the duty of giving signals prescribed for his own safety, and where such signals are not given at such a place as his duty requires he cannot recover for injury resulting therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 108.\*]

**2. MASTER AND SERVANT (§ 243\*)—MASTER'S LIABILITY—NONCOMPLIANCE WITH RULES.**

Deceased, with other machinists, descended in a mining shaft to repair a pump after being warned by the master carpenter, repairing the upper part of the shaft, that they should not come into the shaft until they notified him by knocking on a pipe; but when the repair was finished the foreman said, "Come on," and went into the hoisting basket, followed by deceased, who, as he was getting into the basket, was hit by a piece of timber falling from the carpenters' work and killed. *Held*, that deceased had no right to infer that the foreman had obeyed the rule as to notice, and that, as he himself could have given notice, his failure to observe the rule was negligence, defeating a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.\*]

Appeal from Circuit Court, Knox County; Von A. Huffaker, Judge.

Action by Bertie Smith against the American Zinc Company. Judgment for plaintiff was affirmed in the Court of Civil Appeals, and defendant appeals. Reversed, and judgment for defendant.

Cornick, Frantz, McConnell & Seymour, of Knoxville, for appellant. Pickle, Turner & Kennerly, of Knoxville, for appellee.

**WILLIAMS, J.** This suit was brought by Mrs. Bertie Smith to recover of the American Zinc Company for the death of her husband, James C. Smith, which occurred in a mining operation.

Deceased was an experienced machinist in the employ of the company, under a master machinist, Edleman, his foreman, and at the time was engaged in attending to the repair of pumps in the mine then being driven. He was ordered by Edleman to accompany him and a second assistant, Caine, down a shaft of the mine to repair a pump. The three used for descent a hoisting apparatus. A head carpenter and several assistants were engaged in lining the shaft with lumber, and as the three machinists started down the head carpenter cautioned all of them to signal to him by tapping on a pipe line, that extended up the shaft, before coming from the pump into the shaft to make the ascent; this, so that the carpentry crew could discontinue work above and avoid injury to the machinists by falling timber being worked by the

carpenters or by rock dislodged by them. After fixing the pump, the deceased, Smith, for the machinists, before going from the pump into the shaft, tapped on the pipe line without direction from his foreman so far as the proof shows. The head carpenter gave a return signal that all was right, and the machinists reached the surface in safety.

The pump did not work promptly, and Foreman Edleman again took his crew down the shaft to give it further attention, when they were again warned by the head carpenter: "Whatever you do, don't come about that shaft until you let me know you are coming."

These warnings were in accord with a rule of the company in proof to this effect: "The rule of the mine with respect to the protection of the men coming into the shaft where the timbering was going on was that anybody coming to the bottom of the shaft would knock on the pipe, and the timbermen were to answer by rapping on the pipe and calling down." The proof further establishes that under the rule any workman desiring to go up the shaft was to give the signal or to see that it was given. In going into the shaft for the second ascent, no signal was given by either of the three machinists. Foreman Edleman said, "Come on, we will ascend to the surface," and all started together. Edleman went to the hoisting basket, and got in; Caine followed next, and got in; and as deceased approached the basket and was in the act of getting in, a block of timber fell from where the carpenters were at work, about 180 feet above, and hit and instantly killed Smith.

It appears from the testimony that the pump was located out of danger range about eight feet from the shaft, and that the sound produced by tapping on the pipe line could be heard for several hundred feet from the shaft.

The company made a motion for peremptory instructions in its favor, but this was overruled. The case went to a jury, which gave plaintiff a verdict.

The disposition of the case in the Court of Civil Appeals is best shown by an excerpt from its opinion, as follows:

"The sole question in this case, as we view it, is: Was the foreman guilty of negligence in failing to notify the carpenters at work above them in the shaft of the fact that they were entering the elevator to be carried to the surface?

"The proof is not clear as to what was said when the foreman said to the deceased and the other employé, 'Let us return to the surface.' As a matter of fact, he entered the basket of the elevator first, and it was his duty to tap the pipe to notify the carpenters above of the fact that they were there to be carried to the surface.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"The case runs along a narrow margin, but we think the deceased lost his life by virtue of this negligence of the foreman, and the whole charge of the trial judge embraced in the assignments of error revolves around this sole question as to whether or not the foreman was guilty of negligence in failing to notify the carpenters above that they were entering the elevator for the purpose of being carried to the surface. If it was also the duty of the deceased to notify them, then his representative could not recover in this case; but we think he had the right to rely upon the fact that the foreman, who preceded him in entering the elevator, had notified the carpenters above of their intention to be carried to the surface."

[1] It will be noted that the Court of Civil Appeals held that, if it was the duty of the deceased, Smith, to notify the carpenters above, by means of the signal, there could be no recovery in this case. This is a true conception and statement of the law. While in instances the giving of signals may be the nondelegable duty of the master, it is not meant by the word "nondelegable" that the master may not impose the duty upon a given employé to give signals prescribed for his own safety.

"An action cannot be maintained where it was the duty of the injured servant to direct other employés by means of signals, and the injury was due to the fact that those signals were improperly given, or were not given at such time and place as his duty required." 8 Labatt, Master & Servant (2d Ed.) § 1260; 26 Cyc. 1264.

While the proof does show that the duty to give the signal was imposed upon Edleman, as foreman, it also further shows that the same duty under the rule rested equally and alike upon deceased.

That court was further of view, as we construe the opinion, that deceased had the right to rely upon the fact, as excusing him from giving the signal, that the foreman, Edleman, in leading the way to the basket for ascent, had given the signal, and therefore its ruling was in favor of the plaintiff on the motion for peremptory instructions.

As was indicated by the Court of Civil Appeals, the margin for liability was, in its opinion, a narrow one, and the authorities ruling the point appear to be by no means numerous.

In the case of Atchison, etc., R. Co. v. Reesman, 60 Fed. 370, 378, 9 C. C. A. 20, 28, 23 L. R. A. 768, 772, it was urged in behalf of an injured brakeman, plaintiff, that his disobedience of the company's rules, though it contributed to his injury, should not be accounted to him as contributory negligence, because the disobedience was with the knowledge and consent of the conductor as his superior. Mr. Justice Brewer, sitting at circuit as Circuit Justice, delivering the opinion of the court, said: "The duty of obedience to the rules of the employer is one

resting alike upon all employés; and, when an employé claims to recover from his employer for injuries resulting through the latter's negligence, he cannot escape the consequences of his own act contributing to such injury—an act done in known violation of the rules of such employer—on the ground that his immediate superintendent knew and assented to such act of violation. If it were otherwise, then the supineness and negligence of any superintending officer of a corporation would relieve a subordinate from responsibility for his own conduct. In other words, the wrong of one employé is excused by a like wrong of another. The employé injured through his own omission of duty escapes liability for such omission because some other employé is equally careless."

The recent case of New York, etc., R. Co. v. Ropp, 76 Ohio St. 449, 81 N. E. 748, 11 L. R. A. (N. S.) 413, involved a claim of an employé (Ropp) that his failure to obey a rule respecting signaling was excused by the presence and consent of his superior (Whalen). The court said: "This theory of the case does not seem to us to be tenable. For aught that appears, the rules were equally obligatory on both Whalen and the plaintiff. They certainly were binding on the plaintiff, and the violation of the rules by Whalen, whether he were a superior or not, could not release the plaintiff from his contractual obligation, which was made for the benefit of both himself and his employer. \* \* \* Neither can such authority [of Whalen to suspend the rule as to Ropp] be implied from the fact that Whalen had authority to direct and control the plaintiff in the performance of his duties as a car repairer. His authority to control and direct was authority to control and direct within the limitations of the rules prescribed by the company for the government of all employés. \* \* \* Nor had the plaintiff the right to infer a waiver of the rule in any case. There is not even room for an argument from the necessity of the case; for the plaintiff could have obeyed the order of his superior and still have protected himself from injury by obeying the rule."

[2] We need not, in the pending case, hold that a superior cannot in any case, for lack of authority, so order an inferior employé as to free the latter from the obligation of a given rule binding alike on both, for here there was no order or direction proceeding from the superior to Smith to disregard the rule prescribed for their protection. This was also true in the Ohio case, in which the court further, in this connection, wrote: "Although the plaintiff had not been told by Whalen to disregard the rule, and although he had not looked to see if the signals were placed, and nothing had been said on the subject," it is claimed that "he had the right, when called by Whalen to come and help him on the repairs on which Whalen was working, to take it for granted that Whalen had

done his duty, or to infer from Whalen's conduct and surrounding circumstances that the rule was suspended for the time being"—and the court denied that the plaintiff employé had the right to so infer. See, also, *Central R. Co. v. Kitchens*, 83 Ga. 83, 9 S. E. 827; 26 Cyc. 1270.

In our opinion, the rule thus last declared is sound, and, further, that it is applicable to the facts of the case at bar. Smith had no right to infer that Edleman was by closer attention and compliance absolving him from an observance of the rule, reinforced by the cautions given immediately before to him and Edleman alike. If it be conceived that Edleman directed Smith to follow him out into the shaft and into the basket, then for aught that appears Smith could have done so, and also have complied with the rule by tapping the signal on the pipe line. If Edleman disregarded the rule, that fact did not operate to acquit deceased of negligence in respect of his own omission.

Other contentions are disposed of orally.

The motion for peremptory instructions should have been sustained. Reversed, with judgment here in accord.

#### ST. LOUIS, I. M. & S. RY. CO. v. McCONNELL et al.

(Supreme Court of Arkansas. Dec. 1, 1913.)

##### 1. REFORMATION OF INSTRUMENTS (§ 45\*)—EVIDENCE—SUFFICIENCY.

Before a written instrument will be reformed for mutual mistake, the evidence of the mistake must be clear and convincing.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.\*]

##### 2. REFORMATION OF INSTRUMENTS (§ 45\*)—ACTION.

In ejectment, where defendants filed a cross-complaint seeking a reformation of their deed, evidence held sufficient to support a decree of reformation.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.\*]

##### 3. REFORMATION OF INSTRUMENTS (§ 28\*)—EQUITABLE ESTOPPEL.

Where defendants purchased land from a railroad company and relied upon the railroad company's agent to insert the description of the land which was the subject-matter of the contract in the application for the purchase, defendants are not estopped from securing a reformation of their deed because they did not examine the description of the deed and ascertain that it failed to include the land they sought to buy.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. § 82; Dec. Dig. § 23.\*]

##### 4. REFORMATION OF INSTRUMENTS (§ 25\*)—GROUNDS FOR REFORMATION.

Where defendants purchased land from plaintiff and went into possession, erecting structures thereon, they will not be denied the right to a reformation of their deed so as to make it include the land purchased, on the ground that the parties cannot be placed in

statu quo; the reformation of the instrument placing the parties in statu quo.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 84-90; Dec. Dig. § 25.\*]

Appeal from Johnson Chancery Court; Jeremiah G. Wallace, Chancellor.

Decree by the St. Louis, Iron Mountain & Southern Railway Company against E. T. McConnell and others. From a judgment for defendants on their cross-complaint, plaintiff appeals. Affirmed.

O. M. Walser, of Little Rock, for appellant. G. O. Patterson, of Clarksville, for appellees.

MCCULLOCH, C. J. [1, 2] The plaintiff, St. Louis, Iron Mountain & Southern Railway Company, instituted this action in the circuit court of Johnson county, claiming title to certain tracts of land in that county, and seeking to recover possession of timber cut by the defendants on the land, also to recover possession of certain houses and mill sheds situated on the land. The lands are described in the complaint as the S.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 31, in township 11 N., range 22 W., and the plaintiff shows a complete chain of title back to the government. Damages were also sought to be recovered for timber cut and removed from said lands. An order of attachment was issued and levied on property of the defendants, and an injunction was also issued, restraining defendants from cutting any more timber or removing the houses from the lands. It is shown that the defendants have erected a sawmill on the tracts of land, and are proceeding to cut and remove all the timber on the aforesaid tracts. The defendants answered, alleging that McConnell, one of the defendants, purchased said lands mentioned above from the plaintiff, but that, by mutual mistake, the plaintiff conveyed the wrong lands, to wit, the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 31, in township 11 N., range 22 W. Defendants made their answer a cross-complaint, and asked that the cause be transferred to the chancery court, and that a decree be entered in their favor, reforming the deed so as to correctly describe the lands according to the intention of the parties. The court heard the causes upon depositions of witnesses, and rendered a decree in favor of defendants, reforming the deed according to the prayer of the cross-complaint. Damages in the sum of \$250 were also awarded to the defendants for injuries sustained by reason of the injunction. The plaintiff has prosecuted an appeal to this court.

It appears from the testimony that McConnell, one of the defendants, was in the lumber business in Clarksville, Ark., and purchased lumber from Carille, also one of the defendants. Carille would seek out purchase-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

able timber lands, and McConnell would purchase the same, and then give Carlile a contract for cutting the timber and sawing it. That was done in this instance, and the proof tends to show that Carlile selected the lands in controversy for purchase and reported same to McConnell, who negotiated the purchase with plaintiff's agent, a man by the name of Allison. Mr. Deane, plaintiff's general agent in charge of land matters, resided and maintained his office in the city of Little Rock, but had field agents who looked after the lands and negotiated sales. Allison was a field agent in that territory, and, as before stated, the sale was negotiated with him. Carlile had a survey of the lands made, and selected the lands in controversy for purchase and reported same to McConnell.

The evidence adduced by the defendants is clearly to the effect that the lands in controversy were the ones that were surveyed and which they intended to purchase. They testified that they represented to Allison, the field agent of plaintiff, that these were the lands they wanted, and relied upon him to make out the application to the general agent and describe the lands wanted. Allison, the field agent, wrote out the application, which described other lands, and it was signed by McConnell, as he says, upon reliance that Allison had written the correct description of the lands. The application was sent in and accepted and deed forwarded to McConnell, who, as he says, thought it described the lands correctly, had it recorded, and put it away. Thereafter he paid the taxes on the lands through his agent, but did not give the matter his personal attention, and never knew until this suit was instituted, three years later, that the deed described lands which he did not intend to purchase. The evidence shows also that the lands were all for sale at the same price, and that the lands in controversy were timber lands which were of the kind that McConnell was seeking to purchase, and that he had no use for the other tracts, which had no timber on them. The appeal presents purely a question of fact whether such a mutual mistake was made as calls for the reformation of the deed, and whether that mistake is established by such clear, convincing, and satisfactory evidence as will justify a court of chancery in reforming a written instrument. We are convinced from the testimony that defendant McConnell never intended to buy the lands which were actually conveyed to him, but that he intended to purchase, and thought he was purchasing, the lands which Carlile had selected, and that he never knew until the commencement of this action that a mistake had been made. Without analyzing the testimony in any minute degree, we are of the opinion that it meets the well-established rule that, before a written instrument will be reformed, the evidence must be clear and

convincing. This rule is well established by decisions of this court in cases cited on the briefs of counsel on both sides, and need not be elaborated upon further.

[3] Learned counsel for the plaintiff invoke the rule that defendant McConnell is estopped to dispute the correctness of the description in the deed by reason of his neglect to read it when he had an opportunity to do so. We do not think that he is bound by this omission, because he relied, as he had a right to, upon the agent of the company inserting the correct description. He knew nothing about the description himself, and trusted to the agent to correctly write it down, and the act of the agent was equivalent to a representation that he had done so. If he was misled by what amounted to a misrepresentation on the part of plaintiff's agent, he would not be estopped by reason of his failure to read over the paper or by accepting the deed. *Stewart v. Fleming*, 96 Ark. 371, 131 S. W. 955; *Outcault Advertising Co. v. Young*, 161 S. W. 142. He took possession of the tracts of land in controversy, erected a sawmill, and continued without molestation until the commencement of this suit, to cut the timber.

[4] Nor is there anything in the contention that reformation should be denied because the parties cannot be put in statu quo, for the status of the parties is restored according to the equities of the case by reverting the title in plaintiff which was conveyed by the deed, and by vesting title to the lands in controversy in defendant McConnell. We are of the opinion that, after giving due consideration to the finding of the chancellor, we cannot say that the evidence is not sufficient to come up to the rule of clearness and certainty necessary to reform a written instrument.

It is not contended that the evidence is insufficient to warrant the finding as to damages by reason of the issuance of the injunction. Decree affirmed.

#### ALFORD v. STATE.

(Supreme Court of Arkansas. Dec. 1, 1913.)

##### 1. HOMICIDE (§ 292\*)—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

In a prosecution for an assault with intent to kill, where the court charged on all grades of assault, a charge that if defendant cut a certain third person with felonious intent to take his life, that defendant should be convicted of an offense, and that, if such third person was the aggressor and threw a brick at the defendant, but in good faith abandoned the fight, and defendant followed him and cut him, he should be convicted, was not erroneous as permitting a conviction without considering the element of malice aforethought, since that element was unimportant in determining whether defendant was guilty of some offense embraced in the indictment, but was important only on the question of the degree of the offense.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 597, 598, 600, 601; Dec. Dig. § 292.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—32

## 2. CRIMINAL LAW (§ 53\*)—CAPACITY TO COMMIT CRIME—INTOXICATION.

Voluntary intoxication is no excuse for crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 65, 761; Dec. Dig. § 53.\*]

## 3. HOMICIDE (§ 294\*)—ASSAULT TO KILL—INSTRUCTION—INTOXICATION.

Where defendant in a prosecution for assault with intent to kill was guilty of some degree of assault, even if he was too intoxicated to form a specific intent to kill, the omission to charge as to the element of intoxication was not error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. § 294.\*]

Appeal from Circuit Court, Columbia County; W. E. Patterson, Judge.

Jack Alford was convicted of assault with intent to kill, and he appeals. Affirmed.

Stevens & Stevens, of Magnolia, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellant, Jack Alford, was convicted by a jury in the circuit court of Columbia county of the offense of assault with intent to kill, alleged to have been committed by cutting one Dave Scott with a knife.

It is admitted that the assault was committed by appellant, and that he cut Scott with a knife, inflicting serious wounds; but his defense is that he was intoxicated at the time to the extent that he was incapable of forming the specific intent essential to the commission of the crime alleged in the indictment; and also that he acted "upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible," so that the offense was reduced to a lower degree of assault, or assault and battery.

The evidence tends to show that a short time prior to the cutting, appellant and Scott had an altercation, in which the latter was the aggressor and threw brickbats at appellant. Appellant, according to some of the testimony, had to flee from the scene of the difficulty, but a short time afterwards Scott walked into a hardware store, and was followed by appellant, who at once attacked Scott, without any words or provocation, and cut him with a knife. Appellant testified that he was drunk at the time and didn't remember anything about cutting Scott.

[1] The court gave numerous instructions, most of which were those requested by appellant, submitting to the jury all the grades of assault—from assault with intent to kill down to simple assault—and, among others, gave the following two instructions at the request of the state and over appellant's objection:

"No. 3. The jury are instructed that, if they believe from the evidence beyond a reasonable doubt that Jack Alford, in Columbia county, Ark., within three years prior to the

return of the indictment against him into court, which was on the 20th day of February, 1913, willfully and feloniously cut Dave Scott with a knife, with the felonious intention to take his life, you will convict the defendant."

"No. 5. The jury are instructed that, if they believe from the evidence beyond a reasonable doubt that Dave Scott was the aggressor and threw a brick or bricks at the defendant, Jack Alford, but in good faith abandoned the fight, and that the defendant pursued and followed said Dave Scott into Turner's hardware store and walked up behind him and held and cut him, as alleged in the indictment, then it will be your duty to convict the defendant."

It is insisted that these instructions were erroneous and prejudicial, because they permitted the jury to find appellant guilty without considering the element of malice aforethought. It will be observed that neither of the instructions quoted above refers to the commission of the highest offense charged in the indictment, and did not tell the jury that they must convict him of assault with intent to kill. They were given with other instructions which defined all of the degrees of assault, and submitted the question to the jury as to which offense he was guilty of, if any. They were therefore correct instructions, for the element of malice aforethought in the commission of the offense was unimportant in determining whether appellant was guilty of some offense embraced in the indictment, and was only important in considering the degree of the offense. The jury, of course, considered these instructions in connection with the others defining the several grades of assault embraced in the indictment.

[2, 3] Voluntary drunkenness is no excuse for crime, and these instructions were not erroneous in omitting mention of the element of drunkenness; for, as before stated, appellant was guilty of some degree of assault, even if he was too drunk to be able to form a specific intent to kill. *Byrd v. State*, 76 Ark. 286, 88 S. W. 974; *Chowning v. State*, 91 Ark. 503, 121 S. W. 735, 18 Ann. Cas. 529.

The evidence was abundantly sufficient to sustain the verdict of assault with intent to kill, and as the issues were correctly submitted to the jury, the judgment must be affirmed. It is so ordered.

## WILLIFORD v. EASON.

(Supreme Court of Arkansas. Dec. 1, 1913.)

### 1. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*)—DE FACTO PROSECUTOR — RIGHT TO FEES.

One acting as deputy prosecuting attorney under the district prosecuting attorney, whose appointment was not in writing nor approved by the circuit court, was not a de jure but a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

de facto officer, and hence was not entitled to collect the fees of the office.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

## 2. PAYMENT (§ 82\*)—RECOVERY—VOLUNTARY PAYMENT.

Although an exaction is illegal, yet, if voluntarily paid without any compulsion, it cannot be recovered.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254-266; Dec. Dig. § 82.\*]

## 3. PAYMENT (§ 89\*)—ACTION TO RECOVER—INSTRUCTION.

In an action to recover a fee paid to a de facto prosecuting attorney not entitled thereto, submission of the case on the sole issue of whether plaintiff knew when he made the payment that the fee demanded was illegal was more favorable than defendant was entitled to.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 291-296; Dec. Dig. § 89.\*]

## 4. PAYMENT (§ 87\*)—DURESS—RECOVERY.

A payment of the fee claimed by a deputy prosecuting officer not entitled thereto, made while plaintiff was in the custody of an arresting officer, and upon the assurance of a justice of the peace that it was legal and could be enforced against him, was a payment under duress and hence recoverable.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 283-287; Dec. Dig. § 87.\*]

Appeal from Circuit Court, Mississippi County; W. J. Driver, Judge.

Action by R. S. Eason against W. L. Wiliford. Judgment for plaintiff, and defendant appeals. Affirmed.

C. A. Cunningham, of Blytheville, for appellant. R. S. Eason, pro se.

MCCULLOCH, C. J. Appellant, W. L. Wiliford, acting as deputy prosecuting attorney for the Chickasawba district of Mississippi county, filed an information before a justice of the peace against appellee, R. S. Eason, charging the latter with the offense of gambling. The latter was arrested pursuant to the warrant issued upon the information. He appeared before the justice of the peace and entered a plea of guilty, and a fine of \$10 was adjudged against him. The justice taxed a fee of \$25 for appellant as deputy prosecuting attorney, and appellee was informed of it, but protested against paying the fee. The justice advised him that he was liable for it and must pay it, and he paid it together with the fine and other costs. He instituted this action before a justice of the peace to recover it from appellant after the amount had been paid over to him by the officer.

[1] Appellant was acting as deputy prosecuting attorney by authority from the prosecuting attorney of the district, but he was not appointed in writing, nor was the appointment approved by the circuit court as provided by the statute. He was therefore a de facto officer, but not de jure, and was not entitled to collect the fees and emoluments of the office. *Stephens v. Campbell*, 67 Ark. 484, 55 S. W. 856.

[2] The only question in the case is whether or not the payment was a voluntary one, for, though the exaction was illegal, if voluntarily paid without any compulsion, it cannot be recovered.

[3, 4] The trial court submitted the case to the jury solely on the question whether or not appellee knew, at the time he made the payment, that the fee demanded was a legal one. This was incorrect and was more favorable than appellant was entitled to; for, irrespective of appellee's knowledge of the facts concerning the defect in appellant's title to the office, if he protested against the payment and made it under duress, in order to prevent his incarceration, he was entitled to recover the money which was so paid. No exception to the ruling of the court in giving instructions has been preserved. Therefore the sole question presented to us is whether the evidence is sufficient to sustain the verdict. According to the undisputed evidence, appellee was in the custody of the arresting officer—not actually so, but in theory—and made the payment upon the assurance of the justice of the peace that it was legal and would be enforced against him.

There is much conflict in the authorities upon the question as to what circumstances surrounding the payment of an illegal tax will render it voluntary within the meaning of the law. See recent case of *Brunson v. Board of Directors of Crawford County Levee District*, 153 S. W. 828. But there is no conflict in the authorities over the question as to whether one who is under arrest, and pays an illegal fine or costs under that compulsion, is entitled to recover it in an action instituted for that purpose.

Judgment affirmed.

## KEENE v. TRICE.

(Supreme Court of Arkansas. Dec. 1, 1913.)

### 1. INJUNCTION (§ 128\*)—EVIDENCE.

In an action to compel defendant, the former engineer of a drainage district, to turn over the records of his office to his successor, evidence held to show that defendant was never elected to the office of chief engineer of the district as such, but that he was merely engaged as a construction engineer.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.\*]

### 2. DRAINS (§ 17\*)—DRAINAGE DISTRICT—POWER.

Under Sp. Acts 1911, p. 218, § 2, providing that the board of directors of a drainage district may employ such officers, attorneys, and agents as they may deem necessary, the board has authority to employ a construction engineer without appointing him chief engineer.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 12; Dec. Dig. § 17.\*]

### 3. INJUNCTION (§ 128\*)—DRAINAGE DISTRICT—ACTIONS—EVIDENCE.

In a suit to compel defendant, the engineer of a drainage district, to turn over the records of his office, evidence held insufficient to show

that he was employed for an indefinite period to continue until the completion of the work but to establish that he was only employed for a stipulated length of time.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.\*]

Appeal from Woodruff Chancery Court; Edward D. Robertson, Chancellor.

Suit by Will T. Trice and others against W. A. Keene, Jr. From a decree for complainants, defendant appeals. Affirmed.

Appellees, as directors, brought this suit against the appellant and alleged that on June 19, 1911, they employed appellant as chief engineer for an indefinite period, to extend not later than January 1, 1912, but that the work which appellant was employed to do had not been completed by that time, and that his services were retained from month to month thereafter until the annual meeting of the board, and that at an adjourned meeting of the board, held on the 28th of May, 1912, one Eggleston was elected as chief engineer and directed to proceed with the work on the levee; that appellant had in his possession profiles, records, etc., belonging to the board, and, although same had been demanded of him, he had refused to turn them over to Eggleston; that, on account of not being in possession of these records, great damage was being sustained by the district by reason of delay in the building of the levee. They alleged that appellant was insolvent; that they had no action at law; and they prayed that a mandatory injunction issue compelling appellant to turn over the records, maps, etc., to the appellees.

The appellant answered, denying all of the material allegations of the complaint; admitted that the board had attempted to elect Eggleston as chief engineer, but alleged that the election was invalid; admitted that he had the records mentioned in the complaint, and set up that the district was created by Act 97 of the Acts of the Legislature of 1911, and that appellees were constituted a board of directors under that act, and as such board were directed to complete the levee begun by the White River levee district No. 1 of Woodruff county. He set up that at the organization he was duly elected as chief engineer, and after that, to wit, on the 19th day of May, 1911, in pursuance of the act, he was elected chief engineer and his salary was fixed at \$150 per month; that thereafter, until the 28th day of May, 1912, the board treated with, recognized, and considered appellant the duly elected and lawfully acting chief engineer of the district by directing him to perform the duties incident to the office, by receiving all work done by him and accepting the same, consulting with him, and paying his salary. He alleged that the term of office of chief engineer was fixed by the act at two years, and that under the act his term of office would not expire until the 19th day of May, 1913, and that he was entitled

to perform the duties and obtain the salary until that time; that the appellees, without authority of law, on the 28th day of May, 1912, without notice to appellant, and without any reason therefor, and without complaint to him, elected B. B. Eggleston as chief engineer of said district and demanded of appellant all the property of the district in his possession, and further that he cease to act as engineer, which he refused to do. He prayed that appellees' bill be dismissed, and that the board be directed to recognize him as chief engineer until his term of office expires and pay him his monthly salary as contracted for.

The appellant testified that in March, 1911, when the board first met, he was elected engineer of the district and had held the position ever since; that as chief engineer he was put in charge of the construction work, surveys, etc., and all work needed to complete the original system as planned and decided upon by the board of directors; that the plans for the new work necessary to complete the original levee were submitted to the board of directors and, after approval by the board of directors, were carried out by the appellant under such directions as the president of the board made. Appellant had never failed or refused to do any work directed to be done. He was elected in March, 1911, until the annual meeting of the board. At the annual meeting of the board May 9, 1911, all of the officers of the board were elected, and at the next meeting appellant was elected as engineer in charge. He had been in full charge as engineer since then until the order of the court of June 24, 1912, directing him to turn over the property of the district.

The annual meeting of the board of directors was held May 14, 1912, and at a call meeting May 28, 1912, Eggleston was nominated and declared elected as engineer. No action was taken by the board to dismiss appellant at its annual meeting May 14, 1912, nor had there been any such action taken at any subsequent meeting. Appellant drew a salary of \$150 a month and necessary expenses while away from headquarters. Appellant was at the meeting when he was elected, and W. T. Trice, president of the board, notified appellant that he was elected as chief engineer. Appellant was present at the annual meeting May 14, 1912, and at the call meeting May 28, 1912. All moneys paid out for construction work and engineering services had been paid upon estimates on pay rolls signed by appellant as chief engineer. The orders were so signed by him by direction of the board. After his election as chief engineer the board had letter heads printed containing the names of the officers of the board, and his name appeared on the letter heads as chief engineer.

Appellant testified that at the first meeting

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



there was some discussion regarding the engineer after the levee was completed. It was decided that the work under way and all other work necessary to be done to complete the levee be set for January 1, 1912. It was contemplated that the work should be completed by that time. At the first meeting of the board, in March, 1911, when appellant was elected, he understood that he was to complete the work then in contemplation. There was some discussion about naming another man who had offered to take the place at \$100 a month. It was appellant's recollection that this man was to be retained after the completion of the work in order that the board might have an engineer permanently for maintenance and supervision during overflows. That was not a part of appellant's work. Appellant made the statement that after the completion he did not care to remain for the maintenance work. Appellant said that under favorable conditions it was his opinion that January 1, 1912, was sufficient time to complete the Jackson bayou levee, and that the first 20 miles of the levee would be completed before that time. Appellant told the members of the board that the contract should not be limited further than January 1, 1912. Appellant did not understand that there was any limit placed upon the term of his service unless he chose to give up the office upon completion of the work. Up to July 1, 1912, no contract had been signed for the Jackson bayou work and no work had been done on it to that time. Leonard, the contractor, had been given to understand by the board that, on account of the impossibility of completing the work during the winter of 1911-1912, they would not hold him to the completion of the same by January 1, 1912, but that he would be expected to begin work as soon as favorable weather and ground conditions would permit in 1912.

The minutes of the board meeting held on March 20, 1911, show the following: "Motion that W. A. Keene be elected engineer and on vote he was declared elected." The annual meeting of the board was held on the 9th day of May, 1911. No election was had for engineer on that day. The next meeting of the board was held on the 19th of June, 1911, and the minutes of that meeting show the following: "Motion by R. D. Caldwell and seconded by H. C. Argo that W. A. Keene, Jr., be employed as engineer in charge of the levee at a salary of \$150 a month." The minutes of this meeting were approved May 14, 1912; and the record of the meeting on the latter day shows the following: "Report of engineer read and approved and a copy of same ordered filed with the secretary." The meeting adjourned to May 28, 1912. The record of the meeting of May 28, 1912, shows the following: "Mr. R. D. Caldwell nominated Mr. R. A. Eggleston, engineer of the district, and on a vote he was declared elected. The following members voting in the

affirmative: J. D. Eldridge, C. F. Greenlee, R. D. Caldwell. W. T. Trice and H. C. Argo voting negatively."

Eldridge, one of the members of the board, testified that he was present and participated in a meeting June 19, 1911, when appellant was employed as engineer. Certain other members of the board had expressed themselves as in favor of employing another man as engineer. Mr. Keene was asked how long he thought it would take to complete the work then under contemplation, and he thought it would be completed by January 1, 1912. When this was suggested, the other members of the board withdrew their objections, and he was employed. The work contemplated by the board at its meeting on June 19, 1911, has not yet been completed.

Another member of the board, after corroborating the above statement of Eldridge, testified as follows: "It was understood by both the board and Mr. Keene that his employment was for the completion of that work then contemplated by the board, and that this work would be completed January 1, 1912. It was never contemplated or understood by either party that Keene was employed for either one or two years." On account of weather conditions the contractor could not finish the work within the time contemplated, and witness, as president of the board, extended the time for the completion of the work and permitted Keene to continue to act as engineer until the meeting of the board. The witness permitted him to act until the board should see fit to take some action in the matter. "Keene stated to me he intended to hold the office and objected to any record being removed."

The court made the injunction compelling appellant to surrender the maps, profiles, etc., and enjoining him from interfering with the work of the district, perpetual, dismissed his complaint for want of equity, and the cause is here on appeal.

Jno. W. & Jos. M. Stayton, of Newport, for appellant. J. F. Summers, of Augusta, for appellee.

WOOD, J. (after stating the facts as above). 1. Appellant contends that he was elected to office under Act 97 of the Special Acts of 1911, creating a levee district and naming directors for same, and that under the act his term of office lasted for two years, and that he could not be removed without the preferment of charges against him and an affirmative action thereon.

[1] Conceding, without deciding, that the act provides for the election of a chief engineer as an officer of the board of directors whose term of service was two years from the time of the first annual election, still appellant was never elected to the office of chief engineer. The first meeting of the board was in March, before the annual meeting in May, 1911. At the meeting in March

appellant was elected engineer, but, under the terms of the act, this election at the organization of the board only entitled appellant to hold "until the first annual meeting thereafter," which was May 9, 1911. At the meeting May 9, 1911, no election was had for chief engineer. At the next meeting of the board, June 19, 1911, the appellant was "employed as engineer in charge of the levee at a salary of \$150 per month." The decided preponderance of the evidence shows that it was not the purpose of the board at this meeting to elect appellant to the office of chief engineer, to be held by him until the term of the office of chief engineer (treating it strictly as an office) would expire. The evidence shows that it was understood by both appellant and the board that his employment would last only until the work then in contemplation should be completed, and they estimated that it would take until January 1, 1912, to complete the work; the conditions all being favorable.

The evidence shows that there was objection by certain members of the board to the election of appellant as chief engineer, and that these members, constituting a majority of the board, were in favor of another man, but they consented to the employment of appellant "as engineer in charge of the levee" for the short time that the appellant and the board supposed that it would take to complete the work then contemplated, which they estimated would be until January 1, 1912, a period of something over six months. So we conclude that even if the statute provides for the office of chief engineer, and that the board of directors should elect one to that office whose term of service was fixed by the act at two years from the first annual election, still the board did not elect appellant to the office of chief engineer but, on the contrary, simply employed him as the engineer in charge under a contract to be continued until January 1, 1912.

[2] The board had express power to so employ. Section 2 of the act provides in part: "They (the board) may employ such officers, attorneys and agents as they deem necessary or expedient in the conduct of the business of the district."

[3] 2. Appellant contends that, if he was not elected to the office of chief engineer under the statute, he nevertheless was employed by the board as the engineer of the district for an indefinite period, to continue until the completion of the work contemplated by the board, and that such work had not been completed at the time of his discharge. The period of time that appellant was employed under his contract with the board was purely a question of fact. We have set forth in the statement the testimony bearing upon that issue and need not discuss it in detail. The finding of the chancellor that appellant was not entitled to remuneration for his services beyond the time when he was dis-

charged by the board is not clearly against the preponderance of the evidence. The testimony tends to show that both the appellant and the board of directors understood at the time that his term of employment would last until the completion of the work contemplated, which they estimated and fixed at January 1, 1912. Under the testimony, the board of directors might have terminated the employment of appellant on the 1st of January, 1912; but at that time the work had not been completed, and the board continued appellant in its employ until the 28th of May, 1912, about five months more than his contract of employment contemplated. After the 1st of January, 1912, the time he should be continued in service was at the option of the board. The board at that time had the right to discharge him and employ another in his stead.

The decree is affirmed.

#### RUSSELLVILLE WATER & LIGHT CO. v. SAUERMAN et al.

(Supreme Court of Arkansas. Oct. 20, 1913.)

##### 1. APPEAL AND ERROR (§ 635\*)—DISMISSAL—INSUFFICIENCY OF RECORD.

Defendants' appeal will not be dismissed because of the failure of their transcript to contain the contract upon which suit was brought, where plaintiffs admitted the existence of the contract and the pleadings contained most of its terms.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2776-2872, 2829; Dec. Dig. § 635.\*]

##### 2. APPEAL AND ERROR (§ 635\*)—DISMISSAL—RECORD.

Where plaintiffs, who were successful below, moved to dismiss the appeal because of the failure of defendants' abstract to contain a copy of the contract on which the suit was based and in the alternative for the court to consider as part of plaintiffs' brief and argument the brief and argument filed in a similar case by another plaintiff against the same defendant wherein the contract was fully copied, plaintiffs' alternative motion supplied the omission in the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2776-2782, 2829; Dec. Dig. § 635.\*]

##### 3. SUBROGATION (§ 24\*)—RIGHT TO SUBROGATION.

A construction contract provided that the owner should pay to the contractor semimonthly as the work progressed 85 per cent. of the actual value of the work done, but the remaining 15 per cent. should be retained and not paid to the contractor until ten days after the completion of the work delivered free of all liens for labor, materials, or purchase money, or otherwise, and that the contractor should use all moneys advanced to him to the satisfaction of all labor, material, and other liens. Held, that the right to retain 15 per cent. was for the benefit of the owner, and an unpaid materialman, who did not perfect a materialman's lien is not entitled by subrogation to claim payment out of the 15 per cent. of the contract price retained by the owner.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 49; Dec. Dig. § 24.\*]

Appeal from Pope Chancery Court; J. G. Wallace, Chancellor.

Suits by J. F. Sauerman and another against the Russellville Water & Light Company. From decrees for complainants, defendant appeals. Reversed, and suits dismissed.

On November 14, 1908, the Russellville Water & Light Company entered into a contract with one Fred Wilson to build a dam across the Illinois river and a reservoir, in Pope county, Ark., for the purpose of furnishing power for a water and light plant in the city of Russellville. The contract, among other things, provided that the dam was to be constructed for the sum of \$34,700, 85 per cent. of the value of the transportation, labor, and material furnished during the period then ending, to be determined by the engineer in charge, was to be paid to Wilson, and the remaining 15 per cent. was to be retained until ten days after the completion of the work and the possession of the dam delivered to the Russellville Water & Light Company. The dam was to be delivered to the company "free from all liens for labor or material, or purchase money or otherwise." The money to be paid Wilson under the contract was to be applied, first, to the payment of all labor, material, or other liens, and should not be used for any other purpose until such payments were made, and Wilson could not demand any of the semimonthly payments until he had shown that the preceding semimonthly payments had been disbursed as provided by the contract. Statements as to the amount of the disbursements were to be furnished by Wilson to the company on demand. The contract provided that the money for all labor, machinery, appliances, or material "shall be deducted from any moneys due said Wilson or that may thereafter become due to him from said water and light company" under the terms of the contract; that if at any time there should be any evidence of any liens or claims for which the company might become liable and which are chargeable to the said Wilson, then and in that event the water and light company shall have the right to retain out of any of the payments then due or thereafter to become due to the said Wilson an amount sufficient to completely indemnify said water and light company against said liens and claims." The cases are considered together.

The plaintiffs, Benefield and others, filed their separate complaints in the Pope chancery court, in which some of them set up that they had performed work and labor on, and others that they had furnished material for, the dam at the request of Wilson, setting forth the respective amounts of their several claims. The complaint in the Benefield Case set up the contract of the water and light company with Wilson. Alleged that Wilson had completed the reservoir and dam ex-

cept a small portion and some extra work agreed upon between himself and the company, amounting to only a small per cent. of the entire contract; that Wilson, about the time of the completion of the contract, had been adjudicated a bankrupt, and that he was insolvent; that he had absconded and his whereabouts was unknown to the plaintiffs; that under the contract the company had reserved 15 per cent. of all sums due Wilson until all labor and material used by him were fully paid, and that this amounted to about \$5,000, and was largely in excess of the amount due plaintiffs; that plaintiffs should be paid out of this amount; that they had been subrogated to the rights of Wilson to the amount of their respective claims, pro tanto, and asked that they have judgment against the water and light company for said amounts. The contract was made an exhibit to the complaints.

There was a special demurrer to all the complaints, setting up that they showed on their face that the claims were barred by the statute of limitations, that the plaintiffs had not complied with the statute for preserving their liens, and that the court was without jurisdiction. The court did not pass on the demurrer. An answer was filed, denying all the material allegations of the complaints, and, among other things, setting up that, if the plaintiffs were entitled to subrogation to the rights of Wilson, their claims had been litigated and settled in the bankruptcy proceedings; that the claims sued on were barred by the statute of limitations; that plaintiffs had not attempted to enforce their claims under the statute for preserving liens on the property and had not complied with that statute in any particular. The demurrers to the complaints were renewed in the answers. It does not appear that they were passed upon by the court.

The court, after hearing the testimony, rendered a decree recting "the cause was heard upon the pleadings and the exhibits thereto and the depositions of witnesses." The court found that the company was indebted unto the plaintiffs in the various amounts, which are set forth in the respective decrees, and entered a judgment for such amounts, with costs. An appeal was prosecuted in each of the cases.

A. S. Hays and J. M. Martin, both of Russellville, and Danaher & Danaher, of Pine Bluff, for appellant. R. B. Wilson, J. T. Bullock, and U. L. Meade, all of Russellville, for appellees.

WOOD, J. (after stating the facts as above). [1] In the cases of Russellville Water & Light Company v. Sauerman & Ball, D. C. Carpenter, J. M. Ball, and T. C. Cole, numbered respectively 2,617, 2,619, and 2,620, the appellees ask the court to affirm the judgments for the reason that the contract, which is material to the determination of the issues

involved, and which was in evidence below, is nowhere brought into this record.

There is an agreement of record here by the attorneys representing the respective parties in the above cases that the transcripts now on file here in each of the causes may be used as a part of the transcript in the other causes; that the causes may be submitted the same as if the matter contained in each of them were contained in all of the others. By an examination of the record in one of the causes, we find that the answers allege the existence of a contract between the company and Wilson, and that the reply of one of the plaintiffs to the answer admitted the contract between the company and Wilson, and the reply to the answer states as follows: "That the defendants by their contract with said Fred Wilson kept and agreed to withhold and withheld 15 per cent. of all funds due said contractor for the purpose of paying any indebtedness in the construction and erection of the improvements in controversy; that said defendants, after the bankruptcy of said Fred Wilson, appropriated said 15 per cent. so held back by them to their own use and interest, when in equity and good conscience the same should have been applied to the payment of plaintiffs' claim."

The appellees, in their briefs, acknowledge that the contract was adduced in evidence. Since the appellees admitted the existence of the contract, and show in their briefs that it was considered by the lower court, we are of the opinion that the causes should not be affirmed because of the omission from the transcript of the contract upon which appellant relies to sustain its contention.

[2] Counsel, in their brief, in presenting this motion for affirmance, state that, "if the court should be inclined to have this contract considered here," we respectfully ask permission to file as a part of our brief and argument the brief and argument of Hon. U. L. Meade, filed in the case of Russellville Water & Light Company v. H. D. Benefield et al. In that case the contract is fully set out, and copied by Mr. Meade in his brief. This statement of the attorneys, we are of the opinion, supplies the omission of the appellant to set forth the contract in the record and in its abstract, and sufficiently brings to the attention of the court the contract that was in evidence, and upon which the court, in part, based its decree.

[3] The only remaining question therefore is whether or not under the terms of this contract, as shown in the Benefield case, the appellees were entitled to recover.

The contract, after providing for the erection of the reservoir and dam and specifying the manner in which same should be completed and the time for the completion of the same, contains the following: "Third. The company shall pay to the said contractor for the construction and completion of the said dam and reservoir in accordance with said plans and specifications and this agreement

to the satisfaction of the company, the sum of thirty-four thousand seven hundred dollars in lawful money, which said sum shall include the cost of all labor, machinery, freight thereon, installation thereof and all materials and other things used in and about the construction and completion of the said dam and reservoir, as well as other items of cost which may be incurred by the said contractor or those working for or under him in the erection and completion of said dam and reservoir under this contract. Said sum of money shall be paid to the contractor semi-monthly as the construction of said dam and reservoir shall progress, eighty-five per cent. of the actual value of the cost of transportation and the installation of all machinery and appliances placed on said premises, and all labor performed during the erection and completion of said dam and reservoir during the period then ending, shall be paid to the contractor, which value is to be determined and ascertained by the engineer then in charge of the said work, as herein provided, and the remaining fifteen per cent. shall be retained by the said company and not paid to the contractor until ten days after the completion of the said work and the possession thereof delivered to the company, free of all liens for labor or materials or purchase money or otherwise. It is understood and agreed in this connection that the contractor will use and supply all moneys so advanced to him under this contract at first, to the satisfaction and payment of all labor, materials and other liens used in and about the construction of the said dam and reservoir, and shall not divert or use any of the same for any other purpose until all amounts owing by the contractor for such labor, materials and other things are fully paid off and discharged, and such contractor shall not have the right to demand any of the said semi-monthly payments until he has shown to the satisfaction of the engineer then in charge, that the preceding semi-monthly payments have been disbursed as herein provided."

It is contended by the appellees that they have an equity in the 15 per cent. retained by the company under the contract until the completion of the work, but we are of the opinion that this provision of the contract was made expressly for the benefit of the company, and not for the benefit of laborers and materialmen. The contract provides that the dam and reservoir should be turned over to the appellant "free of all liens for labor or materials or purchase money or otherwise," and it provides that all moneys advanced to the contractor shall be used first, for the payment of all labor, material, and other liens, and that the contractor shall not have the right to demand the semi-monthly payments until he has shown to the satisfaction of the engineer in charge that the money previously advanced had been used to pay off the claims of laborers and ma-

terialmen. All this was to be done, under the contract, before the 15 per cent. was due and payable to the contractor.

Taking all of the provisions together, they clearly show that the 15 per cent. to be retained by the company was for its protection against any lien for labor or materials.

The provisions of the contract under consideration are similar to the provisions in the contract and bond under consideration in the cases of Eureka Springs Stone Co. v. First Christian Church, 86 Ark. 212, 110 S. W. 1042, and Morris v. Nowlin Lumber Co., 100 Ark. 253, 140 S. W. 1. In those cases, construing similar provisions, we held that the provisions of the bond were for the benefit of the owner of the buildings to be erected, and not for the benefit of laborers and materialmen.

There was no privity of contract between the appellant and the appellees. The contract was made with Wilson, and the reservation of part of the contract price due him upon the completion of the dam and reservoir and the delivery of possession thereof to the appellant cannot be construed as for the benefit of the appellees in the absence of more specific language to that effect. See Pine Bluff Lodge of Elks v. Sanders, 86 Ark. 292-299, 111 S. W. 255.

The appellees rely upon certain decisions of the Circuit Court of Appeals to support their contention, to wit: Anniston Pipe & Foundry Co. v. National Security Co., 92 Fed. 549, 34 C. C. A. 526; United States, etc., v. Rundle et al., 100 Fed. 400, 40 C. C. A. 450; United States v. American Surety Co., etc., 135 Fed. 78, 67 C. C. A. 552; and Chaf-

fee v. United States Fidelity & Guaranty Company, 128 Fed. 918, 63 C. C. A. 644. These decisions are grounded on an act of Congress for the "protection of persons furnishing material and labor for the construction of public works." Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523). See 6 Fed. Stat. Ann. p. 125. The act, among other things, provides for a bond to be given by the contractor with good and sufficient sureties "that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract, \* \* \* upon which (contract and bond) the said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their benefit against said contractor and sureties," etc.

It is clear from the provisions of this statute that the contracts and bonds under them are, in part, expressly for the benefit of laborers and materialmen, since they are given a right of action thereon. These authorities are not applicable to the contract under consideration.

The undisputed testimony shows that at the time Wilson abandoned his contract he was indebted to appellant in a sum in excess of the amount of the 15 per cent. reserved. After Wilson left, appellant had to expend a large sum in excess of the 15 per cent. to finish the dam and reservoir.

It follows that the decree was erroneous. It is therefore reversed, and the causes are dismissed.

CINCINNATI, N. O. & T. P. RY. CO. v.  
WINNINGHAM'S ADM'R.†

(Court of Appeals of Kentucky. Dec. 16, 1913.)

1. RAILROADS (§ 275\*)—INJURIES ON TRACK—  
DUTY TO WARN.

Intestate was killed by a train while erecting a coal tippie, which was being constructed by a coal company under authority from the railroad company, which had also furnished the specifications. The tippie was close to the track, and was later to be extended over it, and 5 men were regularly employed, and at times from 15 to 20, and it was frequently necessary for them to cross the track. The work had proceeded about 10 days when intestate was killed. *Held*, that the railroad company was charged with notice that the tippie was being constructed, and was bound to anticipate the presence of persons on the track at that point and warn them of the approach of trains.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 873-877; Dec. Dig. § 275.\*]

2. RAILROADS (§ 275\*)—INJURIES ON TRACK—  
DUTY TO WARN—DUTY OF ENGINEER.

If a railroad company was charged with notice that a coal tippie was being constructed at a point near its track, so that it was bound to anticipate the presence of workmen on the track, the company was not excused, for failure to give warning of an approaching train, because the engineer did not in fact know the tippie was being constructed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 873-877; Dec. Dig. § 275.\*]

3. RAILROADS (§ 383\*)—INJURIES ON TRACK—  
DUTIES OF PEDESTRIAN—LOOKING AND LISTENING.

The doctrine of "stop, look, and listen" on approaching and crossing a railroad track has not been adopted in Kentucky.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1305-1310; Dec. Dig. § 383.\*]

4. RAILROADS (§ 282\*)—INJURIES TO PERSONS  
ON TRACK—CONTRIBUTORY NEGLIGENCE—  
FAILURE TO LOOK.

If a railroad company was bound to warn of the approach of a train to a point at which a coal tippie was being constructed over the track, one engaged in the work could assume that a warning would be given, and was not conclusively negligent in not looking in crossing the track in his work.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 910-923; Dec. Dig. § 282.\*]

5. RAILROADS (§ 282\*)—INJURIES ON TRACK—  
JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action for the death of one engaged in constructing a coal tippie near a railroad track by being struck by a train, whether decedent was guilty of contributory negligence in not looking on crossing the track in his work *held* a jury question.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 910-923; Dec. Dig. § 282.\*]

6. APPEAL AND ERROR (§ 1064\*)—HARMLESS  
ERROR—ADMISSION OF EVIDENCE.

In an action for decedent's death by being struck by a train while crossing the track in his work in constructing a coal tippie near the track, any error in admitting evidence of the trainmen's failure to warn of the train's approach at crossings near the tippie was not prejudicial, where the instructions only authorized a recovery if reasonable warning was not given of the train's approach to the tippie.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

7. RAILROADS (§ 282\*)—JURY QUESTION—UN-  
DISPUTED FACTS.

Where all of the facts were admitted, the question whether a railroad company was bound to give warning on approaching a point where a coal tippie was being constructed over the track was one for the court.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 910-923; Dec. Dig. § 282.\*]

Appeal from Circuit Court, Pulaski County.

Action by W. B. Winningham's Administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company and another. From a judgment for plaintiff, defendant railway company appeals. Affirmed.

O. H. Waddle & Son, of Somerset, and John Galvin, of Cincinnati, Ohio, for appellant. Robert Harding, of Danville, and R. B. Waddle, of Somerset, for appellee.

CLAY, C. In this action for damages against the Cincinnati, New Orleans & Texas Pacific Railway Company and H. E. Britton, plaintiff, J. L. Wright, as administrator of W. B. Winningham, recovered a verdict and judgment for \$5,000. The railroad company appeals.

The facts are as follows: The Indian Creek Coal Company had permission and authority from the railroad to build a tippie across its tracks at a point near Indian Head in McCreary county. The specifications for the work were furnished by the railroad company. The tippie was located about 10 feet from the center of the track on one side, and about 20 feet from the center of the track on the other side. It was to extend across the track at an elevation of about 30 feet above the track. At the time of the accident complained of employes of the coal company had been engaged for about a week and a half in the work of constructing the tippie. Five men were regularly employed, and when it was necessary to raise the up-rights as many as 15 or 20 men would then be employed. When Winningham was killed the work of connecting the two sides across the track had not been begun. In doing the work the men frequently passed from one side of the track to the other. About 800 or 900 feet north of the point where the tippie was being constructed is a private road crossing, and south of the tippie 500 or 600 feet is a public road crossing. Just prior to the time he was injured, Winningham, who was one of the employes of the coal company, crossed the railroad track from the east to the west side, and had gone up the embankment on the west side for the purpose of getting some nails. The embankment begins to rise about 10 feet from the track. As Winningham returned he walked towards the track, looking straight in front of him. On account of the embankment it was impossible for Winningham to see further than 40 or 50 feet up the track, and it was likewise impossible for the engi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 29, 1914.

neer in charge of the train to see him until he got nearly on the track. When Winningham reached the track he was struck and killed by a south-bound train. According to plaintiff's evidence the train was running about 40 or 50 miles an hour, according to defendant's evidence, from 15 to 20 miles an hour. When the engineer discovered Winningham he applied the brakes in emergency with one hand, and grabbed for the whistle cord with the other, but missed it. By that time Winningham was struck. The train was stopped in about 20 car lengths. As the train came towards the tippie no warning of its approach was given. The engineer had not been over the road since the construction of the tippie began, and did not know that it was in process of erection.

The court in its instructions told the jury, in substance, that it was the duty of defendant, in approaching the place where Winningham was killed, to use ordinary care to give him timely and reasonable warning of the approach of the train by ringing the engine bell, or sounding the whistle, and that if they believed from the evidence that those in charge of the engine failed to give such warning, and by reason thereof Winningham, while using ordinary care for his own safety, went upon the track and was killed by the train, they should find for the plaintiff, and unless they so believed they should find for the defendant. Other instructions defining ordinary care and the measure of damages, and covering the question of contributory negligence, were also given.

The railroad company insists that the court erred in refusing a peremptory. This contention is based on two grounds: (1) The place where the decedent was killed was not such as to impose on the railroad company the duty of giving warning of the approach of the train; (2) the decedent was guilty of contributory negligence.

[1] (1) It is true that the decedent was not injured at a public crossing, or even at a private crossing where it was customary to give warning of the approach of a train, or in a city or town where the tracks of the company were used by large numbers of people. It is therefore argued that the duty of warning did not apply. It is, of course, difficult to lay down any general rule prescribing when or under what circumstances there is a duty to give warning of the approach of trains. In a general way that duty has been held to apply to places where the presence of persons on the track might be reasonably anticipated. In the present case the tippie had been in process of erection for about 10 days. The railroad company had not only given the coal company authority to erect it, but had furnished the specifications. The work was being done immediately adjoining the track. Later on it was to be carried on over the track. There were 5 men regularly employed, and at times from 15 to 20 men. In constructing the tippie it

was necessary for these men to cross the track at frequent intervals. Indeed, if not required to cross the track, they were at all times compelled to work so near the track that their position was one of constant danger. With their attention fixed on the work which they were required to do, it was practically impossible for them always to be on the alert to discover the approach of a train. It is not a case where men are temporarily engaged in doing work near the track. The company had authorized the construction of the tippie. On obtaining this authority the coal company began the work. The work had been going on about 10 days. The company, therefore, was charged with notice that the work was going on. Taking into consideration the length of time the work had been going on, the number of men employed, the character of the work in which they were engaged, its proximity to the track, and the necessity for their crossing the track in the performance of their work and the constant danger to which they were thus exposed, we conclude that ordinary care on the part of those operating the train required them to anticipate the presence of persons on the track at that point, and therefore imposed upon them the duty of giving warning of the approach of the train.

[2] There being a duty on the part of the company to give such warning, the fact that the engineer in charge did not know that the tippie was in process of erection no more relieved it of liability than would the ignorance of the engineer of the existence of a public road or a city absolve it from its duty to give warning of the approach of a train about to cross such public road or the streets of such city.

[3] (2) But it is insisted that the evidence shows that decedent looked straight in front of him while approaching the track, and made no effort to discover the approach of the train. It is therefore argued that he was guilty of contributory negligence as a matter of law. We have never adopted the stop, look, and listen doctrine in this state. The doctrine of *Smith's Adm'r v. C., N. O. & T. P. Ry. Co.*, 146 Ky. 568, 142 S. W. 1047, 41 L. R. A. (N. S.) 193, is not applicable. There the decedent was totally deaf. The only way he could discover the approach of the train was by the use of his eyes. Not having done this, it was held that he was guilty of contributory negligence.

[4, 5] Here the decedent was in possession of all of his senses. It being the duty of the railroad company to give warning of the approach of the train, he had a right to act on the assumption that a warning would be given. Having the use of his hearing, the fact that he did not look is not conclusive of the question of contributory negligence. Ordinarily this is a question for the jury, and we see nothing in the facts of this case to take it out of the general rule.

[6] Complaint is made of the fact that

plaintiff was permitted to introduce evidence in regard to the failure of those in charge of the train to give warning of the approach of the train at certain crossings in the neighborhood of the tipple. Even if inadmissible, this evidence was not prejudicial, because the court in its instructions authorized a recovery only in the event those in charge of the engine failed to give reasonable warning of its approach to the tipple. We see no error in the instructions. There was no conflict in the evidence.

[7] The facts being admitted, the question of the duty to warn was for the court; and, as before indicated, the court did not err in holding that this duty devolved upon the railroad.

Judgment affirmed.

#### ROWE v. ALEXANDER, County Atty.

(Court of Appeals of Kentucky. Dec. 1913.)

##### 1. HIGHWAYS (§ 118\*)—CONSTRUCTION—POWER OF FISCAL COURT.

Under Ky. St. § 1840, giving the fiscal court power to make appropriations to maintain roads, the fiscal court is without authority to appropriate funds to compensate persons who repair the road without any contract or authority, for to allow the citizens to receive appropriations for such work would take away the power of the fiscal court to institute road repairs.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 315, 346-356, 362, 380; Dec. Dig. § 118.\*]

##### 2. HIGHWAYS (§ 118\*)—CONSTRUCTION—LIABILITY FOR EXPENSE—IMPLIED CONTRACT.

That citizens repaired a county road without any contract or authorization will not render the county liable on the quantum meruit; the doctrine of implied contracts not applying to municipalities.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 315, 346-356, 362, 380; Dec. Dig. § 118.\*]

##### 3. HIGHWAYS (§ 99\*)—OPENING—POWER OF FISCAL COURT.

Ky. St. §§ 4287-4300, provide for the opening of new roads by the county court; section 4299 expressly declaring that the county court may open or alter a road on condition that the expense be paid by the applicants, but if the court be of the opinion that the cost of the proceeding shall be paid by the county, it shall order the same so paid. *Held*, that while sections 1840 and 4306 give the fiscal court general charge and supervision of public roads, the fiscal court is without authority to open a new road and make appropriations for the payment of the expense of opening such road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-330; Dec. Dig. § 99.\*]

#### Appeal from Circuit Court, McLean County.

Claim by R. P. Rowe for an allowance for repairing a road contested by R. Alexander, County Attorney. The fiscal court made an allowance, and the County Attorney appealed. From the action of the circuit court reversing the order of the fiscal court, claimant appeals. Affirmed.

W. A. Taylor, of Calhoun, and R. P. Rowe, of Island, for appellant. R. Alexander and Joe H. Miller, both of Calhoun, for appellee.

CARROLL, J. The fiscal court of McLean county, at its regular term in 1912, allowed the appellant, Rowe, \$759 to pay him "for making and maintaining the West Island road and the further consideration that the said R. P. Rowe agrees to give to the county his private road through his farm when said order is issued to him. Said road that the said R. P. Rowe agrees to give leads from the New Island and Sacramento road to Wood's coal mine. Said road to be kept open the width of 30 feet. Payable out of the general funds of the levy of 1913." Alexander, as county attorney, objected to this allowance, and upon his objection being overruled, prosecuted an appeal to the circuit court, and that court, after considering the case, found that the fiscal court should not have allowed Rowe anything on his claim, and adjudged that the order of the fiscal court making the allowance should be set aside and held for naught. From this judgment Rowe appeals.

The county attorney insisted in the lower court, and makes a like argument here: (1) That the fiscal court had no jurisdiction to make the appropriation; (2) that the McLean county court established the West Island road, which is the same road the appropriation was made by the fiscal court for making and maintaining, and that the order of the county court establishing the road provided that the petitioners, of whom Rowe was one, should pay all the costs and damages incurred in opening it, and this judgment of the county court concluded the fiscal court from making the allowance complained of. For answer to this, the appellant, Rowe, admitted that the county court established the West Island road, but denied that the \$759 appropriated by the fiscal court was for making or maintaining this road. He further set up that after the Sacramento and West Island road had been established and all damages and costs incurred therein had been paid he was appointed by the county court as its commissioner to open these roads and put them in good condition for travel, and did so at an expense out of his private means of over \$1,500, in which sum the county became indebted to him, and the fiscal court in settlement of this indebtedness made the appropriation mentioned, and was further influenced to do so by the fact that he agreed to give to the county the private road through his farm mentioned in the order of the fiscal court making the allowance. He filed with his answer an itemized statement, showing the money he expended in opening and maintaining the road for which the appropriation was made.

It will be observed that the order of the fiscal court making the appropriation recites



that it was made to pay Rowe for making and maintaining the West Island road, and also in consideration of his agreement to give to the county a private road through his farm described in the order, but the order does not state how much was appropriated for each of these purposes. The legal question arising on the record, as we understand it, is this: Has the fiscal court power to make an appropriation to a citizen for work done on a public road that he was not ordered or directed to do by the fiscal court, and has it the right to make an appropriation to a citizen to pay him for a private road that he agrees to present to the county as a public road before any order of the county court has been made accepting the proposition to convert the private road into a public road?

[1] Taking up first the question of the power of the fiscal court to make an allowance to a citizen for working a public road before he has been ordered or directed to do the work by the fiscal court, or any contract looking to the execution of the work has been entered into, we find that section 1840 of the Kentucky Statutes gives in a general way to the fiscal court the control of the public roads of the county, and expressly provides that it may make appropriations to keep them in good condition. So that there can be no doubt of the jurisdiction and authority of the fiscal court to appropriate public funds that it may rightfully use for this purpose in maintaining the public roads of the county, but this is far from giving the court the right to appropriate money for work done on public roads before the court has made any order or direction that it shall be done, or entered into any contract for this purpose. It would be a very loose method of transacting business if the fiscal court should be allowed to appropriate the public funds to any citizen of the county who thought it proper or necessary to improve the condition of one of the public roads of the county before any contract or arrangement had been made with the fiscal court under which the work should be done. A practice like this would, in a large measure, put the fiscal court and the funds at its disposal under the control of any citizens of the county who might, for their own convenience or interest, decide to work the public roads, and the money at the disposal of the fiscal court, in place of being expended on such roads and in such manner as the fiscal court might direct, would be applied as best suited the interest of the citizens who saw proper to take the matter of working the roads in their own hands.

While admitting the force of this position, it is nevertheless contended that, as the fiscal court might in the first instance have contracted with Rowe to do the work he did do, it had authority to accept it and pay him for it after it was done, although no contract was made in the first instance. To

legalize this method would, in a practical way, have substantially the same effect as if the roads of the county were turned over to the citizens to be worked by them at such times and places as they chose, because there are few fiscal courts that could resist the importunities and influences that might be brought to bear by the combined efforts of citizens who undertook to control the working of the road and the investment of the funds of the county for this purpose. The members of the fiscal court ought not to be subjected to the embarrassment of a situation like this. They ought to be free to take the initiative in road work and to make contracts in advance for such work as in their judgment is needed. In short, the fiscal court cannot, except in cases of emergency, allow any claim for road work not made by its authority or under its direction.

This was the effect of the decision of this court in *Perry County v. Engle*, 116 Ky. 594, 76 S. W. 382, 25 Ky. Law Rep. 813. In that case Engle, without being directed by the fiscal court so to do, did work on a county road amounting to several hundred dollars. He claimed to have done the work by direction of a commissioner appointed by the county judge to have the work done, and filed his claim under the contract with the fiscal court, where it was rejected. He then appealed to the circuit court, and succeeded in establishing his claim. On the appeal of the county we said that neither the county judge nor any commissioner appointed by him had authority to make contracts concerning the repair of public roads, and that the action of the county court in appointing the commissioner, as well as the act of the commissioner in letting the work to Engle, was void. We further said that Engle was bound "at his peril, to know the extent of the authority of an agent of the county in contracting with him. All persons must take notice that a county can contract only in the manner and by the person and for the purposes expressly provided by the statute," and ordered the entry of a judgment for the county.

In *Floyd County v. Allen*, 137 Ky. 575, 126 S. W. 124, 27 L. R. A. (N. S.) 1125, Allen presented a claim to the fiscal court for material and labor furnished by him in improving a public highway. He claimed that the improvement was made under a contract with the county judge and one of the magistrates of the county. In holding that Allen could not compel the fiscal court to pay the claim, as it had not authorized the work to be done, we said: "To permit the citizen to select his own time, place, and manner, even with the advice and consent of one or two of the officials, in which to furnish material and labor for needed repairs or improvements on a public highway of the county and hold the county responsible for the price charged, upon the ground that it had been benefited thereby, would be ruinous to

the county and have the effect to supersede the powers of the fiscal court whose duty it is, under the law, to manage such affairs."

[2] The argument is further made that as the county received the benefit of the services of Rowe, he should be paid the reasonable value thereof, upon the theory that the law will raise an implied contract to pay for the value of services which have been accepted. This rule of law, however, has no application to municipal bodies, and the county cannot become indebted for services rendered it upon an implied assumpsit. *McDonald v. Franklin County*, 125 Ky. 205, 100 S. W. 861, 30 Ky. Law Rep. 1245; *Owen County v. Walker*, 141 Ky. 518, 133 S. W. 236; *City of Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 493.

[3] As before stated, the order of the fiscal court does not show how much was allowed Rowe for the private road it recites he gave to the county, but whatever the amount of this allowance, the fiscal court was not authorized to make it. It seems that the statute confers upon the county court exclusive jurisdiction to open public roads as may be seen by an examination of sections 4287-4300 of the statute, where the Legislature has elaborately set out the method by which new roads may be opened. Section 1840 and section 4306 give to the fiscal court general charge and supervision of the public roads of the county, but this evidently means such roads as have been opened by the county court, or have been accepted in some appropriate manner by the county. After the road has been opened, the authority to repair and supervise it passes from the county court to the fiscal court, and the county court loses jurisdiction to expend any of the public funds in repairing the road. But when it comes to opening a road in the first instance, the jurisdiction is in the county court alone. It is also provided in section 4299 that: "The court may open or alter a road on condition that all or a part of the sum required to be paid to the owner and tenant, and the cost of procedure, shall be paid by the applicants, or on condition that the applicants wholly or in part open or alter the road; but if the court be of the opinion that such sum or sums and the cost of the proceedings shall be paid by the county, it shall order the same to be paid to the person or persons entitled thereto." So that, under this and other sections relating to roads, when the county court orders a road to be opened, it may do so upon condition that the whole of the cost and expense shall be paid by the applicants, or a part of it shall be paid by them and a part by the county, or it may put the entire charge on the county. When, therefore, a county road is ordered to be opened by the county court, the county court should fix the amount of compensation to be paid by the applicants or by the county, as

the case may be, and that part that is to be paid by the county the fiscal court, upon presentation of the order of the county court, must make provision for the payment of. *Rawlings v. Biggs*, 85 Ky. 251, 8 S. W. 147, 8 Ky. Law Rep. 919. It seems, however, that in this case the fiscal court undertook to make an appropriation to Rowe for the purchase of a private road owned by him which it seems he agreed to convert into a public road. This was in effect the opening of a road by the fiscal court, and this it was without authority to do.

It does not appear from the order of the fiscal court that the county court had ever taken any action in respect to this new road, or that it had ever been dedicated to the county for public use. All that appears in the order is that Rowe agreed to give a road, and it is shown by the evidence that this road that Rowe proposed to give was a private road or passway owned by him which he desired to have converted into a public road that would be a charge on the county. To do this it was necessary that the county court should have taken such action as was necessary to have this road opened as one of the public highways of the county.

We think the judgment of the lower court was correct, and it is affirmed.

#### BARCLAY'S TRUSTEE et al. v. COMMON-WEALTH et al.

(Court of Appeals of Kentucky. Dec. 16, 1913.)

##### 1. TAXATION (§ 867\*)—INHERITANCE TAX—TRANSFERS SUBJECT TO TAX.

Plaintiff's mother, living in Chicago, contracted with a trust company in Kentucky for the possession and management of her entire estate, and upon her death to distribute it among her heirs under the statute of descent and distribution in force in Kentucky, and if she left a will, to probate it in this state, and to pay the beneficiaries named therein. She afterwards died intestate, leaving an estate of about \$28,000, consisting of personalty, situated in this state. Ky. St. § 4281a, provides that all property passing by will or intestacy from any person dying seized or possessed thereof, while residing in this state or if the owner was a nonresident, which shall be within the state, shall be subject to an inheritance tax. *Held*, that the personalty was subject to an inheritance tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1681-1684; Dec. Dig. § 867.\*]

##### 2. TAXATION (§ 893\*)—INHERITANCE TAX—ACTION FOR CONSTRUCTION—PARTIES.

In an action by the trustee of an intestate estate, consisting of personal property situated in this state, to determine its liability to an inheritance tax, plaintiff could not state the case in general terms and call upon the sheriff, who was charged with the collection of inheritance taxes, to show affirmatively why the commonwealth was entitled thereto, since by the sheriff's lax pleading, or failure to plead, the estate could not be exempted from taxation, but the administrator would still be bound to pay the tax.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 893.\*]

Appeal from Circuit Court, Fayette County.

Action by Annie D. Barclay's trustee and others against the Commonwealth of Kentucky and others. Judgment for the Commonwealth, and plaintiff and certain defendants appeal. Affirmed.

Sam M. Wilson and Hunt, Bullock & Hunt, all of Lexington, for appellants. D. Gray Falconer, of Lexington, for appellees.

NUNN, J. In September, 1911, the Security Trust Company of Lexington entered into a written contract with Mrs. Annie D. Barclay, who, according to the contract, was a resident of Chicago, Ill. By the contract the Trust Company agreed to act as trustee for Mrs. Barclay, and as such trustee acknowledged that it had possession of her entire estate, and undertook to manage and control the same during her lifetime. Until her death it would pay her the net income therefrom, and upon her death it would distribute the same "among the heirs at law of the party of the first part [Mrs. Barclay] under the statute of descent and distribution then in force in Kentucky," or, in the event she left a will, same to be paid the beneficiaries named in the will, and which will "may be probated as such by the courts of the commonwealth of Kentucky."

Mrs. Barclay died intestate about a year later, and left an estate of about \$28,000, consisting of personalty only. The question presented here is as to the application of inheritance tax law provided in article 19 of the Kentucky Statutes (sections 4281a-4281s). Her only heirs at law are the appellants, who are brothers and sisters, and some children, who are descendants of two deceased sisters. It is conceded that this class of kindred do not come within the exceptions provided in the inheritance tax law, and, if the estate is taxable, then such taxes should be deducted from the estate before distribution.

The trustee brought this action in equity for a settlement of the estate. The only excuse for it, and in fact its avowed purpose, is to have the lower court guide and direct it in the payment of inheritance taxes, and to that end it makes the sheriff of Fayette county a party defendant, and asks that he be required to assert any claim which the commonwealth may have against the estate for inheritance taxes. The heirs at law, including appellants, are also made parties defendant. The petition states that Mrs. Barclay died in Kentucky, that it has in possession all of her estate, and the clear inference is that all of it is in Kentucky. It is true the Trust Company "states that said estate in its hands is not liable for any inheritance taxes to the commonwealth of Kentucky, as it is advised." This is simply a

conclusion of the pleader. Subsequently the Trust Company qualified as administrator of the estate, and in that capacity made itself a party to the action, praying for the advice of the court upon the same matter suggested in the original petition.

[1, 2] Under the state of facts presented by the record, it is immaterial where Mrs. Barclay resided or was domiciled at the time of her death. The actual situs of her property was in Kentucky, and that fact governs the application of the inheritance tax law. Section 4281a of the Kentucky Statutes provides: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same *while a resident of this state*, or if such decedent was *not a resident of this state* at the time of death, which property, or any part thereof, shall be within this state, \* \* \* shall be, and is, subject to a tax," etc.

Under the inheritance tax law all administrators, executors, trustees, and the sheriff are made servants of the commonwealth, and the duty is especially imposed upon them of collecting taxes due upon inheritances. There is no right or authority in either one to shift this duty upon the other. The trustee has no right to state a case in general terms, and call upon the sheriff to show affirmatively why the commonwealth is entitled to the taxes. If the sheriff by lax pleading, or no pleading at all, should fail in the performance of his duty, the trustee or administrator could not be excused of liability for the taxes if, by an incomplete statement of the facts, it secured direction from the court to distribute the estate among the heirs. However, the appellants, heirs at law, are in no position to complain of the faulty pleadings of either the sheriff or trustee. These appellants were parties from the beginning, and they never filed any answer, or pleading of any sort, and never asserted any claim for relief, or exemption from the inheritance taxes.

It is insisted that this property does not come to the appellants by the inheritance laws, or by any deed, grant, sale, or gift, made in contemplation of the death of the grantor. It comes to them by the deed above referred to, upon the death of the grantor. If they are not entitled to it by the laws of descent and distribution of this state, then they are not entitled to it at all, for by the very terms of the deed the Trust Company, upon the death of Mrs. Barclay, is to distribute it, and to only those who are her heirs at law "under the statute of descent and distribution then in force in Kentucky."

In our opinion, the lower court properly charged this estate with inheritance taxes, and its judgment is therefore affirmed.

**FISH v. WELCH'S ADM'R.**

(Court of Appeals of Kentucky. Dec. 19, 1913.)

**APPEAL AND ERROR (§ 688\*)—ARGUMENT OF COUNSEL—BILL OF EXCEPTIONS.**

Alleged improper argument of defendant's attorney could not be reviewed in the absence of a bill of exceptions containing the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2894-2896; Dec. Dig. § 688.\*]

Appeal from Circuit Court, Madison County.

Action by Jennie B. Fish against S. E. Welch's administrator. Judgment for defendant, and plaintiff appeals. Affirmed.

J. A. Sullivan, of Richmond, and S. M. Wallace, of St. Louis, Mo., for appellant. Burnam & Burnam, of Richmond, for appellee.

**TURNER, J.** This is an action by appellant against John W. Welch, administrator of S. E. Welch, deceased, wherein appellant alleges that in December, 1909, she loaned to S. E. Welch \$1,000 due on demand after date, and that he thereafter died in April, 1910, without having paid same. The answer denied that the money had been loaned, and upon a trial the jury found for the defendant, and the plaintiff appeals.

The attorneys, in their briefs, argue the facts at length, but upon examination of the record it is disclosed there is no bill of evidence in it. There is, however, a bill of exceptions reciting that the attorney for the defendant on the argument of the case referred to a certain record of the Madison county court which was introduced in evidence, and said that the record had been prepared and "fixed" for the express purpose of using it as evidence in this case, and argued to the jury along that line. The bill of evidence not being in the record, we are unable to say whether the argument of the attorney was based upon any evidence before the jury, or whether it might have been fairly made from any evidence that was introduced.

The pleadings support the judgment, and, there being nothing else before us, the judgment is affirmed.

**MURRAY et al. v. WALKER.†**

(Court of Appeals of Kentucky. Dec. 19, 1913.)

**1. BANKS AND BANKING (§ 246\*)—NATIONAL BANKS—STOCK LIST—DISCLOSURE—STATUTES—CONSTRUCTION.**

Rev. St. U. S. § 5210 (U. S. Comp. St. 1901, p. 3498), provides that the president and cashier of every national bank shall cause to be kept at all times a full and correct list of all the shareholders and the number of shares held by each, which list shall be subject to inspection of stockholders. *Held*, that a stockholder had an absolute right to inspect the list of stockholders of the bank, whatever may be his motive.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 911, 912; Dec. Dig. § 246.\*]

**2. BANKS AND BANKING (§ 246\*)—NATIONAL BANKS—STOCK LIST—EXAMINATION—RIGHT OF PLAINTIFF—STOCKHOLDERS.**

In a proceeding by an alleged stockholder of a national bank to compel its officers to permit an inspection of its list of stockholders, evidence to show that plaintiff was in fact not a stockholder in good faith, or at all, was admissible.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 911, 912; Dec. Dig. § 246.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Suit by Marvin P. Walker against the American National Bank and Logan C. Murray, its president, to compel defendants to disclose the stock list of the bank. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Burnett, Batson & Cary, of Louisville, for appellants. Leon P. Lewis and Blakey, Quin & Lewis, all of Louisville, for appellee.

**HOBSON, C. J.** Section 5210, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3498), being a part of the National Banking Act, provides: "The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

Marvin P. Walker brought this action against the American National Bank and Logan C. Murray, its president, charging in substance that he was a stockholder in the bank and had demanded the right to inspect the list of stockholders, and had been refused this right. He prayed a mandatory injunction requiring the defendants to permit him to inspect the list of stockholders. The bank by its answer denied that plaintiff was a bona fide stockholder in the bank, or in fact held any stock in the bank, or was the owner of any certificate of stock. In another paragraph it pleaded that plaintiff's purpose in demanding to inspect the list of stockholders was either for purely speculative purposes or to blackmail the defendants. The circuit court sustained a demurrer to the second paragraph of the answer, and on final hearing of the case awarded the plaintiff an injunction as prayed. The defendants appeal.

[1] 1. The court did not err in sustaining the demurrer to the second paragraph of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied February 5, 1914.

answer. If the plaintiff was in good faith a stockholder in the bank, he was entitled to inspect the list of stockholders under the statute, and his motive for wishing to inspect the list is wholly immaterial. In *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302, 89 N. E. 942, 134 Am. St. Rep. 835, the court, construing a similar statute, said: "No doubt the Legislature could make the stockholder's privilege of inspection dependent upon the motive or purpose with which it is sought; but it has not seen fit to do so. The language of the statute is plain and mandatory. It recognizes an absolute right in the stockholder and imposes an absolute duty upon the corporation and the custodian of the stock book. The law requires no statement or proof of any particular intent upon the part of the person demanding the inspection. He must be a stockholder and must prefer his request during business hours; that is all. If it appeared in good faith that the book was then in actual use for other corporate purposes, he could, of course, be required to wait a reasonable time until such use terminated; but no such matter of defense is suggested here. The plaintiff was refused any inspection at all in the absence of a disclosure of his purpose, and this action of the defendant has been sanctioned by the judgment of the Appellate Division. We think that judgment is based upon a mistaken construction of the statute in this respect. Nor was the refusal justified on the ground that the law confers upon the stockholder no express right to copy from the book. The right to inspect the book includes the right on the part of the stockholder to aid his memory by copying therefrom to the extent indicated in the agreed statement of facts in the present case. In *Cotheal v. Brouwer*, 5 N. Y. 562, it was held that the custodian of a register of stockholders which the stockholder had a statutory right to examine could not close the book because a stockholder desired to make a memorandum in the course of his examination in order to assist his recollection. 'Unless the stockholder is permitted to take memorandums from the books,' said Paige, J., 'or copies of the names of the stockholders, the plain object of the statutory provision would be defeated.' A similar conclusion was reached in *Venner v. Chicago City Ry. Co.*, 246 Ill. 170, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707; *White v. Manter*, 109 Me. 408, 84 Atl. 890, 42 L. R. A. (N. S.) 332; *Hubb Construction Co. v. New England Breeders' Club*, 74 N. H. 282, 67 Atl. 574; *Weihsenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; *Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156; *Ellsworth v. Dorwart*, 95 Iowa, 108, 63 N. W. 588, 58 Am. St. Rep. 427; *Kimball v. Derr*, 39 Utah, 181, 116 Pac. 28, 35 L.

R. A. (N. S.) 134. See, also, 10 Cyc. 956. The case of *Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. Ed. 130, 4 Ann. Cas. 433, is not in conflict with the above, for in that case the right of inspection was not founded upon the statute. There the common-law right was relied on.

[2] 2. The defendant offered to show by the plaintiff when he gave his deposition and by J. Stoddard Johnson, Jr., who was introduced as a witness for him, in substance, that the plaintiff really owned no stock and was not in good faith a stockholder in the bank or really a stockholder at all. The witnesses upon the advice of counsel declined to answer the questions, and the circuit court to whom the matter was referred sustained them in their refusal. The statute was intended for the protection of bona fide stockholders. If Walker is not in truth really a stockholder in the bank, he has no right to demand under the statute an inspection of the list of stockholders. This would be to pervert the statute. If the facts are as the defendant offered to show by these witnesses, Walker has no real interest in the bank and is not a bona fide stockholder. The court should have required the witnesses to answer the questions referred to. All suits must be brought by the real parties in interest, and the chancellor will not lend his aid by injunction to a person who has no real interest in the matter.

We do not mean to determine now that Walker was not a stockholder or had no real interest in the bank; we only determine that if the questions asked had been answered as indicated this would be true. What are the real facts may be shown on the return of the case, and the chancellor will require Walker and Johnson to answer the questions indicated, and he will then allow either of the parties to take such further proof as they desire.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### LOUISVILLE, H. & ST. L. RY. CO. v. WILSON'S EX'X.†

(Court of Appeals of Kentucky. Dec. 19, 1913.)

##### 1. CONTINUANCE (§ 12\*)—ABSENCE OF COUNSEL.

It was not error to overrule defendant's motion for a continuance on the ground of the sickness and absence of its chief counsel, where it was ably represented by two other attorneys.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 40, 42, 49, 50, 52; Dec. Dig. § 12.\*]

##### 2. CONTINUANCE (§ 33\*)—ABSENCE OF WITNESS.

Under Civ. Code Prac. § 315, providing that a trial shall not be postponed where the adverse party consents to the reading of the affidavit as the deposition of the absent witness, the trial court did not abuse its discretion

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—33  
†Rehearing denied February 6, 1914.

in refusing a continuance where the affidavit was read as the deposition of the witness.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 113; Dec. Dig. § 33.\*]

**3. RAILROADS (§ 350\*)—ACCIDENTS AT CROSSINGS—ACTIONS—QUESTION FOR JURY.**

Evidence, in an action against a railroad company for running into and killing a team of mules at a private crossing, held sufficient to take to the jury the question of defendant's negligence in failing to give the alarm for the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

**4. RAILROADS (§ 337\*)—ACCIDENTS AT CROSSINGS—ACTIONS—INSTRUCTIONS.**

In an action against a railroad company for running into and killing a team at a crossing, it was not error to refuse to charge that defendant would not be liable if the proximate cause was the breaking of the lock chain on the wagon, where the evidence showed that, though the chain broke, the driver had the team under control before he attempted to cross.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1090-1095; Dec. Dig. § 337.\*]

Appeal from Circuit Court, Daviess County.

Action by James Wilson's executrix against the Louisville, Henderson & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. R. Skillman, of Louisville, and R. A. Miller and Miller, Sandidge & Malin, all of Owensboro, for appellant. Birkhead & Wilson, of Owensboro, for appellee.

**MILLER, J.** This is an appeal from a judgment of the circuit court awarding appellee \$800 damages against appellant for negligently killing four mules which belonged to James Wilson.

Wilson operated a coal mine on his farm, in Daviess county, about one-fourth of a mile east of Mattingly Station on appellant's road. The mine was situated about 75 yards south of the railroad track. A private road ran from the mine northwardly across the track. There is a public road crossing about three-fourths of a mile east of the private crossing, and Mattingly, the station above referred to, is about one-fourth of a mile west of the private crossing. Until about two years before the accident, Wilson had the opening of his mine located some 1,500 feet east of the present opening; but at the time indicated he moved it to its present location, and had constructed a new road leading from it, as above indicated. There was a private road across appellant's track, leading to the old mine. The new crossing was constructed by appellant. The new private road was used by Wilson and his employes in going to and from the coal mine, and in hauling coal therefrom.

On December 16, 1911, appellant's Cloverport Accommodation passenger train left Owensboro at 7:13 a. m., going westwardly. The engineer gave the usual road crossing whistle for the public crossing three-fourths of a mile east of the private crossing, and

also whistled for the old private crossing, which was about 1,500 feet east of the new crossing. When the engine was about 300 feet east of the new crossing, Reid the engineer, blew a station whistle for Mattingly, at the same time shutting off the steam for the purpose of making a stop at Mattingly. According to Reid, the train was then running at a rate of about 45 miles an hour. When about 300 feet east of the private crossing, Reid and the fireman saw the heads of two mules in the cut where the new road crossed the railroad track. The mules were standing about 30 feet south of the track at the crossing, but on account of the cut through which the road passed, and the bushes and briars upon the east side of it, the engineer was unable to see more than the heads of the mules. Almost immediately thereafter, and when the engine was about 150 feet from the crossing, the mules passed upon the track and were instantly killed by the engine striking them. The engineer testifies that he applied his brakes in emergency as soon as he saw that the mules would probably get upon the track, and at that time he was not more than 150 feet from the crossing. The railroad operatives also testified that the bell on the engine had been ringing automatically from the time the train left Owensboro until the accident happened. The new road leading from the mine across the railroad track is downgrade from the mine to the track. At a point about 30 feet south of where the road crossed the track, the road passed through a cut, which came down rather abruptly to the right of way, thus making it impossible for one on the track, to see a team in the cut. Likewise, a man driving a team through the cut could not see a train coming from the east, until he had reached a point within a few feet of the railroad track. The road from the mine to the track had been cross-laid with wood, and was slick from the rain that had fallen the night before. The engineer says the railroad track along the hill at that point was likewise slick. Reddish started from the mine on the morning in question, driving a four-mule team attached to a load of coal. He was riding one of the wheel mules. At a point about halfway to the railroad, the lock chain of his wagon broke. He did not attempt to relock his wagon on the hill, because he said it would have done no good on account of the slick roadbed. He says, however, the mules were able to hold the wagon steady, and that when he got within about 30 feet of the track he stopped his team for the purpose of listening for the train. He says he heard no signal, either from the whistle or the bell. It was while the mules were standing in this position that the engineer saw their heads in the cut. Reddish hearing no whistle or bell, or any noise of a train, started on down the hill to cross the track, when he was struck by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the train as above indicated. Payne, another employé of Wilson, had preceded Reddish across the track with a load of coal. Payne saw the train coming and called to Reddish, telling him of it; but seeing that Reddish had not heard the warning, and had started his team across the track, Payne jumped from his wagon and ran back to the track, and grasping the bridle of the lead mule, attempted to turn them back, but without success. The engineer was familiar with the crossing, and knew the road led from the mine and was liable to be used at almost any time. The wind was blowing from the northwest, and consequently carried the sound of the coming train away from the crossing.

It is conceded the crossing is a private road; but there is abundant testimony tending to show that those in charge of the train had been in the habit of giving warning of its approach by blowing the whistle. The engineer admits that he did not whistle for this crossing on the morning in question; contending, however, that he gave the whistle signal for the old crossing three-quarters of a mile east of the present crossing, and that he also gave the stop signal for Mattingly Station when the engine was within about 300 feet of the private crossing where the accident occurred. But considering the speed of the train, it must be admitted that the signal for Mattingly served no efficient purpose as a signal for the new crossing only 300 feet distant. The act of negligence relied upon by the appellee was the failure of appellant's employés to give the usual and customary warning for Wilson's crossing. The instructions are in line with those usually given in cases of this character, and directed the jury to find for the plaintiff in case they believed from the evidence it had been customary for appellant's trains to give signals of their approach to the crossing in question, and that this custom had prevailed to such an extent that persons using the crossing had reason to rely upon such signals being given, and that the train in question failed to give a reasonable signal of its approach, whereby the mules were killed.

No complaint is made of any of the instructions which were given. As error, however, appellant contends that the court erred: (1) In overruling appellant's motion for a continuance; (2) in overruling appellant's motion to peremptorily instruct the jury to find for it; and (3) in failing to properly instruct the jury upon appellant's theory of the case.

1. The action was brought on July 3, 1912, in time for trial at the September term of the Davless circuit court. The case, however, was passed, and tried at the December term of that court. Appellant moved for a continuance, upon the ground of the absence of its chief attorney, R. A. Miller, on account of sickness; and, further, because of the absence of Payne, the witness above referred to.

[1] We see no error, however, in this ruling of the court. While Mr. Miller was chief counsel for appellant, it was ably and efficiently represented by two other attorneys who, from every indication that can be gathered from the record, admirably presented the appellant's case, and left nothing undone to properly present it to the court and the jury.

[2] The affidavit showing what Payne would have testified to, if he were present, was read as a deposition. Section 315 of the Civil Code of Practice provides that when the adverse party consents that, on the trial, the affidavit shall be read as a deposition of the absent witness, the trial shall not be postponed on account of his absence.

In construing this Code provision in *Independent Life Ins. Co. v. Williamson*, 152 Ky. 821, 154 S. W. 410, we said: "It will be observed that under this section the matter of granting continuances is left largely in the discretion of the trial judge. The reasons for this are so obvious that it is hardly worth while to state them, and we have written in many cases that this discretion will not be interfered with unless it affirmatively appears that it was prejudicial error. *Madisonville, Hartford & Eastern Railroad Co. v. W. M. Allen*, 152 Ky. 706 [154 S. W. 6]. It is further apparent that there is quite a difference between refusing a continuance and also refusing to let the affidavit be read as the deposition of the absent witness, and refusing to continue but permitting the affidavit to be so read. It might not be error to refuse a continuance if the affidavit was permitted to be read as the deposition of the absent witness, when it would be error to refuse to permit the affidavit to be read as a deposition and also refuse a continuance. Generally a party has little just ground for complaint if he is permitted to read as a deposition what his witness would testify to if present in person, although his motion for a continuance is overruled, and especially is this true when the attendance of the witness cannot be enforced by the processes of the court and his evidence in the form of a deposition is all that the party has a right to expect."

There is nothing in the record showing that the trial court abused its discretion in overruling appellant's motion for a continuance.

[3] 2. Appellant insists that the jury should have been peremptorily instructed to find for the defendant, because, as it claims, it is shown the appellant's engineer was not guilty of negligence, and did everything within his power to prevent the accident. And, in this connection, stress is laid upon the fact that the lock chain on the coal wagon broke while the wagon was about a hundred feet south of the crossing, and that Reddish did not attempt to replace it, thus making it impossible, according to appellant, for the team

to hold the wagon in check while going down the hill in the cut. Reddish, however, is specific in his testimony, not only that the lock chain accomplished no good purpose on account of the condition of the road, but that his team could and did control the wagon. Furthermore, Reid, the engineer, says: "After I had started to whistle for Mattingly, I saw the heads of two mules in this cut standing still; and just after I got to whistling the mules jumped, and I thought they had come towards the track, and I applied my air, and we struck the mules." According to Reid's testimony, the mules were standing still when they were first seen by him when he was about 300 feet distant. In this respect Reid fully corroborates Reddish, to the effect that his mules could control the wagon, and that he had stopped them about 30 feet south of the track in order to listen for the signal. This fact, taken in connection with the testimony to the effect that appellant's engineer did not whistle for the crossing, made a case for the jury. The court properly overruled appellant's motion for a peremptory instruction.

[4] 3. Finally, appellant insists that, according to its theory of the case, the proximate cause of the injury was not its failure to give a reasonable warning of the train's approach to the crossing, but the failure or inability of Reddish, the driver, to stop his team after he had discovered that the train was coming.

Appellant asked the court to instruct the jury that if the breaking of the lock chain was the proximate cause of the death of the mules, and not the failure of defendant's employees in charge of its train to give a reasonable signal of the train's approach to said crossing, the jury should find for the defendant; and, in support of this instruction, appellant relies upon *L. & N. R. Co. v. Onan's Adm'r*, 110 S. W. 380. In the *Onan* case the proximate cause of the accident was the backing of *Onan's* horse across the track, and not the failure of appellant's engineer to give notice of the approach of the train. It will be remembered, however, that the lock chain on Reddish's wagon broke when he was about halfway between the mine and the crossing, and that, according to the evidence of both Reddish and Reid, the mules had stopped before Reddish attempted to cross the track. Appellant's theory of the case is that, when the lock chain broke, the loaded wagon got beyond the control of the mules, and plunged through the cut and onto the track, thus making the breaking of the lock the proximate cause of the injury. The evidence, however, does not sustain this contention, since both Reddish and Reid testified that Reddish had come to a stop at the mouth of the cut, and the mules were standing still when Reid first saw them.

In *Conway v. L. & N. R. Co.*, 135 Ky. 229, 119 S. W. 206, 122 S. W. 136, an 11 year

old boy had ridden a horse to a creek to water, going across the railroad track. After he had watered his horse and was on his way home riding along the road that ran by the side of the track, a freight train came upon him and frightened his horse, causing him to run towards the crossing. He reached it about the time the engine did, and was struck by the train, injuring the boy. The boy had frequently ridden to water along the same road, and had often met trains about the same place, but the horse had never before become frightened by them. Under those facts, we said that Conway could not recover, because the failure to give the signal of the train's approach would not have avoided the injury. In doing so, however, we further said: "If there was any evidence even tending to show that Conway would have remained at the creek, or not have ridden his horse along the parallel road, or that he would have taken any precautions for his safety, if the train had sounded the crossing signals, a very different question would be presented."

In *C. & O. Ry. Co. v. Young's Adm'r*, 146 Ky. 317, 142 S. W. 709, the question of the custom of giving the whistle signal at a private crossing is discussed; and, in the course of the discussion, we said: "The jury evidently found that there was in this case such a custom, and, assuming this to be true, the admitted failure of appellant's engineer to give any signal of the train's approach to the Gee crossing was negligence, to which the jury, from all the evidence, had ground to attribute the fright of decedent's horse, and his (the decedent's) death. This primary negligence of the engineer being the efficient cause, the fright of the horse and his running on the railroad track until overtaken by the train were but intervening or secondary events contributing to the result."

The same criticism is applicable to *Sublett v. M. & O. Ry. Co.*, 145 Ky. 707, 141 S. W. 50, 38 L. R. A. (N. S.) 1153, where a team ran away, and, not being in charge of any one, collided with a train, killing the horses. It was there held that, although the engineer had failed to give the crossing signal, that failure did not and could not have saved the horses, under the circumstances. It was not the proximate cause of the injury.

We think the court properly laid down the law of the case in the instructions given, and that it properly declined to instruct as requested by the appellant.

Judgment affirmed.

#### MARCUM v. MARCUM.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

1. EXECUTION (§ 413\*)—PROCEEDINGS—ESTABLISHMENT OF LIEN.

Under Civ. Code Prac. § 439, authorizing an equitable action for the discovery of a judgment debtor's property, and providing "for sub-



jecting the same to the satisfaction of the judgment," it was not necessary, to establish a lien on property discovered, to have another execution issued and levied or sued out of an attachment, but the property discovered could be subjected to a lien without further proceedings.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1192; Dec. Dig. § 413.\*]

## 2. HUSBAND AND WIFE (§ 221\*)—SALE UNDER EXECUTION—PARTIES TO ACTION.

Though a judgment debtor's wife has been paid out of the proceeds of sales for more than her share in land formerly owned jointly by her and her husband, of which a small remnant is subjected to a lien for the satisfaction of a judgment, before the land is sold in satisfaction of the judgment, she should be made a party to the action, for the purpose of having her divested of title.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 707, 802-806, 968, 973, 976½; Dec. Dig. § 221.\*]

Appeal from Circuit Court, Clay County.

Action by H. B. Marcum against William Marcum. From a judgment for plaintiff, defendant appeals. Affirmed.

A. B. Hampton, of Manchester, for appellant. W. W. Rawlings, of Manchester, and H. C. Faulkner, of Barbourville, for appellee.

NUNN, J. This is an action against the appellant upon a return of no property found, under the provisions of section 439 of the Civil Code of Practice for the discovery of his money or other property, and for subjecting of same to the satisfaction of a \$650 judgment debt which the appellee held against him. The appellant, defendant below, filed his verified answer, but same not being deemed by the court sufficiently full or explicit, he was by proper process brought into court, and testified in person. In this way he disclosed the fact that he owned, or claimed to own, a tract of land containing about 100 acres, and in his testimony he gave a detailed boundary and description of the land which was situated in Clay county, on Island creek, where the action was instituted and pending. In his written answer the appellant admitted that he owned this tract of land which was situated on Island creek (without otherwise describing it), but, being a housekeeper with a wife and six infant children, he claimed it was exempt to him as a homestead. No evidence was heard on this bill of discovery other than that of the defendant, who is appellant here, and the lower court upon consideration of the case rejected appellant's claim that the land was exempt to him, and subjected it to the payment of appellee's judgment debt, and directed the master commissioner to proceed in the usual way to sell same.

[1] Appellant on this appeal assigns two errors of the lower court as ground for reversal. The first is that by this proceeding for a mere discovery of appellant's property

no lien was acquired upon the property discovered, and therefore the court could not, without further steps, subject same to the payment of the debt. He insists that since the land was not described in the petition or the written answer, no lis pendens was created, and that a detailed description of the same, merely shown in the evidence given by appellant, taken down and transcribed by the stenographer, is not sufficient to create a lis pendens. If the interests of strangers or third parties were involved, this objection might well be urged, but as between the judgment creditor and the debtor, we are of opinion that the lower court did not err in taking jurisdiction of this land as the subject-matter of the action. After appellant's disclosure that he was the owner of it, it was not necessary for appellee, in order to acquire a lien, to have another execution issued and levied upon it, or to sue out an attachment. The section of the Code, supra, not only authorizes the institution of an equitable action for the discovery of the property, but it is "for subjecting the same to the satisfaction of the judgment." Since the Code permits the court to *subject* the property disclosed to the satisfaction of the judgment debt, we do not think the lower court erred in the steps taken to that end, if, in fact, it was subject to execution; that is, not exempt to appellant as a homestead. The appellant resided in the town of Manchester, and had for a year or more before this action was instituted. He never resided upon nor made the Island creek property his home, and his relation to it was never such that it could or can be considered a homestead. Several years ago he did reside upon a piece of property which was located about a mile and a half from the Island creek land, and if his home place and the Island creek land together had been worth no more than \$1,000, he might properly have claimed both as exempt to him, but his home place alone was worth \$3,500. He sold it for that price, and then, or shortly afterwards, moved to Manchester. We gather from appellant's testimony that the Island creek property is a remnant of a much larger tract of land to which appellant and his wife jointly had record or legal title.

[2] All but this 100 acres has at various times been sold, and, according to appellant, his wife received the proceeds, and in that way has been paid for as much or more than her share of the whole, and for that reason he claims to and does own the Island creek land, but since the record shows that his wife has not formally divested herself of title in the Island creek remnant, the lower court, before having the property sold, should direct that she be made a party to the action, and then sell, for the satisfaction of appellee's debt, such interest that he, the appellant, may have.

In effect the judgment of the lower court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

only directs a sale of appellant's interest; and, being of opinion that the court properly subjected his interest to the payment of this debt, the judgment is affirmed, but the wife should be made a party and her interest determined before its sale.

**MCCORMACK et al. v. LOUISVILLE & N. R. CO.**

(Court of Appeals of Kentucky. Dec. 18, 1913.)

**1. APPEAL AND ERROR (§ 1011\*)—REVIEW—FINDINGS.**

A finding by the trial court as to the value of the services of an expert witness, based on sharply conflicting evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**2. ATTORNEY AND CLIENT (§ 189\*)—COMPENSATION—PROTECTION AGAINST SETTLEMENT BY PARTIES.**

Though a client who has a judgment may not prejudice the rights of his attorney, serving for a fee based on the amount of recovery, by settling with his opponent for less than the face of the judgment, yet a judgment which has been reversed on appeal will not so restrict the rights of the client.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 407-411; Dec. Dig. § 189.\*]

**3. ATTORNEY AND CLIENT (§ 190\*)—COMPENSATION—AGREEMENTS.**

Where defendant in a personal injury action compromised directly with plaintiff, its liability to an attorney who had a contract with plaintiff for a contingent fee on the percentage basis must be measured by treating the sum paid to plaintiff as the entire recovery, and it cannot be considered as merely the percentage to which plaintiff was entitled.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. § 190.\*]

**4. COURTS (§ 89\*)—DECISIONS—STARE DECISIS.**

Unless there is something manifestly erroneous, or the rule of decision has been changed by statute, the court will, under the doctrine of stare decisis, follow earlier precedents.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.\*]

Turner and Nunn, JJ., dissenting.

Appeal from Circuit Court, Warren County.

Actions by A. T. McCormack and B. F. Procter against the Louisville & Nashville Railroad Company, which were consolidated. From the judgment, both plaintiffs appeal. Affirmed.

Grider & Harlin, of Bowling Green, O'Rear & Williams, of Frankfort, and Wright & McElroy, of Bowling Green, for appellants. Sims & Rodes, of Bowling Green, and Benjamin D. Warfield, of Louisville, for appellee.

MILLER, J. These appeals involve only the fees for services rendered by Dr. A. T.

McCormack as a physician, and by B. F. Procter as an attorney, in the action of B. E. Lynch against the Louisville & Nashville Railroad Company for personal injuries.

Having been injured in a collision upon appellee's road at Rockland, Tenn., Lynch and his brother-in-law, Niemeyer, made the following contract of employment with Procter:

"This obligation witnesseth, that I have employed B. F. Procter to adjust by suit or compromise a claim for myself and for E. B. Niemeyer for an injury done to us at Rockland, Tennessee, March 13, 1907, in a collision; he is also to represent a claim for malpractice in treatment of said Niemeyer. It is agreed that we will give all assistance in case of the prosecution of said claim, and for his services we and each of us will pay to said Procter a sum equal to one-fourth (¼) received for said injury if compromised before trial, but if a trial is gone into then said Procter is to prosecute said claim in all courts in which it is pending, and for his services he is to receive a sum equal to one-third (⅓) received for said injuries. If nothing is received he is to receive nothing for his services.

"This November 26th, 1907.

"R. E. Lynch.

"E. B. Niemeyer,

"Per R. E. Lynch."

Acting for Lynch, appellant Procter instituted a suit against the appellee in the Warren circuit court, and recovered a judgment for \$25,000, which was reversed by this court in *Louisville & N. R. Co. v. Lynch*, 137 Ky. 696, 126 S. W. 362. After the case had been remanded to the lower court for a new trial, and before another trial was had, Lynch, acting alone, compromised his case for \$10,000, as is shown by the following receipt given by him: "Received of the Louisville & Nashville Railroad Company Ten Thousand (10,000.00) Dollars in full compromise, settlement and adjustment of all claims and demands of every character whatsoever, which I have against said company, its officers, agents or employees on account of injuries received by me on or about the 13th day of March, 1907, at or near Rockland, Tennessee, and on every other account whatsoever. I hereby agree to dismiss settled my action now pending against said company in the Warren circuit court to recover damages on account of said injuries; the Louisville & Nashville Railroad Company to pay the legally taxable costs of the litigation which it has not heretofore paid. Witness my hand at Louisville, Ky., this May 21, 1910."

The company paid Lynch the \$10,000 called for by the settlement, whereupon McCormack and Procter intervened in this action, claiming their fees and a lien therefor. Recognizing its liability under section 107 of the Kentucky Statutes, which gives attor-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

neys a lien upon all claims or demands, including all claims for unliquidated damages put into their hands for suit or collection, for the amount of any fee which may have been agreed upon by the parties, the company offered to pay Procter \$2,500, that sum being one-fourth of the amount which the company had paid Lynch. Procter, however, claimed that he was entitled to \$5,000, since the settlement had been made after trial, in which event he was, by the terms of his contract, entitled to one-third of the recovery; that in paying Lynch \$10,000, the company had paid Lynch only that part of the recovery which was due him, and that the remaining one-third, or \$5,000, was due Procter under the contract. The circuit court having held that Procter was entitled to a fee of \$3,333.33, the company paid him that sum. Procter appeals, claiming that he was entitled to \$5,000, and that there is yet due him \$1,666.67.

Before the trial of the action in the circuit court, Dr. A. T. McCormack and another physician were appointed by the court to make a physical examination of Lynch for the purpose of preparing themselves to testify concerning his injuries. Dr. McCormack made the examination, and testified; and for his services he claimed \$250. The circuit court allowed him a fee of \$50, which was taxed as costs, and paid by the company; and from so much of the judgment as denied him a recovery of the remaining \$200, Dr. McCormack appeals.

[1] Disposing of Dr. McCormack's appeal first, it is sufficient to say that while several witnesses testified that \$250 was a reasonable fee for the services he rendered, at least two physicians testified that \$50 was a reasonable fee. This question of fact having been tried by the circuit judge, who knew the witnesses and heard them testify, we are not inclined to disturb his finding. Where the proof is contradictory, and the mind is left in doubt upon a question of fact, this court will not disturb the finding of fact by the chancellor. *Byassee v. Evans*, 143 Ky. 415, 136 S. W. 857; *Kirkpatrick's Ex'r v. Rehkopf*, 144 Ky. 134, 137 S. W. 862; *Wathen v. Wathen*, 149 Ky. 505, 149 S. W. 902; *Bond v. Bond*, 150 Ky. 389, 150 S. W. 363. The judgment is therefore affirmed upon Dr. McCormack's appeal.

[2, 3] Turning to Procter's appeal, we find he relies upon *L. & N. R. Co. v. Procter*, 51 S. W. 591, 21 Ky. Law Rep. 447, *Procter Coal Co. v. Tye & Denham*, 123 Ky. 381, 96 S. W. 512, 29 Ky. Law Rep. 804, and *Elk Valley Coal Mining Co. v. Willis*, 149 Ky. 449, 149 S. W. 894, for a reversal of the judgment which passed upon his claim. A careful reading of the opinions in those cases will show, however, that none of them comes up to the position contended for by appellant. A brief examination of those opinions will show that fact.

In the first case, in 21 Ky. Law Rep. 447, the plaintiff had recovered a judgment for \$1,000 against the railroad company, and subsequently compromised it for \$300. In that case Procter, the plaintiff's attorney, had a contract for a fee of one-half of the amount recovered; and the effect of the opinion was that, where a client had compromised a claim, which had already been reduced to judgment, by accepting less than the judgment in satisfaction thereof, his act in so settling his judgment did not deprive the attorney of his fee according to his contract, when applied to the existing judgment. In that case the judgment was in force, and it was therefore a correct measure of the company's liability. In the case at bar, however, Lynch had no judgment at the time he made the settlement; and the fact that he had previously recovered a judgment which had been reversed cannot affect the question. When the case went back to the circuit court for trial, so far as Lynch and his attorney were concerned, it stood as though he had never recovered a judgment, and as though his suit had just been brought and was awaiting trial for the first time.

In *Procter Coal Co. v. Tye & Denham*, supra, the case was compromised by the plaintiff Chandler before trial; and the attorneys having no express contract as to the amount of their fee, they were allowed to recover upon a quantum meruit. It appeared, however, that, although the plaintiff had received but a small sum of money, he obtained a contract by which he was to be given employment by the defendant company as long as it remained in existence. The court held that the attorneys were entitled, in fixing their fee upon a quantum meruit basis, to show the value of the contract between the company and Chandler for future employment. And, in speaking of the effect of the statute giving attorneys a lien for their fees, the court said: "This statute was not intended to deny to parties to an action the right to settle their differences independent of their attorneys, and without notice to them; but if they do so settle, and money or other thing of value is paid by the defendant to plaintiff as a consideration for the settlement, the attorney for plaintiff may recover from the defendant a reasonable fee for his services. Nor was it designed to prevent the compromise or settlement of lawsuits out of court by the parties. The only purpose of it is to provide a means whereby attorneys who have been instrumental in bringing the settlement about, by reason of the claim being placed in their hands for collection, shall receive a reasonable compensation for the services they have rendered."

Again, in *Elk Valley Coal Mining Co. v. Willis*, Alexander, the plaintiff, settled his claim for \$250 in money, a house and lot, and permanent employment in the service of the company. For a fee the attorneys had

a contract for a sum equivalent to 50 per cent. of the amount recovered by suit or otherwise. It will be seen that in this case, as in the Tye & Denham case, it became necessary to determine what the recovery was, by ascertaining the value of the contract for future service and the house and lot, and that the attorneys were entitled to one-half of that sum. It will thus be seen that neither of these cases bears directly upon the case at bar.

The question presented by this appeal has, however, been squarely decided by this court in *Schmitz v. South Covington & Cincinnati Street Railway Co.*, 131 Ky. 207, 114 S. W. 1197, 22 L. R. A. (N. S.) 776, 18 Ann. Cas. 1114. In that case, Mrs. Linns, the plaintiff, employed Schmitz, an attorney, to prosecute a damage suit for her against the company under a contract to pay the attorney, as a fee, a sum equivalent to one-half of any sum that might be collected or recovered by suit, compromise, or otherwise. After the suit had been instituted, and before trial, Mrs. Linns settled her case for \$1,500, the company further agreeing, as a part of the settlement, to pay Schmitz, her attorney, the fee agreed upon between him and Mrs. Linns. It will be observed that this is precisely the agreement the appellee in the case at bar made with Lynch as to paying Procter's fee. In the *Schmitz* Case, the company offered to pay Schmitz \$750, that sum being one-half of the amount it had paid Mrs. Linns. Schmitz, however, contended that he was entitled to \$1,500, under his contract for one-half of the recovery, just as Procter is claiming \$5,000 in the case at bar under his contract for one-third of the recovery. In the *Schmitz* Case, however, this court affirmed the judgment of the circuit court, which allowed Schmitz \$750 instead of \$1,500.

We are now asked to re-examine the question and to overrule the *Schmitz* Case. The question in that case was, however, carefully considered and thoroughly argued, as fully appears from the opinion. The gist of the opinion and the reasons for the conclusion reached are found in the following extract taken from page 211 of 131 Ky., from page 1198 of 114 S. W., 22 L. R. A. (N. S.) 776, 18 Ann. Cas. 1114, of that opinion: "The attorney, independent of his client, had no cause of action whatever against the company. His claim against it resulted entirely from his employment. If his client had no claim against the company, neither did the attorney. If the client did not recover anything, neither could the attorney. The amount of the attorney's recovery depended entirely upon the amount recovered by his client. He was to get a share or interest in whatever amount his client received, and hence in determining what the attorney was entitled to, we must of necessity ascertain what the client secured, as the attorney is only entitled to one-half of that amount.

The venture of the attorney and the client as between themselves may be treated as a partnership in the sense that the attorney was to receive an amount equal to one-half of the sum recovered by the client, but this partnership did not increase the liability of the company. Its obligation was to pay to the attorney the fee the client would have to pay—no more and no less—and it is clear that the client could only be required to pay one-half of the amount recovered. If the case had gone to trial, and a judgment had been rendered for \$1,500, the client and attorney under the agreement would share equally in the recovery solely because the attorney was to get one-half of the recovery, and in this state of case the client would only receive \$750; but, if a third party had come in and assumed to pay the attorney his fee, then the client would receive \$1,500, and the attorneys \$750. It does not follow from the fact that, because the client received \$1,500, the attorney is entitled to a like amount. The amount the attorney is entitled to receive is absolutely fixed by the amount paid to the client. If the attorney receives one-half the amount his client receives, it does not concern him whether he is paid that amount by his client or by some other person." And, as pointed out in that opinion, if the company had been insolvent, and the attorney could not for that reason have recovered any part of his fee from the company, clearly he could not have recovered more than \$750 from his client. And, as his claim against the company arises only from his employment by his client, it is difficult to understand how his claim can be any greater against the company than it could have been against his client.

In *Cooley's Constitutional Limitations* it is said that, when a rule has been once deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and that if the practice were otherwise, it would be leaving us in a perplexed uncertainty as to the law. 7th Ed. p. 84.

[4] Upon the principle of *stare decisis*, the decisions which have been rendered by a court will be adhered to by such court in subsequent cases, unless there is something manifestly erroneous therein, or the rule or principle of law established by such decisions has been changed by legislative enactment. 11 Cyc. 746. And, while we are not unmindful of the salutary tendency of the rule *stare decisis*, we are at the same time not averse to re-examining a question which has been passed upon on a single occasion only, and has not established a rule of property. *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 639, 47 S. W. 773, 20 Ky. Law Rep. 827, 42 L. R. A. 738.

We have therefore carefully re-examined the question decided in the *Schmitz* Case,

and, being of opinion that the rule there announced is sound in every particular, it is approved and followed.

Judgment affirmed in each appeal.

TURNER, J. (dissenting). I must respectfully dissent from so much of the opinion of the court as holds the appellant Procter is only entitled to recover from appellee \$3,333.33.

There is no disputed fact in the record, and in my view, no question of law presented, but really only a question of calculation. The uncontradicted facts are that Procter and Lynch entered into the contract quoted in the opinion of the court; that the suit was instituted by Procter and diligently prosecuted; that there was a verdict for \$25,000 which upon appeal to this court was reversed; that upon the return of the case to the lower court, and before another trial was had, negotiations looking to a settlement were pending between the attorneys for the parties; that at the very time Lynch made the settlement, appellee had pending a proposition by it to settle the case for \$15,000; that while that proposition was pending, Lynch went to Louisville and settled with the appellee's attorney for \$10,000 net to him (Lynch), with the agreement at the time that the company would pay Procter under the terms of Lynch's contract with him, which contract was before the attorney for the appellee at the time the settlement with Lynch was made.

In order that the circumstances may be fully understood, I quote as follows from the uncontradicted testimony of Lynch as to this settlement. In answer to a question from Procter, he said: "I went to Warfield's office in Louisville on my own free will and accord to make a settlement of this case. When I went, after talking over the matter some time, Mr. Warfield asked me as to the conditions of the contract between you and I. I told him about the contract. He asked me if I had it with me. I told him I did, and he asked me if I had any objections to him reading it. I told him none whatever, and I showed him the contract, and after reading the contract, he offered to compromise for \$10,000 net to me. He agreed to pay all legal taxable court costs, your part of the contract, and whatever the contract was with Wright & McElroy, and Dr. Hagan's bill. I told him, after looking over the contract that he drew up, that your name was not on there. He said your part would be paid according to the contract, and with his assurance that it would, I agreed to accept it."

We have then a corporation admitting a liability, in full possession of the fact that one-third of that liability is going to and payable to one party, and deliberately, with its eyes open and in full possession of all the facts, settling with another party two-thirds of that liability for \$10,000, and agreeing to settle the remaining part of it with the other

party; thereby by its own act fixing its liability to the third party at \$5,000. Suppose the liability had grown out of a contract instead of a tort, and suppose the contractual liability was payable two-thirds to one man and one-third to another, could it have, by paying in full the one to whom was due the two-thirds, have reduced its liability to the other? In my mind there can be no difference in principle; if there had been a disputed contractual liability, and it had fixed the amount of ultimate liability by settling with one who was only entitled to a part of the recovery, it would not thereafter be heard to say that it was not proportionately liable to the other party.

But it is argued that it is against the policy of the law not to permit a party to compromise or settle out of court his litigation, even without the consent of his attorney, and that is true; but it is sufficient to say in this case that the client did not undertake to settle the *whole* liability of the defendant, but only to settle that part which was coming to Lynch, which under the terms of the contract was two-thirds. The company expressly agreed, with the contract before it, that it would settle with Procter; by the very terms of its settlement with Lynch it fixed the amount which it must pay to Procter. It may be very readily admitted that it was within the power of Lynch to have made a settlement of the *whole* liability at \$10,000 without the consent of Procter, and if he had done so it would have absolutely fixed Procter's fee at one-third of that amount; *but this he did not undertake to do*. On the contrary, he settled only what was coming to him under the contract; that is, he was paid \$10,000 *net*, with the agreement that the company, having the contract between him and Procter before it at the time, would settle with Procter; that is to say, the company at the time agreed to pay Procter one-half as much as it had paid Lynch, because it knew from the very terms of the contract that Procter was entitled to that much.

The company admits its liability to Procter for a fee under the terms of this contract, and a majority of the court have determined that \$3,333.33 is what it must pay, and that amount has been, as shown by the record, paid Procter. Let us see by a simple calculation whether that is a compliance with the terms of the contract. The company has paid Lynch \$10,000; it has paid Procter \$3,333.33; the aggregate of those sums is \$13,333.33. Has Procter received one-third of that liability which the company now admits? Certainly not; he has only received one-fourth of it, and the terms of his contract have been violated over his protest.

In my view of this case the only question is, Of what sum is \$10,000 two-thirds? I am of the opinion that appellant Procter is entitled to his \$5,000 fee, and that the case of Schmitz v. South Covington & Cincinnati Street Ry. Co., 131 Ky. 207, 114 S. W. 1197,

22 L. R. A. (N. S.) 776, 18 Ann. Cas. 1114, should be overruled. As long as the rule therein laid down obtains, an easy opportunity is offered agents of corporations to procure from ignorant, dishonest, or improvident persons having claims against them settlements which will defraud attorneys out of part of their just compensation, to say nothing of their contract rights.

While it is not the policy of the law to discourage settlements between litigants or to prevent a party from settling without the consent of his attorney, we all know, as a matter of common experience, that settlements made with a litigant in the absence of his attorney (the attorney of the other party being present) is not conclusive, as a general rule, to fair or equitable adjustments.

The reference in the opinion to the doctrine of stare decisis can be viewed in no other light than as an apology for the opinion in the Schmitz Case. If that opinion was and is still right, what necessity is there for invoking the doctrine of stare decisis to continue in force the unfortunate doctrine announced therein?

NUNN, J., concurs in this dissent.

#### HIKSON v. SLOCUM.

(Court of Appeals of Kentucky. Dec. 16, 1913.)

##### 1. ASSAULT AND BATTERY (§§ 2, 12\*)—WHAT CONSTITUTES.

An assault is an attempt with force or violence to do a corporal hurt to another; while a battery is an unlawful touching of the person of another by the aggressor himself. But mere words do not constitute an assault, nor are they sufficient provocation to justify one. Hence plaintiff, who attempted to make defendant leave the sidewalk where he had a right to be, trying to reach out and grasp defendant, is the aggressor, notwithstanding plaintiff's previous profane epithets.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 1, 10; Dec. Dig. §§ 2, 12.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 532-538; vol. 8, p. 7582; vol. 1, pp. 719-721; vol. 8, p. 7583.]

##### 2. MUNICIPAL CORPORATIONS (§ 663\*)—SIDEWALKS—BREACH OF PEACE.

The sidewalk belongs to the public, and an abutting owner cannot compel a member of the public to leave the sidewalk, even though he is guilty of a violation of a breach of the peace.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.\*]

Appeal from Circuit Court, Owen County.

Action by J. O. Hixson against J. L. Slocum. From judgment for defendant, plaintiff appeals. Affirmed.

J. H. Settle, of Owenton, for appellant.  
John W. Douglas, of Owenton, for appellee.

NUNN, J. Hixson sued to recover of Slocum damages for assault and battery, and

upon the trial in the lower court, the jury returned a verdict in favor of Slocum, the defendant.

The parties are elderly men living in the town of Owenton; but on the day of the difficulty Slocum had returned to town in a new automobile after a visit to the country. The machine attracted quite a crowd, and Slocum insists that the presence of the machine and the crowd immediately in front of Hixson's hotel was a mere coincidence. Hixson maintains that it was premeditated on the part of Slocum, so that Slocum might come upon Hixson and provoke him to a difficulty. Slocum admits that he had had two drinks. The other evidence in the case shows that he was either drunk, or considerably under the influence of whisky. At all events, these enemies of long standing were thus brought together, and Hixson says that Slocum broke the years of silence in these words addressed to Hixson: "We are always fighting each other." Hixson replied: "You are fighting whisky," and turned back into his hotel. In a few minutes he came out, and Slocum was still on the sidewalk in front of the hotel, and seeing Hixson on his hotel porch, Slocum spoke to him with vile and vulgar epithets. Hixson came down the steps from the hotel, and, according to his evidence, when he came to the last step, he reached for Slocum with his left hand, and held his right arm extended down by his side. Slocum then struck Hixson three times with what Slocum terms a "little rattan cane." Another witness testifies that, at the time Slocum used the cane, Hixson was either on the last step of his hotel, or the sidewalk, he could not say which. All of the other witnesses say that he was off the step, and went to Slocum out on the sidewalk.

Hixson explains that he carried his right arm to his side because his right hand was crippled. It is not shown that Slocum knew this fact, and therefore Slocum's statement is not without plausibility that he feared Hixson was trying to grab and hold him with his left hand, and with his right use a knife on him, and which he believes Hixson was carrying. Slocum admits that when Hixson returned from the hotel he addressed Hixson without Hixson having said anything to him, and called him the vile names as testified to by Hixson, but he takes issue with Hixson as to the words spoken before Hixson went into the hotel. He claims while in the crowd, and finding himself standing in Hixson's presence, he said to him, "Why can't we be friends?" Hixson replied, "You are fighting booze; you are drunk now." Slocum replied, "Every time I speak to you Mr. Hixson, you insult me." Then Hixson went into the hotel, and returning, Slocum began the conversation by saying, "Mr. Hixson, you always go out of your way to insult people." Both agree that then Hixson ordered him

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

away, and that Slocum called him the vile names which soon led to the encounter.

[1] It is not shown that Hixson suffered any physical injury, and his whole complaint is that Slocum brought on the difficulty by the provoking language used, and his chief effort is to magnify the effect of Slocum's words; while Slocum is mainly concerned in minimizing the size of his "little rattan cane," and the amount of whisky he had imbibed that day. Ordinarily one in an intoxicated condition is not a safe bearer of the olive branch, and if he goes to his enemy to bury the hatchet, he should be careful not to carry the hatchet with him. Reasoning from these propositions, Slocum was not at all discreet, if in fact he was sincere, in his effort to make peace with Hixson; but the action here is not to recover damages for language used, or words spoken of, or concerning Hixson, but for the assault and battery committed upon him. An actionable assault "is any attempt or offer with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with the present ability to carry such intention into effect." 3 Cyc. 1020. And the same book (pages 1021 and 1022) further correctly defines an assault and battery "as an unlawful touching of the person of another by the aggressor himself," and again "the force or violence attempted or offered must be physical, and no words of themselves can constitute an assault." In the case of *White v. South Covington Ry. Co.*, 150 Ky. 684, 150 S. W. 838, this court held: "An assault \* \* \* is not excused \* \* \* by the fact that the passenger assaulted had used grossly profane and abusive language without provocation." Applying these fundamental principles to the facts, it would seem that the lower court was very liberal with Hixson in suffering his case to go to the jury at all.

The first encounter was a mere war of words, and upon which no action can or is attempted to be based. Slocum remained upon the sidewalk, where he had a right to be. Although on the second encounter Slocum began it by the use of abusive language, still that did not justify Hixson leaving his premises to come upon the sidewalk, and grab, or attempt to grab, Slocum. Under such circumstances the jury were warranted in finding under the court's instructions that "the defendant (Slocum) then and there believed or had reasonable grounds to believe that the plaintiff was about to inflict upon him great bodily harm," and that in striking Hixson with the cane, he used only such means or force at his command as was necessary to resist the assault of plaintiff, and he was thereby excusable on the grounds of self-defense.

Appellant concedes that the instructions given by the court correctly apply the law

to the general run of assault and battery cases, but insists that the court erred in refusing to instruct the jury so that they might believe the assault was begun with the first passage of words, and that the defendant was therefore the aggressor, and for that reason he cannot justify assaulting Hixson with the cane upon the grounds of self-defense. But, as we have seen, words do not constitute an assault, and therefore they cannot be the beginning of one.

[2] Neither is appellant's contention sound that he had a right to go upon the sidewalk and make or force Slocum to leave it. The sidewalk belongs to the public. If Slocum's conduct was equivalent to a breach of the peace, he should have been prosecuted for it, and the record discloses the fact that he was. Appellant was not justified in attempting to take the law in his own hands.

While there is very little conflict of a material kind in the testimony, such as there was, under proper instructions of the court, the jury considered, and in rendering a verdict for Slocum, the appellee, we are unable to discover that they erred.

We therefore affirm the judgment of the lower court.

#### FLYNN v. BARNES et al., County Board of Examiners.

(Court of Appeals of Kentucky. Dec. 16, 1913.)

##### 1. STATUTES (§ 141\*)—REPEAL—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. § 51, provides that no law shall be amended by reference to its title only, and that the amended part shall be re-enacted and published at length. St. 1903, § 4425, provided that the county board of examiners should not examine any applicant for a teacher's certificate until satisfied that he was of the prescribed age and of good moral character, and should not grant a certificate to an applicant who was intemperate, or who had had improper access to the examination questions. Act March 16, 1906 (Laws 1906, c. 29), entitled "An act to amend section 4425," relative to the examinations and certificates of teachers substituted for the satisfaction required of the examiners an affidavit of the applicant as to his qualifications. *Held*, that as the amendatory act did not re-enact or publish the former section at length, it was not an addition thereto, and that the amendatory act constituted the whole of the former section which was no longer in force.

[Ed. Note.—For other cases, see Statutes. Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.\*]

##### 2. CONSTITUTIONAL LAW (§ 48\*)—CONSTRUCTION IN FAVOR OF VALIDITY OF STATUTE.

A construction which will uphold an act is to be preferred to one which would render it void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

##### 3. MANDAMUS (§ 79\*)—ACTS OF PUBLIC OFFICERS—CONSTITUTIONAL AND STATUTORY PROVISIONS—MINISTERIAL ACT.

Under St. 1903, § 4425, which before amendment by Act of March 16, 1906, provided that examiners of teachers should not examine an applicant until fully satisfied that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he was of the prescribed age and of good moral character, and should not grant a certificate to one who was intemperate or who had had improper access to the examination questions, and Const. § 2, forbidding arbitrary power in any state officer, the board, on refusing a certificate without reasonable grounds therefor, could be compelled by mandamus to grant it as a ministerial duty.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 170-176; Dec. Dig. § 79.\*]

**4. MANDAMUS (§ 79\*)—ACTS OF PUBLIC OFFICERS—DISCRETION.**

Under such statutory and constitutional provisions, the discretion of the board in refusing a certificate would not be controlled, where it had reasonable grounds therefor—such grounds as men of ordinary prudence would act upon.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 170-176; Dec. Dig. § 79.\*]

**5. APPEAL AND ERROR (§ 934\*)—REVIEW—PRESUMPTION AND CONSISTENT JUDGMENT.**

Where the petition in mandamus showed that petitioner was admitted to an examination for a teacher's certificate by the board of examiners, but did not show that he subscribed the prior oath required by St. 1903, § 4425, as amended by Act of March 16, 1906 (Laws 1906, c. 29), it would be presumed in support of a judgment for the board that it did its duty and did not improperly admit petitioner to examination without his taking the required oath.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.\*]

**6. PLEADING (§ 67\*)—PETITION—ANTICIPATING DEFENSES.**

Plaintiff is only required to state in his petition facts making out a prima facie case in his favor, and is not bound to anticipate the answers or objections which defendant may intend to rely upon.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 139; Dec. Dig. § 67.\*]

Appeal from Circuit Court, Pulaski County.

Mandamus by Luther M. Flynn against Wesley J. Barnes and others as the County Board of Examiners of Pulaski county. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Wesley & Brown, of Somerset, for appellant. O. H. Waddle & Son, of Somerset, for appellees.

HOBSON, C. J. Luther M. Flynn brought this action against W. J. Barnes, Bruce Hale, and W. G. Cundiff, the county board of examiners for Pulaski county, to obtain a mandamus requiring them to issue to him a teacher's certificate. He alleged in his petition in substance that on the third Saturday in June, 1911, the board met for the purpose of examining applicants for certificates to teach in the common schools of Pulaski county, and did conduct the examination. At that time he was more than 18 years of age, possessed an unexceptional moral character, had the requisite qualifications to enter said examination and receive a certificate; that the board examined and

graded the answers he made to the questions propounded, and that he made, and the board ascertained and determined that he made, an average grade of more than 85 per cent. in all the subjects of the common school course, and that his lowest grade was more than 65 per cent.; that this result entitled him to a county certificate of the first class; but that the defendants wrongfully and illegally refused to issue him any certificate. The circuit court sustained a demurrer to his petition. He then filed an amendment by which he alleged that at the time he was examined he did not, and does not now, indulge in drunkenness, profanity, gambling, or licentiousness, and had had no improper or any access to the examination papers to be used in the examination; and that the refusal of the defendants to grant him a certificate was arbitrary and wrongful. The defendants replied their demurrer to the petition as amended, and it was sustained by the court. The plaintiff then filed a second amended petition, in which he alleged that the defendants had no reasonable grounds to believe and did not reasonably believe that he had improper or any access to the papers to be, and that were, used on the examination mentioned; but that the refusal to issue him the certificate was wanton and malicious. The defendants demurred to the petition as thus amended; the demurrer was sustained; and the plaintiff failing to plead further, his action was dismissed. He appeals.

[1, 2] The defendants rely upon the following provision of section 4425 in the 1903 edition of Carroll's Kentucky Statutes: "The said examiners shall not examine any applicant until they are fully satisfied that said applicant possesses an exceptionally moral character, and is of the age herein prescribed; and in no event, shall a certificate be granted to any person who indulges in drunkenness, profanity, gambling or licentiousness, or who, within the belief of the examiners, has had improper access to the examination questions."

It is insisted for the defendants that this statute is in force, and that the petition does not show that the plaintiff had not within the belief of the examiners had improper access to the examination questions. The first question to be determined is, Is this provision now in force?

The act approved March 16, 1906, is in these words:

"An act to amend section four thousand four hundred and twenty-five of the Kentucky Statutes relative to the examination of teachers for county and state certificates and state diplomas.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. That section four thousand four hundred and twenty-five of the Kentucky Statutes, relative to the examination of teachers

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



for county and state certificates and state diplomas, be amended to read as follows:

"Section four thousand four hundred and twenty-five. All applicants for teachers, county and state certificates, or state diplomas, in the commonwealth of Kentucky, immediately before entering upon examination shall subscribe to the following oath, which shall be presented to them by any of the board of examiners, viz.: 'I do solemnly swear (or affirm) that I have not had access, directly or indirectly, to the state board or other questions to be used in this examination, and that I have no personal knowledge of any unlawful usage of the aforesaid questions by any other person or persons, which knowledge I have not communicated to the grand jury, county attorney or county superintendent of schools of the county in which the aforesaid person or persons did unlawfully use or attempt to use said questions.'

"2. The superintendent of public instruction shall furnish each county superintendent in the commonwealth with a sufficient number of copies of the oath prescribed in this act, printed on sheets with blank space below for names and addresses of applicants. Each copy, after being subscribed to by applicants as provided in this act, shall be dated and signed officially by the board of examiners and preserved in the office of the superintendent of public instruction or county superintendent of common schools as a public record.

"3. Any superintendent of public instruction or county superintendent of common schools or board of examiners for teachers' county or state certificates or state diplomas failing to comply with the provisions of the act shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars for each offense.

"4. That the provisions of this act shall become operative at as early a date as possible, an emergency is declared to exist and therefore this act shall take effect from and after its passage and approval by the Governor." Laws 1906, c. 29.

Section 51 of the Constitution, among other things, provides: "No law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

No part of section 4425 as it then stood is re-enacted or published at length; and therefore the act of March 16, 1906, cannot be considered an addition to section 4425 as it then stood; for to so construe it would be to make the act unconstitutional, and the rule is that a construction which will uphold an act is to be preferred to one that would render it void. In addition to this, the act of March 16, 1906, shows on its face an intention not to add words to the existing

section, but to change the section so as to make it read as therein set out; for it provides that the section "be amended to read as follows"; and after this come the words "section four thousand four hundred and twenty-five"; and following these words are the provisions, which, as the act provides, shall constitute section 4425. We are therefore of the opinion that this act is now the whole of section 4425, and that the provision relied on in the old act, which is not incorporated in the new act, is no longer in force. It may be that the Legislature did not intend to repeal all of section 4425 as it then stood, and that the act as written does not accord with the real intention of the Legislature, but we cannot go behind the language of the act. If a mistake has been made the Legislature must supply the remedy.

[3,4] We are also of the opinion that under the original act the board of examiners had not arbitrary power to refuse a certificate, and that, to justify them in refusing a certificate upon the ground that they believed that the applicant had had access to the examination questions, they must have reasonable grounds for such belief. Under section 2 of the Constitution, arbitrary power can exist in no officer of the state. The statute must be construed with reference to the provisions of the Constitution. If the board had reasonable grounds for its action, that is, such grounds as a man of ordinary prudence would act upon, their discretion cannot be controlled; but if they had not reasonable grounds for their action, it was arbitrary, and they may be required by mandamus to perform a ministerial duty.

[5] It is also insisted for the appellees that the petition does not show that before entering upon the examination, the plaintiff subscribed the oath required by section 4425. But it does appear from the petition that he was admitted to the examination by the board of examiners, and was examined. It must be presumed that they did their duty, and did not improperly admit him to the examination. It was the duty of the board to present to all applicants the oath to be subscribed by them before entering upon the examination.

[6] It was only required of the plaintiff to state in his petition facts making out a prima facie case in his favor.

"Another rule of pleading is that matters which should more properly come from the other side need not be stated; in other words, it will be sufficient for each party to make out his case. It is enough if the facts stated by the plaintiff show a prima facie cause of action. He is not bound to anticipate; and is not therefore compelled to notice and remove in his petition every possible exception, answer, or objection which may exist, and with which the defendant may intend to oppose him." (Newman on Pleadings, § 212.)

Judgment reversed and cause remanded for further proceedings consistent herewith.

## GARVEY v. GARVEY.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

## 1. TRIAL (§ 11\*)—TRANSFER OF CAUSE—INVOLVED ACCOUNTS.

Under Civ. Code Prac. § 10, subsec. 4, permitting transfer of an action to the equity docket whenever it involves complicated accounts, an action for services rendered, etc., which involved more than 400 separate items of charges and countercharges from 50 cents to \$125, was properly transferred to the equity docket.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.\*]

## 2. TRIAL (§ 11\*)—TRANSFER OF CAUSE—EQUITABLE ACTION.

A case should be transferred to the equity docket, under Civ. Code Prac. § 10, subsec. 4, providing for such transfer when the case involves accounts so complicated or of such great detail of facts as to make a jury trial impracticable, in all cases where there is difficulty in adjusting accounts, or the issues are so numerous and complicated as to make a jury trial impracticable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.\*]

## 3. TRIAL (§ 370\*)—EQUITABLE ACTIONS—ISSUES OF FACT—SUBMISSION TO JURY.

Where, in a action for services, etc., the case was properly transferred to the equity docket, under Civ. Code Prac. § 10, subsec. 4, because of the large number of accounts involved, the court also properly refused to submit certain questions to the jury as to whether defendant promised to pay for the work, etc., and the amount paid.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 881, 885; Dec. Dig. § 370.\*]

## 4. APPEAL AND ERROR (§ 760\*)—BRIEF—ASSIGNMENTS OF ERROR—NECESSITY.

Where appellant's brief, in an action involving an account for services, etc., does not point out any item concerning which the trial court erred, and there are some 433 issues of fact and 250 pages of conflicting testimony thereon, the appellate court will not search the record for errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.\*]

## 5. REFERENCE (§ 8\*)—ACCOUNTING ACTIONS.

The case was peculiarly one for reference to a commissioner where the evidence, in an action for services, etc., transferred to the equity docket, made over 433 issues of fact involving charges for services and countercharges.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 13-23; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Owen County.

Action by Robert Garvey against B. E. Garvey. From a judgment for defendant, plaintiff appeals. Affirmed.

John W. Douglas, of Owenton, and H. K. Bourne, of New Castle, for appellant. Botts & Perry, of Owenton, for appellee.

MILLER, J. For several years prior to 1896 the appellant, Robert Garvey, had lived as a tenant upon a farm of 251 acres, in Owen county, which belonged to his father, John J. Garvey. In August, 1896, John J. Garvey sold the farm to his brother B. E. Garvey, the appellee. Robert Garvey remain-

ed upon the farm, and cultivated it as the tenant of his uncle, under a contract by which B. E. Garvey was to receive two-thirds of the tobacco and one-half of the corn raised upon the farm, and one-third of the profits on live stock. B. E. Garvey was to furnish the money with which to buy the live stock, while Robert Garvey was to furnish one-half of the feed for the stock. This arrangement continued until the fall of 1912, when Robert Garvey, asserting a hostile title, and claiming to own a life interest in the farm, his uncle B. E. Garvey took forcible detainer proceedings against him, which were finally settled by appellant agreeing to give possession of the farm on March 1, 1913, which he did.

On October 15, 1912, Robert Garvey brought this ordinary action against his uncle B. E. Garvey, claiming that during the 16 years he lived upon the farm he had, at the special instance and request of B. E. Garvey, performed work and labor for him for which he agreed and promised to pay the plaintiff whatever said work and labor were reasonably worth, and that said work and labor were reasonably worth the net sum of \$1,846.79. Defendant answered by traversing the petition, and affirmatively pleading payment and limitation. Upon a motion to make the petition more specific and definite, plaintiff filed an amplified petition, setting up in great detail the specific items, ranging from 50 cents to \$125, which he sought to recover. On the 4th of October, 1912, upon the motion of defendant, the action was transferred to the equity docket, and on the 11th day of October the defendant filed his answer, set-off, and counterclaim. On October 13, 1912, after the issues had been made, the plaintiff moved the court to submit the following questions to a jury:

(1) Did the defendant, B. E. Garvey, agree and promise to pay the plaintiff for work done, material furnished for buildings, for board of hands, as shown by account?

(2) Did he promise and agree to pay this amount within five years before the — day of October, 1912, date of filing of this action?

(3) Has defendant paid any part of same, and, if so, what amount has he paid?

The chancellor overruled the motion, and proceeded to try the case, at the proper time, hearing the testimony orally, and, having adjudged that the plaintiff take nothing by his petition, he appeals.

The first error assigned is that the court erred in transferring the action to equity, and that it again erred in refusing to submit to the jury the questions above set out.

[1] These two objections really present but one question, since the court properly refused to try the suggested questions of fact by a jury, if the case was properly transferred to equity. The reason for transferring

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the case to equity was the inability of a jury to intelligently try the large number of issues of fact presented, and, if the reason was sufficient to warrant the order of transfer, it was equally sufficient to justify the second order complained of, which practically covered the whole case. So the real question was this: Did the appellant have the right to have his case tried by a jury?

The plaintiff's account contained 268 separate items of charges and 31 exhibits, while the defendant's counterclaim contained 134 items of countercharges, making more than 400 separate items of charges and countercharges, ranging from 50 cents to \$125.

Subsection 4 of section 10 of the Civil Code of Practice provides as follows: "The court may, in its discretion, on motion of either party, or without motion, order the transfer of an action from the ordinary to the equity docket, or from a court of purely common law to a court of purely equity jurisdiction, whenever the court before which the action is pending shall be of the opinion that such transfer is necessary because of the peculiar questions involved, or because the case involves accounts so complicated or such great detail of facts as to render it impracticable for a jury to intelligently try the case."

In *O'Connor & McCulloch v. Henderson Bridge Co.*, 95 Ky. 642, 27 S. W. 253, 16 Ky. Law Rep. 247, the appellants had, in an action at law, recovered damages measured upon a large amount of work done by them for appellee in constructing a bridge over the Ohio river, and, in reversing the judgment for a trial in equity, the court construed the above section of the Code, saying: "This court has uniformly held that a court of equity has concurrent jurisdiction in matters of account, and 'should be exercised when otherwise there may be serious doubt as to the true state of the accounts, or difficulty in satisfactorily adjusting them, and safely striking a balance.' *Breckenridge v. Brooks*, 2 A. K. Marsh. 335 [12 Am. Dec. 401]; *Bruce v. Burdet*, 1 J. J. Marsh. 80; *Power v. Reeder*, 9 Dana, 6. But in every case of interposition of a court of equity in such actions there must exist a necessity arising from failure of remedy at law to afford justice."

In *Prussian National Insurance Co. v. Terrell*, 142 Ky. 738, 135 S. W. 416, the action of the circuit court in transferring to equity a case which involved only 20 issues of fact was approved.

[2] This equitable jurisdiction should be exercised wherever there is difficulty in adjusting the accounts, or where the issues involved are so numerous and complicated as to render a jury trial impracticable. See, also, *Harrodsburg Water Co. v. City of Harrodsburg*, 89 S. W. 729, 28 Ky. Law Rep. 625; *Manion v. Manion*, 120 Ky. 1, 85 S. W. 197, 27 Ky. Law Rep. 400; *Hely v. Hoertz*, 82 S. W. 402, 26 Ky. Law Rep. 644; *City of Covington*

*v. Limerick*, 40 S. W. 254, 19 Ky. Law Rep. 330; *Turner v. Johnson*, 35 S. W. 923, 18 Ky. Law Rep. 202.

It needs no argument to show that it would have been practically impossible for a jury to intelligently pass upon 400 issues of fact. We are of opinion the court did not err in transferring the case to the equity docket.

[3] Plaintiff insists, however, that, after the case had been transferred to equity, he had the right to have the common-law issues presented by the questions offered by him tried by a jury, although the case should remain on the equity docket for final disposition, and in support of that proposition he relies upon *Carder v. Weisenburg*, 95 Ky. 135, 23 S. W. 964, 15 Ky. Law Rep. 497; *Moraweck v. Martineck*, 128 Ky. 155, 107 S. W. 759, 32 Ky. Law Rep. 971; *Quigley v. Bean*, 137 Ky. 325, 125 S. W. 727; and other cases of a similar character. These cases do not conflict with the rule above laid down, since the impracticability of trial by jury did not appear in those cases, and it is this impracticability that affords the equitable jurisdiction. The same reason that justified the transfer equally justified the refusal, in this case, to try the suggested questions by a jury.

[4, 5] On the merits of the case we have not been helped in any material respect by either of the four briefs that have been filed, since neither of them has pointed out a single item concerning which it is claimed the circuit court erred. We are merely handed a record of over 250 pages of testimony, covering 433 issues of fact, and asked to go through the record, and review the circuit court's action as to each item. This was peculiarly a case for a commissioner; but neither side asked a reference.

When a party to an appeal is dissatisfied with the ruling of the circuit court upon an issue of fact, he should point out specifically the errors he complains of, and the testimony tending to sustain his contention.

The facts of this case bring it squarely within the rule laid down in *Brown v. Daniels*, 154 Ky. 268, 157 S. W. 3, where the record presented the settlement of complicated accounts covering a period of more than 4 years; the only difference in the cases being that the questions in the case at bar extend over a period of 16 years, and cover a much larger number of items. In that case, as here, the briefs pointed out no specific errors, but merely called upon the court to go over the entire settlement, and adjust the differences of the parties. In declining to undertake that investigation, and in affirming the case, we there said: "When counsel for appellants do not point out in a brief any errors in the judgment appealed from, or assign any reason why it should be reversed, this court, having neither the time nor the inclination to hunt for errors that might justify

a reversal, will assume that the judgment appealed from is correct, and affirm it."

Upon every issue the testimony is conflicting—the appellant and his witnesses sustaining his claims, the appellee controverting them. The rule above indicated has especial application to this case.

#### CASEY v. NEWPORT ROLLING MILL CO. (Court of Appeals of Kentucky. Dec. 19, 1913.)

##### 1. LIMITATION OF ACTIONS (§ 119\*)—COMMENCEMENT OF ACTION—SUMMONS—EFFECT OF CLERICAL ERROR.

Under Ky. St. § 2524, declaring an action to be commenced at the date of the first summons or process issued from a court having jurisdiction of the action, and Civ. Code Prac. § 39, declaring an action to be commenced by filing a petition, account, or statement in the office of the clerk of the proper court, stating the cause of action, and by causing a summons to issue thereon, plaintiff, who has filed his petition, and has actually caused summons to issue thereon in time to save his right of action, cannot be prejudiced by a clerical mistake of the clerk.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 529-535; Dec. Dig. § 119.\*]

##### 2. PROCESS (§ 31\*)—SUMMONS—DESIGNATION OF DEFENDANTS.

Under such statutes the summons to be valid must name the defendants to be summoned.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 25; Dec. Dig. § 31.\*]

##### 3. LIMITATION OF ACTIONS (§ 119\*)—COMMENCEMENT OF ACTION—FAILURE TO ISSUE SUMMONS—EFFECT ON ACTION.

Under such statutes the mere direction to the clerk to issue a summons where in fact no summons is issued against a defendant sought to be charged was insufficient as a commencement of an action to save the cause of action against the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 529-535; Dec. Dig. § 119.\*]

Appeal from Circuit Court, Campbell County.

Action by Robert Casey against the Newport Rolling Mill Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Myers & Howard, of Covington, and Hubbard Schwartz, of Newport, for appellant. Frank V. Benton, of Newport, for appellee.

CLAY, C. This action was originally brought by plaintiff, Robert Casey, against defendant, Andrews Steel Company. In his original petition, which was filed on October 13, 1910, plaintiff alleged that while employed in the manufacturing plant of the Andrews Steel Company he was injured through its negligence on September 3, 1910. Summons was executed on the Andrews Steel Company on October 13, 1910. Thereafter the Andrews Steel Company filed a demurrer to the petition, which was sustained. On December 24, 1910, the defendant moved

that plaintiff be required to verify his amended petition. On January 11, 1911, defendant filed a demurrer to the amended petition. On January 16, 1911, the demurrer was overruled. On January 21, 1911, the Andrews Steel Company filed an answer, denying the allegations of the petition.

On February 17, 1911, plaintiff filed an amended petition, in which he alleged that on the 3d day of September, 1910, the date of his injury, he was employed by the defendant, Andrews Steel Company, and the Newport Rolling Mill Company at a certain rolling mill plant situated in the city of Newport, Campbell county, Ky., operated by the said defendants jointly. He then reiterates the allegations contained in his original petition and amended petition with reference to the circumstances of his injury. To the filing of this amended petition the Andrews Steel Company objected and excepted.

On February 21, 1911, summons was issued against the Andrews Steel Company, commanding it to answer an amendment to the petition filed against it by plaintiff. No summons was issued against the Newport Rolling Mill Company at that time. The summons in question was served on the Andrews Steel Company on February 23, 1911. On March 21, 1911, plaintiff filed a reply to the answer of the Andrews Steel Company. On October 7, 1911, the case was set for trial on November 23, 1911. On November 21, 1911, the case was remanded to the rule docket. On November 23, 1911, one of the attorneys for plaintiff filed an affidavit, stating that on the 17th day of February, 1911, he delivered to the clerk of the court the amended petition making the Newport Rolling Mill Company a party defendant; that said amendment to the petition was filed by the clerk on said day, and on the following day it was noted of record; that on the 20th day of February, 1911, affiant requested and directed the clerk of the court to issue summons thereon against the Newport Rolling Mill Company. On November 23, 1911, summons was issued on the amended petition against the Newport Rolling Mill Company, and duly served on it November 24, 1911. On January 13, 1911, the Newport Rolling Mill Company moved that the affidavit of the attorney be stricken from the files. The motion was overruled, and the Newport Rolling Mill Company objected and excepted. On January 18, 1912, the Newport Rolling Mill Company filed an answer, pleading the statute of limitations, and alleging that plaintiff's cause of action accrued on September 3, 1910, that summons for it was not issued until November 23, 1911, and that the cause of action did not accrue within one year before the commencement of the action against it. To the foregoing answer plaintiff filed a reply, alleging in substance that the amendment to the petition making the Newport

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Rolling Mill Company a defendant was filed within one year after the accrual of the cause of action therein set out, and that the clerk of the court was at the time of the filing of said amended petition instructed and requested to issue summons against the defendant, the Newport Rolling Mill Company, and denying that the cause of action set forth in the petition as amended did not accrue within one year before the commencement of the action against the Newport Rolling Mill Company, and denying that the cause of action against the Newport Rolling Mill Company was barred by the statute of limitations. Thereafter the Newport Rolling Mill Company filed a demurrer to the reply. On November 5, 1912, the plaintiff dismissed his action against the Andrews Steel Company. On the same day the cause was submitted for judgment on the pleadings. The demurrer of the defendant, Newport Rolling Mill Company, to the reply of plaintiff was sustained, and, plaintiff having declined to plead further the petition and amended petition were dismissed as to both defendants, and both defendants were adjudged to recover their costs of plaintiff. From this judgment, plaintiff prosecuted an appeal, naming in his statement only the Andrews Steel Company as appellee. Subsequently an amended statement was filed, making the Newport Rolling Mill Company appellee, and the style of the case was corrected on the record.

Section 2524, Kentucky Statutes, provides as follows: "An action shall be deemed to have been commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction of the cause of action."

Section 39 of the Civil Code of Practice is as follows: "An action is commenced by filing, in the office of the clerk of the proper court, a petition stating the plaintiff's cause of action; or, in cases wherein written pleadings are not required, by filing in such court the account, or the written contract, or a short written statement of the facts on which the action is founded; and, in either case, by causing a summons to be issued, or a warning order to be made, thereon."

It is the contention of plaintiff that, when he filed his amended petition, and requested the clerk to issue summons thereon against the Newport Rolling Mill Company, he did all that the law required of him; that it was then the duty of the clerk to issue the summons according to law; that it was not incumbent upon plaintiff to show that he had issued it, but that he had a right to rely on the clerk's knowing and performing his duty. It is true that this contention of plaintiff finds support in the language of this court in the cases of *L. & N. R. R. Co. v. Smith's Adm'r*, 87 Ky. 501, 9 S. W. 493, 10 Ky. Law Rep. 514, and *L. & N. R. R. Co. v. Bowen*, 39 S. W. 31, 18 Ky. Law Rep. 1099, when considered independently of the facts of those

cases. It is the well-settled rule, however, that the language of the court should be construed in the light of the facts before it, and of the question presented for decision. In the case of *L. & N. R. Co. v. Smith's Adm'r*, supra, the petition was filed, and summons was issued thereon and served on appellant within a year from the accrual of the cause of action; but the summons cited the appellant to appear at the next term of the court, which commenced within ten days from the date of the summons; whereas, section 44 of the Civil Code provided that the summons should be returnable to the first day of the next term of the court which did not begin within ten days from the date of the summons. It was further provided in section 41 that the summons should fix a day for the defendant to answer, and in section 44 that the day fixed should not be less than ten days from the next term of court, and, if the next term of court commenced within ten days from the date of the summons, the defendant should be cited to answer at the next term thereafter. It was accordingly held that appellee had, as a matter of fact, caused summons to be issued, and that he could not be prejudiced by the negligence of the clerk in making the summons returnable to a term of court beginning within ten days from the date of the summons.

[1, 2] In *L. & N. R. R. Co. v. Bowen*, supra, the facts were these: The petition was filed on October 23, 1893. Instead of issuing summons in the name of D. C. Bowen, summons was issued on the day of filing in the name of D. C. Brown as plaintiff, and this summons was actually served on defendant. In this case, therefore, plaintiff actually caused summons to be issued, though, through the fault of the clerk, a mistake was made in the name of the plaintiff. Not only so, but the defendant was actually summoned. In other words, the foregoing cases, when carefully analyzed, simply hold that, when plaintiff has filed his petition, and has actually caused summons to issue thereon in time to save his right of action, he has done all the law requires him to do, and cannot be prejudiced by some clerical mistake of the clerk. On the other hand, we have uniformly held that the issuing of the summons is the commencement of the action, and that a summons, to be valid, must name the defendants to be summoned. *Butts v. Turner & Lacy*, 5 Bush, 435; *Keller v. Stanley*, etc., 86 Ky. 240, 5 S. W. 477, 9 Ky. Law Rep. 388; *Thompson v. Bell*, 6 T. B. Mon. 559. In so far as the defendant is concerned, the suing out of process against him is the commencement of the suit. *Pindell, Assignee, v. Maydwell*, 46 Ky. (7 B. Mon.) 314.

[3] In the present case no summons was actually issued against defendant, the Newport Rolling Mill Company, until after the expiration of a year from the time plaintiff's

cause of action accrued. The question sharply presented, then, is this: Is a mere direction to the clerk to issue a summons, though, as a matter of fact, no summons is ever actually issued against the defendant sought to be charged, a sufficient compliance with the provisions of the statute and Code? It may be conceded that under the authorities relied on by plaintiff, if the summons be actually issued, though a clerical mistake be made by the clerk, the action will be deemed to have commenced as against the defendant against whom summons was issued. But the cases relied on do not sustain the contention that the mere direction to the clerk to issue summons is a commencement of the action against a defendant who, as a matter of fact, is not summoned at all. Indeed, there is a wide difference between directing a summons to be issued and actually causing it to be issued. In the one case no summons may ever issue at all; in the other case it must have been issued. If the broad rule contended for by plaintiff were adopted, it would lead to endless confusion. The commencement of an action would be determined by parol evidence instead of the actual issuance of the summons. Parties having the right to rely on the record, showing that no summons had been issued, would be met with the contention that the clerk had been requested to issue summons, thus making important property rights depend on an issue of veracity between the clerk and the litigant or his attorney. In our opinion, such was not the purpose of the lawmaking power. The statute and Code make it clear that an action is commenced by the issuance of the summons, and not by a request to have the summons issued. It follows that the demurrer to plaintiff's reply was properly sustained.

Judgment affirmed.

**DIXIE FIRE INS. CO. v. A. LAYNE & BRO.**  
(Court of Appeals of Kentucky. Dec. 19, 1913.)

**INSURANCE (§ 668\*)—CANCELLATION OF POLICY—CONSENT—PRINCIPAL AND AGENT.**

Where in an action on a fire insurance policy the defense was that the policy had been canceled by notice accepted by the insured's agent, and there was no evidence that the agent had any authority other than to procure the policy, which was delivered to him unconditionally, a peremptory instruction was properly given for the plaintiff firm; the fact that insured's agent has authority to procure an insurance policy, which is delivered to him unconditionally, creating no presumption that the agent has authority to accept notice of cancellation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

Appeal from Circuit Court, Floyd County.

Action by A. Layne & Bro. against the Dixie Fire Insurance Company. From judgment for plaintiffs, defendant appeals. Affirmed.

Harkins & Harkins, of Prestonsburg, for appellant. S. C. Ferguson, of Prestonsburg, and C. B. Wheeler, of Ashland, for appellees.

CLAY, C. Plaintiffs, A. Layne & Bro., a partnership, conducted a store in Laynesville, Ky. On October 26, 1909, the defendant, Dixie Fire Insurance Company, issued to plaintiffs a policy insuring their stock of merchandise against loss by fire in the sum of \$1,500. The stock of goods was destroyed by fire on January 19, 1912. The defendant declined to pay the loss, and plaintiffs brought this action to recover on the policy. Afterwards, by amended petition, they declared on a policy for the same amount alleged to have been issued on November 11, 1911. The jury returned a verdict in favor of plaintiffs, and defendant appeals.

It appears from the evidence of Anna Smith, who was formerly Anna Layne, a member of the firm, that she wanted to take out a policy on the stock of goods. She was directed to apply to Harry Marcum, an insurance agent at Catlettsburg. He sent her a policy, dated October 26, 1909; whereupon she sent him a check for \$37.50 to pay the premium. She had never seen Mr. Marcum, but supposed that he was the agent. She further testified that the stock of goods had been previously invoiced, and the value of the goods exceeded the amount of the insurance. The policy of insurance which she received was signed by M. T. Marcum as agent. The policy contains the following provision:

"This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

"This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rata premium."

In the month of January, 1910, witness received written notice from the company, canceling the policy issued on October 26, 1909. On October 24, 1910, she sent Harry G. Marcum a check for \$37.50 for insurance. This check was paid. Again on October 24, 1911, she mailed to Harry G. Marcum a check for \$37.50 for insurance, which check was also paid. On neither of these dates did she receive a policy from the company.

According to the evidence for defendant, Harry G. Marcum was never its agent. On

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

the contrary, his wife, M. T. Marcum, whose name was signed to the policy of October 26, 1909, was its only agent in the city of Catlettsburg. Marcum and his wife had occupied the same office, but each represented different companies. On January 8, 1910, the company, by a registered letter, notified plaintiffs that the policy of October 26, 1909, would be canceled after the expiration of five days from that date. The unearned premium was never paid to plaintiffs because the policy was not surrendered. Harry G. Marcum testified that he was not the agent for the Dixie Fire Insurance Company, but that his wife was. When he received the letter from plaintiffs in regard to insurance, he had his wife issue the policy of October 26, 1909. Had no recollection of having received a check of October 24, 1910, but did receive a check for \$37.50, dated October 24, 1911. Thereupon he had his wife issue the policy dated November 11, 1911, which policy was placed on his desk. On sending a report to the general agent of the issuance of the policy, the general agent notified his wife to cancel the policy. In procuring this insurance he acted merely as broker for the plaintiffs, a capacity in which he frequently acted. On receipt of the notice by his wife to cancel the policy, he, as the agent or broker for plaintiffs, consented that this might be done, and surrendered the policy for cancellation. Thereupon the policy was canceled.

We deem it unnecessary to consider any questions connected with the policy of October 26, 1909. It is admitted in the evidence that a policy was issued on November 11, 1911, and that this policy was delivered to Harry G. Marcum as the agent or broker of the insured. Unless properly canceled, the latter policy was in force at the time of the fire. No notice of cancellation of this policy was ever given to the insured. It does appear, however, that notice of its cancellation was given to Harry G. Marcum, and that he consented to its cancellation. The question is, Did he have authority to do so? There is nothing in the record to show that the policy was delivered to the broker on the condition that it should not take effect until approved at the home office of the company. On the contrary, there was an unconditional delivery. That being true, the rule announced in *Young v. Newark Fire Insurance Co.*, 59 Conn. 41, 22 Atl. 36, does not apply.

While it is true that an insurance broker may be authorized by his principal to accept notice of cancellation, and that such authority may be directly given or may be inferred from a course of dealing between the parties, it is likewise true that there is no presumption that the agent to procure a policy of insurance has authority, after it has been procured and delivered, to receive notice of or consent to its cancellation. *Johnson v. North British & Mercantile Insurance Co.*, 66 Ohio St. 6, 63 N. E. 610. On the contrary,

it is well settled that, where one is specially employed to procure insurance on certain property, the agency terminates with the procurement of the policy. *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Kehler v. Insurance Co. (C. C.)* 23 Fed. 709; *Insurance Co. v. Sammons*, 110 Ill. 166; *Assurance Soc. v. Insurance Co.*, 84 Va. 116, 4 S. E. 178, 10 Am. St. Rep. 819; *Insurance Co. v. Nill*, 114 Pa. 248, 6 Atl. 43; *Broadwater v. Lyons Ins. Co.*, 34 Minn. 465, 28 N. W. 455; *Quong Tue Sing v. Assur. Corp.*, 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144; *Von Wein v. Insurance Co.*, 52 N. Y. Super. Ct. 490; *Rothschild v. Insurance Co.*, 74 Mo. 41, 41 Am. Rep. 303; *Stillwell v. Insurance Co.*, 72 N. Y. 385; *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; *Body v. Insurance Co.*, 63 Wis. 157, 23 N. E. 132; *Lumber Co. v. Insurance Co.*, 95 Wis. 542, 70 N. W. 59. And the power to cancel cannot be implied from the power to procure. If he possesses that power, it arises from some actual or apparent authority superadded to the mere power to enter into the contract. *Martin v. Insurance Co.*, 106 Tenn. 523, 61 S. W. 1024; *Adams v. Fire Ins. Co. (C. C.)* 17 Fed. 630; *Wight v. Royal Ins. Co. (C. C.)* 53 Fed. 340; *Ostrander, Fire Ins. Cos.*, § 16; 1 *Joyce on Ins.* §§ 636, 637; 2 *Joyce on Ins.* §§ 1655, 1656; *White v. Ins. Co.*, 120 Mass. 330; *Mechem on Agency*, § 931. In the present case no express authority was shown, nor was there a course of dealing between the insured and the broker from which such authority could be inferred. The insured never consented to the cancellation of the policy. Indeed, they were entirely ignorant of that fact, and believed the insurance was still in force. Under these circumstances, we conclude that plaintiffs were entitled to a peremptory. That being true, we deem it unnecessary to consider the propriety of the instructions or other questions discussed by counsel for defendant.

Judgment affirmed.

#### ARNETT v. HOWARD.

(Court of Appeals of Kentucky. Dec. 16, 1913.)

##### 1. LIMITATION OF ACTIONS (§ 49\*)—ACTIONS AGAINST ASSIGNOR.

The liability of the assignor of a promissory note is barred by the lapse of five years after the maker is judicially declared insolvent.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 266-272; Dec. Dig. § 49.\*]

##### 2. LIMITATION OF ACTIONS (§ 105\*)—SUSPENSION—OTHER ACTIONS.

A void judgment against the assignor on a promissory note would not suspend the running of limitations in his favor against an action against him on the note.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 514, 515; Dec. Dig. § 105.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. VENDOR AND PURCHASER (§ 258\*)—VENDOR'S LIEN—CONSTRUCTION.

A deed executed by intestate to defendant provided that in consideration of \$500, "secured to be paid by part of note of \$500 executed" to defendant by C. for \$500, "\$240 of which is part of the above consideration, all of which said note being assigned" to defendant, "and which note is now in litigation," the balance of said consideration being evidenced by notes by defendant to intestate amounting to \$260, and further provided that "a lien is hereby retained on the land hereby conveyed for the payment of the unpaid purchase money hereinbefore named." Held that, even if the lien applied to the \$500 note of C., it only secured the balance of the note, or \$240, and was discharged when such balance was paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 655-657; Dec. Dig. § 258.\*]

Appeal from Circuit Court, Magoffin County.

Action by Jane Arnett, administratrix, against W. O. Howard. From a judgment for defendant, plaintiff appeals. Affirmed.

D. D. Sublett, of Salyersville, for appellant. John H. Gardner, of Salyersville, and Grannis Bach, of Jackson, for appellee.

CLAY, O. In the month of February, 1896, William O. Howard sold to his brother, Calloway Howard, an interest in certain lands that had been conveyed to them by their father. The consideration was \$500, for which Calloway Howard executed to William O. Howard his note, payable January 1, 1897. On February 27, 1896, William O. Howard purchased from D. H. Arnett, then an infant, a tract of land for which he paid him \$260 in personal property, and also assigned to him the note for \$500 executed by his brother, Calloway Howard. Within ten days after this note became due, D. H. Arnett, by his next friend, instituted suit against Calloway Howard to recover thereon. When this suit was instituted D. H. Arnett was an infant, and had not conveyed to W. O. Howard the tract of land purchased by the latter, nor had W. O. Howard conveyed to Calloway Howard his interest in his father's land. W. O. Howard intervened in the action brought on the note to prevent the collection thereof until Arnett conveyed to him the land which he had purchased. In this condition the action pended until Arnett became of age. Thereupon he executed to W. O. Howard a deed to the land purchased by the latter, and at the same time W. O. Howard executed to Calloway Howard, his brother, a deed to the land which the latter had bought. When this was done, Arnett asked permission to withdraw his answer, and cross-petition, and subsequent pleadings filed in the case. He was then dismissed from the action. Thereafter Calloway Howard set up some kind of a defense to the note sued on, and on February 6, 1900, the court adjudged that he was entitled to a credit of \$225, and rendered judgment against him for the bal-

ance of \$275. Judgment was also rendered against W. O. Howard for \$225.

On November 15, 1899, D. H. Arnett, by a writing which he signed, transferred and assigned the \$500 note in question to Ambrose Arnett. Thereafter Jane Arnett qualified as administratrix of both D. H. Arnett and Ambrose Arnett, who had previously died.

Some time after the year 1900 W. O. Howard brought suit against D. H. Arnett to enjoin the collection of the judgment which had been rendered in his favor against W. O. Howard. D. D. Sublett, to whom the judgment had been assigned, was also made a party defendant. This action continued on the docket until October, 1906, when judgment was rendered perpetually enjoining the defendants from collecting the judgment.

Plaintiff, Jane Arnett, as administratrix of D. H. Arnett, and Ambrose Arnett, brought this action against W. O. Howard to recover the balance due on the \$500 note executed by Calloway Howard, amounting to the sum of \$225, with interest from January 1, 1897, and also the costs in the suit of D. H. Arnett against Calloway Howard, and to enforce the lien reserved on the land to secure the payment of said note. Judgment was rendered in favor of the defendant, and plaintiff appeals.

[1, 2] As a defense to plaintiff's claim defendant pleaded res judicata and the statute of limitations. The plea of res judicata we deem it unnecessary to consider. As to the plea of the statute of limitations, the following facts appear: In the suit on the \$500 note of D. H. Arnett against Calloway Howard, the former obtained a judgment against Calloway Howard on February 6, 1900. This action was not commenced until September 14, 1900. The liability of the assignor of a promissory note implied by law from the contract of assignment is barred by the lapse of five years after the maker of the note was prosecuted to insolvency. *Gilmore v. Green*, 14 Bush, 772. In this case suit was not brought for more than nine years. Counsel for plaintiff insists, however, that during six years of this time there was a judgment against the assignor, W. O. Howard, which suspended the running of the statute. There might be some merit in this contention if the judgment had been merely erroneous. As a matter of fact, however, the judgment was void because rendered at a time when W. O. Howard, the assignor, was not before the court, and was so adjudged in the suit by W. O. Howard against D. H. Arnett and others to enjoin its collection, and the latter judgment is still in full force and effect. Being void, the judgment against the assignor did not suspend the running of the statute in his favor. That being true, plaintiff's right of action on the assignment was barred when the action was instituted.

[3] But plaintiff insists that, even if it be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



true that her right of action is barred, yet she is entitled to recover, because the assigned note is secured by a lien on the tract of land which D. H. Arnett conveyed to the defendant. The parts of the deed of December 19, 1898, executed by D. H. Arnett to W. O. Howard, bearing on the question of lien are as follows: "Witnesseth: That for and in consideration of \$500.00, secured to be paid by part of note of \$500.00 executed to the party of second part by Calloway Howard for \$500.00, two hundred and forty dollars of which is part of the above consideration, all of which said note being assigned to the party of the second part, and which note is now in litigation in the suit of the party of the first part against Calloway Howard, etc., in the Magoffin circuit court, the balance of said consideration being evidenced by notes of the parties of the second part to the party of the first part amounting to \$260.00, all of said consideration being interest from February, 1898 until paid. \* \* \* A lien is hereby retained on the land hereby conveyed for the payment of the unpaid purchase money herein before named."

From the foregoing provisions of the deed it will be observed that the whole consideration for the deed was \$500. Of this the sum of \$240 was secured by the assignment of the Calloway Howard note. The balance of \$260 was represented by the notes of the defendant, W. O. Howard. The lien retained in the deed was merely to secure the unpaid purchase money. It is admitted that W. O. Howard paid the sum of \$260 in personal property. Even if it be conceded that the lien was intended to apply to the Calloway Howard \$500 note, it secured nothing more than the balance of the purchase price due, or the sum of \$240. In 1900 D. H. Arnett recovered judgment against Calloway Howard for the sum of \$275, which judgment was paid. This equaled, if it did not exceed, the balance of the purchase price, with interest thereon. The assignees of the \$500 note having therefore been paid all of the consideration secured by the lien retained in the deed, it follows that plaintiff is not entitled to a lien on the land purchased by defendant to secure any balance due on the \$500 note.

Judgment affirmed.

#### MURPHY et al. v. MURPHY.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

#### 1. WILLS (§ 601\*)—CONSTRUCTION—ESTATE DEVISED.

Testator bequeathed to his widow all his property, both real and personal, belonging to him at the time of his death, and then provided that she should be his executrix without bond as long as she remained a widow. *Held*, that such later clause did not limit the quality of the estate previously devised and that the widow acquired the fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 34\*)—QUALIFICATION TO ACT—MARRIED WOMAN.

Testator's widow by remarrying thereby becomes disqualified to continue to act as his executrix.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 223-226; Dec. Dig. § 34.\*]

Appeal from Circuit Court, McCracken County.

Action between Aubrey E. Murphy and others and Nannie H. Murphy. Judgment for the latter, and the former appeal. Affirmed.

Wm. Marble, of Paducah, for appellants.  
E. H. Puryear, of Paducah, for appellee.

NUNN, J. The only question for our consideration on this appeal is to determine the interest of Nannie H. Murphy under the will of her husband, Z. T. Murphy. The will of Z. T. Murphy reads as follows:

"I, Z. T. Murphy, being of sound mind and realizing the certainty of death do will and bequeath to Nannie H. Murphy (my wife) all of my property both real and personal belonging to me or that may belong to me at my death. I also appoint my wife Nannie H. Murphy my executor without bond as long as she remains a widow. This being my last will and testament. This June 18, 1903.

his  
"Z. T. X Murphy."  
mark

It is clear that he gave to his wife, Nannie H. Murphy, all of his property, both real and personal, that belonged to him at his death, without any restrictions or limitations whatever. It appears that some question arose as to her ability to make a good title to the land from the following separate clause of the will: "I also appoint my wife Nannie H. Murphy my executor without bond as long as she remains a widow."

[1, 2] From that clause it is contended that she only received a life estate in the property, and that at her death the property should go to the children of Z. T. Murphy. The testator does not say anything about, or even intimate, how his property should go by this clause; but he only says that his wife should not be required to give bond until she again married, which was unnecessary, for the reason that she could not act as executrix in case she married again.

It is evident that the writer of the will was illiterate as is evidenced by this clause, and the testator was illiterate as shown by the making of a mark to his signature. He at no place in his will states to whom his property should go in case his wife married again, or at her death. It is impossible to construe the language of the will to give her a life estate, with remainder to his children. It is certain from the will that Z. T. Murphy had great confidence in his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

wife, and that she would be fair and just to the children, and that he was willing to give all of his property to her, believing that she would deal fairly with the children. In *Anderson v. Hall's Adm'r*, 80 Ky. 91, the court said: "To properly construe a will is to ascertain the intention of the testator, either from its express words or the necessary inference resulting from their use."

The intention of the testator in the case at bar was to give to his widow all of his property owned by him at the time of his death, without any limitations or restrictions whatever. If he had intended to give to her only a life estate, he would have said so. That part of the will saying that she should act as executor without bond until she married had no reference to the property, or of giving her a life estate in it. It is clear that she took the fee in the estate left by him.

The judgment is affirmed.

#### MCDOWELL v. EDWARDS' ADM'R.

(Court of Appeals of Kentucky. Dec. 16, 1913.)

##### 1. CONTRACTS (§ 96\*)—VALIDITY—ASSENT OF PARTIES.

The law looks with suspicion on transfers of property, by persons mentally or physically infirm, to those having custody of them; and, even when the parties in good health stand in a confidential relation to each other, the burden is on the stronger character who procures an advantage to show that the transaction was fair, and relief will be afforded in equity in all cases in which influence has been acquired and abused, or confidence reposed and betrayed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 441, 1155, 1169; Dec. Dig. § 96.\*]

##### 2. FRAUD (§ 50\*)—BURDEN OF PROOF.

Ordinarily the burden of proving actual fraud is on the party alleging it, but where fraud implied from fiduciary or confidential relations of the parties is charged, the burden is on the person against whom the complaint is made to show the fairness of the transaction.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.\*]

##### 3. CONTRACTS (§ 99\*)—VALIDITY—ASSENT—FRAUD.

Evidence held to require a finding that a contract made by decedent a few days prior to his death, and after he had been stricken with paralysis, by which he conveyed all his property to the husband of his niece in consideration of care, had been obtained by undue influence of the grantee, and was therefore void.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 443-453, 1197-1199, 1799, 1800; Dec. Dig. § 99.\*]

##### 4. APPEAL AND ERROR (§ 1009\*)—FINDINGS OF CHANCELLOR—REVIEW—CONFLICTING EVIDENCE.

A finding of the chancellor based on conflicting evidence will not be reversed on appeal, where the Court of Appeals is not convinced that the chancellor has erred to the prejudice of the substantial rights of appellant, or has merely a doubt as to the correctness of the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

Appeal from Circuit Court, Larue County.

Action by George W. Edwards' Administrator against James McDowell. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Graham and Williams & Handley, all of Hodgenville, for appellant. O. M. Mather, of Hodgenville, for appellee.

MILLER, J. This is an appeal from a judgment of the Larue circuit court, which canceled a contract, dated January 11, 1912, between appellant, James McDowell, and George W. Edwards, eight days before the latter's death. Edwards was about 70 years of age, and without children. In January, 1911, his wife had obtained a divorce from him. For several years previous to his death, Edwards had not kept house, but had lived in different places with his relatives. He had lived some three years with his nephew, Jesse Simpson, in Kansas, returning to Kentucky in 1911. In May of that year he went to Illinois, where he remained until November 22, 1911, when he returned to Kentucky and went to the residence of the appellant, McDowell, who was the husband of Edwards' niece. He remained at McDowell's from November 22d to December 20th, when he went to the home of Mrs. Maffet, who was also his niece. The Maffet home was some six or seven miles from the McDowell home. Edwards remained at Mrs. Maffet's until January 1, 1912, when McDowell carried him back to the McDowell home. On Sunday, January 7th, Edwards was stricken with paralysis, which affected the entire left side of his body and face, making it difficult for him to talk. Dr. Jones was called in, and visited him on January 7th, 8th, 9th, and 11th, prescribing for him daily. On December 26, 1911, while he was at the home of Mrs. Maffet, Edwards wrote a letter to his nephew, Jesse B. Simpson, and his wife, in Kansas, saying he wanted to go to Kansas and live with them the rest of his days, and that he had better health in Kansas than in any other place. Mrs. Simpson answered promptly, about January 2d, giving her uncle a cordial invitation to come and live with them as long as he desired. The letter from Edwards to Simpson is in the record, but Mrs. Simpson's answer has not been produced. It was directed to "G. W. Edwards," in the care of "James McDowell, Buffalo, Ky.," and mailed, as above stated, about January 2, 1912. On Thursday morning, January 11th, McDowell telephoned to W. M. Graham, an attorney at Hodgenville, to meet him at Buffalo, an intermediate point about six miles from Hodgenville. Graham answered the summons, and met McDowell at Buffalo, where Graham, from information given him by McDowell, drew the following contract:

"This contract made and entered into this the 11th day of January, 1912, by and between G. W. Edwards, of Buffalo, Larue

County, Ky., party of the first part, and Jas. McDowell, of the same town, county, and state, party of the second part, witnesseth:

"That whereas party of the first part has for some time lived with second party, and whereas the said second party has taken care of first party and has nursed and cared for him during a case of sickness and has always been kind to first party and has been very mindful of his comforts and has furnished board and lodging: Now for and in consideration of all the above and the further consideration that the said second party will permit first party to live at his home during the remainder of his natural life and will care for him and will take care of him and furnish him board and lodging and clothes, and medicine, and doctors and all necessities of life and will furnish for the said first party a decent burial, and for the further consideration of one dollar cash in hand paid, the said first party does hereby transfer and assign to second party all of his personal property of every kind and nature and same becomes immediately the property of said second party. Second party hereby acknowledges receipt of the said personal property from the hands of first party. It is understood and agreed by and between the parties hereto and is made a part of this contract that if the first party refuses to reside at the home of the second party then second party is released from obligations under this contract as long as first party resides away from the residence of said second party.

"Given under our hands, this the 11th day of January, 1912.

his  
"G. W. X Edwards.  
mark  
"Jas. McDowell.

"Witness' signatures:

"Bruce McDowell.  
"E. L. Atherton."

Graham and McDowell returned to McDowell's residence, where Graham went into Edwards' room and remained there, talking with him, for perhaps an hour. He says he found Edwards rational; and, after reading the contract over to him, Edwards said it expressed the contract between him and McDowell, and executed it, by making his mark in the presence of witnesses. Dr. Jones saw Edwards later during that day, and says that while Edwards' temperature had, on former days, gone up as high as to 101 and 102 degrees, it was normal on the afternoon of the 11th, when he visited Edwards for the last time. He was not called to see Edwards after the 11th, but communicated daily, by telephone, with those having him in charge. On Friday January 19th, Edwards died; and on February 17, 1912, his administrator brought this action against McDowell to cancel the contract between Edwards and McDowell, upon the ground that it had been procured through fraud and undue in-

fluence. Edwards had been an industrious and frugal farmer, and left an estate of about \$2,000 in cash and notes. The notes had been turned over to McDowell before the agreement had been reduced to writing, but after it had been made. The chancellor canceled the contract, and from that judgment McDowell appeals.

The testimony as to Edwards' mental condition after January 7th, when he was seized with paralysis, is not very satisfactory. We do not deem it necessary to discuss the evidence in detail. While the opinions of the witnesses are contradictory upon the subject of Edwards' mental capacity to make the contract, there is little difference between them as to Edwards' physical condition from the time he was stricken on January 7th until his death on the 19th. According to Dr. Jones the paralysis was caused by a flow of blood from a ruptured blood vessel in the brain of Edwards. On several days his temperature rose to between 101 and 102 degrees; and, although he was helpless physically, on more than one occasion he called for his clothes, in the night, insisting that he must dress and go out, although he was really unable to rise from his bed, and the weather was severely cold, and the ground covered with a deep snow. On the night of January 9th, the attendants became alarmed, thinking Edwards was dying. It is true that while two witnesses give opinions to the effect that Edwards had sufficient mental capacity to make the contract, and several others relate facts from which it is argued that Edwards was competent, at least one witness is even more positive that he was not competent. And although this witness last referred to—Miss Tabitha McDowell—was impeached, she was fully corroborated by Sutherland upon the important point that Edwards had hallucinations upon the subject of his ability to dress and go out of the house on a severe winter night, above referred to. The letter to Mrs. Symson shows that Edwards really desired to go to Kansas, for his health; and her generous answer shows that his confidence in her was not misplaced. Mrs. Symson's letter was mailed about January 2, 1912, and should have reached Edwards before January 11th, the day the contract was made. Its absence is unexplained. Taking all the evidence together, however, it is impossible to avoid the conclusion that Edwards was in a very serious condition from the time he was stricken on Sunday, January 7th, until his death on January 19th. He was confined to his bed during the whole of that period, suffering from a cerebral hemorrhage, and gradually sinking to his death.

[1] The law looks with suspicion upon the transfers of property, by persons mentally or physically infirm, to those having custody of them. Even when parties in good health stand in a confidential relation to each other, the burden is upon the stronger

character, who procures an advantage, to show that a transaction was fair; and relief will be afforded in equity in all such transactions in which influence has been acquired and abused, in which confidence has been reposed and betrayed. *Allore v. Jewell*, 94 U. S. 512, 24 L. Ed. 260. The relief stands upon the general principle applying to all the varieties of relations in which dominion may be exercised by one person over another. *Smith v. Kay*, 7 H. L. Cas. 750; *Tate v. Williamson*, L. R. 2 Ch. 61.

In *Talbott v. Bedford*, 21 Ky. Law Rep. 897, 53 S. W. 294, a mother, after she became mentally and physically infirm, conveyed to her two sons, who resided with her, and largely attended to her business, her farm on which she resided and the personal property thereon, in consideration of love and affection, and that they would support her during her life. The deed disposed of her property in a manner different from her declared intention when her mental and physical condition were better; and about the time the deed was made she expressed a prejudice against her other children with whom she had always theretofore been on good terms. The court canceled the deed, holding that the evidence of the prejudice against her other children was sufficient to authorize the inference that it had been engendered by the other children.

In *Koger v. Koger*, 92 S. W. 961, 29 Ky. Law Rep. 235, it was held that the unreasonable and unnatural disposition of the grantor's estate by a deed, taken in connection with his age, his mental and physical infirmities, left little room for doubt that the grantor would not have made such a disposition of his estate if he had been competent to understand the nature of the transaction, and left to the exercise of his own judgment; and the fact that the grantor had stated to a number of witnesses prior to the making of the deed that he intended to make a different disposition of his property was cited as evidence of undue influence. In that case the court said: "It is extremely difficult to show by evidence the exercise of fraud or undue influence, and in almost every case where these questions arise they must be established, if at all, by the circumstances."

In *McElwain v. Russell*, 12 S. W. 777, 11 Ky. Law Rep. 649, a deed made by a paralytic, 55 years old, to his physician 10 days before the death of the patient, was canceled.

*Smith v. Snowden*, 96 Ky. 32, 27 S. W. 855, 16 Ky. Law Rep. 353, was an action to set aside a conveyance by parents, who were 70 years old, and illiterate, to two of their children who lived with them. The court said: "In the case under consideration the grantors were old, ignorant, and enfeebled by disease; the grantees were vigorous, aggressive, and already in charge of the persons and the property of the grantors. We may say in general that when such a relation

exists the person obtaining the benefit must show, by the clearest evidence, that the transaction was freely and voluntarily entered into, and devoid of inequitable incidents."

In *Best v. House*, 113 S. W. 849, the court emphasized, in the following language, the fact that it requires a greater mental capacity to make a deed than it does to make a will: "Appellants' counsel concede that he might have had capacity sufficient to make a valid will at the date of the conveyance, but contend that he did not have to make a deed, and cite many cases showing that it requires more mental capacity to make a deed than it does to make a will. The cases in effect hold that a vendor must have mental strength and understanding to compete with his business antagonist and to protect his own interest; but the testator has no antagonist to meet, and is not called on to consider whether or not he will be benefited or injured by the act in which he is engaged; that the ordinary business affairs of life involve a contest of reason, judgment, experience, and the exercise of mental powers not necessary to the testamentary disposition of property. See *Bramel v. Bramel*, 101 Ky. 75, 39 S. W. 520 [18 Ky. Law Rep. 1074], *American & English Ency. of Law*, vol. 28, p. 74, and *Ring v. Lawles*, 190 Ill. 520, 60 N. E. 881."

Perhaps one of the best statements of the rule governing such cases is to be found in the late case of *Hoeb v. Maschinot*, 140 Ky. 330, 131 S. W. 23, where this court said: "Where there exists between two persons a relation of confidence and trust, by which one exerts such an influence over the judgment of the other as to subvert the latter's will and independence, a conveyance by the latter to the former will be set aside as fraudulent upon seasonable complaint. Whether such influence was exerted is a question of fact to be determined from the circumstances. Evidence of the fact may consist of such relationship of blood, or consanguinity, or as attorney and client, guardian and ward, physician and patient, and the like; and, when such relationship is shown, and a voluntary conveyance beneficial to the grantee, the burden of proving that in that transaction the other mind acted freely, of its own volition, is on the person benefited, or the conveyance will be set aside. *Smith v. Snowden*, 96 Ky. 32 [27 S. W. 855, 16 Ky. Law Rep. 353]; *Maze's Ex'r v. Maze* [99 S. W. 336], 30 Ky. Law Rep. 679. The reason of the rule is, it is not customary for people to give away their property, particularly to strangers in blood. It is also known that one who has the entire confidence of another can induce the latter to do with his property, that which a stranger could not. Everyday observation is full of incidents of overreaching of that character. Such abuse of confidence is in law a fraud."

In *Johnson v. Stonestreet*, 66 S. W. 621, 23 Ky. Law Rep. 2102, a deed made by a man

80 years of age to a person with whom he lived, conveying real estate worth from \$2,500 to \$3,000, in consideration of the grantee's undertaking that he would support the grantor for the remainder of his life, was canceled, although the grantor was not shown to have been of unsound mind. In that case the court said: "Under all the facts and circumstances we conclude that the contract is an unconscionable bargain obtained by appellant; and, as no ties of blood, or even long friendship, are shown to have existed, the chancellor, looking at all the facts and surroundings, was authorized to reach the conclusion that the contract and deed were obtained by undue influence. Proof of such facts is generally circumstantial from the very nature of the case, and we are of the opinion that the facts and the circumstances shown in the proof here are sufficient to sustain the judgment and decree of annulment and cancellation of the deed."

In *Bozarth v. Banister*, 143 Ky. 476, 136 S. W. 902, it was held that where the grantee is the son of the grantor, who is enfeebled with age and lives with him, and has his confidence, only slight evidence of undue influence is necessary to authorize the setting aside of the deed on that ground. See, also, *Hall v. Orme*, 146 Ky. 487, 142 S. W. 1077.

[2] Ordinarily, the burden of proving actual fraud is on the party alleging it; but, where fraud, implied from the fiduciary or confidential relation of the parties, is charged, the burden is on the person against whom the complaint is made to show the fairness of the transaction. *Shacklette v. Goodall*, 151 Ky. 20, 151 S. W. 23.

[3] Furthermore, it will be observed in this case that the consideration for the deed to appellant was practically nothing, in view of the clearly apparent fact that Edwards was upon his deathbed at the time the contract was made, and could not possibly live longer than a few days or weeks at most. This fact, taken in connection with the other circumstances attending the transaction, fully justified the chancellor in canceling the contract.

It is contended by appellant that the weight of the testimony is with him, and that it has not been shown that Edwards was incapable of making the contract, or that undue influence had been exercised in its procurement. But in cases of this character the burden is upon the party who has obtained the advantage, and the verbal testimony of witnesses must be considered in connection with the facts and attending circumstances which surround the transaction; and, when the facts of this case are considered, there is no escape from the conclusion that Edwards was in no condition to transact business, much less to make a contract disposing of his entire estate. It was only four days after he had been stricken

with paralysis, and less than two weeks before his death.

[4] If, however, we should be in doubt as to this conclusion, we would nevertheless be slow in setting aside the judgment of the chancellor upon a question of fact. The rule is that where the evidence is conflicting, and the court is not convinced that the chancellor has erred to the prejudice of the substantial rights of the appellant, or has merely a doubt as to the correctness of the judgment, it will not be disturbed. *Byassee v. Evans*, 143 Ky. 415, 136 S. W. 857; *Kirkpatrick's Ex'r v. Rehkopf*, 144 Ky. 134, 137 S. W. 862; *Wathen v. Wathen*, 149 Ky. 505, 149 S. W. 902; *Norris v. Isaacs*, 149 Ky. 709, 149 S. W. 991; *Bond v. Bond*, 150 Ky. 392, 150 S. W. 363; *Salmon v. Martin*, 156 Ky. 309, 160 S. W. 1058.

Judgment affirmed.

#### COOKE-JELICO COAL CO. v. RICHARDSON'S ADM'X.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

##### 1. MASTER AND SERVANT (§ 96\*)—INJURIES TO SERVANT—NEGLIGENCE.

In an action for the death of a servant, a recovery cannot be had upon bare proof of the master's negligence and the injury to the servant, but it is necessary to show that the injury was the natural and proximate result of the negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 157, 158, 162; Dec. Dig. § 96.\*]

##### 2. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—ACTIONS—JURY QUESTION.

In an action for the death of a servant, evidence of the master's negligence in failing to properly support the roof of a mine and in allowing one of the props to be taken from near the place of the accident held insufficient to go to the jury to show that his negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

##### 3. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT—CARE OF MASTER.

While a mining company is liable for the death of a miner caused by a fall of rock from the roof of the place of work, if the place was not timbered owing to the negligence of its inspection officers, yet if the miner's own work made the room dangerous and, knowing of the danger, he remained therein, he assumed the risk, and no recovery can be had against the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from Circuit Court, Whitley County.

Action by Ed Richardson's Administratrix against the Cooke-Jellico Coal Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Tye & Siler, of Williamsburg, for appellant. H. C. Gillis, B. B. Snyder, and J. B. Snyder, all of Williamsburg, for appellee.

CLAY, C. Ed Richardson, a coal miner, in the employ of the Cooke-Jellico Coal Com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pany, was struck by a falling rock and killed. In this action for damages against the coal company, his administratrix recovered a verdict and judgment for \$2,500. The coal company appeals.

Plaintiff based her cause of action on the failure of the defendant to use ordinary care to furnish decedent a reasonably safe place in which to work. In this connection she relied on four specific acts of negligence; (1) The negligent planning, surveying, and excavation of the mine; (2) failure to inspect; (3) failure to cross-timber; (4) the removal of a prop set by decedent.

Richardson was a miner of several years' experience. He had not only worked in defendant's mine for a number of years but had acted as foreman for another mine for about ten months. At the time of the accident he was working in a room neck which had been driven about 20 feet 4 inches from the entry. The room neck was 10 feet 4 inches wide at the entry and 8 feet 5 inches wide at the face of the coal. Ahead of him was a solid block of coal about 300 feet in length. On the right of the room neck was a block of coal from 26 to 30 feet wide. According to the evidence for plaintiff, the block of coal on the left of the room neck had been "gobbed out" on the far side and had been filled in with rocks and debris. At the beginning of the entry this block was only 12 feet wide. It appears, however, that this block gradually widened as it extended back, and at a point opposite the end of the room neck was about 72 feet wide. The entries were indicated on the map. The room necks and rooms were not located on the map, but their location was left to be determined by the mine foreman to the best advantage. In locating the room necks the mine foreman made no measurements. Plaintiff further proved by two witnesses that a stump 12 feet wide was not sufficient for safety, as it would not afford proper support for the roof. Prior to the accident Richardson had fired three shots in the coal. He had loaded and removed the coal shot down from under the rock. The rock that struck decedent was 7 feet 4 inches long and 7 feet 2 inches wide. It reached almost from one rib to the other and extended right up to within a short distance from the face of the coal. Near the face of the coal the rock was thin, tapering down to a feather edge. When it reached a point about 4 feet from the face, it was a foot thick. It then tapered down to another feather edge to a point where it reached a small hill seam.

On the Saturday preceding the Tuesday on which Richardson was killed, Charles Cox, a track layer, removed from the room neck a small prop. This prop was about 6 feet from the entry and about 8 feet from the edge of the rock that fell. He knocked the prop out with a small hammer. It had been about three days since the mine foreman was in the room neck. When he was there he did

not see the prop removed by Cox. Two of plaintiff's witnesses testified that the removal of this prop might have caused the rock to fall, while another of plaintiff's witnesses testified that it would not have had any effect on the other place. There was also testimony to the effect that it is the duty of the miner to set timbers when he widens a room, and also the duty of the miner to set props, while in the case of a neck before it is widened it is the duty of the company. It is the duty of the mine foreman to watch for these places and see that they are timbered.

According to the evidence for the defendant, the accident happened in the room neck at a place 20 or 25 feet from where the pillar on the left had been gobbed out. The pillar on the left was entirely sufficient to support the roof of the mine, and furthermore the fact that the pillar on the left had been gobbed out, even if insufficient to support the roof at that point, had no effect whatever on the roof at the place where Richardson was killed. Defendant also proved by a number of witnesses that the removal of the prop 8 feet from the rock could in no way have affected the roof at the place where the rock fell. It was further shown that it was decedent's duty, after removing the coal from under the rock, to sound the roof for the purpose of ascertaining whether it was drummy or solid. While it was the foreman's duty to have the room necks cross-timbered if he knew of their condition, it was also the duty of the miner to apprise him of this fact, and the latter, who was digging the coal and removing the support from the roof, had a better opportunity to know of its condition than the mine foreman, who had the whole mine to look after. Several witnesses for the defendant also testified that the accident was not due to a sag or squeeze in the mine at that time, nor had there been any sag or squeeze since that time.

The court told the jury in substance: (1) That it was the duty of the defendant to use ordinary care to provide and furnish plaintiff's decedent a reasonably safe place in which to work; (2) it was the duty of the defendant to inspect or cause to be inspected, by its mine foreman, superintendent, or other competent person, its entries and working places, including that in which plaintiff's decedent was killed, and to use ordinary care to keep and maintain such place in such condition as to be free from loose, overhanging slate or rock; (3) it was the duty of the defendant company to support with crossbeams any and all loose or overhanging slate, if any, which could not be taken down or removed in the room neck in which plaintiff's decedent was assigned to work, and which loose, overhanging slate was known to the defendant company, its officers or agents, or by the exercise of ordinary care could have been known to it or them; (4) it was the duty

of the defendant company to so plan, lay out, and drive its entries, rooms, room necks, and other openings and passageways as to leave at regular intervals sufficient pillars of coal in their natural bed to support the roof of the mine and to render same reasonably safe, and if they believed from the evidence that decedent, while engaged in driving the room neck mentioned in the evidence, and while exercising ordinary care for his own safety, was killed by rock or slate falling from the roof of the room neck, which fall of rock or slate was the direct and proximate result of the carelessness or negligence of the company in failing to perform any one of the aforementioned duties, and that the dangerous and unsafe condition of the room neck, if it was dangerous or unsafe, was known to the defendant, its officers or agents, or by the exercise of ordinary care could have been known to them, and was unknown to the decedent, and could not have been known to him by the exercise of ordinary care, then the law was for the plaintiff and the jury should so find. After giving the converse of this instruction and the measure of damages and defining ordinary care and negligence, the court also gave the usual instruction on contributory negligence.

[1, 2] We have repeatedly held that in an action such as this it is not sufficient for the plaintiff merely to prove negligence and injury, but that it is necessary to show that the proven injury was the natural and proximate result of the proven negligence. *C. N. O. & T. P. Ry. Co. v. Zachary's Adm'r*, 106 S. W. 842, 32 Ky. Law Rep. 680; *Stuart's Adm'r v. N. C. & St. L. Ry. Co.*, 146 Ky. 131, 142 S. W. 232. Under this rule, the evidence on the question of the removal of the prop and on the further question of the insufficiency of the pillars to support the roof of the mine did not authorize the submission of the case to the jury.

On the question of the removal of the prop the evidence is to the effect that the prop was small and was so insecurely fastened that it could be knocked out with a small hammer. Furthermore the prop was seven or eight feet from the edge of the rock that fell, and between the prop and the rock was a small hill seam. The prop was removed on Saturday. The accident took place on Tuesday. No witness stated that the removal of this prop caused the roof to fall. One witness stated that "it might have"; another witness said "it could have." It was incumbent upon plaintiff to show that the fall of the roof was the natural and probable result of the removal of the prop. Mere conjecture is not proof, especially when the undisputed facts show the contrary. There was no evidence of a sag or squeeze. A large rock fell from the roof. The break stopped at the hill seam between the prop and the rock, and the prop was seven or eight feet from the rock. Under these circumstances, the removal of

the prop could not have caused the rock to fall.

On the question of the insufficiency of the pillars, the evidence is as follows: In front of the room neck was a solid block of coal about 300 feet in width. On the right-hand side was a pillar of the approved size. On the left-hand side the pillar was only 12 feet at the entry but gradually widened to about 72 feet at a point opposite the end of the room neck. On the far side of this pillar there was a gobbled out place. There was not only no evidence showing a squeeze or sag in the mountain at the time of the injury, but there was no evidence of a sag or a squeeze even at the time of the trial. Had the pillar on the left-hand side been insufficient, it would have been crushed had the mountain taken weight. No such condition is shown. While there was testimony tending to show that a pillar 12 feet wide was insufficient to support the roof, there was no evidence tending to show that the insufficiency of the pillar at this point had caused the roof of the entry some 20 or 25 feet away to fall. That being true, the question of the insufficiency of the pillar should not have been submitted to the jury.

[3] As to the duty of inspection and cross-timbering, a different question is presented. The facts of this case differ from those in *Smith's Adm'r v. North Jellico Coal Co.*, 131 Ky. 197, 114 S. W. 785, 28 L. R. A. (N. S.) 1266. In that case there was a "rotten top." Smith was engaged in cutting coal with a machine. It was his duty to call for props. Immediately after cutting out a block of coal, the roof fell. There was no proof conducing to show that it was the duty of the foreman of the mine to inspect the place where Smith was at work in order to see whether or not it was in a reasonably safe condition. Nor was there any proof that after the block of coal was cut out the foreman, in the exercise of ordinary care, could have ascertained that cross-timbering was practicable and necessary. In the present case it is affirmatively shown that it was not only the duty of the defendant to cross-timber the neck where plaintiff was at work, after being informed that cross-timbering was necessary, but to inspect the room neck for the purpose of ascertaining whether or not cross-timbering was practicable and necessary and, if practicable and necessary, to have the cross-timbering done. It was also made to appear that the foreman had not been in the room neck for two or three days, and there are certain physical facts from which it could be reasonably inferred that some time had elapsed between the removal of the coal and the falling of the rock, and that ordinary care in inspecting the room neck would have disclosed conditions showing the necessity for cross-timbering in order to render the place where decedent was at work reasonably safe. Under these circumstances the question was for the jury.

On another trial the court will instruct the jury as follows:

(1) It was the duty of the defendant's foreman to use ordinary care to cross-timber the neck where decedent was at work; and if you believe from the evidence that, after the decedent removed the coal from the place where he was at work, the condition of the roof was such as to render it practicable and necessary to cross-timber the place in order to make it reasonably safe for plaintiff to work there, and this condition, if it did exist, could have been known to the foreman by the exercise of ordinary care on his part in inspecting the place where decedent was at work, and he failed to exercise such care, and by reason of such failure, if any, the decedent, while exercising ordinary care for his own safety, was injured and killed, you will find for the plaintiff. Unless you so believe you will find for the defendant.

(2) If the decedent, by the work he did, made the place dangerous, and he knew the danger, or by ordinary care in the discharge of his duties should have known it, and with this knowledge he continued at work, he took the risk, and you should find for the defendant.

In addition to the foregoing instruction the court will give other instructions defining ordinary care and fixing the measure of damages.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

#### COMPTON et al. v. MOORE et al.†

(Court of Appeals of Kentucky. Dec. 19, 1913.)

##### 1. WILLS (§ 614\*)—CONSTRUCTION—NATURE OF ESTATES AND INTERESTS CREATED.

A will in which testatrix provided that her niece should have the control of her property, that the rents and profits should not be alienated from her except in the event of her marriage, when she should share equally with her three brothers, and that at the death of any one of the four the others should inherit the life interest until the last one, was not so uncertain and ambiguous that the meaning could not be ascertained; but the purpose was to devise to the niece a life estate and thereafter to the three brothers a joint life estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.\*]

##### 2. WILLS (§ 229\*)—ACTIONS TO DETERMINE VALIDITY—PERSONS WHO MAY ATTACK.

Where testatrix devised life estates in her property and the remainder over to a church, a question raised by her heirs, that the remainder to the church was void, was not academic, since, if it were void, the heirs would inherit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 550-554; Dec. Dig. § 229.\*]

##### 3. WILLS (§ 229\*)—ACTIONS TO DETERMINE VALIDITY—PERSONS WHO MAY ATTACK.

Though escheat statutes, since they are designed to take from corporations property theretofore lawfully acquired, must provide for a forfeiture, and the state, being the party in interest, alone can enforce the forfeiture, yet, as Ky. St. § 319, prohibiting any church from taking or holding exceeding 50 acres of land, is

not an escheat statute, but a mortmain, since it prohibits the acquisition, the heirs of a testatrix, who had devised 300 acres to a church, could raise the question, as they, and not the state, were the parties in interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 550-554; Dec. Dig. § 229.\*]

##### 4. CONSTITUTIONAL LAW (§ 205\*)—RELIGIOUS SOCIETIES (§ 2\*)—CLASS LEGISLATION.

Ky. St. § 319, prohibiting any church or society of Christians from taking or holding exceeding 50 acres of land, applies to all religious organizations of whatever faith, and not to societies of Christians only, and hence is not discriminatory against Christians.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205;\* Religious Societies, Cent. Dig. § 24; Dec. Dig. § 2.\*]

Appeal from Circuit Court, Mercer County.

Action by J. W. Compton and others against Irene Moore and others. From a judgment sustaining defendants' demurrer, plaintiffs appeal. Reversed and remanded.

Jay W. Harlan and Emmett V. Puryear, both of Danville, for appellants. John T. Shelby, of Lexington, and James T. Wilson and B. F. Roach, both of Harrodsburg, for appellees.

TURNER, J. In 1910 Mrs. Rebecca Taylor Harlan died a resident of Mercer county; thereafter in April, 1910, her will, together with several codicils, was probated in the county court of that county. The will and codicils, written wholly by her, are in full, as follows:

"I, Rebecca (Jenkie) Taylor Harlan, declare this my last will, revoking any other made at any time by me.

"I wish my executor to hold my farm and house in which I now live, until all my just debts are paid from rents of said property.

"I give to my niece Irene Moore all my furniture, jewelry, silver and china to be hers absolutely.

"I give my books to my nephew Mead Moore.

"The house in which I now live and my farm in Boyle county given me by my son Wellington Harlan, I leave in the care of and under the control of my niece Irene Moore, in whom I have every confidence. I feel that I am carrying out the wishes of my husband and children in doing this—the rents must not be alienated from her except in so far as I shall state in a private paper to her.

"In the event of her marriage or death the income from said property is to be divided among my nephews, William Moore, Meade Moore, Harlan Moore. In case of her marriage she will share with them the income from the aforesaid property. At the death of any one of these four heirs, the other three inherit the life interest until the last one. At the death of the last one of these four above named heirs, the property is to pass into the control of persons named by my above named heirs, for the use of the Protestant Episcopal Church in Harrodsburg,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 6, 1914.



Kentucky, to become absolutely the property of the Protestant Episcopal Church to be used for the benefit of this parish.

"Any attempt to set aside any of the provisions of my will must be resisted by my executor.

"I name as my executor Frank P. James who has so kindly and efficiently managed my business affairs. He to act without security. Rebecca Taylor Harlan.

"May 8th, 1898.

"As I do not feel able to rewrite my will I add this codicil that I may change one portion of said will. The house in which I now live can be sold if it is necessary, I leave it to my niece Irene Moore to decide—if said property is sold, two hundred and fifty dollars must be given to the Episcopal Church in Harrodsburg, Kentucky. I leave to my niece Irene Moore the disposal of the remainder. Rebecca Taylor Harlan.

"Harrodsburg, Kentucky, November 3rd, 1909.

"The property I leave to my niece Irene Moore during her life, I wish her to have and control whether she marries or not, this I would incorporate in the body of my will if I was now able to re-write my will. She is and has always been to me more like a child than a niece.

"Rebecca Taylor Harlan.

"Harrodsburg, Kentucky, February 14th, 1910.

"Fifty dollars at each recurring Christmas must be given to my nephews. W. J. Moore, fifty dollars. At each recurring Christmas must be given to my nephew Mead Moore, these small bequests I make to my nephews must prove in a very slight degree my appreciation of their kind thoughts of me this season. Rebecca Taylor Harlan.

"Harrodsburg, Ky. Feby. 14th, 1910."

In May, 1911, the appellants Compton and Maddox, heirs at law of Mrs. Harlan, filed this action against her executor and devisees, alleging in the first paragraph of their petition that the provisions of the will were so uncertain, ambiguous, and confused that it could not be ascertained from them what was the meaning of the testatrix, and praying that the same be declared null and void for that reason. In the second paragraph of the petition they seek to have declared null and void the devise in remainder to the church, because, as alleged, it is void under the provisions of section 319 of the Kentucky Statutes; the allegation being that the farm referred to in the will embraces 300 or 400 acres in Boyle county, Ky. To the petition the executor and devisee, Irene Moore, and the Episcopal Church, each demurred, and the lower court sustained each of their demurrers, whereupon the plaintiffs declined to plead further, and the petition was dismissed, and they have appealed.

Whether that action of the lower court was correct involves the determination of these questions: (1) Are the provisions of the will

so confused, ambiguous, and uncertain as that its meaning may not be fairly ascertained? (2) Is the question raised by the plaintiffs purely an academic one, and can the court, if the devise over to the church is void, grant them any present relief? (3) Can the heirs at law raise the question of the validity of the devise over to the church, or must that question be raised in a direct proceeding by the state? (4) Is section 319 of the Kentucky Statutes discriminatory and therefore unconstitutional?

[1] A careful reading of the will and codicils is convincing that the first question made by appellants cannot be sustained. While she does not in terms give a life estate to her niece and three nephews, she expressly leaves the property in the care and control of Irene Moore, and provides that the rents must not be alienated from her except in the event of her marriage, when she shall, with her three brothers, share the income therefrom. The provision that in the event of the marriage of Irene Moore the income from the property is to be divided between her and her three brothers, and the further provision that at the death of any one of these four "the other three inherit the life interest until the last one," is conclusive that she intended each one of them to have a life estate down to the last survivor of the four. This conclusion is strengthened by the facts: (1) That she did not undertake to devise the property to the church until after the death of the last of these four, at which time she provided that it was to become *absolutely* the property of the church; and (2) in the second codicil she refers to it as "the property I leave to Irene Moore during her life."

There seems no reason to doubt from the context of these instruments that it was plainly the purpose, first, to give Irene Moore a life estate in the property devised, and thereafter to give her said three named nephews a joint life estate therein, the survivor among them to have a life estate in the whole.

[2] That the question made by appellants is purely an academic one because of the alleged fact that the court could grant them no present relief, if it should be decided that the devise over to the church was void, is untenable. Appellants are the heirs at law of the testatrix, and, if the devise over to the church is void, the testatrix, save as to the life estates referred to, died intestate as to the remainder interest in this property, and, if she so died intestate, then appellants as her heirs at law inherit an interest in it, and that interest, while the enjoyment of it is postponed, is a present vested interest, and one which they may sell and convey at any time, and realize upon.

[3] Section 319 of the Kentucky Statutes is as follows: "No church or society of Christians shall be capable of taking or holding the title, legal or equitable, to exceeding fifty acres of ground; but may acquire and hold

that quantity for the purpose of erecting thereon houses of public worship, public instruction, parsonage, or graveyard."

It is the contention of appellee that under the terms of this statute, even though the church is incapable of taking or holding the title to this property, the question can only be raised in a direct proceeding by the state for that purpose, and cites *Louisville School Board v. King*, 127 Ky. 824, 107 S. W. 247, 32 Ky. Law Rep. 687, 15 L. R. A. (N. S.) 379, *Miller v. Flemingsburg Turnpike Co.*, 109 Ky. 475, 59 S. W. 512, 22 Ky. Law Rep. 1039, and *Krell-French Piano Co. v. Dengler*, 145 Ky. 202, 140 S. W. 168, as upholding this view.

The *Louisville School Board Case* was where the board, under the provision of a statute that property in the city of Louisville which was escheated to the state should be vested in the school board for the benefit of the schools in that city, sought to recover certain property which had been held by a Louisville banking company for a longer period than allowed by the statute, but which had, after the expiration of the statutory period, and before any proceeding by the commonwealth to escheat it, been sold and conveyed; and the court in that case only held that, if a corporation does hold land in the face of the prohibition of the escheat statute, the title will be good as against the state until it is invalidated in a direct proceeding by the state for that purpose.

The case of *Miller v. Flemingsburg Turnpike Co.*, 109 Ky. 475, 59 S. W. 512, 22 Ky. Law Rep. 1039, was where a vendor of a tract of land to a turnpike company sought to recover the same, after the company had discontinued the use of the road, under the provisions of a statute that such property should revert to the original owner; and there the court held that, inasmuch as the land had been actually sold and conveyed by the owner to the company, and had not been acquired by it by condemnation proceedings, the grantor could not recover, and the title of the company was valid until assailed by direct proceeding for that purpose.

In the case of *Krell-French Piano Co. v. Dengler*, 145 Ky. 202, 140 S. W. 168, it was merely held that, where one sells stock in one corporation to another corporation which is incapable under the law of acquiring it, the seller cannot thereafter raise the question of the buyer's lack of power to buy.

But all of these questions are essentially different from the one confronting us here. Escheat statutes always provide for forfeiture of title to the commonwealth or some subdivision of it; that is, when a corporation or individual holds property which under the law it has no right to hold, the title thereto shall vest and be in the commonwealth. From the very nature of these statutes, no one can enforce them except the commonwealth, because it alone is authorized to assert title.

But in this case we are dealing with an

essentially different kind of statute; it nowhere provides for any forfeiture or escheat, but in unmistakable language provides that the class of societies therein named shall *neither take nor hold* title to real estate in excess of 50 acres. It has none of the characteristics of an escheat statute; it is, on the contrary, a mortmain statute, prohibiting in express terms the acquisition by the societies named of the title to any real estate in excess of the prescribed number of acres. Escheat statutes are designed to take from corporations the title to lands theretofore lawfully held, but which have been held for a longer period than allowed by law and in violation of law; the mortmain statutes are designated to *prevent acquisition* of land by corporations in violation of law. Escheat statutes from their very nature must provide for forfeitures; in mortmain statutes which are intended to *prevent acquisition* of lands there is no necessity for a forfeiture provision. The state under an escheat statute is the party in interest, and of course it alone can go into court, and demand a forfeiture; but in this case, where we are dealing with mortmain statutes which positively prohibit the church from taking the title to this property, but which provide for no forfeiture to the state, the real parties in interest are the heirs at law of the testatrix, who will take it by inheritance if the devise is void.

The case of *Kinney v. Kinney's Adm'x*, 86 Ky. 610, 6 S. W. 593, 9 Ky. Law Rep. 753, was where the heirs at law of a decedent undertook to have a devise declared invalid under the terms of the same statute; but the court in that case held that the devise was to the church in trust to be applied to a charitable purpose, and not for its own use, and was not therefore within the terms of the statutory prohibition. It is significant, however, in that case the question was not raised as to the power of the heirs at law to make that question, and, if it ever occurred to the attorneys or to the court, there is nothing in the opinion to disclose it; but the court did in fact dispose of the case on its merits, and thereby inferentially at least recognized the right of the heirs at law to raise the question. In *re McGraw Estate*, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387; *St. Peter's Roman Catholic Church v. Germain*, 104 Ill. 440; *Church of Redemption v. Grace Church*, 68 N. Y. 570; *De Camp v. Dobbins*, 31 N. J. Eq. 671; *Betts v. Betts*, 4 Abb. N. C. (N. Y.) 317.

[4] The remaining question is whether or not the statute is discriminatory against churches or societies of Christians, and therefore void. Counsel for the church interprets the language of this section to apply to Christian churches or societies of Christians only, and argues that, inasmuch as it is not applicable to societies of Buddhists, Mohammedans, or Jews, it is discriminatory against Christian churches and organizations, and void. It

may be well doubted whether, when this enactment was first made in Kentucky—nearly a century ago—there was any religious organization in this state other than Christians; there can be no doubt that it was intended, and has been at all times intended, to apply to all churches and religious societies. It would be a startling thing to interpret a statute of Kentucky to be discriminatory against churches and societies of Christians when 95 per cent. of the people of the state belong to or affiliate with churches of that faith. On this question it is likewise significant that in the Kinney Case the question never occurred to either the court or counsel.

The question having been passed upon by demurrer in the lower court, and it not appearing in the record what real estate the church now owns, or whether it desires to use, when it may get possession hereafter, any part of the real estate devised up to the limit of 50 acres for the purposes set forth in the statute, we expressly withhold an expression of an opinion as to what it may take.

For the reasons indicated, the judgment is reversed for further proceedings consistent herewith.

**CHRISTIAN-TODD TELEPHONE CO. v. COMMONWEALTH, For Use of CHRISTIAN COUNTY, et al.**

(Court of Appeals of Kentucky. Dec. 19, 1913.)

**1. CORPORATIONS (§ 391\*)—POWER TO REGULATE.**

Power to grant a franchise to a corporation carries with it the power to impose such reasonable regulations as to its exercise as will effectuate the purposes for which it is granted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1573, 1578; Dec. Dig. § 391.\*]

**2. FRANCHISES (§ 2\*)—PROPERTY RIGHT—CONDITIONS.**

Grant of a franchise being in the nature of a vested property right, it is subject to the performance of conditions and duties imposed on the grantee.

[Ed. Note.—For other cases, see Franchises, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**3. CONSTITUTIONAL LAW (§ 63\*)—HIGHWAYS (§ 165\*)—REGULATIONS—POWER—DELEGATION.**

The Legislature, except as restrained by the Constitution, may assume or regain control and supervision of the public highways of the state, either in whole or in part, and such power may be delegated by the Legislature to a subdivision of the state or governmental instrumentality like the fiscal court of a county.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63\*; Highways, Dec. Dig. § 165.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 10\*)—COUNTY HIGHWAYS—USE—NECESSITY OF FRANCHISE—STATUTES—CONSTRUCTION.**

Ky. St. § 4306, confers on the fiscal court of each county general supervision of the pub-

lic roads and authorizes it to prescribe necessary regulations for repairing the same and for the proper management thereof; and section 4679b provides that telephone companies shall have a right to construct and operate telephone lines through any public lands of the state and along public highways, provided that their fixtures shall not interfere with travel. Held, that section 4679b did not give to a telephone company the right to construct and operate its line along the highways of a county without first acquiring, by purchase from the county, a franchise for that purpose, as required by Const. § 164, declaring that no county shall grant a franchise for more than 20 years nor except by sale to the highest bidder after advertisement, etc.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.\*]

**5. HIGHWAYS (§ 165\*)—OCCUPIED GROUND—TITLE.**

The title to ground occupied by a public road is in the adjacent landowners, subject to public use, to whom the possession would revert if the road were abandoned, and the control of such roads, given the fiscal courts by Ky. St. § 4306, is a property right for the use of the counties and the public, of which they cannot be deprived without their consent except by express legislative authority.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 165.\*]

**6. TELEGRAPHS AND TELEPHONES (§ 10\*)—USE OF HIGHWAYS—PAYMENT OF COMPENSATION.**

Under Const. § 164, providing that no county shall grant a franchise except by sale to the highest bidder after due advertisement, a telephone company cannot construct and maintain its line along the highways of a county without first making compensation therefor by bidding for a franchise.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 6; Dec. Dig. § 10.\*]

**7. MANDAMUS (§ 98\*)—REFUSAL TO GRANT—REMEDY.**

Where a telephone company desires to construct and maintain its line along the highways of a county as authorized by Ky. St. § 4679b, and the fiscal court arbitrarily refuses to offer for sale a franchise granting such right, the telephone company can compel such action by mandamus as authorized by Civ. Code Prac. § 474.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 142, 149; Dec. Dig. § 98.\*]

**8. TELEGRAPHS AND TELEPHONES (§ 26\*)—CONSTRUCTION—FRANCHISES—REGULATIONS.**

The fiscal court of a county being authorized to prohibit the use of the highways for the operation of a telephone line without the owner having first purchased a franchise to use the highways, the court was authorized not only to designate where and the manner in which the poles and wires should be located on and across the roads but it was also authorized to impose, as conditions, regulations affecting rates and restrictions to prevent discrimination, etc.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 14; Dec. Dig. § 26.\*]

Appeal from Circuit Court, Christian County.

Suit by the Commonwealth, for the use of Christian County, and by Christian County against the Christian-Todd Telephone Company. Injunction granted, and defendant appeals. On defendant's motion to dissolve an

injunction restraining defendant from maintaining, operating, or constructing its telephone poles and lines on or across the public roads of the county and requiring removal thereof. Denied.

Alexander P. Humphrey, of Louisville, Hunt Chipley, of Atlanta, Ga., Hunter, Wood & Son, of Hopkinsville, Wm. L. Granbery, of Nashville, Tenn., and Humphrey, Middleton & Humphrey, of Louisville, for appellant. John C. Duffy, of Hopkinsville, for appellees.

SETTLE, J. This case is before us on a motion of the Christian-Todd Telephone Company to dissolve an injunction granted by the circuit court whereby it is prevented from maintaining, operating, or constructing its telephone poles and lines upon or across the public roads of Christian county and required to remove them therefrom. The facts out of which the controversy arose are admitted, and they as fully appear from the record, as if presented by proof.

The single question to be decided is: Has the telephone company the right to occupy the public roads of Christian county, with its poles and wires, without a franchise? It is insisted for the county that, under the Constitution and statutes of the state, the telephone company, in order to entitle it to occupy with its poles and lines the public roads of the county, must first obtain, by purchase, from the fiscal court a franchise. On the other hand, it is conceded by the telephone company that the fiscal court has the power and authority to reasonably designate where, and the manner in which, its poles and wires shall be located upon and across the public roads; but it denies the right of the fiscal court to absolutely exclude its poles and wires from the public roads unless and until a franchise has been secured for such use from the fiscal court.

In order that the situation anterior to the issuance of the injunction may be understood, it should be stated that the Christian-Todd Telephone Company was formed by a merger or consolidation of the Cumberland Telephone & Telegraph Company, the Hopkinsville Home Telephone Company, and the Pembroke Home Telephone Company. None of these constituent companies ever obtained or owned a franchise to occupy the highways of Christian county with its poles or wires. One of them, the Hopkinsville Home Telephone Company, did, however, prior to the merger, procure of the fiscal court a permit to erect its poles and lines in the highways under certain regulations set forth in an order of that court; but for this permit no consideration was paid, and it was revoked by the fiscal court after the consolidation of the three telephone companies.

On January 7, 1913, at a regular term of the fiscal court of Christian county, the following order was entered: "Whereas the Cumberland Telephone Company, the Hopkinsville Home Telephone Company, and the

Pembroke Home Telephone Company, each formerly doing a telephone business in this county and recently consolidated under the name of the Christian-Todd Telephone Company, have each and all failed and refused to remove their poles outside of those portions of the roads used by the public for travel and outside of the valleys and ditches along said roads, so as not to interfere with the maintenance and repair of said public roads at various places, when ordered to do so by this court and the officers of this county; and whereas, the said consolidation of the said telephone companies using and occupying the public roads of Christian county and the rights of way thereof have been followed by advance in the rates charged for the service on said lines so using and occupying same, and discrimination in the rates charged to various patrons along the said public roads of this county outside of incorporated cities and towns: It is therefore ordered by this court that any permission, privilege, or consent, if any, heretofore granted or given by this court to either of said telephone companies to use the public roads of this county or any part of the rights of way thereof, or to occupy the same with their poles and wires in the telephone business, is hereby revoked, recalled, and set aside and held to be void and no longer binding on this court. And it is further ordered that a franchise to use, operate, and maintain telephone lines along and across the public roads of this county and along the rights of way thereof be sold by this court at public outcry to the highest and best bidder to erect and maintain a system of telephone poles and wires along the public roads of this county and the rights of way thereof for a period of 20 years from the date of sale and purchase of same, with such restrictions and regulations as to the place of erection, maintenance, and operation of same along said public roads and rights of way thereof, and providing free service through this county fixing rates to be charged therefor, with such other regulations and restrictions as to prevent discrimination, etc., as this court may deem reasonable and just. And it is further ordered that the county attorney prepare and submit such a franchise for the consideration of this court at its next meeting and to be sold as heretofore ordered. The said telephone company, all other persons, and the public are invited to have representatives before this court at its next meeting to discuss the said franchise, its regulations and restrictions as to rates, etc. And this cause is continued for such purpose to the next term of court."

Upon receiving notice of this order the Christian-Todd Telephone Company, by a written communication addressed to the fiscal court, recognized its right to have changed such telephone poles as might be found to obstruct the highways, expressed its willingness to change the location of same and to pay the expense of so doing, and requested

the fiscal court to appoint a representative to go over the highways with a like representative of the telephone company and designate such changes in the location of the telephone company's poles and wires as might be deemed necessary, but the request contained in the communication was not complied with by the fiscal court. Shortly after the entering of the order of January 7, 1913, a telephone franchise, after due advertisement, was offered for sale at public auction by the fiscal court, but neither the Christian-Todd Telephone Company nor any other telephone company appeared at the time and place of sale or made a bid for the franchise. In March following, this action was brought by order of the fiscal court, and the injunction prayed therein against the Christian-Todd Telephone Company was granted by the circuit court, after hearing the evidence introduced by the parties for and against its issuance.

It is manifest that the bone of contention in this case is the attempt of the fiscal court to restrict the power of the Christian-Todd Telephone Company, resulting from its absorption of all other competing telephone companies in Christian county, in the matter of increasing the charges for the use of its lines by the public to an unreasonable or exorbitant extent, for if the fiscal court can compel the telephone company to purchase a franchise as a condition precedent to its use of the public roads of the county by its poles and lines, it can, by the terms of the franchise, impose such reasonable regulations as to rates as will protect the public against the monopoly the latter seems to have acquired. It is equally patent that the telephone company has not been deterred from obtaining the franchise on account of its cost, which, in view of its advantage over other telephone companies from being already in possession of the highways, would be insignificant, but because of the restrictions the franchise would impose upon its business in the matter of regulating rates.

[1, 2] We understand the authorities to be in accord in holding that the power to grant a franchise carries with it the power to impose such reasonable regulations as to its exercise as will effectuate the purposes for which it is granted. This is necessarily so, because, a grant of a franchise being in the nature of a vested right of property, it is subject to the performance of conditions and duties on the part of the grantee. The following excerpt from the opinion in *Moberly v. Richmond Telephone Co.*, 126 Ky. 369, 103 S. W. 714, 31 Ky. Law Rep. 783, will illustrate our meaning: "The city may annex any lawful condition to the exercise of the franchise which becomes a part of the contract under which it is thenceforth used. And we think it was competent for the city to provide, as a condition of the franchise, that the rates to citizens should not exceed the schedule fixed in the ordinance or any

future ordinance." To the same effect is *City of Louisville v. Louisville Home Telephone Co.*, 149 Ky. 234, 148 S. W. 13. In the opinion, in quoting from *Joyce on Franchises*, § 342, it is said: "'So it is declared that it has never been doubted that the legislative authority, in making a grant of a corporate franchise, can prescribe such terms and such conditions for its acceptance and for its enjoyment as it shall deem best, not inconsistent with constitutional limitations. The manner of enjoying the franchise, its life, its scope, are all subjects of legislative control.' In section 348 it is further said: 'If a city grant a franchise to a corporation for a term authorized by law, and the conditions thereof are accepted, the same constitutes a contract between the parties, the violation of which is the subject of litigation in an ordinary proceeding.'" *Chicago General Ry. Co. v. City of Chicago*, 176 Ill. 253, 52 N. E. 880, 66 L. R. A. 959, 68 Am. St. Rep. 188.

We now come to the consideration of the primary question: Must the Christian-Todd Telephone Company obtain of the fiscal court of Christian county a franchise to entitle it to occupy, with its poles and lines, the public roads of the county? It is insisted for the telephone company that the fiscal court is without power to grant such a franchise, and that the Legislature, by section 4679b, Kentucky Statutes, has granted to telephone companies the use of the highways, outside of cities and towns, subject only to the power in the fiscal court to prescribe certain police regulations in the matter of designating where and how the place and lines should be located.

[3] It is undoubtedly true that the Legislature may, except as restrained by the Constitution, assume or regain control and supervision, in whole or in part, of the public roads of the state. And it is likewise true that such power may be delegated by the Legislature to a subdivision of the state or governmental instrumentality like the fiscal court, if there be nothing in the Constitution to prevent it.

[4] But does section 4679b give the telephone company the independent right to occupy the public roads of Christian county with its poles and wires, subject only to police regulation by the fiscal court as to where and how they shall be placed? That section provides: "That any telephone company chartered and incorporated under the laws of this or any other state, partnership or individual, shall, upon making just compensation as hereinafter provided, have the right to construct, maintain and operate telephone lines through any public lands of this state and on and across and along all public roads and turnpikes, and across and under any navigable waters and on and across the land of any person: Provided, that fixtures of said company shall not interfere with the travel on or along said roads, nor obstruct the navigation of said waters. If such tele-

phone company, partnership or individual, cannot obtain the right of way by contract, companies, partnerships or individuals may proceed to institute condemnation proceedings to obtain the desired right of way, which proceedings shall be substantially the same as are provided in chapter 125a (section 4679a, Kentucky Statutes), in respect to proceedings to acquire the right of way for telegraph companies. The provisions of this act shall not apply to any incorporated town or city." The provisions of this section are much like those of section 4679a with respect to telegraph companies; practically the only difference being that by the latter section telegraph companies are given the right to condemn railroad rights of way but not the property of individuals. On the other hand, telephone companies are given the right to condemn the property of individuals but are not given the right to condemn railroad rights of way. In this connection, section 4306, Kentucky Statutes, should also be considered. It provides: "The fiscal court of each county shall have general charge and supervision of the public roads and bridges therein, and shall prescribe necessary rules and regulations for repairing and keeping same in order, and for the proper management of all roads and bridges in such county under and subject to the provisions of this act. The public roads shall be maintained, either by taxation or by hands allotted to work thereon [or both] in the discretion of the fiscal court of the respective counties, as hereinafter provided."

[5] Properly speaking, the title to the ground occupied by a public road remains in the adjacent landowners, subject to the public use, to whom the possession would revert if the road should be abandoned. So it would not be wide of the mark to say that the control of the public roads given the fiscal courts by section 4306 is a property right for the use of the counties and the public, of which they cannot be deprived without their consent, except by express legislative authority.

In our opinion, the right claimed for the telephone company is not to be found in section 4679b. The right it confers upon any telephone company to construct, maintain, and operate its telephone lines through "any public lands of this state on and across and along all public roads and turnpikes, and across and under any navigable waters, and on and across the land of any person" is predicated upon its first making just compensation for the use to be made of same.

[6] In the event such compensation cannot be agreed upon, the condemnation proceedings provided for in the section must, where applicable, be resorted to by the telephone company. And if it be true, as insisted for the telephone company, that such condemnation proceedings can only apply as to the making of compensation to a private individual for the use to be made of his

land by the telephone company's poles and wires, that fact would not relieve the company of the necessity of compensating the state and the county to which such condemnation proceedings may not apply, for the use of the lands of the former and the public roads of the latter, in the erection and maintenance of its poles and wires. The requirement of the section is that, in any event, just compensation must be made for the use the telephone company makes of the property of others, unless the right to such compensation be relinquished, which, so far as the fiscal court is concerned, cannot be done. Its consent to the use of the public roads of the county by the poles and wires of a telephone company can be given only by the granting of a franchise; and, as the franchise must be sold, the compensation which the section, *supra*, requires the telephone company to pay the fiscal court for its use of the public roads of the county is derived through the sale of the franchise, which must be made at public auction, and after due advertisement, to the highest and best bidder. All this is provided for and required by section 164 of the Constitution, which declares: "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

We may, for the purposes at hand, concede the correctness of the contention made by counsel for the telephone company that section 4679b, Kentucky Statutes, does not contemplate condemnation proceedings against the state in obtaining the right to erect poles and lines upon or over public lands owned by it, and likewise that condemnation proceedings will not lie against the county or fiscal court in obtaining the right to occupy the public roads of the county with its poles and lines; yet these facts do not relieve the telephone company of the necessity of compensating them for the use to which it would put the lands of the one or the highways of the other. The state cannot be sued without legislative authority; and, if the statute has given no means of compelling the state by grant to yield to a telephone company the right to construct and maintain its poles and lines over its public lands, legislative action must be invoked for a remedy, which would secure to the telephone company the necessary use of the lands and at the same time fairly compensate the state therefor.

[7] It cannot be said, however, that the failure of section 4679b to provide a meth-

od whereby a fiscal court, in case of its arbitrary refusal to act, may be compelled to grant to a telephone company the use of the public roads of the county for the erection, maintenance, and operation of its poles and lines, or that its failure to provide a method for ascertaining what compensation shall be paid the fiscal court for such use of the public roads by the telephone company, would leave the latter without a remedy. If a fiscal court should be notified by a telephone company, prepared to do business in the county, of its wish to acquire a franchise authorizing the use by it of the public roads of the county for the erection and maintenance of the poles and lines necessary to the conduct of its business, and the fiscal court should refuse to offer for sale, as provided by section 164 of the Constitution, such a franchise, the telephone company could, by the writ of mandamus, compel it to do so. This remedy is provided by section 474 of the Civil Code and has been held by this court applicable to such a state of case as that here presented.

In *Louisville Home Telephone Co. v. City of Louisville*, 180 Ky. 611, 118 S. W. 855, this writ was employed to compel the sale by the board of public works of the city of Louisville of a telephone franchise, at the suit of certain private citizens and taxpayers. Among other matters, urged in resistance to the granting of the writ, was the contention that the plaintiffs in the court below had no right to maintain the action because of their having no direct and special interest in the matter in litigation. In rejecting this ground of defense, we said: "However, as has been said, the appellants contend that, even if they have not the requisite mere private right to entitle them to the writ sought in this proceeding, they, being citizens and residents of, and engaged in business in, the city, and as such interested in the execution of the law, have the right as relators to bring the matter before the court. Clearly the ordinance exhibited with the petition imposes upon the board of public works of the city of Louisville the duty of advertising and selling at public sale the telephone franchise in the ordinance provided. In this day efficient telephone service is so essential not only to the conduct of private business in the cities, as well as in the rural districts, but is also so important in the management and conduct of the business and government of cities that its proper installation, maintenance, and service constitute a matter of decided public interest. The question in this case is therefore one of public right, and the object is the enforcement of public duty. And as we have seen from the authorities quoted, supra, in such state of case a relator in a mandamus proceeding need not show that he has any special interest in the result but it is sufficient for him to show that he is a citizen and resident and engaged in business in the city and as such interested

in the execution of the law, and that, inasmuch as the public duty here sought to be enforced is not one due to the state in its sovereign capacity, the decided preponderance of American authority is that private citizens may move for a mandamus to enforce such public duty."

If private citizens, situated as were the plaintiffs in the case, supra, had the right to a writ of mandamus to compel the public authorities to offer for sale a franchise, a much stronger reason exists for holding that it may be so employed by an intending purchaser of the franchise. As previously stated, by section 4306 the fiscal court is given absolute control of the public roads of the county. The authority it confers is in no sense abrogated or lessened by section 4679a or by section 4679b; and the rights conferred upon telephone companies by section 4679b, as well as the duties it imposes upon the fiscal court, are subject to the power of absolute control given that court by section 4306. *Bevis v. Vanceburg Telephone Co., etc.*, 121 Ky. 177, 89 S. W. 126, 28 Ky. Law Rep. 142.

In order to fully understand the legislative intent with respect to the powers of fiscal courts over the public roads of the county and the rights of telephone companies with respect to their use, sections 4306 and 4679b must be read together, and the two in connection with section 164, Constitution. Thus considered, it is manifest that they confer upon telephone companies the right, with the consent of the fiscal courts, to occupy with their poles and wires the public roads of the counties, provided they make just compensation for such use, and that their fixtures do not interfere with the travel on and along the roads. The method by which they are to obtain the consent of the fiscal court to such use of the public roads by their poles and wires is through the purchase from the fiscal court, at public sale, of a franchise as provided by section 164, Constitution. In *Cumberland Telephone & Telegraph Co. v. City of Hickman*, 129 Ky. 220, 111 S. W. 311, 83 Ky. Law Rep. 730, and *Nicholasville v. Board of Council*, 86 S. W. 549, 38 S. W. 430, 18 Ky. Law Rep. 592, we held that this section of the Constitution is self-operative; and this being true, in order to make its provisions applicable to section 4679b, Kentucky Statutes, it was unnecessary for the Legislature, in enacting that section, to specifically declare therein that a telephone company, in order to obtain the use of the public roads of a county for the erection and maintenance of its poles and wires, should first obtain from the fiscal court a franchise to do so. In providing that just compensation should be made by a telephone company for its use of the public roads by its poles and wires, the section as fully declared that such compensation must be through the purchase by the telephone company of a franchise from the fiscal court, as provided by section 164, Constitution, as if it had in terms so stated.

This is necessarily so, because the law provides no other means for the fiscal court to compel the payment of the compensation provided for; and the sale of the franchise to the telephone company by the fiscal court would, of course, carry with it the consent of that court to the telephone company's use of the public roads which both section 4306 and section 4679b make it necessary for the latter to obtain.

In thus viewing this question, we have not overlooked the fact that the fiscal court of Christian county is a court of limited jurisdiction, but, as we have shown, the authority it is here attempting to exercise in compelling the telephone company to purchase a franchise entitling it to the use of the public roads of the county for its poles and wires is but a reasonable exercise of the powers conferred upon it by section 164, Constitution, and sections 4306 and 4679b, Kentucky Statutes. The interpretation we have given these two sections of the statutes, in the light of the mandatory effect of the provisions of section 164, Constitution, has been followed by some of the telephone companies doing business in this state. One of the telephone companies thus acting is the Cumberland Telephone & Telegraph Company, whose lines in Christian county were consolidated with those of the other telephone companies hereinbefore mentioned in forming the Christian-Todd Telephone Company. This appears from the opinion in the case of Cumberland Telephone & Telegraph Co. v. Cartwright Telephone Co., 128 Ky. 395, 108 S. W. 875, 32 Ky. Law Rep. 1357, in which it is stated that, prior to the erection of its poles and lines and the beginning of its business in the city of Springfield and county of Washington, the Cumberland Telephone & Telegraph Company purchased both from the city and county a franchise, the former giving it the use of the streets of the city, and the latter the use of the public roads of the county, for the erection and maintenance of its poles and lines; and that the litigation in that case arose out of its alleged violation of both these franchises. The fact that section 163, Constitution, expressly provides that none of the public utilities mentioned therein, including telephone companies, shall make use of the streets, alleys, or public grounds, with the appliances necessary to their business without the consent of the proper legislative bodies or boards thereof, does not militate against the reasonableness of the construction we have, in this case, given sections 4306, 4679b, Kentucky Statutes. As the provisions of the former make it necessary that the telephone company should obtain the consent of the fiscal court to its use of the public roads of the county and those of the latter that it shall make just compensation for such use, and section 164, Constitution, in effect provides that such required consent cannot be given by the county (i. e., the fiscal

court), or the necessary compensation made by the telephone company, without a sale by the fiscal court of a franchise and its purchase by the telephone company.

There is nothing in the provisions of section 4306 or 4679b which justifies the contention made by counsel for the telephone company that the only control that may be exercised by the fiscal court with reference to the use of the public roads for the erection and maintenance of the telephone company's poles and wires is the power of location; that is, to require that they shall be so placed and the wires so strung thereon as that neither will interfere with travel along the highways or their proper maintenance. This cannot be the only authority possessed by the fiscal court, because regulation to this extent is found in section 4679b, which in express terms forbids the telephone company to so erect and maintain its poles and wires in the public roads as to interfere with the public use thereof; its language being: "That fixtures of said company shall not interfere with the travel on and along said roads. \* \* \*" In our opinion the control of the public roads given the fiscal court by section 4306 goes far beyond such mere regulation. It is indeed so absolute that it compels the telephone company to obtain its consent to occupy the road with its poles and wires, and in giving such consent the fiscal court may impose the rules and regulations under which the telephone company shall use the highways. Without such consent, the telephone company, in occupying the public roads with its poles and lines, becomes a mere trespasser. Therefore its continued occupancy of the public roads may be prevented by injunction. *East Tennessee Telephone Co. v. City of Russellville*, 106 Ky. 687, 51 S. W. 308, 21 Ky. Law Rep. 305; *East Tennessee Telephone Co. v. Anderson Telephone Co.*, 115 Ky. 488, 74 S. W. 218, 24 Ky. Law Rep. 2358; *Rough River Telephone Co. v. Cumberland Telephone & Telegraph Co.*, 119 Ky. 470, 84 S. W. 517, 27 Ky. Law Rep. 32; *Maraman v. Ohio Valley Telephone Co.*, 76 S. W. 398, 25 Ky. Law Rep. 784; *Rural Home Telephone Co. v. K. & I. Telephone Co.*, 128 Ky. 209, 107 S. W. 787, 32 Ky. Law Rep. 1068; *Jackson-Hazard Telephone Co. v. Holliday's Adm'r*, 143 Ky. 149, 136 S. W. 135.

[8] After all, the controversy here is as to the degree of control to be exercised over the telephone company's right to use the public roads of Christian county. It seems to us that the regulations which the fiscal court desire to impose by the franchise they will afford the telephone company the opportunity of purchasing are but reasonable and such as should enter into the grant; and to permit the telephone company to continue in possession of the public roads of Christian county in the maintenance of its poles and lines, and the operation of its business, in defiance of the authority of the fiscal court,



would be to take away from the county, without just compensation, a most valuable right of property, which would be disastrous in the extreme to the public welfare.

For the reasons indicated, the motion to dissolve the injunction is overruled. Whole court sitting.

# CITY OF NEWPORT v. MERKEL BROS. CO.

(Court of Appeals of Kentucky. Dec. 19, 1918.)

## 1. CONSTITUTIONAL LAW (§ 42\*)—STATUTES—VALIDITY—WHO MAY QUESTION.

One who is not interested in the subject of a statute, and is not injuriously affected thereby, cannot attack its provisions as unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.\*]

## 2. LICENSES (§ 7\*)—MOTOR VEHICLES.

Act 1910, c. 81, known as the "Motor Vehicle Law" regulating the use of motor vehicles within the state, is not a revenue measure, though revenue is incidentally derived therefrom, but it was enacted by virtue of the police power of the state.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

## 3. HIGHWAYS (§ 165\*)—POLICE POWER.

The Legislature can, in the exercise of the police power, regulate the use and driving of motor vehicles.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 165.\*]

## 4. LICENSES (§ 6\*)—LEGISLATIVE CONTROL.

Though a city had power from the state to tax, and could, under the police power, by ordinance, reasonably regulate the use of motor vehicles, either or both of these powers could be withdrawn from the city at any time by the Legislature.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.\*]

## 5. LICENSES (§ 7\*)—ORDINANCES—VALIDITY.

As Act 1910, c. 81, known as the "Motor Vehicle Law," regulating the use of motor vehicles, provides that no owner is to be required to comply with any other regulations except those therein contained, and section 7 exempts nonresidents from registration, payment of license tax, etc., where they have already complied with similar laws of their own state, an ordinance of the city of Newport, known as the "Vehicle License Ordinance," requiring all persons using motor vehicles on its streets to pay a license fee, is invalid as to nonresidents because in conflict with the act.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

## 6. STATUTES (§ 79\*)—CLASS LEGISLATION.

Act 1910, c. 81, known as the "Motor Vehicle Law," § 7, exempting nonresidents from registration, payment of the license tax, as provided therein, etc., where they have already complied with similar laws of their own state, does not discriminate against the citizens of this state under state Const. § 60; also, since the exemption is upon the condition that they have complied with similar laws of their own state, the doctrine of comity between states gives force to their right to the exemption.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 84, 85; Dec. Dig. § 79.\*]

Appeal from Circuit Court, Campbell County.

Action by the Merkel Bros. Company against the City of Newport. From a judgment overruling defendant's demurrer, it appeals. Affirmed.

Otto Wolff, of Newport, for appellant. R. C. Simmons, of Covington, and Gordon, Morrill & Ginter, of Cincinnati, Ohio, for appellee.

SETTLE, J. This action was brought February 19, 1913, in the Campbell circuit court by appellee, Merkel Bros. Company, a corporation under the laws of the state of Ohio, against the city of Newport, a municipal corporation of the second class, and William C. Buten its police judge, to have declared invalid certain provisions of an ordinance of the city of Newport, known as the Vehicle License Ordinance, in so far as its provisions were attempted to be applied to appellee, and to prevent by injunction threatened prosecutions of appellee's agents for its failure to obtain and pay a license demanded by appellant for using on its streets two motor vehicles or motor trucks, propelled by gasoline motive power. It appears from the petition: That the city of Newport, through its general council, duly passed an ordinance, which was approved by its mayor June 4, 1909, containing, among other provisions, the following: "All persons, companies and corporations using any vehicle on the streets of the City of Newport be and are required to obtain from the city clerk and pay respectively therefor, an annual license fee in the amount as follows, to wit \* \* \* For each passenger automobile—\$5.00; for each freight automobile (one ton capacity or less)—\$5.00; for each freight automobile (over one ton capacity)—\$10.00." That at and prior to the institution of the action, appellee had its domicile and principal office in the city of Cincinnati, Ohio, and was engaged in the business of manufacturing and dealing in plumbing supplies, in making deliveries of which to its customers located in Newport, appellee used two motor vehicles or motor trucks propelled by gasoline motive power. That the motor vehicle law of Ohio, the state of appellee's domicile, requires that every owner of a motor vehicle, or vehicles, operated or driven upon the public highways of that state, shall annually, before the 1st day of January in each year, for each motor vehicle owned or acquired by him, apply for registration, and register such motor vehicle and pay the license fee exacted therefor, and, in addition, placard such motor vehicle with an identification mark, bearing the number assigned to such motor vehicle, the name of the state, and the figures of the calendar year for which the number was issued, and that by the provisions of such law nonresident owners of motor vehicles were exempt from registration in the state of Ohio, provided, they had complied with the provisions

of the law in regard to the registration of motor vehicles in the state of their residence. It further appears that appellee had complied with the laws of Ohio with reference to the registration of motor vehicles; and when they were used in the city of Newport it had, at all times, conspicuously displayed upon each the identification mark required by the laws of Ohio and those of Kentucky respecting the operation of motor vehicles; but, notwithstanding that fact, the appellant city was proposing to arrest and try, for the violation of the vehicle ordinance referred to, the agents of appellee engaged in operating such motor vehicles in the city of Newport in the prosecution of appellee's business. A demurrer to the petition was filed and overruled by the circuit court, and, appellant and its codefendant, the police judge, declining to plead further, the case was submitted. The trial court, being of opinion that the ordinance in question, in so far as it requires an automobile license for motor vehicles owned by nonresidents who have complied with the law of their domicile in procuring a license, registering and numbering their vehicle, is in conflict with and superseded by, the motor vehicle law of Kentucky of 1910, held it to be inoperative and void, and entered judgment enjoining the city of Newport, and its officers from enforcing the ordinance against the appellee. The city appeals.

Appellant seeks a reversal upon the ground that the act of the General Assembly of Kentucky, approved March 23, 1910 (Laws 1910, c. 81), entitled "An act defining motor vehicles, providing for the registration of the same and uniform rules regulating the use and speed thereof," known as the "Motor Vehicle Law," is unconstitutional upon several grounds, but only such of these as present questions upon which appellant is entitled to rely will be considered.

[1] The law is well settled that one who has no interest in the subject of a statute, and is not injuriously affected by its provisions, cannot attack its validity. *Burnside v. Lincoln County Court*, 86 Ky. 423, 6 S. W. 276, 9 Ky. Law Rep. 635. The record here presents for our decision but one controverted question that can properly be said to affect the rights of the parties. All others are purely academic. This single question is: Does section 7 of the act under consideration, which exempts any motor vehicle owned by a nonresident of the state from the provisions of sections 2, 3, 4, and 5 of the act, where the owner has complied with the laws of his own state requiring the registration of motor vehicles, payment of license tax, etc., discriminate against the citizens of this state, or otherwise violate any provision of its Constitution? Briefly stated, sections 1, 2, 3, 4, and 5 of the act define motor vehicles, require payment of a graduated license tax thereon, their registration by the owners, the assignment to each of a distinctive num-

ber, and the issuance of a certificate of registration to the owner; the issuance of an identification seal; the keeping of a record of registration; require owners of motor vehicles to display, in a conspicuous place thereon, the identification seal and number, and to keep lights thereon during the hours of the night; provide how manufacturers and dealers in motor vehicles shall register and use their vehicles; classify motor vehicles; require renewal of registration upon change of ownership of a motor vehicle; provide for safety appliances upon motor vehicles; regulate their speed upon the highways; impose certain duties upon operators of motor vehicles when horses in use are, or are about to become, frightened thereat; require the display of but one identification seal, and forbid the exclusion from use of the public highways owners of motor vehicles. Other sections permit municipal corporations to make reasonable rules regulating the speed of such vehicles and their use upon its public ways; provide that no right to redress for injuries resulting from the negligent operation of motor vehicles shall be curtailed or abridged; make disposition of the registration fees; forbid the use of a fictitious number on motor vehicles; and impose penalties for violations of the provisions of the act.

Section 2 contains a proviso: "That nothing in this act shall be construed to prevent cities of the first, second and third classes from levying and collecting license taxes from resident owners of motor vehicles for city purposes, by ordinances properly passed."

[2-4] Section 7, to which reference has already been made, provides: "The provisions of sections two, three, four, and five of this act shall not apply to any motor vehicle owned by nonresidents of this state, provided the owner thereof has complied with any law requiring the registration of motor vehicles, or the names of the owners thereof, in force in the city, state, territory or federal district of his residence, provided the registration number showing the initial or abbreviation of the name of such city, state, territory or federal district shall be displayed on such vehicle, substantially as in section three of this act provided. And provided, that nothing in this section shall be so construed as to exempt nonresident owners and drivers of automobiles from complying with the first part of section four of this act requiring the carrying of lighted lamps as in said section provided." Manifestly, this statute was enacted by virtue of the police power of the state, and is designed to regulate the use of motor vehicles. Properly speaking, it is not a revenue measure, though incidentally revenue is derived therefrom. Undoubtedly the state has the right, under the police power, to legislate in the interest of the public health, public safety, or public morals. There can be no question, therefore, of the right of the Legislature, in the exer-

dise of the police power, to regulate the driving of automobiles and motor cycles on the public ways of the commonwealth; and, while the city of Newport has the power from the state to tax, and may, under the police power, by ordinance, reasonably regulate the use that may be made of its streets by automobiles and other vehicles, either or both these powers are subject to any statute of the state in force, and may be withdrawn from it by the Legislature of the state. Indeed, it may be said to be a recognized doctrine that the power of the Legislature with respect to police regulation cannot be delegated by that body so as to preclude the resumption of the power by it. This rule is stated in 25 Cyc. 501, as follows: "The Legislature has the undoubted right by a later act to divest a municipal corporation of its right to impose license taxes and resume the exercise of the power itself." *Brazier v. Philadelphia*, 215 Pa. 297, 64 Atl. 508, 7 Ann. Cas. 548; *Wilkie v. Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; *Black*, Constitutional Law, p. 279. So, while the appellant city had the right to adopt the ordinance under which it attempts to collect of the owners of automobiles and motor trucks the license fee thereby imposed for the use of the streets by such vehicles, it is equally true that the Legislature had the power to withdraw from it the power to impose or collect such license tax of nonresident owners of such vehicles, where the latter pays such a tax under a law of their own state.

[5] As the act of 1910 provides that no owner of motor vehicles is to be "required to comply with other provisions or conditions as to use of such motor vehicles, except as in this act provided" and, in addition, by section 7 thereof, exempts nonresident owners of motor vehicles, who have complied with a similar law of their own state with reference to such vehicles, from the payment of a license tax in this state, there can be no doubt as to the invalidity of the ordinance, in so far as any right thereunder to collect the license tax of appellee was concerned. And this is true whether the ordinance was in existence at the time of the passage of the act, or was thereafter adopted by the city council. *City of Buffalo v. Lewis*, 192 N. Y. 193, 84 N. E. 809.

[6] We are further of opinion that the exemption by the act of nonresident owners of motor vehicles from registration and the payment of the license fee requirement is not a violation of any provision of the Constitution of this state. Although this question does not seem to have been directly passed upon in this jurisdiction, it has been decided by several of the courts of last resort in other states. In *Ft. Smith v. Scruggs*, 70 Ark. 549, 69 S. W. 679, 58 L. R. A. 921, 91 Am. St. Rep. 100, the question was as to the validity of a statute authorizing the imposition, by a municipal corporation, upon residents, of a tax for keeping and using a vehicle on its streets,

objection to which was made on the ground that the act did not include nonresidents. In disposing of this question, the court said: "It is doubtless true that the Legislature could not arbitrarily select certain citizens upon whom to impose the tax, while exempting others in like situation. But the rule of equality only requires that the tax shall be collected impartially of all persons in similar circumstances; and this statute applies equally to all persons of the class taxed. As a class, residents of the city use the streets more, and are more benefited by having them kept in good repair, than those who do not live in the city. It is true that nonresidents of the city also use the streets with their wagons and other vehicles, and it may be true that certain of them use the streets as much as or more than certain of the residents of the city, but, as a class, they do not use the streets as much as residents of the city, and this furnishes a reasonable basis for the distinction made in the act between the two classes. The requirement of the statute that the tax must be imposed on residents of the city only is but an adoption by the Legislature of the common policy of making each community keep up its own highways. This does not discriminate unjustly in favor of those who live beyond the city limits, for they have to keep other highways which the people of the city may in turn use free of charge. For this reason, we think that it was within the discretionary powers of the Legislature to make this distinction, and that it does not invalidate the act. After full consideration of the questions presented we are of opinion that the enactment of this statute was a valid exercise of legislative power. With the wisdom or expediency of it, as before stated, we have nothing to do. If it should prove to be unsatisfactory, there is still a remedy. The Legislature can repeal the statute, or the city council may repeal the ordinance, but the courts cannot do so." *Kersey v. Terre Haute*, 161 Ind. 471, 68 N. E. 1027. It is not to be overlooked that the discriminatory feature pertaining to the ordinance passed on by the court in *Ft. Smith v. Scruggs*, supra, was stronger than in this case, for it does not appear that there was any exemption of nonresidents from the payment of the tax imposed upon the ground that they were subject to a similar tax at the place of their residence. In the instant case, however, it is admitted that appellee registered his motor vehicles and paid the license tax on each of them in Ohio, in compliance with a statute of that state. It would seem, therefore, that the doctrine of comity of the states gives force to its right to the exemption afforded by section 7 of the act in question.

The doctrine of comity of the states is generally recognized by the courts of the land, and a very interesting discussion of it may be found in *Thompson v. Waters*, 25 Mich. 21.

12 Am. Rep. 243. In the opinion, it is said: "As it is not, then, the comity of the courts, but that of the state, and the question is upon the adoption, or qualified adoption in this state, of the laws \* \* \* of Indiana, it follows that the power of determining the question whether, and how far, or with what modification, or upon what conditions, the laws of that state, or any rights dependent upon them, shall be recognized here belongs to the legislative or lawmaking power of this state, and that the judiciary, whose province is only to declare, and not to make, the law, must be guided in their decision by the principle and policy adopted by the Legislature of this state in reference to this question. And in ascertaining what this legislative policy is, we are to be guided, not only by such express provisions as they have chosen to make, and the natural implication from them, but also by their silence, which may furnish as clear an indication of what that policy was intended to be, as can be drawn from what they have expressed, since, if they made no provision at all upon the particular subject, or branch of the subject, or question involved, it may reasonably be inferred that they intended to adopt, and left to the courts to apply, the generally received principles of comity, and, to that extent, to adopt the foreign, or rather to recognize the rights dependent upon such laws; and, if they have chosen to leave the matter without any legislative provision, the case must be a very clear one indeed which would authorize the courts to refuse such recognition, on the ground that it would be prejudicial to the interests of the state, since the Legislatures are the proper representatives of the public interest, and, having the exclusive power to determine what shall be the public policy of the state, if they have chosen to make no enactment upon the subject, it is natural to infer they omitted to do so because they thought it unnecessary, and that the generally recognized principles would be sufficient for such cases. None of the foregoing principles have been seriously questioned in this case, so far as they relate to the power and capacity of corporations, created in one state, to make and enforce contracts, and to acquire personal property in another."

While, as at present advised, this court does not commit itself to the application of the doctrine of comity as made in the case *supra*, it gives the doctrine its approval as applied by section 7 of the act under consideration, as it rests the exemption allowed to nonresidents upon the condition that they comply with a similar law of their own state; and it so happens in the instant case that Ohio, the state of appellee's residence, admittedly has a statute with respect to motor vehicles similar to that of this state, containing the same exemption to nonresidents.

The act before us does not, in so far as its

application to any material question here presented is concerned, violate any provision of the Constitution; and, being of opinion that it supersedes and repeals so much of the vehicle ordinance of the appellant city as attempts to impose a license tax upon owners of motor vehicles other than residents of that city, we approve the conclusions expressed in the judgment rendered by the circuit court, wherefore it is affirmed.

#### NANTZ et al. v. SIZEMORE et al.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

##### 1. NEW TRIAL (§ 102\*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Plaintiff was not chargeable with lack of diligence barring his right to obtain a new trial for newly discovered evidence, in that he failed to ask a witness for defendant concerning what he heard defendant say as to his contract with plaintiff for compensation; plaintiff having no reason to believe that the witness heard any such conversation.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

##### 2. APPEAL AND ERROR (§ 977\*)—NEW TRIAL—DISCRETION—REVIEW.

Where a new trial is granted in the exercise of discretion by the trial court, the Court of Appeals has no right to interfere unless the discretion exercised is abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3830-3835; Dec. Dig. § 977.\*]

Appeal from Circuit Court, Leslie County.

Action by G. A. Sizemore and another against Allen Nantz and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. M. Bicknell and A. B. Dixon, both of Hyden, for appellants. Cleon K. Calvert, of Hyden, and McQuown & Beckham and Brown & Nuckols, all of Frankfort, for appellees.

NUNN, J. This is the second appeal in this case. The first opinion can be found in 149 Ky. 819, 149 S. W. 1126. In that opinion it will be seen that Allen Nantz was sheriff of Leslie county from the 1st of January, 1906, to the 1st of January, 1910, and that G. A. Sizemore was his deputy during that time. During the first two years he acted at the price of \$1 per day (both parties agree to this), and Nantz claims that he acted throughout the term and for three months thereafter for that price. Sizemore says they changed the contract, making it \$40 per month for the year 1908, and for the year 1909 and three months thereafter he completed the sheriff's business at \$50 per month. The parties to the action being the only witnesses on this point, appellant won. Sizemore, during the pendency of his appeal, learned for the first time that he could prove by two witnesses that they heard Nantz say during the year 1909 that he was paying Sizemore during that year \$50 per month,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and appellee brought an equitable action for a new trial upon the ground of newly discovered evidence. He stated that he could not with reasonable diligence have learned these facts and introduced these witnesses on the first trial. He afterwards filed an amended petition, stating that he had since learned that he could prove the same facts by another witness, naming him. The case was prepared, and the court rendered a judgment, giving Sizemore a new trial, and appellant Nantz appeals, claiming that the evidence was not sufficient, and, if it was, the record shows that appellee did not use due diligence in discovering and producing the evidence on the first trial.

[1] The three witnesses, Morgan, Farley, and Lewis, who testified that they heard Nantz say during the year 1900 that he had a contract to pay Sizemore \$50 per month during that year also stated that they never said anything to Sizemore about this until long after the first trial, and Sizemore made the same statement. It was impossible for Sizemore to know that Nantz had made these statements, and, if he had, to whom. Morgan was a witness for Nantz on the first trial; but the other two did not testify at all. Morgan was not asked the question as to what he heard Nantz say about the matter, and, if he had been the only witness, appellant's claim would in all probability have been well taken; but, as Morgan was Nantz's witness, it would hardly be proper to hold that Sizemore was chargeable with lack of diligence in failing to ask the question, but his testimony, coupled with Farley's and Lewis', is very decisive on the one point involved upon this appeal.

[2] The lower court, in the exercise of a sound discretion, granted a new trial, and this court has no right to interfere with the exercise of that discretion unless it has abused same. See *Hall v. Wilson*, 116 S. W. 244; *Torain v. Terrell*, 122 Ky. 745, 93 S. W. 10, 29 Ky. Law Rep. 306; *Southern Insurance Co. v. Johnson*, 140 Ky. 485, 131 S. W. 270.

In our opinion the court was right in setting aside the former verdict, and granting a new trial. Sizemore and the three witnesses named gave all the testimony that was introduced on the trial. Nantz did not even testify, and it is difficult to see how the court could have done otherwise.

Therefore the judgment is affirmed.

### SAMS v. GRAY.

(Court of Appeals of Kentucky. Dec. 19, 1918.)

#### 1. MASTER AND SERVANT (§ 281\*)—INJURY TO MINER—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence, in an experienced miner's action for injuries from the falling of slate, held to sustain a finding that at the time of the accident plaintiff was digging coal from the entry stump, contrary to the rules of the mine, and

that his own negligence was the proximate cause of his injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

#### 2. APPEAL AND ERROR (§ 714\*)—PRESENTATION FOR REVIEW—BILL OF EXCEPTIONS.

Where the alleged misconduct of the trial court in refusing to discharge the jury because some of the members had acted in the trial of other cases during a suspension of the present trial was not shown by the bill of exceptions, but appeared only from appellant's affidavit, it could not be reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2958-2963; Dec. Dig. § 714.\*]

Appeal from Circuit Court, Knox County.

Action by W. C. Sams against Sarah M. Gray. From judgment for defendant, plaintiff appeals. Affirmed.

B. B. Golden, of Barbourville, for appellant. J. M. Robison, of Barbourville, for appellee.

CLAY, C. Defendant, Sarah M. Gray, owned and operated a coal mine in Knox county, Ky. Plaintiff, W. C. Sams, was an employe in the mine. On June 26, 1908, plaintiff, while in the entry of the mine, was severely injured by falling slate. He brought this action to recover damages. The jury returned a verdict in favor of the defendant. Judgment was entered accordingly, and plaintiff appeals.

[1] According to the evidence for plaintiff, he was an experienced miner, and had been employed in the mine in question six or eight years. His working place was in one of the rooms about 50 feet from the place where he was injured. On the morning of the accident he took some picks out of the mine for the purpose of having them sharpened. On returning from the outside, he proceeded along the entry, and met his "buddie." When they got to the place of the accident, they found that some slate had fallen from the side of the entry stump. Some coal had also fallen, and it was necessary to clean the coal and slate off before they could get the cars over the track. He, and his buddie, and the driver got the slate off. They then threw into the car the coal that had fallen. There was also a piece of coal sitting on the side of the stump where the slate fell. This they also put into the car. He then noticed a large lump of coal sticking to the bottom. When he reached for his pick to prize it off, the slate started to fall. His buddie said, "Look out;" and they both jumped, and the slate struck him on the shoulder. It also caught his foot on a tie, and severely mashed it. The slate which was on the track had fallen while he was out of the mine. Plaintiff further stated that a stump was a block of coal between two room necks, left there to support the roof, and it was against the rules of the mine to dig coal from a stump.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

According to the evidence for the defendant, as given by two witnesses who were present, plaintiff was actually digging coal from the entry stump at the time the slate fell. He first knocked off four or five little blocks. He then took his pick, and knocked out a big block of coal, and then the slate fell. The slate fell from the side of the entry, and its fall was brought about by the dislodgment of the coal. These witnesses also testified that it was contrary to the rules of the mine to dig coal from the entry stump, and while plaintiff was digging coal they warned him that the slate was loose and liable to fall. Defendant also proved by two witnesses that after his injuries plaintiff admitted to them that at the time of the accident he was digging coal from the entry stump.

[2] The principal error relied on is the fact that the court suspended the trial of this case for two or three days, and in the meantime tried two or three other cases before juries, some of the members of which were jurors in this case, and on the reassembling of the jury the court declined to discharge the jury when this fact was made to appear. It is well settled that the only way by which errors occurring on a trial can be brought here for review is by bill of exceptions. *Bannon v. Louisville Trust Co.*, Adm'r, 150 Ky. 401, 150 S. W. 510; *Louisville Ry. Co. v. Gaar*, 112 S. W. 1130; *Paducah Light Co. v. Bell*, 85 S. W. 216, 27 Ky. Law Rep. 423; *Geo. T. Stagg Co. v. Brightwell*, 92 S. W. 8, 28 Ky. Law Rep. 1220. In this instance the alleged misconduct of the trial court is not shown by the bill of exceptions, but appears only from an affidavit of plaintiff. That being true, it cannot be considered.

Considered in the light of the facts, we find no errors in the admission or rejection of testimony or in the instructions that will justify a reversal. It is manifest that the jury, being guided by the decided weight of evidence, took the view that plaintiff, at the time of the accident, was digging coal from the entry stump, contrary to the rules of the mine, and that his own negligence was the proximate cause of his injury.

Judgment affirmed.

#### NASHVILLE, C. & ST. L. R. CO. v. BANKS. (Court of Appeals of Kentucky. Dec. 19, 1913.)

##### 1. DAMAGES (§ 216\*)—PERSONAL INJURIES—ASSESSMENT OF DAMAGES—INSTRUCTIONS.

An instruction, in an action for the loss of both hands, that the jury, on finding for plaintiff, should assess such sum as will fairly compensate him "for injuries to his person, for loss of time occasioned on account of said injuries; \* \* \* for physical and mental suffering \* \* \* on account of said injuries, and for permanent injury to him lessening his power to earn money," is erroneous, and the words "for injuries to his person" should be omitted, and the words "diminution of" should be substituted

for the words "permanent injury to him lessening," so as to read "any diminution of his power to earn money."

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

##### 2. MASTER AND SERVANT (§ 296\*)—INJURY TO SERVANT—ISSUES—INSTRUCTIONS.

Where, in an action for injuries to a brakeman while between cars to uncouple them, the company pleaded contributory negligence, the court, in submitting the issue of the brakeman's negligence, must follow the pleading and submit the facts alleged and proved, and state that it was the duty of the brakeman to perform his duties in a way that was usual or reasonably safe, and to exercise such care as might be reasonably expected of a man of ordinary prudence under like circumstances, or he was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

##### 3. COMMERCE (§ 27\*)—INTERSTATE COMMERCE—WHAT CONSTITUTES.

A brakeman engaged in switching cars for transportation from one state to another is engaged in interstate commerce, though the train on which he is employed runs only between two points in a state.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 25; Dec. Dig. § 27.\*]

##### 4. NEGLIGENCE (§ 101\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—FEDERAL EMPLOYERS' LIABILITY ACT.

Under the federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), declaring that contributory negligence shall not bar a recovery, but the damage shall be diminished in proportion to the negligence of the injured employe, an employe sustaining a personal injury cannot recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the railroad company bears to the entire negligence attributable to both, and an instruction that, if the employe was guilty of negligence which contributed to his injuries, the jury must diminish the damages in proportion to the amount of negligence attributable to him in producing the injury, is erroneous.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 85, 163, 164; Dec. Dig. § 101.\*]

##### 5. TRIAL (§ 233\*)—INSTRUCTIONS—SUFFICIENCY.

The instructions must be sufficiently concrete to bring before the jury the law of the case, and instructions which do not present a party's theory of the case are insufficient.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 527-530; Dec. Dig. § 233.\*]

Appeal from Circuit Court, McCracken County.

Action by George Banks against the Nashville, Chattanooga & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Wheeler & Hughes, of Paducah, and Claude Waller, of Nashville, Tenn., for appellant. Samuel A. Anderson, of St. Paul, Minn., and Oliver & Oliver and Joseph R. Grogan, all of Paducah, for appellee.

HOBSON, C. J. George Banks was a brakeman in the service of the Nashville, Chattanooga & St. Louis Railway, which op-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

erates a railway from Memphis, Tenn., to Paducah, Ky., that division being known as the Paducah & Memphis Division; also a line of railway from Nashville, Tenn., to Hickman, Ky., the two divisions crossing at Hollow Rock Junction. The train on which Banks was employed ran from Memphis to Hollow Rock Junction, and while it was there he sustained injuries to recover for which he brought this action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

The following agreed stipulation was made part of the record: "That at the time plaintiff received the injuries complained of by him in this action, he was in the employ of the defendant as a brakeman or flagman, and at said time was working as such with a freight train which was made up at the city of Memphis in the state of Tennessee, and known as an 'extra freight train,' composed of a locomotive, tender, nine freight cars, some of which freight cars were loaded with merchandise in the states of Mississippi and Alabama and transported by other railroad companies to the city of Memphis, and there delivered to this defendant herein, and by the defendant put into said train, which was transported by the defendant over its railroad as a part of the train complained of to Hollow Rock Junction in the state of Tennessee; that at Jackson in the state of Tennessee a car loaded with lumber was delivered to this defendant which was put into said train, also an empty freight car was put into said train at Jackson, Tenn., and said train, as thus made up, was by the defendant hauled to Hollow Rock Junction, which place is also in the state of Tennessee, at which place the injury complained of by plaintiff was sustained; that at said place said train was divided or split up, and one empty box car hauled by this defendant by another train over its line of road to the city of Paducah in the state of Kentucky, and the one loaded with lumber which was received at Jackson in the state of Tennessee consigned to Evansville, in the state of Indiana, was by the defendant hauled to Paris, in the state of Tennessee, and there delivered to the Louisville & Nashville Railroad Company to be transported to the consignee at the city of Evansville in the state of Indiana, and three of said cars which were loaded with cotton were hauled by the defendant to Chattanooga, in the state of Tennessee, and two of the cars in said train were loaded with pyrites at Mobile, Ala., and received by the defendant from another railroad at the city of Memphis and was a part of said train from Memphis to Hollow Rock Junction, and from said Hollow Rock Junction carried to Nashville, in the state of Tennessee, and one of said cars in said train was an empty box car, and was consigned to Atlanta, in the state of Georgia, and one other of said empty box cars was consigned to Puryear, in the

state of Tennessee; that each and all of said cars proceeded on to their respective destinations after leaving said Hollow Rock Junction in Tennessee."

When the train reached Hollow Rock Junction, it was necessary to take some of the cars from that train and place them on another track, where a train destined for Nashville would take them and carry them to Nashville. The conductor left the train in charge of Banks and went to the depot to attend to other duties. The train was pulled up beyond the switch. Banks threw the switch and gave the engineer the back-up signal, and, as the cars passed him backing down the side track, he got up on the side of one of the cars so as to ride down. When he had backed in far enough, he gave the engineer a stop signal. At this time the engineer was around the curve from him, and so the signal was passed on to the engineer by Siler, another brakeman who stood out from the train for this purpose. As to what followed the proof is conflicting. According to the proof for Banks, the engineer stopped the train in obedience to the signal, and after it was stopped Banks went in between the cars to cut off the cars that were to be left on that track. He pulled the pin at the coupling and turned the angle cock on the front car. He then took hold of the air hose with one hand and reached over with the other hand to turn the angle cock on the rear cars, and just at this juncture the engineer, without any signal from him so to do, again backed the cars, catching both of his hands in the bumper, and so injuring them that both had to be amputated. On the other hand, the proof for the defendant is to the effect that Banks was riding on the rear car that was to be left in the train, and that he reached over and turned the angle cock on this car before he got off it; that he then got down on the ground, and, while the cars were still moving, went in between the cars, pulled the pin, and then took hold of the air hose with one hand and reached over with the other to the angle cock, and, when he did this, he set the brakes on the rear cars in emergency, causing the wheels to stop revolving, and that this caused the forward part of the train, which was still in motion, to bump against the rear cars, thus inflicting upon him the injuries which he received. The proof for the defendant also showed that it was improper and very dangerous to attempt to uncouple the cars in this way, and that if Banks had followed the usual way of doing the work there would have been no danger in it. The jury found for the plaintiff in the sum of \$20,000. The court refused a new trial and gave judgment upon the verdict. The defendant appeals.

The chief complaint on the appeal is as to the instructions of the court. We see no objection to instructions 1 and 2. Instructions 3, 4, and 5 are in these words: "(3) If you find for the plaintiff, you will assess

in his favor such sum in damages as you may believe from the evidence in this case will fairly and reasonably compensate him for injuries to his person; for loss of time occasioned on account of said injuries, if any, not exceeding \$800; for physical and mental suffering, if any of either, on account of said injuries; and for any permanent injury to him lessening his power to earn money, but in all not exceeding the amount claimed in the petition, to wit, \$100,000. (4) Although you may believe from the evidence in this case that defendant was guilty of negligence on the occasion complained of, and as defined to you by instruction No. 1 herein, yet, if you shall further believe from the evidence that plaintiff was also guilty of negligence in the performance of his duties as brakeman at the time complained of by him, then he is chargeable with contributory negligence, and if you shall believe from the evidence in this case that plaintiff was guilty of negligence as mentioned to you in this instruction, and that such negligence on his part contributed to bring about the injuries to him and but for which he would not have been injured, then you will diminish the damages, if any, you may assess in his favor, in proportion to the amount of negligence, if any, attributable to him in causing or producing the injury complained of by him. (5) The court further instructs you that if you shall believe from the evidence in this case that the injuries received by plaintiff were caused wholly and solely by his own negligence and without any negligence on the part of defendant, as defined to you by instruction No. 1 herein, then the law is for the defendant, and you will so find."

[1] The words "for injuries to his person" should have been omitted from instruction 3. What would compensate a man for losing both of his hands is too uncertain to be submitted to a jury. We have often laid down the measure of damages in this class of cases, and have uniformly condemned such expressions as this in instructions. *L. & N. R. R. Co. v. Logsdon*, 114 Ky. 746, 71 S. W. 905, 24 Ky. Law Rep. 1566; *L. & N. R. R. Co. v. Hall*, 115 Ky. 576, 74 S. W. 280, 24 Ky. Law Rep. 2487; *Cincinnati, etc., R. Co. v. Giboney*, 124 Ky. 809, 100 S. W. 216, 30 Ky. Law Rep. 1005; *Lexington R. Co. v. Herring*, 96 S. W. 558, 29 Ky. Law Rep. 794; *Paducah Traction Co. v. Burradell*, 104 S. W. 709, 31 Ky. Law Rep. 1052; *L. & N. R. R. Co. v. Percy*, 121 S. W. 1087. The words "diminution of" should also be substituted for the words "permanent injury to him lessening," so that this part of the instruction will read: "any diminution of his power to earn money."

[2] Instruction 4 is faulty in that it nowhere defines the duty which the law required of the plaintiff under the evidence. The duties required of the defendant were defined in instruction 1, but in instruction 4

the court only told the jury that, if they believed from the evidence that the plaintiff was also guilty of negligence in the performance of his duties as brakeman, then he was chargeable with contributory negligence. The defendant by its answer aptly pleaded the facts relied on as constituting contributory negligence on the plaintiff's part, and when this is done the court should in its instructions follow the pleading and submit the facts therein alleged to the jury. In lieu of the part of the instruction referred to, the court should have told the jury that it was the duty of the plaintiff to perform his duties in the way that was usual or reasonably safe; and to exercise such care in performing them as might be reasonably expected of a man of ordinary prudence under like circumstances, and that, if he failed to do this, he was guilty of contributory negligence.

[3, 4] The facts agreed showed clearly that this train was engaged in interstate commerce and that the action was properly brought under the federal Employers' Liability Act. That act provides: "Contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Construing this statute, the United States Supreme Court, in *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, said: "The statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee." The instruction of the court does not conform to the rule thus laid down. It does not in terms state what the amount of negligence attributable to him is to be in proportion to; but, as in the previous part of the instruction the negligence of the defendant and his negligence are referred to, we think the natural meaning of the instruction is that the damages are to be diminished in the proportion to the amount of negligence attributable to him and that attributable to defendant, which, as shown above, is not the construction of the statute adopted by the Supreme Court.

[5] Instruction 5 is so general that it does not clearly present the defendant's theory of the case; and no other instruction was given



presenting its side of the case. We have, in a number of cases, held that the instructions should be sufficiently concrete to bring the mind of the jury intelligently to the law of the case. *L. & N. R. Co. v. King*, 131 Ky. 347, 115 S. W. 196; *Johnson v. Westerfield*, 143 Ky. 10, 135 S. W. 425; *Bauer v. I. C. R. R. Co.*, 156 Ky. 183, 160 S. W. 933. In lieu of instruction 5, on another trial the court will give the jury this instruction: (5) If you shall believe from the evidence that the plaintiff went in between the cars while they were in motion, and sustained the injuries sued for before the train came to a stop, you will find for the defendant.

Judgment reversed, and cause remanded for a new trial.

# LOUISVILLE & N. R. CO. v. STEWART'S ADM'X.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

## 1. MASTER AND SERVANT (§ 250½. New, vol. 15 Key-No. Series)—PLEADING—WHAT LAW GOVERNS.

Where a general allegation of negligence is sufficient in the courts of a state, such allegation is good in an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), though the petition, if the action had been brought in the federal court, would be bad unless it set up with particularity the acts of negligence complained of.

## 2. MASTER AND SERVANT (§ 276\*)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for the death of an engineer, evidence held not to show the negligence of the rear flagman in applying the emergency air brake, thereby stopping the train so suddenly as to throw the engineer against the window of the cab, causing injuries resulting in his death.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

## 3. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for the death of an engineer, evidence held to show that the conductor was negligent in giving signals to the engineer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

## 4. DEATH (§ 95\*)—ACTION FOR DEATH—DAMAGES.

The measure of damages in an action for negligent death is such as will compensate the estate of decedent for the destruction of his earning power, and the jury in arriving at the amount must consider all the evidence bearing on the question.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.\*]

## 5. DEATH (§ 101\*)—ACTION FOR NEGLIGENT DEATH—DAMAGES—APPORTIONMENT.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for negligent death, the jury should apportion the recovery, if any, between the beneficiaries.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 132-140; Dec. Dig. § 101.\*]

Appeal from Circuit Court, Warren County.

Action by William H. Stewart's administratrix against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions to grant new trial.

Benjamin D. Warfield, of Louisville, and Sims & Rodes, of Bowling Green, for appellant. Wright & McElroy, of Bowling Green, and Hazelrigg & Hazelrigg, of Frankfort, for appellee.

TURNER, J. On September 5, 1908, William H. Stewart, an engineer employed by appellant, while running a train from Paris, Tenn., to Bowling Green, Ky., was injured, and as result thereof died 22 days later from inflammation of the brain. Thereafter his wife qualified as administratrix, and instituted this action as personal representative seeking damages under the Employers' Liability Act of April 22, 1908 (chapter 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]). The jury returned a verdict for \$20,000, and from a judgment on that verdict this appeal is prosecuted.

Upon the occasion in question the train was coming north from Paris, Tenn., towards Bowling Green, Ky. When it reached Cumberland City, Tenn., it met a south-bound freight train, and, accordingly, the north-bound train went in on the single switch which was at that point, so that the freight train might proceed south; but there was also due at that point a south-bound passenger train in a short time, and Stewart's train had to wait there until it also went south. Stewart's train had to clear the main track first to let the freight train proceed south, and later to permit the passenger train to pass. Stewart's freight train was a long train, and there were several cars standing on the side track when his train went in on it. The cars so standing were coupled to the engine and pushed ahead of the engine on the side track as it proceeded north. When the freight train had gone far enough north to clear the main track at the south end of the switch to enable the freight train standing on the main track to pass south, the cars so pushed ahead of the engine on the side track were either on the main track at the north end of the switch or so close to the main track as to foul it, or not to be "in the clear" of the main tracks upon which the passenger train which was shortly expected from the north must pass. The flagman in charge of the rear end of the train, after his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

train was on the switch, threw the switch and locked it, as it was his duty to do, so that not only the freight train but the expected passenger train might proceed south. After the freight train had gone south, the conductor, who was up near the engine and cars near the north end of the switch, signaled the engineer to back his train, evidently with the purpose of leaving the north end of the switch clear so that the passenger train might pass; a flagman had already been sent out to flag the approaching passenger train to the north.

There were three crossings going over the side track, one very near the south end of the switch, and the other two were blocked by the standing freight train. It was the duty of the company to keep these crossings open, and the rear flagman, as soon as he had closed the switch, started up to the middle crossing to see if anybody wanted to get through, and if necessary to open it; but, before he reached the middle crossing, the conductor up at the front of the train gave the engineer a signal to back his train, and this he proceeded to do. The rear flagman, whose duty it was not only to keep the crossings open, but to throw the switch at the south end so that the switch would not be split, and to avoid a possible derailment of cars, immediately started back while the train was moving for the purpose of throwing the switch; but when he reached the rear of the train, doubting whether he had time to unlock and throw the switch before the caboose reached it, he put on the emergency air brake from the rear of the train called an angle-cock, and stopped the train before the caboose reached the switch, and just about where it fouled the main track. The putting on the emergency in this way from the rear had the effect to immediately stop the whole train, and cause a considerable jerk or jar, and it is claimed by the plaintiff that this jerk or jar threw him up against the side of the cab of the engine and bruised his shoulder and injured his head in such way as resulted in his death.

The crew of the train consisted of five men: Jones, the conductor; Stewart, the engineer; Minor, the brakeman at the front of the train; and Hill, the flagman at the rear of the train; and Sorrels, the fireman. Jones, the conductor, did not testify upon the trial; but we have the testimony of Minor, Hill, and Sorrels. The testimony is that the siding was not long enough to hold Stewart's train and the cars which were already on it, and at the same time be clear of the main track at both ends, so that it was necessary to back his train till he cleared the main track at the north end of the switch so that the passenger, a much shorter train, could pull down the main track and stop clear of the north end of the switch till the freight train could pull up north so as to clear the main track at the south end; in other words, as expressed by railroad men,

they had to "saw-by." Sorrels, the fireman, testified that the conductor gave Stewart the signal, and the engineer gave three blasts of the whistle, and then started back slowly, and while so backing slowly, and after the train had backed a short distance, the flagman, Hill, put on the emergency application of the air brake at the rear and stopped the train suddenly, and that the jar threw Stewart up against the window, and Stewart claimed immediately afterwards that it had hurt his head and shoulder; that the jar was neither hard nor soft, but medium. Minor states that the emergency application caused a "right smart" jar, that it stopped every car, including the engine, at once, and that such an application might endanger some part of the train, or might result in injuries to persons around or on the train. Hill, the rear flagman who applied the air, testified that he applied it for the purpose of preventing the train "from splitting the switch," and possibly derailing one or more cars; that he did not apply the brakes for the purpose of "bunching the slack," although its application did have that effect, and did have the effect to keep the rear end of the train from going on the main track at the south end of the switch. He testified that after the train had pulled onto the side track from the main track he threw the switch and locked it; that it was his duty then to go to the middle crossing, which was blocked by the freight train, to see if any one wanted to get by, and to cut the train if necessary and let them by; and after he had locked the switch he started to the middle crossing which was from 400 to 600 feet distant from the lower crossing near where the caboose stopped; that he had gone about one-third of the way when the train began to back, and he immediately hastened back towards the rear of the train, and, thinking he did not have time to unlock and throw the switch before the train got to the main track, he put on the emergency from the rear and stopped the caboose before it reached the main track and about at a point where it would foul the main track.

Two rules of the company were introduced in evidence as follows: No. 1. "The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reached the exact spot." It was shown, however, that the latter sentence had no application where the air is applied from the rear of the train. The other rule introduced was as follows: No. 2. "A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp. No attempt

should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock and see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employé attending the switch will, after locking it to main track, take a position not nearer than ten feet from the switch until the expected train has passed."

[1] The petition charged in general terms that the death of Stewart was brought about by the negligence of the agents and employes of defendant, but does not specify in detail the negligence complained of. It is urged by appellant that the demurrer to the petition should have been sustained because the plaintiff was proceeding under a federal statute and should have been required to set up with particularity the acts of negligence complained of as he would have been required to do in the federal court; but the act of Congress does not undertake to prescribe the mode of procedure where the action is pending in the state courts, except in certain particulars not here involved. So that, the general allegation of negligence being held sufficient in this state prior to the enactment of the Employers' Liability Act, such a plea will be held good even when proceeding under that act.

[2] It is urgently insisted for appellant that it was entitled to a peremptory instruction. We have given above the substance of the evidence, and must say that, so far as the evidence shows any negligence upon the part of Hill, the rear flagman, appellant's contention should have been sustained. It was Hill's duty to lock the switch at the south end of the siding just as he did. Under one of the rules quoted, it was his duty to remain near that switch until the expected train had passed on the main track, but he was relieved from that duty by the further imperative duty which devolved upon him of seeing that the middle crossing was kept open for traffic. It was the duty of the company, under the laws of Tennessee, to keep those crossings open, and Hill immediately after closing the switch proceeded to the performance of this latter duty, and before he could get to the middle crossing the train began to back, and he, knowing that the switch was closed, immediately ran back towards the rear of the train; but, finding he did not have time to unlock and throw the switch in order to prevent the "splitting of the switch" and possibly the derailment of some of the cars, and consequent delay in traffic which would have resulted therefrom, he did the only thing which he could reasonably have done, and that was to apply the emergency air brake by angle-cock; and it is doubtful from the evidence whether he then applied it in time to prevent the freight train from fouling the main track.

[3] But the conductor was guilty of negligence; he gave the order to back the train when he knew, or should have known, that the switch at the south end of the siding was locked; he knew, or should have known, that the rear flagman, after locking that switch, had to see to the keeping open of the middle crossing, and therefore knew, or should have known, that the flagman was not at the switch when he gave that order to back, and that if the rear end of the train backed onto the main track at the south end of the switch it would split the switch and possibly derail some cars and delay traffic. He knew that under the rule above quoted the train before entering or leaving a siding must come to a full stop before the switch is thrown, and that until the switch is thrown and the lock secured no signal must be given for starting. The conductor knew that his train was too long for that siding to be "in the clear" of the main track at both ends; he necessarily knew that when he backed that train so as to clear the main track at the north end of the switch that it would probably run out onto the main track at the south end, and before giving that order he should have known either that the switch was open or that the flagman was there to open it. The front flagman had been sent ahead to flag the approaching passenger train, and there was no such emergency existing to clear the north end of the switch as justified him in giving the order to back until he knew that the switch at the south end was open, or that the flagman was there for the purpose of opening it. For these reasons the motion for a peremptory instruction was properly overruled.

[4] But the instructions of the court were radically wrong in several particulars. The correct measure of damages in such cases has been so often pointed out by this court that it would seem unnecessary to cite authority; but in this case in the first instruction the plaintiff is permitted to recover such a sum as will fairly compensate his estate for his death. Instructions similar to that have been frequently condemned upon the idea that it might authorize the jury to consider mental anguish, and loss of companionship, and so on. The true measure of damages is that sum that will compensate his estate for the destruction of his power to earn money. On another trial of the case the second instruction, which deals alone with the negligence of Hill, the flagman, if the evidence is the same, will under our view of the case probably be eliminated, and for that reason we will not consider it. Instruction No. 3 is erroneous for the same reason as instruction No. 1; it should have been in substance that the measure of recovery is such sum as will compensate his estate for the destruction of his power to earn money, and that the jury may in arriving at this amount consider all the evidence in the case bearing upon this question. Instruction No. 4 should be given

on a new trial in conformity with the rule laid down in Nashville, Chattanooga & St. Louis R. Co. v. Banks (this day decided) 156 Ky. 609, 161 S. W. 554.

[5] The court will also upon the return of the case give such instructions to the jury as will apportion the ultimate recovery, if any, between the beneficiaries as is suggested by the Supreme Court in the case of Gulf, Colorado, etc., Ry. Co. v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785.

For the reasons indicated, the judgment is reversed, with direction to grant appellant a new trial for further proceedings consistent herewith.

### SOUTHERN BITULITHIC CO. v. DETREVILLE et al.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

#### 1. EVIDENCE (§ 83\*)—INDEBTEDNESS—VALIDITY—SCHOOL BONDS.

On an issue as to whether a city that had issued certain high school bonds exceeded the limit of its lawful indebtedness by executing a subsequent contract for paving, it would be presumed, in the absence of evidence to the contrary, that the city council performed the necessary requirements and that the bonds were valid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 863\*)—CONSTITUTIONAL DEBT LIMIT—OBLIGATIONS—VALIDITY.

An obligation of a city in excess of the income and revenue provided for the year is a violation of the Constitution, though it is made payable in future years.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1824-1827; Dec. Dig. § 863.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 863\*)—FISCAL ADMINISTRATION—LIMIT OF TAXATION.

Where a city has created a debt which is not in excess of the amount which it is entitled to raise under the constitutional limit of taxation, it cannot defeat the debt by failing to make the necessary levy and may be required to make it within the constitutional limit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1824-1827; Dec. Dig. § 863.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 867\*)—DEBT LIMIT—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Const. § 157, provides that the tax rate of cities for other than school purposes shall not exceed specified rates; that no city shall become indebted in any manner or for any purpose to an amount exceeding, in any year, the income and revenue provided for such year without the assent of two-thirds of the voters thereof, voting at an election held for that purpose; and that any indebtedness contracted in violation of the section shall be void. Section 158 declares that cities shall not incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding specified maximum percentages on the value of the taxable property therein. Held, that a municipality, without a vote of the people, cannot in one year create a debt to be thereafter paid in subsequent years out of the income and revenue for such subsequent years, and for the payment of which no provision can be made

out of the income and revenue provided for the year in which the indebtedness is created, and that, where a city has become indebted in an amount exceeding the income and revenue provided for the year 1913, a contract creating an indebtedness for street improvements for that year is void to the extent of the excess.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

Appeal from Circuit Court, Christian County.

Suit by George Detreville and others against the Southern Bitulithic Company Decree for complainants, and defendant appeals. Affirmed.

Hunter Wood & Son and Campbell Pilcher, all of Hopkinsville, for appellant. Southall & Southall and W. H. Southall, Jr., all of Hopkinsville, for appellees.

HOBSON, C. J. The city of Hopkinsville entered into a written contract with the Southern Bitulithic Company on July 3, 1913, by which it agreed to pay the company \$8,500 for paving certain parts of the public ways of the city. George Detreville brought this suit to enjoin the execution of the contract on the ground that by the contract an indebtedness was created in excess of the income and revenue provided for the year; and that the contract was void under section 157 of the Constitution. On the trial of the action the following agreed statement of facts was filed:

"That the following items of the income and resources of the city of Hopkinsville for the year 1913 are correct and to be estimated in determining the question whether or not the city of Hopkinsville exceeded its resources when it entered into the contract heretofore referred to with the Southern Bitulithic Company on the 3d day of July, 1913:

Amount of taxes on real and personal property and from franchises assessed at \$4,480,879 .....	\$44,808 79
2,510 poles at \$1.50 each per pole.....	3,765 00
Amount collected from delinquent taxes for the year 1912 from January 1, 1913, to July 3, 1913.....	4,778 88
Amount due on delinquent taxes for the year 1912 that is collectible.....	2,771 64
Amount collected from license fees from January 1, 1913, to July 3, 1913.....	21,334 37
Amount collected from fines, dog taxes, and pounds, fees from January 1 to July 3, 1913.....	2,094 00
Amount cash collected from January 1, 1913, to July 3, 1913, from cemetery.....	1,222 63
Making total amount of resources for the said city of Hopkinsville for the year 1913 .....	\$80,275 31

"It is agreed between the parties hereto that on the 3d day of July, 1913, the city of Hopkinsville owed the following debts which were created by contract which should be and are to be estimated in determining the question whether or not the city of Hopkins-

ville exceeded the resources and income of the city for the year 1913, to wit:

Note due Planters' Bank & Trust Co.....	\$19,971 78
Fixed salaries of officers and employees....	20,631 72
On contracts with the Hopkinsville Water Co. ....	5,100 00
On contract with Kentucky Public Service Company for street lighting for the year 1913 .....	7,200 00
Amount due on contracts for sewers.....	3,647 50
Amount of interest on 66,000 school bonds	1,300 00

Making the total amount of indebtedness of the city of Hopkinsville on July 3, 1913..... \$57,851 00

"It is further agreed between the parties hereto that on the 1st day of March, 1910, the city council of the city of Hopkinsville adopted an ordinance under which said city issued bonds to the amount of \$40,000, running a term of 20 years and bearing 5 per cent. interest, for the purpose of erecting a high school building in the city of Hopkinsville, which bonds were dated April 1, 1910, and that said bonds were issued by the city without having submitted the question whether or not they should be issued to a vote of the people, and that said bonds are payable out of the general fund of the city of Hopkinsville, and that there were certain conditions in the ordinance under which said bonds were issued, all of which are fully set out and described in a copy of said ordinance, which is filed herewith and made a part of this agreed statement of facts, marked '2.'

"It is further agreed between the parties hereto that on the 10th day of November, 1911, the city council of city of Hopkinsville adopted an ordinance under which said city issued bonds for the amount of \$30,000, running a term of 20 years and bearing 5 per cent. interest, for the purpose of erecting a high school building in the city of Hopkinsville, which bonds were dated December 1, 1911, and that said bonds were issued by the city without having submitted the question whether or not they should be issued to a vote of the people, and that said bonds are payable out of the general fund of the city of Hopkinsville, and that there were certain conditions in the ordinance under which said bonds were issued, all of which are fully set out and described in a copy of said ordinance, which is filed herewith and made a part of this agreed statement of facts, marked '3.'

"It is further agreed that on July 3, 1913, \$66,000 of the bonds issued by the city of Hopkinsville, as hereinbefore stated, under ordinance adopted March 10, 1910, and November 10, 1911, were still outstanding and owing by the city of Hopkinsville on the 3d day of July, 1913. And it is contended by the plaintiff that the said sum of \$66,000, represented by the \$66,000 of high school bonds hereinbefore referred to, should be added to the sums hereinbefore agreed on as indebtedness of the city of Hopkinsville in

determining the question whether the city of Hopkinsville exceeded the constitutional limit and exceeded its income and resources for the year 1913, when it entered into the contract with the Southern Bitulithic Company on July 3, 1913; and it is contended on the other hand by the Southern Bitulithic Company that the \$66,000 indebtedness created by the issuance of the high school bonds of that amount, which remained unpaid on July 3, 1913, and which were issued prior to the year 1913, cannot properly or legally be included in an estimate of the indebtedness of the city of Hopkinsville on July 3, 1913, for the purpose of determining whether the city of Hopkinsville exceeded its resources for the year 1913 when it entered into the contract with the Southern Bitulithic Company on July 3, 1913."

Hopkinsville has a population less than 10,000 and is a city of the fourth class.

Sections 157, 158, and 159 of the Constitution, among other things, provide:

"The tax rate of cities, towns, counties, taxing districts and other municipalities, for other than school purposes, shall not, at any time, exceed the following rates upon the value of the taxable property therein, viz.:

\* \* \* For all towns or cities having (a population) less than ten thousand, seventy-five cents on the hundred dollars. \* \* \*

No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void." Section 157.

"The respective cities, towns, counties, taxing districts and municipalities, shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz.:

\* \* \* Cities and towns of the fourth class, five per centum. \* \* \*

Section 158.

"Whenever any city, town, county, taxing district or other municipality is authorized to contract an indebtedness, it shall be required, at the same time, to provide for the collection of an annual tax sufficient to pay the interest on said indebtedness, and to create a sinking fund for the payment of the principal thereof, within not more than forty years from the time of contracting the same." Section 159.

The circuit court held the contract made by the city with the Bitulithic Company void on the ground that the city had incurred an indebtedness in excess of the income and

revenue provided for the year. The city appeals.

[1] It will be observed that, while it is stipulated in the agreed facts that the high school bonds were issued without a vote of the people, it is not stipulated that, in issuing either of these sets of bonds, the council created or did not create an indebtedness in excess of the income and revenue provided for the year; and the case seems to have been practiced upon the ground that, nothing appearing on this subject, the court would presume that the council did its duty and that the school bonds were valid. This seems to be the rule as heretofore announced by the court. *Morris v. Hoagland*, 116 S. W. 684; *City of Louisville v. Gosnell*, 61 S. W. 476, 22 Ky. Law Rep. 1524; *City of Frankfort v. Morgan*, 110 S. W. 286, 33 Ky. Law Rep. 297. We shall dispose of the case upon this assumption. The question to be determined is: Must the \$66,000 of outstanding school bonds issued without a vote of the people be considered in determining whether the city has incurred an indebtedness in excess of the income and revenue provided for the year?

[2] The rule is well settled that an obligation in excess of the income and revenue provided for the year is a violation of the Constitution, although it is made payable in future years. *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 15 Ky. Law Rep. 756, 23 L. R. A. 402, 44 Am. St. Rep. 222; *City of Covington v. McKenna*, 99 Ky. 508, 36 S. W. 518, 18 Ky. Law Rep. 288; *Ramsey v. City of Shelbyville*, 119 Ky. 180, 83 S. W. 116, 26 Ky. Law Rep. 1102, 83 S. W. 1136, 27 Ky. Law Rep. 141, 68 L. R. A. 300.

[3] The rule is also well settled that, when a municipality has created an indebtedness which is not in excess of the amount which it may raise under the constitutional limit of taxation, it cannot defeat the indebtedness by failing to make the necessary levy within the constitutional limits. *City of Providence v. Providence Electric Light Co.*, 122 Ky. 237, 91 S. W. 664, 28 Ky. Law Rep. 1015; *Burkhart v. Vine Grove Common School District*, 118 Ky. 865, 80 S. W. 1128, 26 Ky. Law Rep. 262; *Trustees Common School District v. Kane*, 87 S. W. 321, 27 Ky. Law Rep. 983; *Lawrence Co. v. Lawrence Fiscal Court*, 130 Ky. 587, 113 S. W. 824.

[4] But the precise question that arises here does not seem to have been before the court in any previous case. It is earnestly insisted for appellant that each year the municipality may become indebted without a vote of the people to an amount not exceeding the income and revenue provided for that year, and that in determining the amount of indebtedness only the indebtedness created in that year is to be counted. It is insisted that in section 158 the words used are "incur indebtedness to an amount including existing indebtedness in the aggregate exceeding," etc.; and that the words "includ-

ing existing indebtedness" and the words "in the aggregate" are not contained in section 157. It is urged that this shows that the aggregate of indebtedness was not to be considered under section 157, but only the indebtedness incurred in the year in question. On the other hand, it is insisted that to adopt this construction of the Constitution would be to make it unnecessary for the municipal authorities ever to take a vote of the people, and that they could create from year to year indebtedness without taking a vote of the people until they had reached the limit prescribed in section 158. The decision of the question turns on the proper construction of these two sections.

It will be observed that in section 157 the first clause limits the rate of taxation that may be levied. The last clause limits the power of the municipality "to incur indebtedness in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for the year" without the assent of the people. Both parts of the section must be looked to in determining its proper meaning. A limitation upon the rate of taxation would have been of little value if debts without limit might be created. The purpose of the section as a whole was: First, to limit the rate of taxation; and, second, to require the municipality to live within its means. The words "to become indebted in any manner or for any purpose" are equally as broad as the words used in section 158, for, if a municipality in any year is already in debt \$5,000 and creates another debt of \$5,000, it will "become indebted in the sum of \$10,000." The words "in any manner" show that it was intended that the municipality should under no circumstances become indebted beyond the limits fixed. To allow the municipal authorities in each year to create an indebtedness up to the income and revenue provided for the year, regardless of previous outstanding indebtedness created in former years, would be to defeat the plain purpose of the section in limiting the rate of taxation and in limiting the power of the municipality to become indebted in any manner or for any purpose beyond the income and revenue for the year, for under such a construction the limitations of the section as to the creating of indebtedness by a vote of the people would be practically useless. We did not lay down a different rule in *Knipper v. City of Covington*, 100 Ky. 187, 58 S. W. 498, 22 Ky. Law Rep. 676, or in *Lawrence County v. Lawrence Fiscal Court*, 130 Ky. 587, 113 S. W. 824. In the first case the question presented was as to the power of a municipality without a vote of the people to become indebted in excess of the income and revenue provided for the year in case of emergency the public health or safety should so require, as provided in section 158 of the Constitution, and it was held that the indebtedness

could not be created without a vote of the people, although in a case of emergency, and that this limitation found in section 158 only applied to the amount of indebtedness the municipality might incur and did not apply to the limitations prescribed in section 157. In the other case it was held that the income and revenue of a year includes assets of the municipality which are reasonably collectible, and which in ordinary events may be relied on as equivalent to cash, and that, under the facts there shown, the municipal authorities had a right to assume that certain revenues which had not been collected would be available. It is true the court said in that opinion that it is not necessary to the validity of a municipal indebtedness that the municipality should have made provision for its payment, but this must be read in connection with the subsequent part of the opinion, in which the court showed what it meant. Section 4281t, Ky. St., subssecs. 3, 4, and 5, provide:

"All money, bonds and securities belonging to any separate fund, or sinking fund, of any county, city or town, shall be kept in a separate account, and where said fund is that of any county, a semiannual statement thereof upon dates fixed by the fiscal court shall be made to said court by the treasurer, commissioners, or custodian of said fund; and where said fund is that of any city or town, a semiannual statement thereof shall be made to the common or general council of said city, or the board of trustees of said town at its first regular meeting in the months of January and July of each year, by the treasurer, commissioners, or custodian of said fund." Subsection 8.

"Neither the fiscal court of any county, nor the common or general council of any city, nor the board of trustees of any town, shall expend any money in excess of the amount annually levied and collected for that year by such county, city or town, or levied, collected or appropriated for any special purpose; and the fiscal court of any county, and the common or general council of any city, and the board of trustees of any town, shall not expend, nor suffer, nor permit or authorize to be expended, any money or tax levied and collected for any one purpose to any other purpose than that specified in the order, resolution or ordinance under which the same is levied, imposed and collected. Any member of the fiscal court of any county, or of the common or general council of any city, or of the board of trustees of any town, who shall knowingly vote for any appropriation of money, or for the making of any contract in violation of this act, or any officer of the county, city or town who shall knowingly do any act to impose upon the county, city or town any pecuniary liability in excess of the authority in this act limited, shall be guilty of a misdemeanor and, upon conviction, be punished by fine of not less

than one hundred nor more than five hundred dollars, or imprisoned in the county jail not less than one month nor more than twelve months, or both so fined and imprisoned." Subsection 4.

"Where the special object or purpose for which a tax was levied and collected has been accomplished, completed and finished the amount remaining in said special fund, if any, shall pass to and become a part of the general revenue fund of the county, city or town." Subsection 5.

This statute was enacted the better to enforce section 180 of the Constitution:

"Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose."

Section 180 of the Constitution must be borne in mind in determining the meaning of section 157. To illustrate: If a municipality in one year creates a debt and levies a tax to pay it, but the tax is not all collected, and so a part of the debt is left unpaid, this fund, when collected in the following year, must be applied to the payment of this debt and should not be considered in computing the income and revenue of the year unless the unpaid debt is also included in the estimate of the liabilities. A creditor is not defeated in the collection of a debt that the council had the legal right to create merely because the tax levied is not collected, or the council misapplies the money that should have been paid to him. Still the debt remains and must be considered in determining the amount of indebtedness that may be incurred in the succeeding year and each following year until it is paid. If the school debt was legally created in 1910 and 1911, the part unpaid in those years must be counted as a debt in each succeeding year until the debt is paid. No one interested in that debt is a party to this proceeding, and, no facts being shown to establish the invalidity of the debt, we cannot assume its invalidity. A debt for school purposes is within the constitutional inhibition no less than a debt for other purposes. *City Council of Richmond v. Powell*, 101 Ky. 7, 27 S. W. 1, 16 Ky. Law Rep. 174; *Commonwealth v. L. & N. R. R. Co.*, 105 Ky. 208, 48 S. W. 1092, 20 Ky. Law Rep. 1127; *Brown v. Board of Education*, 108 Ky. 783, 57 S. W. 612, 22 Ky. Law Rep. 483. Bonds issued by a city of the fourth class for school purposes are a debt of the city and must be included in computing its indebtedness (*City Council of Richmond v. Powell*, 101 Ky. 7, 27 S. W. 1, 16 Ky. Law Rep. 174; *Walsh v. City of Pineville*, 152 Ky. 556, 153 S. W. 1002), although a different rule applies in cities of the second class (*Ex parte City of Newport*, 141 Ky.

329, 132 S. W. 580, 37 L. R. A. [N. S.] 1034, Ann. Cas. 1912C, 447; *Coppin v. Board of Education*, 155 Ky. 387, 159 S. W. 937).

Where a debt has been created with the assent of two-thirds of the voters of the municipality voting at an election held for that purpose, such debt is not to be computed in determining the amount of indebtedness which the municipal authorities may incur during any year. Such a debt must be provided for as required in section 159 of the Constitution with the limitation that the total tax rate does not exceed the maximum rate allowed in section 157 and will cut down to that extent the revenue available for other purposes.

Summing up the matter and reading the sections of the Constitution referred to together, we conclude:

(1) In any year all the outstanding valid indebtedness of the municipality not created with the assent of two-thirds of the voters thereof must be taken into consideration in determining whether in that year the municipality becomes indebted in any manner or for any purpose to an amount exceeding the income and revenue provided for the year.

(2) When the municipality has created an indebtedness and has power under the Constitution to levy a sufficient tax to pay the debt so that its indebtedness will not exceed the income and revenue provided for the year, it may not defeat the debt by failing to levy the proper tax or by diverting the fund to other purposes.

(3) Any indebtedness created by the municipal authorities beyond the limits prescribed is void to the extent of such excess.

(4) A municipality may have income from other sources beside the revenue provided for the year by taxation, and it will be presumed, in the absence of a showing to the contrary, that the officers did their duty.

(5) It is not contemplated by the Constitution that a municipality shall without a vote of the people create in one year a debt to be thereafter paid in subsequent years out of the income and revenue for such subsequent years, and for the payment of which no provision can be made out of the income and revenue provided for the year in which the indebtedness is created.

When we add to the admitted debt of the city, \$57,851, the amount of the school bonds, \$66,000, we have an aggregate of \$123,851, or much more than the admitted assets, \$80,275.31; and, if we add to this certain disputed assets which appellant insists should be counted, it would not change the result. We therefore conclude that the city had become indebted in an amount exceeding the income and revenue provided for the year on July 3, 1913, when the contract in question was made, and that the circuit court properly held the contract void.

Judgment affirmed.

**STUESSY v. CITY OF LOUISVILLE et al.**  
(Court of Appeals of Kentucky. Dec. 19, 1913.)

**1. ELECTIONS (§ 60\*)—SCHOOL ELECTIONS—RIGHT TO VOTE—WOMEN—CONSTITUTIONAL PROVISIONS.**

Const. § 145, provides that every male citizen of the United States of the age of 21, who has resided in the state one year, in the county six months, and in the precinct in which he offers to vote 60 days, next preceding the election, shall be a voter in that precinct and not elsewhere; but section 155 declares that section 145 shall not apply to the election of school trustees and other common school district elections, and that such elections shall be regulated by the General Assembly, except as otherwise provided in the Constitution. *Held*, that section 155 conferred on the Legislature full power to regulate everything relating to the management and control of the common schools of the state, and authorized the passage of Act March 12, 1912 (Laws 1912, c. 47), authorizing women to vote on all school measures and questions submitted to the vote of the people.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 56; Dec. Dig. § 60.\*]

**2. ELECTIONS (§ 65\*)—VOTERS—SEX—"SCHOOL DISTRICT ELECTION."**

The city of Louisville being a school district, an election therein on a tax measure is a "school district election," within Const. § 155, providing that such elections shall be regulated by the General Assembly, and that other sections of the Constitution providing the qualifications of voters shall not apply thereto.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 62; Dec. Dig. § 65.\*]

**3. ELECTIONS (§ 65\*)—VOTERS—SEX—BOND ISSUE—"SCHOOL MEASURE OR QUESTION."**

A proposition for the issuance of school improvement bonds of the city of Louisville, the proceeds to be used entirely for the advancement of the schools of the city, was a "school measure or question," within Act March 12, 1912 (Laws 1912, c. 47), providing that women shall have the right to vote for school trustees and on all school measures and questions.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 62; Dec. Dig. § 65.\*]

**4. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—SCHOOL BONDS—RIGHT TO ISSUE.**

The board of education in cities of the first class has no authority to issue school bonds or levy a tax for school purposes; such power resting exclusively in the general council.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 224-232; Dec. Dig. § 97.\*]

**5. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—BOND ISSUE—ELECTION—NOTICE.**

Act March 15, 1912 (Laws 1912, c. 90), amending the school laws of cities of the first class, authorized such cities to issue bonds for school purposes, on the consent of the voters given at an election, and directed that the mayor should see that all proper steps were taken to secure a vote of the people on the question, conforming as far as practicable to the proceedings in case of an election of members of the board of education in such cities, etc. *Held* that, the act not having provided for the giving of any notice of such an election, the fact that the 10 days' notice required by an ordinance passed by the city council directing a submission of the question of school bond issues to the voters under the act was not complied with did not invalidate the election, where the ordinance was published nearly three months before the election



was held; such publication being sufficient notice.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 224-232; Dec. Dig. § 97.\*]

**6. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—SPECIAL ELECTIONS—NOTICE.**

Where the statute under which an election was held to authorize a school bond issue did not provide for notice, and the requirement of an ordinance, passed to carry the act into effect, that 10 days' notice of the election be given, was not complied with, the size of the vote cast at the election could be considered as evidence in determining whether the notice given was sufficient.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 224-232; Dec. Dig. § 97.\*]

**Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.**

Suit by E. C. Stuessy against the City of Louisville and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Robert F. Vaughan, of Louisville, for appellant. Pendleton Beckley, of Louisville, for appellee City of Louisville. Ben F. Washer and Arthur Rutledge, both of Louisville, for appellee Board of Education.

MILLER, J. The appellant, a taxpayer, instituted this action to enjoin the city of Louisville, a city of the first class, and John H. Buschmeyer, its mayor, from executing, issuing, or delivering "school improvement bonds" of the city of Louisville of the face value of \$1,000,000, which were authorized by the voters of the city at the election held November 4, 1913. The circuit court sustained a demurrer to the petition, and, the plaintiff having declined to further plead, the petition was dismissed, and the plaintiff appeals.

The appeal presents questions of law only; there is no dispute whatever about the facts. If all the steps required by law for the issuing of the bonds have been taken, they will be valid and the petition was properly dismissed; if, however, any essential requirement has been omitted, the bonds cannot be lawfully issued, and their execution should be restrained.

The act of the Legislature approved March 4, 1910, makes every city of the first class, in the state, a single school district, and provides that the supervision and government of common schools, kindergartens, high schools, manual training schools, and normal schools, and all such school property therein, shall be vested in a board of five members to be known as the board of education of said city. Acts 1910, page 2. It is proposed to issue these bonds by virtue of the authority of an act of the Legislature, approved March 15, 1912, entitled "An act to amend the school laws of cities of the first class," which provides:

"That in cities of the first class whenever the board of education shall deem it neces-

sary for the proper accommodation of the schools of such city to purchase a site or sites or to erect school houses for the high schools or for the other schools, or to purchase land for the enlargement of existing school yards, or for any or all these purposes, and the annual funds raised from other sources are not sufficient to accomplish said purpose or purposes, and it shall deem a bond issue to be necessary therefor, said board shall make a careful estimate of the probable amount of money required for such purpose or purposes and it shall certify to the general council of said city the fact that an election for an issue of bonds for school improvements should be held together with the amount of money for which bonds shall be issued and the purpose or purposes to which the proceeds thereof shall be applied. It shall thereupon be the duty of the general council to adopt an ordinance submitting to the qualified voters of the city at the next regular municipal election the question whether bonds of the city to the amount specified shall be issued for school improvement purposes. The bonds so issued shall be designated as 'school improvement bonds,' and the ordinance shall provide the date and maturity of such bonds, the rate of interest they shall bear, and the total amount to be issued; and the ordinance shall also contain the necessary details in reference to the execution and delivery of said bonds, their denominations, coupons to be annexed, tax to be levied to pay the interest and a sinking fund to retire such bonds at maturity. No bond issue shall ever be for an amount exceeding the sum of one million dollars. The question to be submitted shall be so framed that the voter may by his vote answer for or against the issue of bonds.

"It shall be the duty of the mayor of the city to see to it that all proper steps are taken to secure a vote of the people upon the question, conforming, as far as applicable, to the proceedings in case of an election for members of the board of education in cities of the first class. If the voters of the city shall determine that such bonds shall be issued, they shall, when so issued, be placed under the control of the board of education, who shall determine when and at what price and how they shall be sold: Provided, that no such bonds shall be sold for less than par; and, provided, further, that any premium which may be obtained from said bonds shall constitute a part of the sinking fund for their ultimate retirement. As the bonds are sold, their proceeds shall be placed to the credit of the board in the same depositories which are selected for its other funds but shall be kept in a separate account and shall be used only for the purpose for which the bonds were issued.

"It shall be the duty of the general council to levy annually in its tax levy a rate

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that will raise a sum that shall be sufficient to pay the interest and create a sinking fund for the payment of the bonds at maturity. The said bonds, principal and interest, shall be a charge upon the sinking fund of said city, and it shall be entitled to have the annual tax that shall be levied as aforesaid." Acts 1912, p. 257.

Proceeding under this act, the board of education of the city of Louisville adopted a resolution on June 3, 1913, declaring that it deemed a bond issue for \$1,000,000 necessary for school purposes, as authorized by the act; and having made a careful estimate of the probable amount of money required for said purposes, it certified to the general council of said city the fact that an election for the issue of bonds for one million dollars for school improvements should be held in said city, and the specific purposes for which the proceeds of said bonds would be applied. Thereafter, in August, 1913, and pursuant to the direction of the act of March 15, 1912, above set out, the general council adopted an ordinance submitting to the qualified voters of said city, at the next regular municipal election to be held in said city on November 4, 1913, the question whether the bonds of the city of Louisville, to the amount of \$1,000,000, should be issued for "school improvement purposes," to be designated as "school improvement bonds." Said ordinance was duly approved by the mayor on August 8, 1913, was thereafter duly published as required by law, and became effective on August 12, 1913.

The question thus submitted and certified to the people was voted upon at the regular November election of 1913; and of the 32,772 voters voting upon that question, 22,259 voted for the proposition and in favor of the issuance of said bonds, and 10,513 were cast against the proposition. The result of the election was properly and regularly certified by the election commissioners of the county to the county court clerk. It will thus be seen that the bond proposition received the requisite assent of more than two-thirds of the voters who voted upon that proposition at said election, as required by section 157 of the Constitution.

Three grounds are assigned for a reversal of the judgment of the circuit court: (1) That a large number of women voted in said election and upon said question, and that women are not entitled to vote in an election of this character under the law of Kentucky; (2) that the right to vote for school trustees and on all school measures and questions, conferred upon women by the act of March 12, 1912 (Acts 1912, p. 193), does not include the right to vote on a bond issue; and (3) that the 10 days' notice of the submission of the proposition, provided by the ordinance, was not given.

We will consider these questions in the order named.

1. Excluding the exceptions, which do not

embrace women, the right to vote in Kentucky is fixed by section 145 of the Constitution, which reads as follows: "Every male citizen of the United States of the age of twenty-one years, who has resided in the state one year, and in the county six months, and in the precinct in which he offers to vote sixty days next preceding the election, shall be a voter in said precinct, and not elsewhere." Section 155 of the Constitution further provides: "The provisions of sections 145 to 154, inclusive, shall not apply to the election of school trustees, and other common school district elections. Said elections shall be regulated by the General Assembly, except as otherwise provided in this Constitution." Acting under section 155, above quoted, the Legislature, by the first section of an act approved March 12, 1912, provided: "That all women possessing the legal qualifications required of male voters in any common school election, and who in addition are able to read and write, shall be qualified and entitled to vote at all elections of school trustees and other school officers required to be elected by the people, and upon all school measures or questions submitted to a vote of the people; and all women possessing the legal qualifications required as to males shall be eligible to hold any school office or office pertaining to the management of schools. Provided, however, that this act shall not apply to any election the qualifications of the voters at which are otherwise prescribed by the Constitution nor to any office as to which the Constitution otherwise prescribes the qualifications of the persons eligible thereto." Acts 1912, p. 193. The act is copied in full in *Crook v. Bartlett*, 155 Ky. 306, 159 S. W. 826.

It is contended that the right given by section 155 of the Constitution to the General Assembly must be strictly confined to "the election of school trustees and other common school district elections," and that, when the Legislature by the Act of March 12, 1912, extended the right of suffrage to women "upon all school measures or questions," it exceeded its authority and went beyond the limits imposed by the Constitution, since under said act women are authorized to vote for officers other than school trustees, and at elections other than common school district elections.

In *Crook v. Bartlett*, 155 Ky. 305, 159 S. W. 826, we considered, at some length, the effect of the act of 1912, extending the right to vote to women on school questions, and held that it constitutionally gave the right to women to vote in the election of a county school superintendent, thus holding that an election of that character was a school measure or question within the meaning of the act, although section 155 of the Constitution did not mention county superintendent of common schools, or any other school officers except school trustees. It was there further held that the words "other common school district elections," found in section 155 of the

Constitution, were broad enough to embrace elections for county superintendent of common schools. In so holding, we said: "A narrow construction of these words would confine them to elections relating to taxation for school purposes, or other elections concerning schools that did not involve the election of school officers, independent of school trustees, and would further confine them to 'common school district elections' as distinguished from common school county elections. But no sufficient reason appears for giving to these words this limited meaning. On the contrary, the words 'other common school district elections' refer to all elections that have to do with matters relating exclusively to the management and conduct of the affairs of the common schools of the state, saving the office of Superintendent of Public Instruction, which is a constitutional office. Section 155 of the Constitution was evidently intended to take all school elections out of the provisions of the article on suffrage and elections and put these elections in a class by themselves, to be controlled by the will of the General Assembly of the state." Again, in speaking of section 155 of the Constitution, the court, on page 311 of 155 Ky., on page 829 of 159 S. W., supra, used this language: "In excepting school officers and school elections from the general provisions relating to elections, the framers of the Constitution had in view the large purpose of putting all common school elections in a class by themselves, and this manifest purpose should not be frustrated by attaching undue importance to particular words, or by giving to them a meaning that would defeat the intention of section 155 when considered as a whole. This section should be given a liberal construction and one that will carry out what seemed to be the purpose of its enactment, which was to leave the Legislature a free hand in everything relating to the management and control of the common schools of the state except when restrained by other sections of the Constitution."

[1, 2] Under this broad construction of section 155 of the Constitution, whereby a free hand is given to the Legislature in everything relating to the management and control of the common schools of the state, we see no difficulty as to the power of the Legislature in passing the Act of March 12, 1912, by which it gave the franchise to women "upon all schools measures and questions submitted to a vote of the people." The city of Louisville being a school district, an election therein upon a tax measure is clearly a "school district election" within the exception of section 155 of the Constitution, over which the Legislature is given control.

[3] 2. It is suggested, however, that an election in regard to the issuing of school bonds was a municipal or political question, and not a "school measure or question," within the meaning of the act of March 12, 1912. That the voting upon the question constituted

an "election," within the meaning of that term as used in the Constitution, there can be no doubt. *Morgan v. Goode*, 151 Ky. 284, 152 S. W. 584; *Hall v. City of Madison*, 128 Wis. 132, 107 N. W. 31. And, in view of the interpretation given to the term "elections" as found in section 155 of the Constitution, in *Crook v. Bartlett*, supra, there can be no doubt that the election upon the question of issuing school bonds is a "school measure or question," pure and simple. It not only vitally affects the management and control of the common schools of the city, but the act under which the election was held expressly provides that the proceeds of the bonds authorized under said election are to be applied to school purposes, only. The bonds are to be entitled "school improvement bonds," and were voted for, under an act entitled "An act to amend the school laws of cities of the first class." Furthermore, these bonds were voted for in pursuance to the resolution of the board of education, and the question of issuing them could not have been submitted to the people without that having been first done.

[4] The board of education in cities of the first class has no authority to issue school bonds, or levy a tax for school purposes. That power rests exclusively in the general council. And in *City of Louisville v. Commonwealth*, 134 Ky. 488, 121 S. W. 411, the board of education compelled the city, and its mayor, by mandamus, to levy a school tax which had been provided by an act of the Legislature. In the course of that opinion, we said: "Nor does the state take its hands off the control of the school system, by allowing, or by requiring, the different localities to take steps toward supplementing the general appropriation by local taxation. The school is none the less a state institution for that matter." And, in the same opinion, it was expressly said that the public schools were not municipal institutions at all; on the contrary, they are a part of the state's common school system, and their trustees are officers of the state. And, in the late case of the *City of Louisville v. Board of Education*, 154 Ky. 316, 157 S. W. 379, we further said: "This question is no longer an open one in this state. We have several times written in substance and effect that every common school in the state, whether it be located in a populous city or in a sparsely settled rural district, is a state institution, protected, controlled, and regulated by the state, and that the fact that the state has appointed agencies, such as fiscal courts, school trustees, and municipal bodies, to aid it in the collection of taxes for the maintenance of these schools, does not deprive them of their state character. *City of Louisville v. Commonwealth*, 134 Ky. 488 [121 S. W. 411]; *Prowse v. Board of Education*, 134 Ky. 366 [120 S. W. 307]; *Elliott v. Garner*, 140 Ky. 157 [130 S. W. 997]; *Board of Educa-*

tion v. Townsend, 140 Ky. 248 [130 S. W. 1105]; McIntire v. Powell, 137 Ky. 477 [125 S. W. 1087]; City of Henderson v. Lambert, 8 Bush, 607; Bamberger, Bloom & Co. v. City of Louisville, 82 Ky. 337. Therefore, when a municipal body, or a county, or a school district levies taxes for school purposes, the tax so levied is a state and not a municipal, county or district tax, although it be levied and collected by municipal or county or district officers. The fact that the tax is levied and collected for the state by these agencies of the state appointed for that purpose does not deprive it of its character as a state tax." If the issuance of these bonds is not a school measure or question, it is hard to imagine a case that would come within the meaning of those terms. Crook v. Bartlett, supra.

[5] 3. Did the failure to give the full 10 days' notice required by the ordinance invalidate the election?

The petition alleges, and the demurrer admits, that only five days' notice of the election was given; while section 6 of the ordinance of August 8, 1913, submitting the question, provides as follows: "Separate ballots shall be prepared for the purpose of ascertaining the will of the qualified voters at the general election on November 4, 1913, upon which ballots there shall be printed the following question or proposition required to be submitted to the qualified voters of the city of Louisville by this ordinance, viz.: 'Are you in favor of the issue by the city of Louisville of one million (\$1,000,000) dollars of "school improvement bonds" to be used for school improvement purposes, as provided in Ordinance No. —, Series 1913, and the act of the General Assembly of the commonwealth of Kentucky, entitled "An act to amend the school laws of cities of the first class," approved March 15, 1912? Such ballots shall be deposited in separate ballot boxes, to be provided for this purpose by the sheriff of Jefferson county. And the mayor is hereby authorized and directed to give public notice of the time, place and purpose of the election upon said question or proposition at least ten (10) days (exclusive of Sundays) prior to the day of election, in each of the daily morning and afternoon papers published in the city of Louisville.'"

The general rule for the construction of statutes regulating elections is laid down in 15 Cyc. 317, as follows: "In the construction of statutes regulating elections it is important to keep in mind two recognized principles: (1) The legislative will is the supreme law under the Constitution, and the Legislature may prescribe the forms to be observed in the conduct of elections, and provide that such method shall be exclusive of all others; (2) since the first consideration of the state is to give effect to the expressed will of the majority, it is directly interested in having each voter cast a ballot in accordance with the dictates of his individual judgment. Recog-

nizing the principle first above stated, the courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and in no other, such provisions are mandatory and exclusive. By an application of the second principle above stated the courts, in order to give effect to the will of the majority, and to prevent a disfranchisement of legal voters, have quite as uniformly held that those provisions which are not essential to a fair election are merely formal and directory." And on page 320 of the same volume it is further said: "The time and place of holding regular elections are generally prescribed by public laws, and when this is so the rule is that an omission to give the prescribed statutory notice will not vitiate an election held at the time and place appointed by law. In such case the provision for notice is considered as directory and not mandatory. The time and place being appointed by law, the electors are bound to take notice of the same and therefore derive notice from the statute itself, inasmuch as they are presumed to know the law. The purpose of the prescribed notice is to give greater publicity to the election, but the authority to hold it comes directly from the statute; if it were otherwise, any public election might be defeated by the ignorance, carelessness, or design of the officers whose duty it is to give the notice. And a fortiori a defective official notice which does not mislead the electors or cause them to lose their votes will not vitiate a general election held under such circumstances; for where there has been a substantial compliance with the requirements of the law in this regard, and there has been a fair election, the result cannot be defeated by mere technical irregularities. The vital and essential question in all the cases is whether the want of a statutory notice has resulted in depriving a sufficient number of electors of the opportunity to exercise their franchise to change the result of the election."

It will be observed, however, that the notice in the case at bar is not required by the Constitution, or by the act of March 15, 1912, authorizing the submission of the questions; it is provided for by the ordinance, only. It is true the act of March 15, 1912, above set forth, directs the mayor to see that all proper steps are taken to secure a vote of the people upon the question submitted, conforming, as far as applicable, to the proceedings in case of an election of the members of the board of education in cities of the first class; but this provision of the act does not require the mayor, or any person, to give notice of the election. On the contrary, the act makes it the duty of the general council, upon its having received the certificate of the board of education, to adopt an ordinance submitting the bond question to the voters "at the next regular municipal election." This was done by the fifth section of the ordinance, which

reads as follows: "That at the general election to be held on November 4, 1913, there shall be submitted to the qualified voters of the city of Louisville, as required by law, the question as to whether the city of Louisville shall issue bonds for the purposes aforesaid as provided for in this ordinance, and none of said bonds shall be prepared or issued unless at said election two-thirds (%) of those voting on the said question shall vote in favor of the issuance of said bonds, as provided for in this ordinance; but in the event it shall be duly ascertained and certified, as required by law, that two-thirds of those voting on said question at said election voted in favor of the issuance of said bonds for the purpose aforesaid, as provided for by said ordinance, the fact that they have done so shall be certified to by the mayor upon the face of said bonds, which bonds shall then, and only in that event, be issued and delivered to and sold by the board of education of said city of Louisville, and the proceeds of such sale applied and deposited as aforesaid." The ordinance is styled "An ordinance concerning the issuance of one million of dollars of 'school improvement bonds' of the city of Louisville, for the purpose of purchasing sites for schoolhouses, the erection of schoolhouses for the high schools and other schools, and the purchase of lands 'for the enlargement of the existing school yards within said city,' and it was published in full in a daily newspaper of Louisville, in August, 1913, as required by law.

The ordinance fully complied with the statute, which made it the duty of the general council to submit the question "to the qualified voters of the city at the next regular municipal election." The provision of the act making it the duty of the mayor to take all proper steps "to secure a vote of the people upon the question" evidently intended to impose upon him the duty of co-operating with the general council in the adoption of an ordinance submitting the question. This the mayor did, promptly and efficiently, and in good faith. Suppose, however, the mayor had declined to approve the ordinance; could he not have been compelled to approve it under the explicit language of this statute?

No specific notice being required by the statute or the Constitution, can it reasonably be contended that the ordinance should have gone further than the requirements of the Constitution or the statute by giving a specific notice in addition to the adoption of the ordinance which called the election? And if so, how much notice should it have given? Should it have given a different notice, or a longer notice than is required in the enactment of other city ordinances? If the ordinance in question had not required any notice, would any one doubt its validity under the facts of this case? And where the statute carefully prescribes what the general council shall do in submitting the question, all of which is prop-

erly done, can the general council invalidate the ordinance, which is otherwise valid, by incidentally inserting some extraneous provision in the ordinance? We think not. We must not overlook the fact that the ordinance properly and regularly called the election. The ordinance took its validity from the statute, and when it complied with the requirements of the statute, and contained no provision contrary to the statute, it was a valid ordinance.

So, the question comes to this: Was the ordinance calling the election for a specific date, as was required by the enabling act, a sufficient notice of the election?

The question here presented was before the court in *Board of Trustees of Augusta v. Maysville & B. S. R. Co.*, 97 Ky. 145, 30 S. W. 1, where the question of a bond issue by the city of Augusta was submitting to a vote of the people under an enabling act of the General Assembly, which did not prescribe the time, manner, or place of holding the election, or the kind of notice to be given. The enabling act in that case is chapter 690 of the Acts of 1883-84, and merely provides for the issue of the bonds, provided a majority of the legal voters voting in said city should vote in favor thereof at an election called and held for that purpose. Acts 1883-84, vol. 1, p. 1270. In that case, as here, a taxpayer sought to enjoin the city and its officers from issuing the bonds, and it was there also contended that notice of the election was necessary. And, in the absence of such a requirement in the enabling act, it was further contended that the city council was bound by the manner of holding elections generally for the city, and that the same notice must be given as was provided by the city charter, which required a notice of 30 days. On the other hand, it was contended for the city that the ordinance calling the election under the statute was a notice of the election, and that no other notice was necessary.

In sustaining the election called in this way, the court said: "It is also well settled that, when the law fixes the time for holding an election, the notice otherwise required to be given may be dispensed with. *Toney v. Harris*, 85 Ky. 475 [3 S. W. 614, 9 Ky. Law Rep. 36]; *Berry v. McCullough*, 94 Ky. 247, [22 S. W. 78, 15 Ky. Law Rep. 117]; *Doores v. Varnon*, 94 Ky. 507 [22 S. W. 852, 15 Ky. Law Rep. 244]."

The effect of this decision is that, where the act of the Legislature provides that a city council may submit the question of a bond issue to the vote of the people without specifying the kind of notice to be given, the submission of that question by an ordinance duly adopted constitutes all the notice that is necessary to a legal submission of the question, provided a sufficient time elapses between the adoption and publication of the ordinance and the election to afford the voters a reasonable opportunity of informing

themselves upon the merits of the question submitted. If, however, the period between the publication of the ordinance and the election is of so short a duration as not to afford the voters a reasonable opportunity to so inform themselves, the publication of the ordinance will not be treated as a sufficient notice. In the case at bar the ordinance was published on August 8, 1913, about three months before the election was held. Certainly that was ample notice.

[8] Furthermore, the size of the vote cast may be considered as evidence in determining whether the notice was sufficient, under the rule above announced. *Wilson v. Brown*, 109 Ky. 235, 58 S. W. 595, 22 Ky. Law Rep. 708. In the case at bar more than 32,000 votes were cast upon this proposition, while the total vote for mayor of the city in said election aggregated about 46,000 votes. Considering the fact that the vote on the bond proposition was taken by a separate ballot, the vote was, under all the circumstances, unusually large.

We conclude the election was not invalidated for want of the notice provided by the ordinance.

Judgment affirmed.

#### OLIVER CO. v. LOUISVILLE REALTY CO.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

##### 1. CORPORATIONS (§ 657\*)—FOREIGN CORPORATIONS—FAILURE TO COMPLY WITH STATUTE—EFFECT ON CONTRACT.

Under Ky. St. § 571, providing that corporations carrying on business in the state shall have a known place of business therein and an authorized agent upon whom process may be served, and that no corporation may carry on business in the state until it has filed with the Secretary of State a statement of the location of its office and the name of its agent for process, and making failure to comply therewith a misdemeanor subject to fine, but not in terms declaring contracts made in violation thereof to be illegal, a contract of a corporation which has not complied with such requirements entered into in the execution of its business in the state is void.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2538-2541, 2550, 2552-2554; Dec. Dig. § 657.\*]

##### 2. CORPORATIONS (§ 645\*)—FOREIGN CORPORATIONS—DESIGNATION OF AGENT TO RECEIVE PROCESS.

Ky. St. § 571, requiring all corporations doing business in the state to have a known place of business and an agent to receive service of process, and the filing of a statement with the Secretary of State showing such location and the name of such agent, and making a noncompliance therewith a misdemeanor, was intended as a police regulation for the protection of the people of the state, who have a right to know whether the party with whom they deal is an individual or a corporation, and to relieve, in a measure, the disadvantages of citizens dealing with foreign corporations.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2513, 2514; Dec. Dig. § 645.\*]

##### 3. CORPORATIONS (§ 659\*)—FOREIGN CORPORATIONS—CONTRACTS—ESTOPPEL TO DENY—INVALIDITY.

Under Ky. St. § 571, requiring all corporations doing business in the state to have a known place of business and an agent to receive service of process therein, making it unlawful for any corporation to do business in the state unless it shall have filed a statement with the Secretary of State giving the location of its office and the name of such agent, and making a noncompliance therewith a misdemeanor, a resident of the state contracting with a foreign corporation which had not complied with the statutes was not estopped to set up the corporation's violation of the law, although the enforcement of the statute might work a hardship on the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2561, 2562; Dec. Dig. § 659.\*]

##### 4. COURTS (§ 100\*)—STARE DECISIS—PARTY ENTITLED TO RELY THEREON.

Where cases, holding that one, contracting with a corporation which had not complied with Ky. St. § 571, requiring it to have a known place of business and an agent to receive process in this state and to file a statement as to such facts with the Secretary of State, was estopped to defend on the ground of the corporation's noncompliance therewith, were not overruled until after the transaction out of which a similar situation arose, the corporation was not deprived of its right to rely on the doctrine of stare decisis.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 341-343; Dec. Dig. § 100.\*]

##### 5. COURTS (§ 90\*)—RULES OF DECISION—STARE DECISIS.

When a rule of law has once been deliberately declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very cogent reasons and upon a clear manifestation of error.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 313-321, 351; Dec. Dig. § 90.\*]

##### 6. COURTS (§ 89\*)—RULES OF DECISION—"STARE DECISIS"—SCOPE AND GROUND.

The rule of "stare decisis," in relation to its effect upon private affairs, is nothing more than the application of the doctrine of estoppel to court decisions, grounded upon the principle that when courts have announced certain principles of law for the guidance and government of individuals and of the public, or have given a construction to statutes upon which they have relied in making contracts, they ought not to withdraw or overrule them so as to disturb contract and property rights entered into and acquired upon the faith of the principle announced or the construction made.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6627, 6628.]

##### 7. COURTS (§ 89\*)—RULES OF DECISION—STARE DECISIS—PARTY ENTITLED TO RELY THEREON.

Ky. St. § 571, requires all corporations doing business in the state to have a known place of business and an agent to receive service of process therein, declares it unlawful to do business without filing a statement of such matters with the Secretary of State, and makes the violation thereof a misdemeanor. A foreign corporation knowingly entered into a contract in violation of the disability imposed by the statute, and without being misled to its prejudice by reliance on previous decisions that the other party to the contract was estopped to defend on the ground of its noncompliance. *Held*, that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the corporation suing on the contract could not rely upon the doctrine of stare decisis.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.\*]

### 8. COURTS (§ 90\*)—RULES OF DECISION—STARE DECISIS—IN GENERAL.

The doctrine of stare decisis is not an arbitrary rule of positive law forbidding, under any circumstances, the questioning of prior decisions, or the exercise of judicial discretion in relation thereto; and, while no prior decision is to be reversed without good cause, there may be cases where it is plainly the court's duty to overrule a bad decision, as where the future benefit will be of greater moment than any erroneous decision in the past, and where a correction can be made without working more harm than good.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313-321, 351; Dec. Dig. § 90.\*]

### 9. CONSTITUTIONAL LAW (§ 116\*)—OBLIGATION OF CONTRACTS—JUDICIAL CONSTRUCTION OF STATUTE.

The obligation of a contract, valid when made under the laws of the state as then expounded, cannot be impaired by any subsequent decision of its courts altering the construction of the law, since a change in judicial construction as to a statute has the same operation on contracts and existing contract rights as any subsequent action of the Legislature, and since, after a statute has been settled by judicial construction, that construction becomes as much a part of the statute as the text itself in so far as contract rights under it are concerned.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 278; Dec. Dig. § 116.\*]

### 10. CONSTITUTIONAL LAW (§ 42\*)—OBLIGATION OF CONTRACTS—JUDICIAL CONSTRUCTION OF STATUTES—PARTY ENTITLED TO RELY THEREON.

The rule that the obligation of a contract, valid when made by the laws of the state as then construed, cannot be impaired by any subsequent decision of its court's altering its construction cannot be invoked by a party going into court as a confessed violator of the law of the state, and asking relief from a condition resulting from its willful violation of a penal statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.\*]

Hobson, C. J., dissenting. Nunn, J., dissenting in part.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by the Oliver Company against the Louisville Realty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Helm Bruce and Bruce & Bullitt, all of Louisville, for appellant. Trabue, Doolan & Cox, of Louisville, for appellee.

CARROLL, J. The question for decision in this case is this: Is it a good defense, to an action brought in a state court by a foreign corporation to enforce the collection of the amount due on a contract entered into in the execution of its business here engaged in, that it has not complied with section 571 of the Kentucky Statutes reading: "All corporations except foreign insurance companies formed under the laws of this or any other state, and carrying on any business in this state, shall at all times have one or more

known places of business in this state, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employé of such corporation, who shall transact, carry on or conduct any business in this state, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense"? The Oliver Company is a Tennessee corporation, and entered into a contract with the Louisville Realty Association to do certain work for it in the construction of a building by the latter company in the city of Louisville, Ky. The contract fixed the compensation that should be paid to the Oliver Company for the work it agreed to do, but during the progress of the work certain changes were made in the specifications, and as a result of differences arising between the parties to the contract as to the amount that should be paid, this suit was brought by the Oliver Company to recover from the realty company the sum it claimed was due it on the contract.

To this suit several defenses were made going to the merits of the claim asserted by the Oliver Company, but the issues arising on the merits of the controversy we do not find it necessary to discuss. The only question that we need concern ourselves with is the sufficiency of the defense relied on by the realty company that the Oliver Company could not maintain the action because it had failed to comply with the statute quoted. The lower court ruled that the failure of the Oliver Company to observe the requirements of this statute denied it the right to maintain the action, and dismissed its suit, and in the correctness of this decision we concur.

[1] It will be observed that this statute expressly provides that it shall not be lawful for any corporation to carry on any business in this state until it shall have observed the requirements of the section, and further subjects to a penalty any corporation undertaking to transact, carry on, or conduct any business in this state without observing the section, although it does not in terms declare that any contract made by a corporation

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



before complying with the statute shall be void or not enforceable. The fact, however, that the statute does not expressly declare that contracts made before complying with the section shall be void or not enforceable does not weaken the effect of the statute as a prohibition against the enforcement of contracts made by a corporation in violation of the statute. In other words, the declaration of the statute that it shall not be lawful for any corporation to carry on any business in this state until it shall have observed the requirements of the statute, and the imposition of a penalty for engaging in business in violation of it, has the same effect and accomplishes the same end as if the statute had expressly declared the invalidity of contracts made without observing its conditions.

Upon this point we may repeat what was said in the case of *Fruin-Colnon Contracting Co. v. Chatterson*, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857, where this question was discussed: "The statute does not provide that contracts, entered into before it has been complied with, shall be void or nonenforceable, nor does it use any language in reference to the contract; but, when a statute makes it unlawful to do business under certain conditions, it seems to necessarily and logically follow that the doing of the business under the prohibited conditions is in itself unlawful. When the doing of the act is made unlawful, there is no reason why the statute should also declare that contracts made in violation of it should also be unlawful. When the law prohibits a thing, it is unlawful to do it, and the courts should not lend their aid to the enforcement of prohibited contracts. Courts are established to afford remedies to litigants who seek relief growing out of lawful transactions, and not to aid those who would invoke their assistance to enforce contracts made in violation of law. Their chief purpose is to secure the observance of laws enacted for the safety and protection of life and property and the general well-being of the people, and it would be a startling departure from this purpose if they should also give relief to parties who were seeking to enforce contracts made in violation of law. Such a course of procedure would be a perversion of justice, and convert the courts into instruments to aid lawbreakers in place of punishing them." The principle thus announced is supported by abundant authority, for it is a generally prevailing rule that a contract is void if prohibited by statute, though the statute only inflicts a penalty and does not in terms declare illegal contracts made in violation of it. *Lindsey v. Rutherford*, 17 B. Mon. 246; *Vanmeter v. Spurrier*, 94 Ky. 22, 21 S. W. 337, 14 Ky. Law Rep. 684; *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901; *Wilson v. Spencer*, 1 Rand. (Va.) 76, 10 Am. Dec. 491; *Harrison v. Berkeley*, 1 Strob. Law (S. C.) 525, 47 Am. Dec. 578; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Columbia Bank & Bridge Co.*

*v. Haldeman*, 7 Watts & S. (Pa.) 233, 42 Am. Dec. 229; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423, and *Levison v. Boas*, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661.

But passing this, a vigorous assault is made on the decision of the lower court denying to the Oliver Company the right to maintain the action it had instituted, and it is earnestly pressed on our attention that the statute should not be so construed as to prohibit a corporation that had failed to comply with the statute from bringing suit to enforce contracts made in the prosecution of its business in this state. The argument is made that persons who make otherwise valid contracts with foreign corporations should be estopped to deny the right of the corporation to enforce them. It is, of course, at once apparent that the effect of such a construction of this statute would be to destroy the life and vigor of the feature of it now under consideration. So construed, it would virtually have no meaning or effect at all. It would be to say, in substance, to a corporation: "It is true the statute expressly prohibits you from doing business in this state until you have complied with its simple provisions, but if it does not suit your convenience or your interest to do so, your failure will not prejudice any rights that you may have. If you choose to observe these requirements, well and good, but if you don't, you can yet carry on any business you please and make as many contracts as you wish, and the courts of the state are open to your pleas, and, notwithstanding your dereliction of duty and your violation of law, will afford you all the remedies that could be afforded if you had seen proper to observe the statute." If corporations may thus lightly treat the laws of this state, if they may ignore them at their pleasure and comply with them or not as suits their convenience, free from any of the civil disabilities imposed by the statute, the Legislature of the state might as well cease the enactment of laws intended to protect the people of the state in their dealings with corporations.

[2] The statute, as may be readily seen, does not impose any harsh or unreasonable conditions. A literal compliance with its simple requirements is both easy and inexpensive, and no good reason can be assigned why a corporation undertaking to do business in the state should not be obliged to observe its provisions. It is a useful statute, and was intended as a police regulation for the protection of the people of the state, who have a right to know whether the party they are dealing with is an individual, or a corporation. It is a notorious fact that the country is full of corporations engaged in every imaginable line of business, with their agents going here and there and everywhere, and many of the people dealing with them do not know where the home of the corporation is, or, if they do know, would find it impracticable to



seek relief by suits in foreign jurisdictions. Except for this statute they would not, in many instances know on whom process could be served, or in what county a suit against the corporation could be brought, and thus in many cases would be left virtually remediless. To relieve in a measure the disadvantages our citizens, as a result of this condition, were placed under in their dealings with corporations, the Legislature undertook in this statute to say that when a corporation, whether foreign or domestic, desired to engage in business in this state, it should at all times have an agent at a known place of business in this state upon whom process could be served, and to whom the citizens of the state might look if it became necessary to seek redress in the courts of the state, so that any citizen desiring to institute an action against a corporation might, by writing to the Secretary of State, learn who and where its agent was, and where its place of business was, and thus be able to secure such relief as the circumstances of the case seemed to demand.

So universally recognized is the wisdom and propriety of this character of legislation that every state in the Union, save possibly two, have adopted statutes in substance the same as ours, and the courts of these different states, as we will presently point out, have, with few exceptions, given to these salutary statutes the same construction and the same meaning and effect that we have.

As said by the United States Circuit Court of Appeals in Pittsburg, etc., *Co. v. West Side Belt Ry. Co.*, 154 Fed. 929, 83 C. C. A. 501, 11 L. R. A. (N. S.) 1145, in speaking of a like statute: "This act is a salutary one, for the protection of persons transacting business with foreign corporations. The facility with which irresponsible corporations are created, frequently with no assets within the jurisdiction where business is transacted, would frequently leave creditors without any chance whatever of collecting their claims, were it not for acts requiring registration where business is transacted. This enables the creditors to bring the foreign corporation within the jurisdiction of the courts where the obligations are created; and, in order that the provisions of these laws may be complied with, it is necessary that they should receive a reasonably strict enforcement."

The purpose of the statute is also well expressed by the Supreme Court of Pennsylvania in Delaware, etc., *Co. v. Bethlehem, etc., Ry. Co.*, 204 Pa. 22, 53 Atl. 533, where the court said: "The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks

to enforce is made can give it a right of action. Any other construction of the act would violate its plain words, and wholly defeat its object by affording protection to the corporation and denying it to the public."

[3] It may further be observed that the effect of allowing the plea of estoppel would be to defeat one of the chief purposes of the statute. For example, if every person who made a contract with a corporation should be denied the right to set up, when sued by the corporation, the defense that when making the contract it acted in violation of law, instances would be very rare in which the statute could be effectively interposed, and the corporation punished for failing to observe it. There are few cases in which business transactions are not directly conducted between the parties affected, or others acting for them, and it is manifest that if the party within the law should be estopped to make the defense that the other party was without the law, the party who was guilty of violating the law would feel assured that his violation would not subject him to any disadvantage. In short, if the statute is to be given effect, the doctrine of estoppel should not be applied. So apparent is the fact that the adoption of the doctrine of estoppel would virtually nullify the purpose of the statute that the authorities generally refuse to assent to it, although the failure to apply this rule may, in some cases, work a hardship on the delinquent corporation.

It is equally plain that the fact that the enforcement of the statute may work hardships on corporations that fail to obey it, and sometimes prevent them from collecting just debts, cannot, without ignoring the legislative intent, be allowed to defeat the object sought to be accomplished by the enactment of the law. Every person who violates the law puts himself in the attitude of being required to pay the penalty for the infraction; but, although the delinquency may subject him to punishment, civil or criminal, this of course furnishes no reason why the statute should not be enforced. The individual who violates a penal statute may expect to pay the penalty, and so a corporation that violates the civil features of a statute is not in any position to complain if it, too, must pay the penalty.

These views in different forms of expression have been frequently announced. Thus in *Thompson on Corporations* (2d Ed.) vol. 5, § 6712, it is said: "Such statutes are intended for the protection of the citizens of the state who deal with such foreign corporation, and there are many reasons why a person, after dealing with such a corporation, should have the right to insist on compliance with the statute, when the corporation sues to enforce the contract. The effect of the cases holding otherwise is to make such a statute an instrument of fraud as against persons whom it was intended to protect, and the doctrine of estoppel cannot be extended so

far as to aid a foreign corporation in doing what was forbidden by statute."

In *Cyclone Mining Co. v. Baker Light & Power Co.* (C. C.) 165 Fed. 996, the court, in answering the argument that the doctrine of estoppel should be applied, said: "Nor are the defendants estopped, by reason of their contractual relations with the plaintiff, from insisting that the contract is void, and the plaintiff without legal right or capacity to sue for the breach thereof, because if so estopped, the plaintiff would be permitted to take advantage of its own offending acts done in derogation and even in defiance of the law. It would be a revolting doctrine, fraught with inconceivable, deleterious results, if a foreign corporation could come into a state not its own, and there carry on a business in direct defiance of the provisions of law by which it may capacitate itself for the transaction of business therein, and then validate its acts because, forsooth, parties had dealt with it; for but few others have cause for suit except those having contractual relations in some form with such corporations."

Out of a large number of cases illustrating the rule that a corporation or an individual that has made a contract for carrying on a business in violation of law or without having complied with statutory requirements cannot enforce the collection of his or its demands created in carrying on the business, and that the defendant, although the beneficiary of the unlawful transaction, when sued is not estopped to raise the question of the disability of the plaintiff to maintain the suit, we may select the following: *Smith v. Robertson*, 106 Ky. 472, 50 S. W. 852, 20 Ky. Law Rep. 1959, 45 L. R. A. 510; *Franklin Insurance Co. v. Louisville & Arkansas Packing Co.*, 9 Bush, 590; *Bull v. Harragan*, 17 B. Mon. 349; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Helleman Brewing Co. v. Pelmeisl*, 85 Minn. 121, 88 N. W. 441; *Delaware R. Q. & C. Co. v. Bethlehem Ry. Co.*, 204 Pa. 22, 53 Atl. 533; *United Lead Co. v. Reedy Elevator Mfg. Co.*, 222 Ill. 199, 78 N. E. 567, 6 Ann. Cas. 637; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Seamans v. Temple Co.*, 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457; *Commonwealth Mutual Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545; *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808; *State Bank of Greentown v. Lawrence*, 177 Ind. 515, 96 N. E. 947, 42 L. R. A. (N. S.) 326; *Strout Co. v. Howell* (Del.) 85 Atl. 666.

[4] Another argument advanced by counsel for the Oliver Company is rested on the doctrine of stare decisis. In support of this contention, our attention is called to the fact that in *Johnson v. Mason Lodge*, 106 Ky. 838, 51 S. W. 620, 21 Ky. Law Rep. 493,

decided in 1899, this court held that a person who contracted with a corporation that had failed to comply with the statute here in question would be estopped, when sued by the corporation, to set up as a defense the illegality of the transaction, and it is said that the principle announced in this case was followed in *Aultman v. Mead*, 109 Ky. 583, 60 S. W. 294, 22 Ky. Law Rep. 1189, and *Hallam, Receiver, v. Ashford*, 70 S. W. 197, 24 Ky. Law Rep. 870, and therefore, following the rule of stare decisis, this court should now adhere to these opinions. In other words, the effect of the argument is this: That the Oliver Company felt authorized to violate this statute because this court said in *Johnson v. Mason Lodge* that it might do so with impunity, and repeated this assurance of protection in the *Ashford* and *Mead* Cases subsequently decided. It might here be noted that *Johnson v. Mason Lodge* and the two cases that follow it were virtually overruled in *Fruin-Colnon Contracting Co. v. Chatterson*, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857, but as this case was decided subsequent to the transaction of the business out of which this litigation arose, it cannot be said to deprive the Oliver Company of the right to rely on the doctrine of stare decisis, if the invocation of that doctrine saves it from the penalty of the statute. Before, however, taking up directly the question of stare decisis, it may be well to notice with more care the decision in *Johnson v. Mason Lodge*. The opinion in that case discloses that *Mason Lodge* was a Kentucky corporation and a branch of the Independent Order of Odd Fellows. It sued *Johnson* to recover a sum of money it had loaned him. In defense of the suit, he set up that the corporation was not legally organized, and, furthermore, that it had not complied with section 571 of the statute, and for these reasons could not enforce collection of the debt. The court, after discussing at length the proposition that *Johnson* was estopped to deny the legality of the corporate existence of the *Mason Lodge*, took up the question of the nonenforceability of the contract because the corporation had failed to comply with section 571 of the statute, and disposed of it in a few words adversely to the contention of *Johnson*. The opinion makes it perfectly apparent that the entire reasoning of the court was devoted to consideration of section 566 of the statutes, providing that "no corporation organized under this chapter shall be permitted to set up or rely upon the want of legal organization as a defense to any action against it; nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of legal organization as a defense"; and that little or no attention was given to the effect on the contract of section 571. But, nevertheless, it is fair to say that the court held in this opinion that the failure

of this corporation to comply with section 571 did not defeat its right to enforce the collection of the contract sued on. In the Ashford Case all that was said on the point under consideration is this: "In Johnson v. Mason Lodge \* \* \* it was held that one who is sued upon a contract made with a corporation is estopped from relying upon the failure of the corporation to comply with the provisions of section 571. As this question was very thoroughly considered in that case, and has been followed in quite a number of subsequent decisions of this court, it is unnecessary for us to again consider the question." In the Mead Case the only reference to this question is this: "The objection that appellants did not comply with section 571 of the Kentucky Statutes is fully answered in the opinion of the court in the case of Johnson v. Mason Lodge, \* \* \* and it will therefore be unnecessary for us to again consider that question."

It will thus be seen that while in three opinions it was held that section 571 of the statute did not obstruct the right of a delinquent corporation to enforce a contract made with it, in no one of these opinions was the question examined with any degree of care. In the Johnson Case we think the court fell into the error of confusing an ultra vires contract with an unlawful contract, and treating section 571 as a companion section to section 566, and this error seems to have been followed in the two subsequent cases. It is of course plain that section 566 and section 571 relate to entirely distinct subjects. They have not the remotest connection with each other except in so far as they relate in a general way to corporations. They were enacted for different reasons and to accomplish different purposes. Section 566 relates to defects in the organization of a corporation, and so states, while section 571 relates exclusively to the matter of a corporation doing business in this state without having an agent and a place of business in this state. *Fruin-Colnon Co. v. Chatterson*, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857. As said in the Johnson Case, it has been repeatedly decided, both by this court and others, that a person dealing with a corporation will not be permitted to raise the question that it was not legally organized, and section 566 merely put into the form of a statute a rule that a long line of court decisions had made a part of the law of the state.

On the other hand, the subject-matter of section 571 first made its appearance in the history of the state in 1893 when it was adopted as a part of the statute law of the state, and it was put into the statute in obedience to section 194 of the Constitution, providing that "all corporations formed under the laws of this state, or carrying on business in this state, shall, at all times, have one or more known places of business in this state, and an authorized agent or

agents there, upon whom process may be executed, and the General Assembly shall enact laws to carry into effect the provisions of this section."

Under these circumstances the question now before us, put in simple form is, Shall section 571 of the statute, enacted pursuant to section 194 of the Constitution of the state, stand or shall the decision of this court in Johnson v. Mason Lodge stand? The decision and the statute are in conflict, and if the doctrine of stare decisis as sought to be applied is to control, the decision must prevail and a valuable part of the statute be in effect expunged.

We are not unmindful of the importance of courts of last resort adhering to rules of law announced in long-established decisions that have become a part of the jurisprudence of the state, and on the faith of which people have transacted business, entered into contracts, and conducted in a general way their affairs, and we should be slow to overrule any opinion that might unsettle property rights acquired on the faith of the opinion overruled, or that might prejudice the rights or interests of persons who had entered into engagements in reliance upon the fact that the opinion assailed was the law of the land.

[5] As said in Kent's Commentaries, vol. 1, § 475: "When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law." To the same effect are *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 9 South. 532, 12 L. R. A. 856; *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; *Vermont R. Co. v. Vermont Central R. Co.*, 63 Vt. 23, 21 Atl. 262, 731, 10 L. R. A. 562, and many other cases referred to in these opinions.

[6] But the rule of stare decisis, stated in simple form and considered in relation to its effect upon private affairs, is really nothing more than the application of the doctrine of estoppel to court decisions. It finds its support in the sound principle that when courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law, or have given a construction to statutes upon which individuals and the public have relied in making contracts, they ought not, after these principles have been promulgated and after these constructions have been published, withdraw or overrule them, thereby disturbing contract rights that had been entered into and property rights that had been acquired upon the faith and credit that the principle announced or the construction adopted in the opinion was the law of the land. In the correct application of the rule of stare decisis we fully concur, and do not

propose in this opinion to announce any views that would impair or overthrow its efficiency when properly understood and applied. Later in the opinion we will again advert to the necessity for an adherence to the rule of stare decisis, when properly invoked, to protect contract or property rights.

[7] It, however, seems to us apparent that the doctrine of stare decisis, giving to it what may be called a personal application, cannot be relied on by a party who has not, in good faith, been deceived by the decision under which he claims to have acted; and, when it appears that a party was not misled to his prejudice by reliance on a decision that the court rendering it subsequently concluded was erroneous, the court will not feel estopped to overrule it by the insistence of the party claiming to have acted under it that it would overturn contracts and engagements that he had entered into on the faith of it.

Let us see now for a moment if the Oliver Company is in a position to assert that, relying on *Johnson v. Mason Lodge*, it did not observe this statute. It will be observed that the statute not only subjects the offending corporation to the civil disability of denying it the right to maintain an action, but it also subjects it to a fine under the criminal law of the state; and, if it should be said that the civil disability was removed by construction in *Johnson v. Mason Lodge*, the penal features of the statute remained undisturbed, and furnished full notice to the corporation that it must comply with the statute or subject itself to the penalty imposed. Under these circumstances it does not lie in the mouth of the Oliver Company to say that, acting on the faith and credit of the *Johnson Case*, it did not know it was necessary that it should observe this statute. In entering into this contract the Oliver Company was undeniably guilty of violating a law of this state that has been enforced in many cases, and it is not in a position to set up that this court ought not now to overrule the *Johnson Case*.

We have examined a large number of cases on the subject of stare decisis, and in no one of them can there be found an attempted application of it to a state of facts such as are here presented. In every instance, so far as our investigation goes, where the doctrine has been applied, the decisions relied on furnished in themselves a line of authority that left no notice that anything else was required.

[8] But aside from this, the doctrine of stare decisis is not without its limitations. A court of last resort is not irrevocably bound to follow opinions that in the light of present circumstances and conditions seem to be erroneous, and this case furnishes a good illustration of the necessity for a departure from the rule. Here we have a statute of the state enacted pursuant to the Constitution for the purpose of carrying

out a wise public policy, an important feature of which was eliminated by the decision in *Johnson v. Mason Lodge*, and upon mature consideration we do not feel bound to follow this decision. In overruling it we are not without ample precedents furnished, not only by the decisions of other courts, but of this court. This court in the course of its history has deemed it wise and proper to overrule many cases, numbers of them relating to property rights, as may be seen by an examination of volumes 2 and 4 of *Barbour's Digest*, under the head of "Overruled Cases." A few of them may be mentioned:

In *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773, 22 Ky. Law Rep. 827, 42 L. R. A. 738, in overruling several previous cases, we said: "When a question involving important public or private rights, extending through all coming time, has been passed upon on a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule of stare decisis; but at the same time we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantage of review."

In *Hall v. Martin*, 89 Ky. 9, 11 S. W. 953, 11 Ky. Law Rep. 241, and *Breathitt Coal, Iron & Lumber Co. v. Strong*, 106 Ky. 699, 51 S. W. 189, 21 Ky. Law Rep. 302, the case of *Hamilton v. Fugett*, 81 Ky. 366, was in effect overruled, although the overruling opinions unsettled extensive property rights acquired on the faith of the *Fugett* opinion. True it was not expressly overruled, but it was effectually disposed of by being explained away in the cases mentioned, a process of elimination sometimes adopted to remove undesirable opinions.

Another case affecting property rights was *Sheets v. Grubbs*, 4 Metc. 339, decided in 1863; but this case, after standing for many years and being followed in several cases, was overruled in *Chenault v. Chenault*, 88 Ky. 83, 11 S. W. 424. Yet another example is found in the bank tax case reported in 102 Ky. 174, 39 S. W. 1030.

In *Victor Cotton Oil Co. v. City of Louisville*, 149 Ky. 149, 148 S. W. 10, the case of *Mengel Box Co. v. City of Louisville*, 117 Ky. 735, 79 S. W. 255, 25 Ky. Law Rep. 1861, was overruled, although, on the faith of the exemption from taxation it afforded the *Victor Cotton Oil Company* was, as it claimed, induced to establish its plant in the city of Louisville. Having thus been induced to act on the authority of the *Mengel Case*, the *Cotton Oil Company* insisted that its right to the exemption ought not to be defeated,

but Chief Justice Hobson, speaking for the court, said: "It is insisted, however, that the facts here shown bring the case directly within the doctrine laid down in *Mengel Box Co. v. City of Louisville*, 117 Ky. 735 [79 S. W. 255, 25 Ky. Law Rep. 1861]. This seems to be true, but that case is out of line with the subsequent cases, and with what seems to us the proper construction of the Constitution and the statute." To the same effect is *Pratt v. Breckenridge*, 112 Ky. 1, 65 S. W. 136, 23 Ky. Law Rep. 1356, 66 S. W. 405, 23 Ky. Law Rep. 1858.

In 26 *American & English Ency. of Law*, p. 183, we find this sensible statement of the limitations upon the rule of stare decisis: "This doctrine is not an arbitrary rule of positive law which forbids the questioning, under any circumstances, of all decisions or the exercise of judicial discretion in relation thereto, but is subject to reasonable limitations. \* \* \* No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense iron-clad, and the future and permanent good of the public is to be considered rather than any particular case or interest. Even if the decision affects real estate interests and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedence should not have an overwhelming or despotic influence in shaping legal decisions. \* \* \* The benefit to the public in the future is of greater moment than any incorrect decision in the past. Wherever a correction can be made without working more harm than good, it should be done. \* \* \* Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty, as well as the right, of the court to consider them carefully, and to allow no previous error to continue if it can be corrected. The foundation of the rule of stare decisis was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it."

[9] It is further insisted by counsel for the Oliver Company that this court, in construing section 571 in *Johnson v. Mason Lodge*, declared that a failure to comply with this statute did not affect the validity of a contract made by the delinquent corporation, or prohibit it from enforcing the contract, and that as the contract between the Oliver Company and the Louisville Realty Association was entered into subsequent to this opinion, and while it was standing unaffected as the law of the land, this court is not now at liberty, without impairing the obligations of a contract, to overrule the *Johnson Case* so as to affect the validity of the contract here in question.

In support of this position our attention is called to *Gelpcke v. Dubuque*, 68 U. S. (1 Wall.) 175, 17 L. Ed. 520. In that case the

court said: "The sound and true rule is that if the contract, when made, was valid by the laws of the state, as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law."

And to *Douglass v. Pike County*, 101 U. S. 677, 25 L. Ed. 968, where the court said: "As a rule we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly. \* \* \* The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment." To the same effect is *Havemeyer v. Iowa Co.*, 70 U. S. (3 Wall.) 294, 18 L. Ed. 38; *Pine Grove Township v. Talcott*, 86 U. S. (19 Wall.) 661, 22 L. Ed. 227.

[10] We entirely concur in the right and justice of the rule announced in these cases, and fully agree to its soundness when properly applied, but we think it should have no application to the facts of this case. In the cases mentioned, and the others we have examined, it was used to protect innocent and law-observing parties who in good faith had made investments in securities upon the faith and credit of opinions of courts of last resort. The parties invoking the protection of the rule did not, in making the contracts sought to be declared void by subsequent decisions, violate any law of the state. They appeared before the court with clean hands, asking relief from decisions the effect of which was to deprive them of property in which they had been invited to invest, not only by the laws of the state, but by the opinions of its highest court in construing them. Here the situation is quite different. The Oliver Company comes before the court a confessed violator of the laws of the state. It is asking relief from a condition resulting from its deliberate and willful violation of a penal statute. It is not in a position to ask the protection of beneficial rules of law intended to save from loss law-observing citizens. We put our decision, that the Oliver Company is not entitled to the protection afforded by the principle announced in these cases and invoked in its behalf, upon the ground that it brought upon itself all the trouble it seeks to escape by making the con-

tract now in question, in violation of an express penal statute of the state that was in full force and effect at the time the contract was made, and that it was fully advised of, if its other pleas heretofore noticed are true, and that it was obliged to take notice of whether it had actual notice or not.

For the reasons stated the opinion in *Johnson v. Mason Lodge* and the others that follow it are overruled, and the judgment appealed from is affirmed. HOBSON, C. J., and NUNN, J., dissenting.

HOBSON, C. J. (dissenting). Two questions arise in this case: (1) Did the court err in its conclusion as to the construction of section 566, Ky. St., in *Johnson v. Masonic Lodge*, 106 Ky. 838, 51 S. W. 620, 21 Ky. Law Rep. 493, *Altman & Co. v. Mead*, 109 Ky. 583, 60 S. W. 294, 22 Ky. Law Rep. 1189, and *Hallam v. Ashford*, 70 S. W. 197, 24 Ky. Law Rep. 870? (2) Can the court now under its own rulings properly depart from the construction of the statute it then adopted, the Legislature having acquiesced in that construction?

1. In *Johnson v. Masonic Lodge*, the corporation had not complied with section 571, Ky. St. *Johnson* had borrowed the money from it, and when sued for the money relied on the violation of section 571 by the corporation in bar of a recovery. The circuit court sustained a demurrer to his answer, which was practically the same as the answer in this case. In the opinion delivered by this court, after stating the facts, the court quotes section 194 of the Constitution and sections 571 and 566, Ky. St. It then proceeds, in a lengthy opinion, to show that under section 566 a person, by executing a note to a corporation, "is estopped to deny its existence or authority to do business at that time." The other two cases follow and reaffirm this decision; and in the list of cases it is stated that the question has been repeatedly before the court, and had been decided the same way, though it would seem that it was not noticed in the opinions being deemed settled by the previous adjudications. These cases being based upon section 566, Ky. St., in no manner conflict with *Lindsey v. Rutherford*, 17 B. Mon. 245, *Franklin Ins. Co. v. Packet Co.*, 9 Bush, 590, *Van Meter v. Spurrier*, 94 Ky. 22, 21 S. W. 337, 14 Ky. Law Rep. 684, or *Smith v. Robertson*, 106 Ky. 472, 50 S. W. 852, 20 Ky. Law Rep. 1959, 45 L. R. A. 510, or other like cases, for the reason that the statute under which those cases were decided contained no such provision as is set out in section 566. The opinion proceeds on the ground that the equitable doctrine of estoppel does not apply. This may be conceded, but the question turns on section 566, and not on equitable estoppel. So the question recurs, Was the court right in the construction it then gave section 566? That section and section 571 are parts of the same act, the work of the same Legislature,

and the two must of course be read together.

Section 566 is as follows: "No corporation organized under this chapter shall be permitted to set up or rely upon the want of legal organization as a defense to any action against it; nor shall any person transacting business with such corporation, or sued for any injury done to its property, be permitted to rely upon such want of legal organization as a defense." It is now insisted that the words "want of legal organization" refer only to the filing of the articles of incorporation, the election of officers, and the like. Is this the natural meaning of the words in the connection in which they are used in this section? In *Words and Phrases*, vol. 5, defining the words "organize" and "organization" in reference to corporations, it is said: "'Organize' and 'organization' as used in reference to corporations, has a well-understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created." It will be observed that this is precisely the definition of the terms which this court adopted in the cases referred to; and, if we insert this definition in section 566, it will read as follows: "No corporation organized under this chapter shall be permitted to set up or rely upon its want of capacity to transact the legitimate business for which it was created, as a defense to any action against it, nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of capacity to transact the legitimate business for which it was created."

In *Black's Law Dictionary*, the word "organization" is not given, but among the definitions of "organize" are these: "To put into working order; to arrange in order for the normal exercise of its appropriate functions." A corporation is not put into working order until it has capacity to do business. It is not arranged in order for the normal exercise of its appropriate functions until it is lawful for it to make contracts. It is true that appellant is a foreign corporation, but as such it had no legal existence outside of the state creating it. The exercise of any power in another state depends upon the will of that sovereignty. *Lathrop v. Commercial Bank*, 8 Dana, 114, 33 Am. Dec. 481. By section 202 of our Constitution foreign corporations coming into this state must do business on conditions not more favorable than are prescribed by law to similar corporations organized under the laws of the commonwealth. So when foreign corporations come into the state, they must comply with our laws, and have no right to do business or legal existence here except by virtue of our laws. When they do this, as has been frequently held, they stand on the same

plane as similar corporations created under the laws of the state. If, as is uniformly held, appellant had no legal existence as a corporation in this state until it complied with our laws giving it a right to do business here, how can it be maintained, under any meaning of the word "organization," that it is not within the provisions of section 566?

Under section 571 it was not "lawful for any corporation to carry on any business in this state" until it complied with that section; and therefore no corporation had capacity to do business in this state until it complied therewith. The defense here made is simply that the corporation had not capacity to do business because it had not complied with section 571; and this defense, under section 566, a person transacting business with the corporation cannot make.

Section 460, Ky. St., which is the work of the same Legislature regulating the construction of statutes, provides as follows: "All words and phrases shall be construed and understood according to the common and approved usage of language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such meaning." The word "organization" having acquired a peculiar and appropriate meaning in the law, the court in the cases referred to properly gave it that meaning.

But, looking beyond the letter of the statute to its purpose and intent, what reason could the Legislature have had for making section 566 apply only to irregularities in the steps taken prior to the filing of the papers in the office of the Secretary of State, as required by section 571, and not including this step also? By section 460, Ky. St., it is also provided as to this revision that its "provisions are to be liberally construed with a view to promote its objects."

In *Bailey v. Com.*, 11 Bush, 691, this court said that "every statute ought to be expounded, not according to the letter, but according to the meaning." In *Sams v. Sams*, 85 Ky. 400, 3 S. W. 593, 9 Ky. Law Rep. 24, it is said that "the reason for the enactment must enter into its interpretation, so as to determine what was intended to be accomplished by it."

Can any one believe that a body of practical men intended by section 566 to protect a corporation that had not the necessary number of incorporators or the necessary stock subscription, or that had not paid its organization tax, and did not intend it to protect a corporation that was not qualified to do business because it had not filed a certain paper in the office of the Secretary of State? Section 571 applies alike to domestic as well as foreign corporations, and section 566 must also apply to all alike. Much of the business of the state is now done by corporations. Mistakes are sometimes made by the most careful men; papers sent by mail sometimes

do not reach the Secretary of State, and sometimes one officer is under the impression that another has performed this duty or that required by the statute. So section 566 was inserted for the protection of the capital invested in these enterprises. It only validates the contract as between the parties to it. When we construe the statute liberally with a view to promote its objects, how can it be thought that section 566 only refers to defects in the articles of incorporation and the like? What was its purpose? Manifestly to prevent injustice, and to prevent those who had done business with the corporation from taking advantage of the corporation's want of capacity to do business. The words employed in section 566 show the Legislature had this in mind. In the first place it provides that the corporation shall not make this defense. If we turn this case around, and the owner of the house was here suing the contractor for not building the house properly, would there be any doubt that under section 566 the corporation could not make this defense, although both parties made the contract knowing the facts? And if the first part of the section would cut off the corporation from making that defense, upon what principle can it be maintained that the last clause of the sentence is narrower in its application than the first clause? Not only so, but the second clause deals with the person who has transacted business with the corporation, and in that clause manifestly the Legislature has in mind business done by the corporation, and provides that this defense shall not be allowed in favor of the men who have done business with the corporation. There may be cases in which the word "organize" is given a narrower meaning, where only the life of the corporation is in issue; but this section is dealing with the transaction of business by the corporation, and manifestly uses the words "legal organization" in the sense of capacity to do business. The court entirely overlooks, in section 566, the words "or sued for injury done to its property." Can anybody believe that the Legislature intended this protection to the property of a corporation only in cases where there was some defect in the steps taken to form the corporation? Is there any reason why the property of such a corporation should be protected from wanton injury that would not apply to a corporation that had not complied with section 571? Would anybody hold that a trespass committed upon the property of a corporation before it had complied with section 571 would be without redress when it complied with the section before bringing suit? Does anybody believe that the Legislature intended that the defendant here could, with impunity, have appropriated to its own use the property of the plaintiff because it had not complied with section 571? The plain purpose of section 566 was not to leave corporations without remedy in the two classes of cases indicated,

although they had failed to comply with some provision of the statute, and could not lawfully do business as a corporation.

The Kentucky cases above referred to are cited in Thompson on Corporations, section 6710, where he says: "Not a few courts have applied the general doctrine of estoppel to persons dealing with foreign corporations. And the rule established by these courts is that a person who has contracted with a foreign corporation that has not complied with the statute authorizing it to transact business in the state will be estopped, in any action by it on such contract, from setting up the fact that it had not complied with the statute."

In 19 Cyc. 1297, after showing that in some states where they had no such statute as section 566 the contracts of the corporation have been held not enforceable, it is said: "In some states the courts have held, contrary to the doctrine hereinbefore stated, that where a person enters into a contract with a foreign corporation, and receives the benefit of such contract, he is estopped to set up the fact that the corporation had not complied with a statute of the state, imposing conditions upon its right to do business therein, for the purpose of avoiding liability on the contract." In support of this statement, decisions are cited from Arkansas, Colorado, Idaho, Iowa, Massachusetts, Missouri, Montana, New Hampshire, Ohio, Rhode Island, Washington, West Virginia, Kentucky, North Dakota, South Dakota, and in the annotations for 1914 a number of other cases to the same effect are cited.

Section 194 of the Constitution requires all corporations carrying on business in this state to have one or more known places of business in this state, and an authorized agent upon whom process may be executed. But this has no application to the case at bar, for a violation of this section is not shown. The General Assembly, to carry into effect the constitutional provision, enacted sections 566 and 571. What regulations should be made was a legislative question.

It is said that the construction of the statute adopted by the court makes it vain and elusive. Other penal statutes are not vain and elusive because the penalties affixed for their violation are the means relied on for their enforcement. If experience has shown that the statute as construed by the court is vain or elusive, it must be presumed that the Legislature, coming biennially from the people, would have afforded a remedy. When they have not done this and no officer of the state has complained, by what authority is it said that the statute is vain and elusive? The General Assembly met in the year 1900, a few months after the decision in the Johnson Case was rendered, and when the matter was fresh in everybody's mind. It not only took no action, but the subsequent General Assemblies, meeting biennially, have acquiesced likewise

in the court's construction of the statute. The dockets of this court show that the statute is not vain and elusive; for the officers of the state have not been remiss in prosecutions under the statute to obtain the fines it provides for. It is a highly penal statute. Not only the corporation may be fined, but every officer or agent doing any business, and the corporation can enforce no civil right by action except as provided by section 566. The Chatterson Case, where a contractor who had built a street was refused relief, illustrates the fact that the statute is not vain and elusive. Must it not strike any justice-loving man as a travesty on justice that a person may borrow of a corporation \$20,000, and, when asked to pay it snap his fingers in the creditor's face, and say, "I will keep your money, because you did not file a statement in the office of the Secretary of State, as required by law, before you lent me the money, and took my note for it"? Must it not strike any justice loving man as a travesty on justice when the owner of property, who as here is sued by the contractor for \$20,000 for building him a house, says, "I have the house and you can do without your money because you have not complied with section 571, Ky. St.?" Is it any wonder that the representatives of a justice-loving constituency like the people of Kentucky put such a section as 566 in the statutes to prevent such injustice as this? And is it any wonder that when the statute they made was thus construed by the court, the representatives of such a people acquiesced in the construction of the court and made no effort to change the statute? A change of the statute by the Legislature and a change of its construction by the court are very different things. When changed by the Legislature the change operates only on the future, and the people have notice of it; a change by the court, as in this case, operates on the past, and destroys rights contracted innocently upon the faith of the decisions of the court.

It is true that in some states, where the statute expressly provided that contracts made in violation of it should be void, and in others where the contract was simply declared unlawful, the courts have enforced the statute while acknowledging its hardship, saying that it was a legislative question. Such is the rule in Pennsylvania, Alabama, Tennessee, Wisconsin, Michigan, Minnesota, and Oregon. But in no case has this been done where the court did not recognize that justice had been defeated. In view of these things, how can it be maintained that the construction which is now given section 566 construes the statute liberally with a view to promote its purposes?

2. The second question comes to this: Is the construction of a statute settled by a line of decisions of this court, or is it never settled until settled right in the eyes of those who are judges of this court when the case



reaches here? Does the obligation of contracts depend upon the law as officially promulgated at the time the contract was made, and may it be impaired by a subsequent change in those laws by judicial construction?

The purpose of establishing this court is primarily that justice may be administered, and that the laws of the state may have a uniform operation. To this end the opinions of this court are published as the authoritative exposition of the laws. When the court has construed a statute, and that construction has been adhered to in a line of cases, it has been the settled policy of the court not to depart from it. In *South v. Thomas*, 7 T. B. Mon. 62, where the court was urged to overrule previous decisions construing a statute, it said: "It has been often said that it is not so important that the law should be rightly settled as that it should remain stable after it is settled. This is true, for attempts to change the course of judicial decision, under the pretext of correcting error, are like experiments by the quack upon the human body."

In *Trimble v. Taul*, 7 T. B. Mon. 455, where members of the court differed in opinion as to the correctness of the previous decisions construing a statute, the court said: "If we were convinced that on this point the law was settled wrong originally, we should not feel ourselves at liberty to depart from it; aware that it is of greater importance to society that the rule should be uniform and stable than that it should be the best possible rule that could be adopted. In the Supreme Court of a state, as this is, possessing, with but few exceptions, appellate judicial power coextensive with the state, the influence which its decisions must have is evident. Its mandates are conclusive, and even its dicta are attended to in all the inferior courts. No sooner is a decision published than it operates as a pattern and standard in all other tribunals, and as a matter of course, all other decisions conform to it. If in this court a settled course of adjudication is overturned, then the trouble and confusion of reversing former causes succeeds in the inferior tribunals; and even the credit and respect due to this court is shaken by the phenomenon that A. has lost his cause on the same ground that B. gains his. And not only do these consequences follow, but evils still more serious may ensue. For perhaps no court may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications."

In *Maddox v. Graham*, 2 Metc. 56, where a like question was passed upon, the court said: "If this court were now to overrule its former decision, it would be an inconsistency as gross in form and manifestation as unjust in its consequences."

In *McChesney v. Hager*, 104 S. W. 715, 31 Ky. Law Rep. 1041, the court, after pointing out that if the question was a new one, it

would give the statute a different interpretation, said: "But we do not feel disposed to overrule the opinion of this court in the case *supra*. Since that case was handed down, there have been four regular sessions of the Legislature, and if the constructions given to these statutes was not the one intended by the legislative department, it is fair to assume that the statute would have been so amended as to make effective the purpose of the Legislature in the enactment of these laws, and give to the Secretary of State the additional salary now insisted upon." Further on in the opinion the court said that: "In construing the statutes interpreted, they must be read in connection with the opinion of the court, and in fact the opinion becomes, in effect, a part of the statute, binding upon all persons asserting rights under it, or whose interests are affected by it."

These rules are of universal application. In *Commissioners v. Harrison*, 7 H. L. 9, Lord Cairns said: "I think that with regard to statutes \* \* \* it is desirable, not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty."

In *Sutherland on Statutory Construction*, 485, it is said: "A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of those rights. To divest them by a change of the construction is to legislate retroactively."

It is now nearly 15 years since the decision of this court in the *Johnson Case* was rendered. In the meantime, and while that decision was acquiesced in by all three departments of the state government, a large part of the business of the state has been done by corporations. Thousands of dollars have been lent or invested in the building of railroads or other structures upon the faith of these decisions, under contracts which were valid under the law as then expounded, and which are now declared invalid under a different construction of the statute.

The *Chatterson Case* is rested on the ground that there was no estoppel; the defendant there not being a party to the contract. The point decided is not inconsistent with the prior cases. While the court has often overruled a single case, especially where it was inconsistent with subsequent decisions, it has never overruled two reported cases on the construction of a statute after they "had been followed in quite a number of subsequent decisions." None of the cases cited go as far as the decision now made, and none of them in the slightest degree sustain the action of the court in this case.

It is submitted that nothing so unwarranted has ever been done by this court before as to overrule repeated decisions construing a penal statute and adding greatly to its pen-

alties, when those decisions have been acquiesced in by the Legislature. It is to the interests of all that the law should be settled. The uncertainty of the law has passed into a proverb, but how infinitely more uncertain it must be when reliance cannot be placed upon the decisions of the highest court in the state. Our docket is now overburdened with cases in which this or that precedent is sought to be overruled; and certainly it is a sound principle that the law as settled shall remain settled.

Manifestly, if the Legislature after the decision of the cases referred to, had amended section 571 and provided, as in a number of other states, that contracts made in violation of it should be void, this act could not have the effect to invalidate contracts made before it was passed, and which were valid under the statute as it then stood. Can a court of justice consistently, if it has the power, by a retroactive decision, invalidate contracts which were valid under the law as it stood when they were made? Aside from the federal question, it is submitted that no court in administering justice can consistently do such injustice.

In 28 Am. & Eng. Ency. of Law, 179, it is said: "But after a statute has been settled by judicial construction, the construction becomes, as far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment, and contract obligations entered into or vested rights acquired while the former decision was in force cannot be impaired."

A number of decisions of the United States Supreme Court and the state courts are cited in support of the text, and a number of other cases are given in the brief for appellant. It is said that these cases have no application for the reason that it was unlawful for the corporation to do business, and that it cannot avail itself of the constitutional provision in an illegal act. But it will be observed

that a number of cases cited were just such cases as this. If the contract was valid under the law in existence as it stood when it was made, and is invalid under the law as it is now declared, has not the obligation of the contract been impaired? In *Ohio Ins. Co. v. Debro*, 16 How. 416, 14 L. Ed. 997, the United States Supreme Court said: "The sound and true rule is that if the contract when made was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the state, or decision of its courts, altering the construction of the law."

The argument that the obligation of the contract may be impaired by a change in the court's ruling because the transaction was unlawful assumes the point in issue. To illustrate: The court by its former decisions read section 566 into section 571, so that that section, when read with section 566, meant that contracts made in violation of it might be enforced against the party doing business with the corporation. If these words had been inserted by the Legislature in section 571, and a subsequent act had stricken them out, would it be contended that the effect of the subsequent act was to invalidate contracts already made? And if the Legislature could not do this, how comes it that the court has any greater power when the limitation of the federal Constitution is that the state shall not impair the obligation of a contract? Certainly it must be admitted that a contract that was valid under the law as it stood when it was made according to the construction then given it by this court is now held invalid. If this is not to impair the obligation of a contract, what is it?

For these reasons I dissent from the opinion of the court.

NUNN, J., concurs in this dissent on the second question.

**BOONVILLE SPECIAL ROAD DIST. v.  
FUSER.**

(Kansas City Court of Appeals. Missouri.  
Nov. 3, 1913. Rehearing Denied  
Dec. 1, 1913.)

**1. HIGHWAYS (§ 161\*)—OBSTRUCTION—ACTION  
FOR PENALTY.**

Under Rev. St. 1909, § 10,533, imposing a penalty for the obstruction of a public road recoverable, after notice, by the road overseer in the name of the road district, and Rev. St. 1909, c. 102, art. 6, providing for the consolidation of road districts, *held*, that after the district in which the obstructed road was located was consolidated, the consolidated district was the proper plaintiff in an action for the penalty.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 302; Dec. Dig. § 161.\*]

**2. HIGHWAYS (§ 161\*)—OBSTRUCTION—AC-  
TIONS FOR PENALTY—SUFFICIENCY.**

A petition in an action for the penalty imposed by Rev. St. 1909, § 10,533, for willfully and knowingly obstructing a public road which omitted to charge that defendant willfully and knowingly did so, but charged the obstruction and that after notice to remove it he failed to do so and had since maintained it, was sufficient.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 302; Dec. Dig. § 161.\*]

Appeal from Circuit Court, Cooper County;  
J. G. Slate, Judge.

Action by Boonville Special Road District against Martin Fuser. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. G. Pendleton, W. F. Johnson, and Roy D. Williams, all of Boonville, for appellant. John Cosgrove and Daniel W. Cosgrove, both of Boonville, for respondent.

**ELLISON, P. J.** This action was brought against defendant for \$5, the penalty prescribed for obstructing a public road. The case is based on section 10,533, R. S. 1909, prescribing a penalty for road obstruction, to be recovered in an action prosecuted by the road overseer in the name of the road district. The trial court sustained a demurrer to the evidence for plaintiff and judgment was rendered for the defendant.

[1] The evidence for plaintiff tended to show that the road was a public one and that defendant had obstructed it, and that the road overseer had given him ten days' notice to remove the obstruction as provided by the statute aforesaid, and that he refused to comply with the notice. But defense is based on the following facts also appearing in evidence: It will be noticed that this plaintiff is called "Boonville Special Road District of Cooper County," while the evidence showed the obstructed road was in "Road District No. 5" at the time the obstruction was erected. But it was further shown that thereafter, and before the beginning of this action, district No. 5, under article 6 of chapter 102, R. S. 1909, was, at an election held for that purpose, consolidat-

ed with or taken into and made a part of the plaintiff district, which adjoined it. In such circumstances, we think the latter district is the proper plaintiff. We think the question asked in plaintiff's brief is pertinent. It is this: "Suppose district No. 5 had begun suit, and pending same, and before final judgment, the district had become legally wholly consolidated with the plaintiff district. Would the action have abated, or would the action have continued in the name of the new district?" The statute (section 10,533) reads that after notice given and ten days have elapsed, the penalty and liability to a fine have accrued, "such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction." This evidently does not nullify the offense by destroying its mode of punishment. The statute, by prescribing that the action shall be brought "in the name of the road district," did not intend to nullify the offense by destroying its mode of punishment in instances where the district offended against had been lawfully taken into another district. It could hardly be thought that if this action had been instituted before consolidation in the name of district 5, and consolidation had while pending, that it would have abated the action.

[2] The peremptory instruction is also defended on the ground that no offense was charged in the petition. No demurrer was offered to it. The statute aforesaid reads that: "Any person or persons who shall willfully or knowingly obstruct or damage any public road," etc. The petition charges that defendant obstructed the road by erecting a fence thereon, omitting to charge that he willfully or knowingly did so. But it does allege that the overseer "notified said defendant by writing to remove said obstruction, and that said obstruction has not been removed and has ever since been maintained by said defendant." We think that is tantamount to an allegation that he willfully or knowingly obstructed the road. Allowing that he may have fenced the road inadvertently, that condition of mind could not have continued after notice of what he had done. When he persisted in maintaining the fence after notice of his wrong, he did it both willfully and knowingly.

The judgment is reversed and the cause remanded, to the end that a trial may be had and the defense, if there be any, may be heard. All concur.

**WINFREY v. MATTHEWS.**

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1913.)

**1. APPEAL AND ERROR (§ 1010\*)—REVIEW—  
JUDGMENT.**

Where a jury was waived, and the cause was submitted to the trial court without any

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

declarations of law being asked or given, the judgment should be sustained on appeal if there is any substantial evidence in support of the finding on the facts, and if any theory of law will support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

## 2. BILLS AND NOTES (§ 499\*)—PAYMENT—BURDEN OF PROOF.

A defendant pleading payment of a note has the burden of proof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1682, 1695-1697; Dec. Dig. § 499.\*]

## 3. APPEAL AND ERROR (§ 231\*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—OBJECTION.

A party cannot complain on appeal that evidence incompetent for certain reasons was improperly admitted, where the objection below did not point out the reason of incompetency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.\*]

## 4. APPEAL AND ERROR (§ 934\*)—REVIEW—FINDINGS.

Where there was a finding in favor of plaintiff, only plaintiff's evidence need be considered in determining the propriety of the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.\*]

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Action by Caleb Winfrey against T. A. Mathews. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Hawthorne and S. L. Mathews, both of Kansas City, for appellant. Isaac Tavenner and A. R. Strother, both of Kansas City, for respondent.

ELLISON, P. J. This action is based on 11 promissory notes. The defense was payment, and a counterclaim, but the latter was abandoned. The judgment in the trial court was for the plaintiff.

[1] A jury was waived, and the case was submitted to the trial court without any declarations of law being asked or given. We find it impossible to sustain this appeal without violating fundamental rules of law, viz., that where a jury is waived and no declarations given, the court is intrusted with the decision of both law and fact, and if any substantial evidence supports the finding on the facts and if any theory of the law will support the judgment under the evidence and the pleading, there is no ground for appeal. *State ex rel. v. Staed*, 143 Mo. 248, 45 S. W. 50; *Sommer v. Bryson*, 168 Mo. App. 335, 153 S. W. 1069; *Rice v. McClure*, 74 Mo. App. 383.

[2] The plea of payment put the burden on defendant to prove it. *Ferguson v. Dalton*, 158 Mo. 323, 59 S. W. 88; *Rider v. Culp*, 68 Mo. App. 527.

[3] It is insisted in defendant's briefs that improper evidence was admitted in that it concerned matters pertaining to a compro-

mise. That was not stated to the trial court as a ground of objection; and it therefore does not give defendant ground for complaint on appeal. But, waiving that, we think the evidence was entirely proper in every respect.

Objection was made to the admission of pencil memoranda of statements made by defendant in the latter's presence. The ground of objection was that counsel "could not see how it has anything to do with this matter." We think it was directly pertinent to the case, and the objection was properly overruled.

[4] The alleged payments on the notes were said to consist, among other things, of a variety of business transactions and services rendered by defendant; that plaintiff and defendant owned an interest in a fruit farm in Howell county; and that defendant bought of plaintiff a half interest in a hardware store, and that defendant took charge of it and was to be credited on one of the notes for his services; that they sold the store and that plaintiff collected all the purchase price agreeing to credit defendant; that defendant paid all of a joint note they owed and was to receive credit from plaintiff for one-half thereof. There is no need of further specification. Nor is there any necessity to set out evidence in detail, and we need only say that if that for plaintiff is to be believed the judgment was properly rendered for him. We think the error made by defendant is in considering the evidence in his behalf, under the rule above stated, whereas, with the finding against him, it is only evidence for the plaintiff we need consider.

The judgment must be affirmed. All concur.

## GOLLER v. HENSELER MERCANTILE OIL & SUPPLY CO.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

## 1. EVIDENCE (§ 441\*)—PAROL EVIDENCE—VARYING CONTRACT.

In an action for breach of a written contract of employment as agent for the sale of oil, which required plaintiff to sell at market prices at all times, plaintiff could not show by parol that when the written contract was executed defendant agreed to permit plaintiff to give a rebate to his customers out of his commissions; such evidence contradicting the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

## 2. CONTRACTS (§ 245\*)—PAROL EVIDENCE—VARYING CONTRACTS.

All prior negotiations as to the subject-matter are merged in a written contract, in absence of fraud, accident, or mistake.

[Ed. Note.—For other case, see Contracts, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.\*]

## 3. MASTER AND SERVANT (§ 30\*)—CONTRACT OF AGENCY—BREACH.

A contract to pay plaintiff certain commissions upon oil sold by him for defendant,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

provided that plaintiff should get the market prices for the oil at all times, was breached by sales by plaintiff under an agreement to refund to his customers 5 per cent. of his commissions, justifying his discharge from defendant's employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 30-36; Dec. Dig. § 30.\*]

#### 4. CONTRACTS (§ 346\*)—ACTION—PROOF.

While the parties may modify the terms of an existing written contract, recovery must be had upon the original contract as modified.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. § 846.\*]

#### 5. CONTRACTS (§ 238\*)—MODIFICATION—PAROL MODIFICATION.

A written contract may be subsequently modified by a new parol contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1117, 1123; Dec. Dig. § 238.\*]

#### 6. TRIAL (§ 191\*)—ACTIONS FOR BREACH—INSTRUCTIONS.

In an action for breach of a contract to pay plaintiff certain commissions for selling oil, required thereby to be sold at the market price, at all times, a charge that, if it was not agreed at the time of the employment that plaintiff should be permitted to pay a rebate to his customers, defendant could refuse to permit plaintiff to allow such rebate out of his commissions, and if it instructed him not to do so, and plaintiff nevertheless continued rebating, defendant could discharge him, was erroneous for assuming that an agreement relating to commissions or rebates, made contemporaneously with the written contract, was valid though it contradicted the writing.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 436; Dec. Dig. § 191.\*]

#### 7. CONTRACTS (§ 237\*)—NEW CONTRACT—NECESSITY OF CONSIDERATION.

A new contract made to replace another existing contract must be supported by a consideration.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1119-1122; Dec. Dig. § 237.\*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by Emil C. Goller against the Henseler Mercantile Oil & Supply Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Johnson, Rutledge, Marlatt & Lashly, of St. Louis, for appellant. H. Chouteau Dyer, of St. Louis, for respondent.

**NORTONI, J.** This is a suit for damages accrued through the breach of a contract of employment and as for the wrongful discharge of plaintiff. Plaintiff recovered, and defendant prosecutes the appeal.

Defendant is a corporation engaged in the oil business in St. Louis, and plaintiff is an experienced salesman of that commodity. Defendant, desiring to install a tank wagon service for the sale of oil, employed plaintiff, who possessed considerable experience in that line, for a period of one year, and entered into a written contract with him to that effect on the 27th day of January, 1911. By the terms of the contract plaintiff was to receive a commission on the oil sold through

his efforts, and he guaranteed to defendant that he would sell no less than an average of 15,000 gallons per month; the sales to be made at market prices of the oil at all times of the year. It appears that plaintiff entered upon the employment immediately and induced three experienced tank wagon men to quit the employ of other companies and enter that of defendant under his supervision in selling the oil. It seems that by their course of conduct the parties construed the contract of employment as authorizing the employment of the three tank wagon men to sell and deliver the oil under plaintiff's supervision. The case was tried throughout on this theory, and it appears defendant paid a salary to the drivers of the tank wagons, while plaintiff paid to them a portion of his commissions on sales as well. Plaintiff went about and solicited the customers to which the tank wagon men delivered the oil, and thus made the sales contemplated in the contract of employment. Through this method plaintiff sold and delivered more than an average of 15,000 gallons of oil per month during February, March, April, and May; but he was discharged by defendant on June 2d. The suit proceeds on the theory that plaintiff fully performed the conditions of the contract on his part until his discharge, and that such discharge was wrongful. As a justification of the discharge, defendant insists that plaintiff did not obtain the market price for the oil, in that he instituted a system of rebates whereby he returned to each customer 5 per cent. of his commissions received on sales and refused, on request, to desist from this practice. The entire controversy between the parties pertains to this matter, and the principal argument for a reversal of the judgment relates to the action of the court in permitting plaintiff to prove by parol as a part of his contract of employment that defendant agreed he should do so and to recover thereon as if such were a term of the contract said to be breached by defendant. The contract of employment is in writing, and the petition declares upon that alone, assigning its breach through the wrongful discharge of plaintiff on June 2d by defendant. The contract declared upon and introduced in evidence, omitting signature, is as follows:

"Henseler Mercantile Oil & Supply Company.

"St. Louis, Mo., January 27, 1911.

"We, the undersigned, do hereby agree to pay Mr. Goller the following commission on sales of refined oils and gasoline for the period of one year, to wit:

"40—41 coal oil 1% per gal.

"43—44 coal oil 2¢ per gal.

"Stove gasoline 1% per gal.

"All other grades of gasoline and coal oil 50 per cent of the gross profits as per books open to Mr. Goller at any time.

"Mr. Goller, on his part, to guarantee us

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an average sale of not less than 15,000 gallons per month, he to get the market prices for the above goods at all times during the year."

It is obvious that there is no provision contained in this writing by which plaintiff is authorized to induce the sale of defendant's oil through rebating a portion of his commissions to his customers; but, on the contrary, the contract in express terms provides that plaintiff is "to get the market prices for the above goods at all times during the year." Moreover, the petition contains no averment to the effect that this contract was subsequently modified by another agreement authorizing plaintiff to give rebates to his customers. Neither is there an averment in the petition to the effect that a further agreement in parol was made contemporaneously with the writing to that effect. But, as stated, the petition declares upon the written contract above copied only and for its breach through an alleged wrongful discharge of plaintiff.

[1] Notwithstanding the petition declares upon the written contract, the court permitted plaintiff, over the objection and exception of defendant, to introduce evidence tending to prove that, immediately before and at the time the written contract was entered into, Mr. Nobbe, president of defendant company, agreed plaintiff might rebate his customers out of his commissions by way of an inducement to them to purchase defendant's oil. Plaintiff testifies such to be the fact, and he says, too, that about a week after the contract was entered into he and Mr. Nobbe again talked the matter over and this course was agreed upon. Touching this matter, Mr. Nobbe says that, during the next week after the written contract was entered into, plaintiff approached him upon the subject, and he stated that he had no objection to plaintiff's rebating his customers, provided defendant company got the amount due it according to the market price less plaintiff's commissions for the oil. However, it is insisted on the part of defendant that no new contract was made at the time touching this matter, nor a modification of the prior one, but rather a mere permission was given by defendant company to plaintiff to pursue that course if he chose to do so. It is conceded throughout the case that plaintiff did enter into an arrangement with all of his customers to whom the oil was sold by which he agreed to and actually did return to them 5 per cent. of his commissions received on sales to each. The business was thus conducted during the months of February and March and, indeed, throughout April and May, but in April other oil companies complained of the practice as an unfair one. Indeed, Mr. Nobbe testifies that the Waters-Pierce Oil Company and the Bell Oil Company, who had learned of plaintiff's rebating his customers, insisted that the practice must be discontinued as it operated to impair the

selling price. Upon being thus advised of the objections by and on the part of competing companies, Mr. Nobbe says he notified plaintiff that he must "cut out" his rebates to customers, and that plaintiff agreed to do so. Mr. Nobbe explains in his testimony that, though he had given his permission to plaintiff and acquiesced in the matter about a week after the contract of employment was made, he could not tolerate it over the objections of his competitors. He says that both the Waters-Pierce and the Bell Company were large concerns, while his company was a small one, and that they would crush him if the practice were continued by plaintiff. According to the evidence for defendant, plaintiff agreed to quit rebating, but did not do so. It appears, without contradiction, that plaintiff continued the practice throughout the month of May after having been notified by defendant not to do so and told Mr. Nobbe on June 2d that he could not quit it, as his customers insisted upon having rebates. Upon being thus informed by plaintiff that he would not quit giving the 5 per cent. rebate to his customers, on June 2d, Mr. Nobbe summarily discharged him as if plaintiff had breached his contract of employment. The contract by which plaintiff was employed as a salesman for defendant is in writing, and there is nothing upon its face suggesting it to be incomplete in itself or that it does not purport to be a complete expression of the entire contract.

[2] Indeed, it is declared upon in the petition as the contract between the parties, and it is certain that it is such, for all prior conversations and negotiations with respect to the same subject-matter are, in the absence of fraud, accident, or mistake, of which there is no suggestion here, regarded in the law as merged in the writing. *Morgan v. Porter*, 103 Mo. 135, 15 S. W. 289; *Flanagan Mills Co. v. Adams Grain Co.*, 115 Mo. App. 542, 90 S. W. 1035. This contract in express terms imposes upon plaintiff the duty to obtain the market prices from his customers for the oil sold by him. The last clause of the writing imposes the obligation that "he (plaintiff) to get the market prices for the above goods at all times during the year."

[3] Of course, if he sold the goods to his customers at the market price and collected the full amount therefor, but under an agreement that he would refund to them 5 per cent. of his commission, this obligation was breached, for though he obtained the full measure of compensation to which defendant was entitled, less commissions, he nevertheless indirectly made the sale to his customers for less than the market price. It is obvious that this provision of the contract referred to the market price at which plaintiff was to sell the oil to his customers, and not to the price at which defendant was to furnish the oil to him for sale to them. This being true, there can be no doubt that defendant was justified in discharging plain-

tiff from its service for breaching this stipulation of the contract, unless it be the right to do so was vouchsafed in a modification of the contract made subsequent to its execution.

[4] It is, of course, true that parties may modify an existing contract after it is executed by adding new terms or varying prior terms imposed thereby. But in such cases the recovery is to be had upon the original contract and the subsequent modification declared upon as a whole, for it is the breach of the entire contract thus modified which gives rise to the cause of action. See *Lanitz v. King*, 93 Mo. 513, 518, 519, 6 S. W. 263; *Henning v. U. S. Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332.

[5] While it is no doubt true that a contract expressed in writing may be subsequently modified by the parties through entering into a new one, which lies in parol alone, it is certain that one may not recover as for the breach of a contract expressed in writing by showing an additional agreement thereto varying its terms made contemporaneously with the execution of the written contract by parol, except it be in those cases where the writing reveals on its face that it is incomplete with respect to the additional term sought to be supplied in parol. See *Koons v. St. Louis Car Co.*, 203 Mo. 227, 255, 101 S. W. 49; *Henning v. U. S. Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332. There is nothing in the written contract sued upon suggesting it to be incomplete with respect to the price at which plaintiff was to sell the oil, for it expressly requires him to obtain the market price. It is therefore obvious that the court erred in permitting him to give evidence to the effect that, at the time the contract was made and immediately prior thereto, in the conversation pertaining to the subject-matter, defendant agreed plaintiff might sell the oil for less than the market price through the medium of an arrangement whereby he should rebate 5 per cent. of his commissions to the customers.

Moreover, the court erred, too, in submitting this matter to the jury as a predicate of liability as for a breach of a term of the contract: First, because it was not declared upon in the petition; and, second, for the more obvious fundamental reason that it authorized a recovery as for the breach of a parol contract made contemporaneously with a written contract between the same parties touching the same subject-matter which contradicted and varied the terms of the writing.

So much of plaintiff's instruction as is pertinent to this matter will be copied here. The instruction is extended, and for the purpose of brevity other portions will be omitted. Concerning the matter in judgment the instruction reads: "The court further instructs the jury that if you find and believe from the evidence that the plaintiff and defendant entered into the contract read in

evidence, that *at the time they entered into the contract it was understood and agreed between them* that plaintiff should, in order to secure and hold customers, be permitted to pay to those purchasing oil through him a rebate or discount out of his commissions equal to 5 per cent. of the amount of their purchases, etc., etc.," the finding should be for the plaintiff, provided the jury further found defendant received the market price for the oil and the discharge of plaintiff. (Italics are our own.) This instruction is, of course, erroneous for that, as before said, it submits a predicate of liability as for a breach of a verbal contract not set forth in the petition in any way, and further because it authorizes a recovery for the breach of a verbal contract revealed in the evidence to have been made contemporaneously with the writing and contradictory thereto. The instruction seems to assume, too, that the words of the contract requiring plaintiff to get the market price for the oil at all times during the year to have been fully complied with if he received less than the market price therefor, but caused defendant to be paid the amount due it after his commissions were deducted. Obviously, such was not the intention of the parties as revealed on the face of the contract, for it says nothing about the price defendant was to receive, but, on the contrary, expressly requires that he (the plaintiff) get the market prices for the oil, and, of course, thereafter defendant would compensate him by way of commission thereon.

[6] The court refused to instruct, at the request of defendant, that the giving of rebates after they were forbidden by defendant's president justified the discharge, in that it operated a breach of the stipulation requiring plaintiff to obtain the market price for the goods and instructed of its own motion on this question as follows: "The jury are instructed that if you find and believe that defendant employed the plaintiff as a salesman, but that it was not agreed between them at the time of the employment of the plaintiff that the plaintiff should be permitted to pay customers a rebate or discount of 5 per cent. on the amount of their purchases out of his commissions, then defendant had the right to refuse to permit plaintiff to make such rebates even out of his own commissions, and in that case if you find that defendant instructed plaintiff not to allow rebates or discounts to customers, and plaintiff nevertheless continued to do so and refused to discontinue the practice then defendant had the right to discharge him, and your verdict must be for the defendant." This instruction is erroneous, too, in that it assumes as a matter of law that an agreement touching the subject of the 5 per cent. commission made contemporaneously with the written contract was valid and enforceable though it varied and contradicted the terms of such writing.

[7] There can be no doubt that if the par-

ties actually made a new contract covering this matter after the written contract was made, and thereby modified the terms of the contract theretofore expressed in writing, such modified contract should prevail. However, that matter, it seems, was not relied upon in the case, though there is some evidence tending to prove it. But the consideration for a new undertaking is not developed and, of course, such is required. *Henning v. U. S. Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 332; *Bunce v. Beck*, 43 Mo. 266.

If the case is retried and the petition amended, more may be made to appear. On the other hand, if it appears that defendant merely granted permission to plaintiff to give rebates from his commissions and thereafter revoked the license and directed him to discontinue the practice which he declined to do, it was, of course, justified in the discharge, for in such circumstances it appears plaintiff breached the contract by continuing the practice from and after notification on the part of his employer to quit it.

The judgment should be reversed, and the cause remanded, but with leave to plaintiff to amend, if he be so advised. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

#### LEWKOWITZ v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

#### EVIDENCE (§ 528\*)—EXPERTS—PHYSICIAN'S OPINION.

Where a physician who had attended plaintiff after her injury testified that from his examination it was his medical opinion that she was suffering from nephritis resulting from the twisting of a kidney on its pedicle, and that such condition could have been caused from a traumatism, and particularly from a fall of the character described by plaintiff, and the injuries therefrom as they appeared at the time of the accident, his testimony was competent and relevant, though he was also compelled to state on cross-examination that without an operation he could not absolutely tell that the kidney was twisted, and that his conclusion to that effect was a guess.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.\*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by Julia Lewkowitz against the United Railways Company of St. Louis. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyle & Priest, Geo. T. Priest, Samuel McChesney, and Elmer C. Adkins, all of St. Louis, for appellant. Henderson, Marshall & Becker and G. B. Arnold, all of St. Louis, for respondent.

ALLEN, J. This is an action for damages for personal injuries alleged to have been re-

ceived by plaintiff while alighting from one of defendant's cars in the city of St. Louis, which it is said prematurely started, throwing plaintiff to the street and injuring her. Plaintiff recovered, and defendant prosecutes the appeal.

The only assignment of error before us pertains to the overruling of a motion of defendant to strike out certain testimony of a physician who testified as a witness for plaintiff. It appears that plaintiff is quite a large woman, and that when she was thrown or fell, while attempting to alight from the car, she struck the end of her spine and the back of her head against the surface of the street, and that the injuries resulting therefrom caused her to be confined to her bed for some ten weeks thereafter.

Dr. Hopkins, who testified for plaintiff, was her family physician. He examined her and treated her shortly after the accident and testified as to her injuries. In describing her condition shortly after she was injured, he said that "the greater portion of the pain was right at what we generally call the small of the back, just above the coupling of the hips and at the end of the spine"; that upon examining the end of the spine he found that he "could double it" (i. e., it was preternaturally movable); and that plaintiff manifested great pain when it was thus moved. He testified that on the evening of the injury he examined the urine and found that it showed signs of bright blood; that blood did not appear in the urine thereafter, however; that it was difficult to tell where the blood came from, but that it could have come from her kidneys; that he examined the urine some 50 times, and every day during the first week after the injury, to see whether there were kidney lesions or anything to manifest an inflammation of the kidneys; that in his early examinations he found no albumen, but that about three weeks after the accident he discovered albumen in the urine, which he stated was one of the prominent symptoms of Bright's disease; that this "means an inflammation of the kidneys," technically known as nephritis, which could result from traumatism; and that a fall of the character such as was described could produce it by causing the kidney to be twisted on its pedicle. A portion of the testimony of this witness on cross-examination by defendant's counsel was as follows: "Q. You said that this Bright's disease might be caused by a twisted kidney; do you know whether that kidney was twisted or not? A. Twisted on its pedicle. Q. Do you know whether it was twisted on its pedicle or not? A. I couldn't see into it, but we have got to take some things for— Q. Do you know, doctor, whether it was twisted on its pedicle or not? A. I couldn't tell whether it was or not; no, I couldn't say it was; only we have got to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



take manifestation for that (that is, the results have got to show). Q. But, so far as you know, you don't know whether it was twisted on the pedicle or not? A. I said it was the supposition that it could be; I don't know. Q. It is a matter of speculation on your part whether it was or not? A. It is just the same as making the diagnosis of any case. It is from the knowledge of what happens that we have to judge from, without cutting the abdomen open. You are guessing; I am using my knowledge to bear on the subject, drawing conclusions from results. Q. And that conclusion is a guess? A. And that conclusion, if you put it that way, would be a guess; yes, sir." Thereupon defendant's counsel moved "to strike out the doctor's testimony relating to the question of Bright's disease on the ground that there is no causal connection between that condition and this accident." After argument of counsel this motion was overruled; defendant excepting.

The point that there was no causal connection shown between the fall which plaintiff received and the development of Bright's disease, from which it appears she thereafter suffered, we think is not well taken. The purport of the testimony of this witness on direct examination was not, by way of conclusion, to the effect that the disease, known as Bright's disease, resulted from the particular accident in question; but his testimony went to show that, in his opinion as a medical expert, the disease might or could have resulted from trauma, and particularly from a fall of the character described and the injuries therefrom as they appeared at the time of the accident. This was not violative of the rule respecting evidence of this character. See *Taylor v. Railroad*, 185 Mo. 239, 84 S. W. 873; *Hutton v. Street Railway Co.*, 166 Mo. App. 645, 150 S. W. 722; *Jerome v. Railways Co.*, 155 Mo. App. 202, 134 S. W. 107.

But it is urged that the doctor's testimony above set out showed "that he based his conclusion upon mere guess that the kidney was twisted on its pedicle by the accident, and that that caused the disease known as Bright's disease," and that, being based upon mere guess, the evidence is of no probative force. And in support of this we are cited to *McCreery v. Railways Co.*, 221 Mo. 18, 120 S. W. 24, where a witness, who disclaimed ability to form an opinion regarding the speed of a car, was permitted by the trial court to state what his guess would be respecting the same; and this was held to be error. There can be no doubt as to the incompetency of such testimony. Here, however, not only was the witness testifying as an expert, but his later testimony, on cross-examination, frees the case from any possible prejudicial error on this score. A portion of such testimony follows: "Q. Do you

mean to sit there and tell this jury that the plaintiff is suffering from Bright's disease as a result of this accident? A. The indications point that way. Q. And yet you cannot tell whether or not that kidney is twisted? That is my diagnosis. Q. And so you are telling this jury, as a matter of fact, because that is simply your guess, you are telling it to this jury? Mr. Arnold: I object to his characterization of it. The Court: The Supreme Court has said pretty much the same thing about all expert testimony. I do not know that that is improper. Q. And you are just giving your guess? A. I am just giving my judgment." It will be observed that the witness was here questioned in a way which would not have been permissible on direct examination, against objections thereto. But of this, of course, defendant cannot complain. By this examination the defendant brought forth an expression of opinion from the witness to the effect that the plaintiff was suffering from Bright's disease as a result of the accident; that the witness' diagnosis, as a physician, was that plaintiff's kidney was twisted; and that, instead of this being the witness' mere guess, the latter was in fact giving his judgment thereupon or expressing an opinion as a medical expert.

It appears to be undisputed that plaintiff was in fact suffering from Bright's disease. That such disease could be caused by an injury to the kidney fully appears from the expert testimony adduced. Plaintiff's physician, who had treated her, testified that in his opinion there was an injury to the kidney, and that such an injury could be caused by a fall of the character described. And, added to this, this witness, at the instance of defendant, testified that the indications were that plaintiff "was suffering from Bright's disease as a result of this accident." In the face of this record it cannot be said that there was no evidence to show a causal connection between the accident and the disease from which plaintiff was suffering.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and NORTON, J., concur.

#### MUTH REALTY CO. v. TIMMERBERG et al.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

#### 1. JUSTICES OF THE PEACE (§ 158\*)—APPEAL—DISMISSAL.

In view of Rev. St. 1909, § 7568, providing that, on appeal from a judgment of the justice of the peace, the appellant shall give a bond to prosecute his appeal with due diligence, and under section 2273 providing that, where an appeal from the judgment of a justice of the peace shall not be prosecuted according to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

law, the judgment shall be affirmed, the failure of an appellant to pay the requisite fee for filing the transcript of the appeal in the office of the circuit clerk is a failure to prosecute the appeal and will authorize an affirmance of the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 543, 545-549; Dec. Dig. § 158.\*]

## 2. JUSTICES OF THE PEACE (§ 158\*)—APPEALS—JUDICIAL DISCRETION.

The payment of the fee for filing the transcript of an appeal from a judgment of the justice in the office of the circuit clerk is not jurisdictional; and hence the question of the affirmance of such a judgment depends upon the exercise of a sound discretion by the trial court, which discretion may not be arbitrary or capricious but a sound judicial discretion liberally exercised in the furtherance of justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 543, 545-549; Dec. Dig. § 158.\*]

## 3. APPEAL AND ERROR (§ 1092\*)—REVIEW—DISCRETION OF LOWER COURT.

The question of the affirmance of a judgment of a justice of the peace for nonpayment of the fee for filing the transcript rests in the sound discretion of the trial court, and that tribunal's determination will not be disturbed except for an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4312-4321; Dec. Dig. § 1092.\*]

## 4. APPEAL AND ERROR (§ 957\*)—DEFAULT—VACATION.

In the case of default judgments, the appellate courts look with favor upon the exercise of the lower court's discretion in favor of a trial on the merits and are less apt to interfere when the judgment is set aside than when it is not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.\*]

## 5. JUSTICES OF THE PEACE (§ 158\*)—APPEALS—PAYMENT OF FILING FEE—EXCUSE.

Where plaintiffs on appeal from a judgment of the justice left the entire conduct of the appeal with their attorney, and the attorney, before the commencement of the term of the circuit court to which it was returnable, was stricken with a mortal illness the nonpayment of the fee for filing the transcript will be excused, where it did not appear that the attorney knew that the transcript had been delivered to the circuit clerk before he became ill.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 543, 545-549; Dec. Dig. § 158.\*]

## 6. APPEAL AND ERROR (§ 957\*)—DEFAULT—VACATION.

The action of the trial court in declining to set aside a default judgment will not be reviewed on appeal, unless appellant make a prima facie showing of a meritorious case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.\*]

## 7. JUSTICES OF THE PEACE (§ 189\*)—APPEALS—AFFIRMANCE—VACATION.

Where a judgment appealed from the justice's court is affirmed because of failure to diligently prosecute, the appellant must not only show facts sufficient to excuse his failure to prosecute the appeal but must also make a prima facie showing that he had a meritorious defense or cause of action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 727-733; Dec. Dig. § 189.\*]

## 8. JUSTICES OF THE PEACE (§ 189\*)—APPEALS—AFFIRMANCE—VACATION.

Where plaintiff, who recovered judgment for the full amount asked, but against whom defendants recovered on a counterclaim, appealed from the judgment of the justice, and the judgment was affirmed for failure to prosecute the appeal, a bare affidavit that plaintiff had a meritorious defense against the counterclaim is not a sufficient showing to warrant the vacation of the affirmance.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 727-733; Dec. Dig. § 189.\*]

## 9. APPEAL AND ERROR (§ 854\*)—DETERMINATION—AFFIRMANCE.

It is the duty of the appellate court to affirm a judgment if there is any ground upon which the action of the court below may be properly sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3480; Dec. Dig. § 854.\*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by the Muth Realty Company, a corporation, against John C. Timmerberg and another, begun in justice's court and appealed by plaintiff to the circuit court. From a judgment for plaintiff for less than his claim, he appeals. Affirmed.

Robert W. Hall, of St. Louis, for appellant. A. E. L. Gardner, of Clayton, and Robert C. Powell, of St. Louis, for respondents.

ALLEN, J. This action was begun before a justice of the peace and is to recover the sum of \$213.50 for certain personal property alleged to have been sold by plaintiff to the defendants. One defendant filed a counterclaim. The justice found for plaintiff on its cause of action and against it on the counterclaim, entering judgment for plaintiff against both defendants in the sum of \$130, assessing all of the costs against the plaintiff. From this judgment the plaintiff appealed to the circuit court; its appeal being returnable to the October term, 1911, thereof. Plaintiff, however, failed to pay the filing fee for filing the transcript in the office of the clerk of the circuit court, and on October 4, 1911, the second day of said term, the defendants paid the same; and at the instance of defendants the court on the same day entered a judgment affirming that of the justice of the peace. Three days later counsel who now represents plaintiff entered his appearance for plaintiff and on behalf of the latter filed a motion to set aside this judgment upon the ground of alleged sickness of the attorney who had represented plaintiff in the justice court and who was in charge of the case on appeal until after the entry of judgment in the circuit court. This motion was overruled, and the plaintiff appeals.

It appears that plaintiff's attorney was seriously ill at the beginning of the October term, 1911, of the circuit court. The appeal to the latter court was taken on August

12, 1911; the transcript of the proceedings before the justice being filed in the office of the clerk of the circuit court on August 14, 1911. The clerk of the justice of the peace testified that plaintiff's said attorney was in the justice court attending to some other business as late as September 27, 1911. But the witness stated that the attorney was very sick at the time; that "right after that time" he became confined to his bed; and that he later died of said illness.

[1] Section 7568, Rev. Stat. 1909, provides that, in an appeal from the judgment of the justice of the peace, the appellant, or some person for him, shall enter into a recognizance conditioned that the appellant will prosecute his appeal with due diligence. And section 2273, Rev. Stat. 1909, provides that, where an appeal from the judgment of a justice of the peace "shall not be prosecuted by the appellant according to law, the judgment shall be affirmed, and the costs adjudged accordingly."

It is well settled that a failure to pay the requisite filing fee for filing the transcript in the office of the clerk of the circuit court, within the required time, is such a failure to prosecute the appeal as will authorize the circuit court to affirm the judgment. The cases are numerous to this effect, but see *Young v. School District*, 119 Mo. App. 108, 95 S. W. 947; *World Publishing Co. v. Grain Co.*, 108 Mo. App. 479, 83 S. W. 781; *Cabanne v. Macadaras*, 91 Mo. App. 70; *Johnson v. Railway*, 48 Mo. App. 630; *Vastine v. Bailey*, 46 Mo. App. 413.

[2, 3] But it is also well settled that payment of the filing fee is not jurisdictional, and that it is not the imperative duty of the circuit court to affirm a judgment of a justice of the peace for failure to pay the same. On the contrary, it is held that the exercise of such power is one which addresses itself to the sound discretion of the court. And the action of the latter in the premises, as in the case of any other matter resting in the discretion of the court, is subject to review only when it is made to appear that such discretion has been palpably abused or, as has been said, when the court arbitrarily refuses to affirmatively exercise its discretion. See *Cabanne v. Macadaras*, *Johnson v. Railway Co.*, and *Vastine v. Bailey*, *supra*. In such cases the circuit court's discretion is not an arbitrary or capricious one but a sound judicial discretion which should be liberally exercised in the furtherance of justice. Where there appears to have been an abuse of such discretion, it is the duty of the appellate court to interfere. And in *Vastine v. Bailey*, *supra*, this court, through Thompson, J., said: "In our opinion, where a case calls strongly for an affirmative exercise of the court's discretion in a given instance, a refusal of the court to exercise it is a subject of appellate review, equally with an affirmative abusive exercise of discretion."

[4] Here, as in the case of default judgments in general, the appellate courts look with favor upon the exercise of the lower court's discretion in favor of a trial on the merits and are less apt to interfere when the judgment is set aside than when it is not. See *Armstrong v. Elrick*, 160 S. W. 1019, not as yet officially reported; *Hall v. McConey*, 152 Mo. App. 1, 132 S. W. 618; *Parks v. Coyne*, 156 Mo. App. 379, 137 S. W. 335; *Currey v. Zinc Co.*, 157 Mo. App. 423, 139 S. W. 212.

[5] In the case before us it was made to appear that the failure of appellant to pay the filing fee was due to the serious sickness of appellant's attorney. That the latter was desperately sick at and shortly prior to the beginning of the term of the circuit court to which the appeal was returnable, by which time the filing fee should have been paid, is not controverted. And the serious character of his illness is disclosed by the fact that on October 20, 1911, when testimony was heard on appellant's motion to set aside the affirmance, it was shown that the attorney had in the meantime died.

In *Scott v. Smith*, 133 Mo. 618, 34 S. W. 864, the Supreme Court held that the trial court properly vacated a judgment against the appellant therein, for failure to prosecute his suit, upon a showing that his attorney, who had sole charge of the case, was unable to attend to it, or to any other business, because of the serious and dangerous sickness of his wife, requiring his constant attention to her, and in this connection the court said: "We do not think the court acted arbitrarily in vacating the judgment in this case. Indeed, we are of the opinion that the court, in the circumstances shown, could not have acted otherwise, disregarding the common instincts of humanity." And other cases to like effect might be referred to.

In the case before us, so far as concerns the showing made to excuse plaintiff's failure to pay the filing fee, the precepts of natural justice alone would appear to afford a sufficient ground for the exercise of the court's discretion in favor of setting aside the affirmance of the judgment and giving an opportunity for a trial upon the merits. It seems that appellant relied upon his counsel in the matter of perfecting the appeal from the justice of the peace, and that such counsel, who became sick and shortly thereafter died, had complete charge of the case. It is true that the transcript was lodged in the clerk's office on August 14th, but it does not appear that plaintiff or its counsel was advised thereof. It is also true that there was testimony to the effect that appellant's said counsel was attending to some business in the latter part of September of that year, but it appears that he was then very sick and became at once confined to his bed, and that, at and shortly prior to the time when plaintiff became in default respecting the payment of the filing fee, he was too ill to attend to business of any kind. Hence, so

far as concerns this phase of the case, such showing, we think, called strongly for an affirmative exercise of the court's discretion in favor of setting aside its former judgment of affirmance. Such was the view taken by this court in *Vastine v. Bailey*, supra, in a case of this character, where the facts relied upon to excuse the failure to pay the filing fee were, to our minds, not as strong as those here appearing.

[8-8] But there appears to be a reason why the appellant cannot invoke the judgment of this court upon the ground that the trial court abused its discretion or arbitrarily refused to affirmatively exercise its discretion in the premises. In such cases in general the rule is well settled that the appellate court will not interfere with the action of the trial court in refusing to set aside a judgment, as by default, unless it appears that the appellant made below at least a prima facie showing that he had a meritorious case. Such is the provision of our statute respecting the vacating of a final judgment by default, providing that the defendant must set forth the facts constituting the defense which he has to the action; and this, indeed, is the general rule of decision prevailing with respect to vacating default judgments generally.

The judgment before us is not technically one by default but is a judgment affirming that of the justice of the peace in accordance with the statutory provision therefor, as for a failure to prosecute the appeal. But that in seeking to set aside such a judgment the applicant must show not only facts sufficient to excuse his failure to prosecute the appeal but must also make a prima facie showing that he has a meritorious defense or cause of action has been expressly decided by this court. It has been so assumed in *Cabanne v. Macadaras* and *Vastine v. Bailey*, supra, and other cases; but in *Sigaloff v. Breweries Co.*, 148 Mo. App. 452, 128 S. W. 523, it was distinctly held that the defendant there was not in a position to invoke the judgment of this court, for failure to make a showing of facts constituting a meritorious defense to the action. And, as there said, a mere affidavit that the defendant has a meritorious defense, without more, is insufficient, for it does not reveal the facts relied upon and amounts to nothing more than the expression of an opinion touching the matter.

In the case before us the motion to set aside the judgment, and which was verified by affidavit, contained among other things the averment that plaintiff had "a good and meritorious cause of action." This, of course, did not disclose any facts whatsoever. But, aside from this, it would appear that plaintiff's cause of action was not the matter then in controversy. Plaintiff recovered before

the justice on its cause of action, but the amount of its recovery was reduced by the counterclaim interposed by one defendant and which was allowed by the justice. So far as concerns plaintiff's cause of action, the merits thereof would seem to be conceded by respondent's motion to affirm the judgment; and it would appear that the only matter in controversy pertained to the counterclaim. It is also true that the justice of the peace erred in taxing all costs against plaintiff, but the judgment of the circuit court on its face carries with it the costs in favor of plaintiff; so it seems that this question was then out of the case.

So far as concerns, then, plaintiff's defense to the counterclaim interposed, plaintiff occupied the position of a defendant; and in order to invoke the judgment of this court and to convict the trial court of an abuse of discretion, or of having acted arbitrarily in the premises, it must appear that the plaintiff sufficiently disclosed to that court the facts upon which it relied in defense thereto, showing prima facie that it had a meritorious defense to the same. It is true that that issue was not one to be then tried by the court, for an affirmative showing of a good defense cannot be overcome by counter affidavits or otherwise. See *Armstrong v. Elrick*, supra. But such prima facie showing must be made.

In the case before us nothing whatsoever on this score appears beyond the general averment in the motion that plaintiff has a good and meritorious cause of action, which amounts to nothing, and which in fact does not here pertain to the matter in controversy, viz., the counterclaim. The record is barren of any showing whatsoever respecting the facts relied upon by plaintiff as a defense to the latter. Such being true, in spite of the showing made respecting the excuse for plaintiff's failure to seasonably pay the filing fee, and which appears sufficient to invoke our interference so far as concerns that question, we are unable to say, upon the record before us, that the court below abused its discretion or acted arbitrarily in the premises.

[8] It is true that no point is here made respecting plaintiff's failure to make a showing as to the merits. However, if there is any ground upon which the action of the court below may be properly sustained, it is our duty to sustain it; and hence this question is one which arises upon the record and must be considered when we are asked to reverse the judgment.

In this view the judgment of the circuit court should be affirmed. It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

## LACLEDE LAUNDRY CO. v. FREUDENSTEIN et al.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

## EVIDENCE (§ 441\*)—PAROL EVIDENCE TO VARY WRITING—DEEDS—"GRANT, BARGAIN, AND SELL."

Where the words "grant, bargain, and sell" in a statutory general warranty deed were unrestrained by any express terms contained in the deed, and hence under the express provisions of Rev. St. 1909, § 2793, were to be construed as a covenant against incumbrances, it could not be shown by parol evidence that in addition to the consideration recited in the deed the grantee agreed as part of the consideration to assume and pay taxes which were then a lien on the land, since, while ordinarily parol evidence is admissible to explain, vary, or even contradict the recited consideration, it is not so admissible if to admit it involves an attack upon the covenants of the deed, and Rev. St. 1909, § 1974, providing that whenever a specialty or other written contract for the payment of money or delivery of property, or the performance of a duty, shall be the foundation of an action or defense in whole or in part, a want or failure in whole or in part of the consideration thereof may be proved, does not apply to such a case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3156-3158.]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by the Laclede Laundry Company against Henry W. Freudenstein and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Wildsey, McIntyre & Nardin, of St. Louis, for appellant. John W. Benstein, of St. Louis, for respondents.

REYNOLDS, P. J. This is an action on the covenants of warranty in a deed, to recover \$122.87 and interest, on account of city, school and state taxes for the year 1909. Plaintiff is grantee in the deed, defendants are grantors. The deed is in the usual statutory form and "grants, bargains, and sells, conveys and confirms," the property to plaintiff, defendants "hereby covenanting that they, their heirs and legal representatives will warrant and defend the title to the said premises unto the said part of the second part and unto its successors and assigns forever, against the lawful claims and demands of all persons whomsoever." It is dated January 14th, 1909, and was then delivered. That the taxes were a lien upon the real estate at the time of the execution and delivery of the deed, although not then due, is conceded, it being admitted that plaintiff had paid them and interest to discharge the lien, and that while plaintiff had demanded repayment thereof

from defendants, this demand was refused. The deed recites \$12,000 as the consideration, the receipt of which is acknowledged.

By their answer defendants set up that the \$12,000 stated in the deed was not the real consideration, but that it had been agreed between plaintiff and defendants before and at the time of the execution of the deed and its delivery to plaintiff, that plaintiff assumed and would pay these taxes as part of the consideration of the purchase of the property.

There was a general denial of this by reply. Trial to a jury.

Evidence was offered by defendants tending to prove that such an agreement had been made between the parties by parol immediately before and at the time of the execution and delivery of the deed, and it was admitted by the court over the objection and exception of plaintiff.

The court refused an instruction asked by plaintiff, who duly preserved exceptions, to the effect that under the law and the evidence the verdict of the jury should be for the plaintiff. At the request of defendants the court instructed the jury to the effect that if they found from the evidence that at the time of the sale and conveyance of the property described, it was understood and agreed between plaintiff and defendants that plaintiff assumed and agreed to pay the taxes assessed against the property for the year 1909 as part consideration of the purchase price of the property, their verdict should be for defendants. This was duly excepted to by plaintiff.

The jury returned a verdict in favor of defendants, from which, after interposing a motion for new trial and excepting to that being overruled, plaintiff has duly perfected its appeal to this court.

There is but a single question for determination in this cause, namely, the correctness of the action of the trial court in admitting parol evidence of the alleged agreement between the parties, made at or immediately prior to the execution and delivery of the deed, that plaintiff, in addition to the consideration named in the deed had as part of the consideration, verbally agreed to pay the taxes for the year 1909, those taxes being then a lien on the property. The contention of learned counsel for appellant, while conceding that it is admissible to show the real consideration for the deed, so long as it affects only the consideration, is, that such evidence is not admissible if it has the effect of contradicting the warranty in the deed itself, and it is claimed that such is the effect here. It appears by the abstract of the proceedings at the trial that this evidence was admitted by the learned trial judge on the theory that where there are contemporaneous verbal agreements entered into, one may modify the other; under this theory he held that he would allow the defendants to show, if they could, what the real consideration was.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—38

"That," said the court, "does not destroy the deed. It does not affect the validity of the deed." It was under this view of the law that the instruction asked by defendants and above set out was given and that asked by plaintiff refused.

While in the earlier cases the courts, English and American, took the view that the rule of evidence, that a written instrument could not be varied by parol, applied to the consideration clause as well as to other portions of the deed, the later and American view now almost universally adopted, certainly adopted in our state, to give it in its broadest terms, is, that the recitals of a deed as to the consideration, are not a part of the contract, and parol evidence is admissible to explain, vary or even contradict them. In the great majority of cases, however, in which the rule has been stated so broadly, the purpose of introducing the evidence was not to invalidate the deed as a conveyance or to annul its covenants. Where the introduction of the evidence will have that effect, the general rule is that the evidence is not admissible. We take the above substantially from notes to the case of *Shehy v. Cunningham*, 81 Ohio St. 289, 90 N. E. 805, the note being on page 1195 of 25 L. R. A. (N. S.). The first part of this paragraph is credited by the annotator to 6 Am. & Eng. Ency. of Law (2d Ed.) p. 767. Reading further in this volume of the American & English Encyclopedia of Law, at page 775, following the discussion of the admissibility of evidence to vary the consideration expressed in the deed or written contract, when the statement of the consideration is merely the recital of a fact, it is said: "When, however, the statement of the consideration leaves the field of mere recital and enters that of contract, thereby creating and attesting rights, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction by extrinsic evidence." *Jackson v. Chicago, St. Paul & Kansas City R. R. Co.*, 54 Mo. App. 636, a decision of the Kansas City Court of Appeals, the opinion by Judge Ellison, is cited and quoted from as one showing the difference between the statement of a consideration in a deed as a mere recital of a fact and as a contractual stipulation.

Considering the admission of parol or extrinsic evidence to vary deeds and written contracts, the law is thus summarized by accepted authority: "Where a writing, although in the form of a receipt, also embodies the elements of a contract, it is, in so far as it expressed the contract or is contractual in its nature, subject to the same rules as any other contract, and is not open to contradiction by parol; and of course the mere fact that a contract, as part of its terms, acknowledges the receipt of certain money or property does not render the writing a mere receipt." 17 Cyc. p. 632, par. III.

The same authority further says, pars. f

and g, p. 659: "That the consideration to be shown by the parol evidence must be consistent with that stated in the writing, otherwise the evidence cannot be admitted;" and that "where the effect of parol evidence contradicting the consideration expressed in the instrument or showing the true consideration to be different therefrom, would be to change or defeat the legal operation and effect of the instrument, or to add new matter to an agreement complete upon its face, the evidence is not admissible; for in such case it comes within the rule which forbids the introduction of parol evidence to vary, contradict, or defeat a written instrument and not within the exception to that rule that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the writing."

Recurring to *Shehy v. Cunningham*, supra, the decision a late one, handed down December 21st, 1909, we find the question very fully discussed. The point in decision is compactly stated in the syllabus thus: "The consideration clause in a deed of conveyance is conclusive for the purpose of giving effect to the operative words of the deed, but for every other purpose it is open to explanation by parol proof and is prima facie evidence only of the amount, kind and receipt of the consideration."

In *Patterson v. Cappon*, 125 Wis. 198, 102 N. W. 1083, an action for damages for the breach of covenants for peaceable and undisturbed possession, the defense was that the grantee had agreed to pay a certain tax over and above the stated consideration. It was held not to constitute a defense, the agreement to pay the tax being extrinsic, by parol, not covered by the conveyance itself, which contained the usual covenants of title, etc. The eviction occurred under a tax deed given on the sale of the land for these taxes. It is said by the Supreme Court of Wisconsin (125 Wis. loc. cit. 202, 102 N. W. 1083), that in order that this outside agreement "should be any defense against the plaintiff's cause of action as above described, it must be construed as impliedly asserting that by extrinsic agreement between the defendant and Debus (plaintiff's grantor) it was stipulated that the former should not covenant or warrant against this incumbrance. Obviously, however, if that fact were established, it could constitute no defense against the plaintiff's action. It would constitute a direct contradiction of the express covenant of the deed, and this cannot be permitted. Defendant refers us to a familiar line of authorities holding that the consideration of a deed is open to examination and proof by parol evidence; also that proof of other elements of the contract involved in the sale and purchase of real estate is not excluded by the deed, for the reason that that instrument is, in its very nature, but an expression or

execution of a part of the contract in fact made. But these authorities all recognize the qualification that it is not permissible thus to contradict such parts of the contract as are expressed in the deed itself."

In *Stanisics v. McMurtry*, 64 Neb. 761, 90 N. W. 884, an action to recover for a breach of a covenant against incumbrances in a deed executed by defendant to the plaintiff, it was held that evidence of an agreement made contemporaneous with and as a part of the negotiations leading up to the execution of the deed, should not have been received. Among other authorities cited by the Supreme Court of Nebraska in support of this holding, is that of *MacLeod v. Skiles*, 81 Mo. 585, 51 Am. Rep. 254.

In *Simanovich v. Wood*, 145 Mass. 180, 13 N. E. 391, it is held that in an action for breach of a covenant against incumbrances in a deed of land from the defendant to the plaintiff, oral evidence is inadmissible to prove that at the time the deed was given, and as a part of the consideration, the plaintiff promised to pay an assessment for taxes then a lien upon the land.

Turning to the decisions of our own courts, we find them generally in line with the foregoing authorities—we say generally, because there are a few cases that at first reading and without careful consideration seem somewhat out of line.

Thus *Laudman v. Ingram*, 49 Mo. 212, in which it is said by the judge who wrote it (loc. cit. 213): "It seems to me that there is very little conflict in the authorities that one may prove by parol evidence additional considerations not inconsistent with the one mentioned in the deed." This is repeated at page 214. But if this is to be taken literally, and without reference to the covenants in the deed, the authorities almost unanimously condemn it. Referring to the consideration, it is said that "the balance of such consideration was the taxes for the current year, which in each case were to be assessed in the respective names of the grantees and paid by them." It seems that the controversy was over the payment of these taxes. If the agreement to pay them was in the deed, as might be assumed from the language of the judge who wrote the opinion, we can easily understand what is meant, and in that event the remark first above quoted is correct and in line with authority.

In *Fontaine v. Boatmen's Savings Institution*, 57 Mo. 552, Judge Wagner says (loc. cit. 561): "Whilst it is true that parol evidence will not be admissible to vary the effect of the deed, we do not understand that the deposition of the plaintiff was offered for that purpose. It was simply to show the circumstances and condition of the parties at the time it was executed, and rebut the idea that the consideration expressed in it was ever paid, and for these objects it was properly admitted. The consideration clause in a

deed has only the force and character of a receipt, and is always open to explanation and contradiction." Necessarily these remarks are to be applied to the case before the court. There is no intimation here that parol evidence to contradict the stated consideration, is admissible, if that evidence destroys the covenants in the deed. That this is the meaning and limitation to be put upon these and the like cases often referred to in support of the broad proposition that you can always attack the stated consideration and that the recital of it in the deed or contract is no more than a receipt, is made entirely clear by what is held by our Supreme Court in *MacLeod v. Skiles*, supra. There (81 Mo. loc. cit. 603, 51 Am. Rep. 254) it is said: "This suit brings us to a consideration of the question whether it is competent for a party, as in this case, to accept a deed for real estate with an express covenant therein to warrant and defend the title thereto against the claim of every person whatsoever, save and except taxes of 1877, and then turn around and show that the covenantor, by a contemporaneous parol contract agreed to pay the taxes thus expressly excepted by the written contract in the deed so accepted. It is elementary law that upon the execution, delivery and acceptance of a deed or written instrument, all prior or contemporaneous parol stipulations are merged in the deed or writing, and cannot afterward be set up to contradict or vary the same. It is scarcely necessary to refer to elementary authority or adjudged cases to establish so plain and recognized a doctrine as this. \* \* \* There may be cases seemingly at variance with this well established rule, but when properly considered, they will be found to turn mainly upon questions and principles altogether different from those involved in the case at bar. Such, we think, for the most part, are the cases cited in the brief of plaintiff in error. *Nedvidek v. Meyer*, 46 Mo. 600; *McConnell v. Brayner*, 63 Mo. 461; *Laudman v. Ingram*, 49 Mo. 212. These cases properly considered, go to the extent that when it is material to show the amount or character of the consideration of a deed, parol evidence, not inconsistent with that named in the deed, may be received. The question now before us, as we think, is not one as to the character or the amount of the consideration, which is clearly and expressly stated in the deed, but one as to the force and effect of an express covenant in the deed, and the admissibility of parol evidence to contradict or vary the same. The covenant in this deed especially saves and excepts the taxes of 1877. The party cannot accept a deed with such a covenant and escape its force and effect by verbal protestations and stipulations to the contrary. If he does not like the deed with such a limitation he had the right, and it was his plain duty, not to accept it at all. He was not compelled to do so. By its acceptance he abandoned

and waived the prior written agreement which called for a general warranty."

In line with the rule which we draw from the authorities, is the decision of the Kansas City Court of Appeals, in *Jackson v. Railroad Co.*, supra, cited and quoted from in 6 Am. & Eng. Ency. of Law (2d Ed.), note, p. 775, as is also *Brown v. Morgan*, 56 Mo. App. 382. It is held in this latter case that where a deed conveying land, contains a covenant against incumbrances, evidence of a contemporaneous oral agreement by the grantee to assume an existing incumbrance on the land as a part of the consideration for the conveyance, is not competent. Of *Laudman v. Ingram*, supra, it is said by Judge Rombauer, delivering the opinion, it "is so meagre in its statement of facts, and so indefinite in its statement of the law, that we cannot construe it as giving sanction to a proposition which otherwise is devoid of all logical elements." So also we say in reference to that case.

The cases bearing on this question are very thoroughly considered by Judge Goode in *See v. Mallonee*, 107 Mo. App. 721, 82 S. W. 557. There it is said (107 Mo. App. loc. cit. 732, 82 S. W. 561), after a very full citation and analysis of the cases, that "it is thus apparent from a uniform line of decisions in our state from its earliest days, that it is competent to show the real consideration for a conveyance of land by oral testimony which contradicts the recited consideration, unless the effect of the evidence is to destroy the deed by showing there was no consideration for it, or that the consideration was a good instead of a valuable one, or, unless the named consideration is stated in such a manner as to show the parties intended it to be an essential term of the written instrument."

The recent case of *McDaniel v. United Rys. Co.*, 165 Mo. App. 678, loc. cit. 691, 148 S. W. 464, 466, while not involving the construction of a deed, does involve that of a written contract. It is there said by Judge Norton: "The rule is now firmly established that when a statement of the consideration in a contract or deed is merely formal it may be contradicted or explained by parol evidence. In such cases the consideration clause is not deemed an essential part of the instrument but instead is regarded as a mere recital of fact and as such may be contradicted," citing cases. But Judge Norton then had in mind and very clearly before him the limitation on this rule, for he continues: "However, the rule is subject to some exceptions; for instance, one may not be allowed to contradict a consideration expressed in a deed executed by him, to the end of defeating the operative words of the deed. \* \* \* Furthermore, when the statement of the consideration contained in the instrument leaves the field of mere recital and enters that of contract, thereby creating and attesting rights as shown by the intention of the parties to be gathered from the instrument, it

is no longer open to contradiction by extrinsic evidence, for to permit it to be thus overthrown would infringe the rule affording immunity from parol attack to written contracts."

Some point is made as to the effect of section 1974, Revised Statutes 1909. In *Wishart v. Gerhart*, 105 Mo. App. 112, 78 S. W. 1094, where that section, then section 645, Revised Statutes 1899, was invoked, it is held that this section does not affect the law of estoppel, and that it affords no aid to a grantor seeking to defeat the conveying effect of the deed by showing it was voluntary, nor is parol evidence admissible to alter or contradict the legal construction of the deed.

If we may venture to state the rule we gather from the authorities, some of them rather difficult to understand, and some of them stating the rule broadly or loosely, and so often presenting an apparent conflict, more apparent than real, among the decisions, the rule often stated by others we would state it thus: Ordinarily you may attack the consideration, but when to do so involves an attack upon the solemn covenants in the deed or contract, that attack resting on a parol agreement, outside of the deed or contract, it cannot be sustained. The great mass of authorities clearly distinguish between the admission of parol evidence to sustain an attack upon the stated consideration, and under cover of an attack upon the consideration, really make an attack upon the covenants of the deed itself. We have referred to a few—in them will be found reference to the very many cases covering this. We do not think it necessary to cite them.

In the case at bar we have the statutory general warranty deed; the statutory words "grant, bargain and sell," unrestrained "by any expressed terms contained in" the conveyance. Section 2793, Revised Statutes 1909. Under this statute these words, so used and without restriction in the deed itself, are to be construed as covenants against any and all incumbrances. In the case at bar we have here presented an attempt to limit that covenant, to restrain it, by an outside agreement resting in parol, no restraints or limitations expressed in the deed itself.

The judgment of the circuit court was therefore pronounced upon a verdict which could only be sustained on evidence which was received contrary to the established principles and rules of law; in effect, evidence of an agreement by parol which would constitute a restraint upon the covenants in the deed, the restraint not expressed in that deed.

The judgment is reversed and the cause remanded, with directions to the circuit court to enter up a judgment for plaintiff for the amount of the taxes and interest or penalties paid, and for interest thereon, after having ascertained that interest, and for costs.

NORTONI and ALLEN, JJ., concur.



## CABANNE v. ST. LOUIS CAR CO.

(St. Louis Court of Appeals. Missouri.  
Dec. 2, 1913.)

## 1. MASTER AND SERVANT (§ 125\*)—MASTER'S DUTY—APPLIANCES.

A master who has exercised ordinary care to furnish a reasonably safe appliance is not liable for injuries resulting from it becoming defective while in use, unless he should have known of the defect by exercising ordinary care long enough to have enabled him to remove it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

## 2. MASTER AND SERVANT (§ 258\*)—INJURIES—ALLEGATIONS OF PETITION.

Allegations of the petition, in an action for injuries by the steering gear of an automobile separating and causing a collision while plaintiff was demonstrating the car for defendant, that the injuries were the direct result of defendant's negligence in furnishing a car with defective steering apparatus, grounded the action on negligence in not originally furnishing a reasonably safe appliance, and hence need not allege that defendant should have known of the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

## 3. MASTER AND SERVANT (§ 285\*)—INJURIES—JURY QUESTION—CAUSE OF INJURY.

In an action for injuries by the steering gear of an automobile which plaintiff was demonstrating for defendant separating and causing a collision with a tree, whether the injury was caused by the defective steering gear or the explosion of a tire *held* a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.\*]

## 4. MASTER AND SERVANT (§ 107\*)—MASTER'S DUTY—REPAIRING APPLIANCES.

When defendant overhauled an automobile for plaintiff's use in demonstrating, it was defendant's duty to exercise ordinary care in reconstructing all parts of it, including the steering gear.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

## 5. MASTER AND SERVANT (§ 265\*)—PRESUMPTIONS—PERFORMANCE OF DUTY.

The presumption that an employer did his duty with respect to furnishing a reasonably safe appliance is not conclusive.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

## 6. MASTER AND SERVANT (§§ 101, 102\*)—MASTER'S DUTY—SAFE APPLIANCES.

A master must exercise ordinary care in furnishing a reasonably safe appliance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

## 7. MASTER AND SERVANT (§ 125\*)—MASTER'S DUTY—SAFE APPLIANCES.

An employer who undertakes to construct and furnish an appliance need not, as a condition to liability for defects therein, be given notice of a defect which he could have discovered by exercising ordinary care in constructing the appliance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.\*]

## 8. MASTER AND SERVANT (§ 289\*)—INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries by the coming apart of the steering gear of an automobile furnished to plaintiff for demonstrating, resulting in a collision with a tree, whether plaintiff was guilty of contributory negligence in exceeding the speed limit or otherwise *held* a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

## 9. NEGLIGENCE (§ 134\*)—EXCEEDING SPEED LIMIT—PRIMA FACIE EVIDENCE.

Running an automobile at a speed in excess of that permitted by statute is *prima facie* negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

## 10. MASTER AND SERVANT (§ 247\*)—INJURIES—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

The fact that an employé, when injured, is running an automobile in excess of the statutory speed limit, will not bar a recovery, unless such negligence proximately contributed to his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.\*]

## 11. MASTER AND SERVANT (§ 289\*)—INJURIES—JURY QUESTION—PROXIMATE CAUSE.

In an action for injuries from the breaking of the steering gear of an automobile which plaintiff was demonstrating for defendant, causing a collision with a tree, whether plaintiff's negligence in running in excess of the statutory speed limit proximately contributed to his injury *held* a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by C. Gratiot Cabanne against the St. Louis Car Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Watts, Gentry & Lee, of St. Louis, for appellant. Jones, Hocker, Hawes & Angert, of St. Louis, for respondent.

NORTONI, J. This is a suit for damages accrued to plaintiff through the negligence of defendant. Plaintiff recovered, and defendant prosecutes the appeal.

Defendant manufactures and sells automobiles, and plaintiff was in its employ as a demonstrator and salesman of its automobiles at the time of his injury. It appears plaintiff was demonstrating an automobile to a prospective purchaser when the steering gear of the machine separated and caused it to collide with a tree in Forest Park with such force as to demolish the automobile and throw plaintiff upon the earth so as to fracture his skull at the base of the brain.

It is argued, first, on the part of defendant, that the petition is insufficient to state a cause of action against defendant in that it omits to aver defendant either knew or might have known of the defective steering gear at-

tached to the automobile; but we are not so persuaded.

[1] Defendant seems to confuse the doctrine requiring the master to exercise ordinary care in the matter of construction and furnishing appliances reasonably safe for the use of his servant with that which obtains with respect to appliances which, though reasonably safe when furnished, become defective thereafter. No one can doubt that the master performs the full measure of his duty enjoined by the law when he exercises ordinary care to discover defects and furnishes the servant an appliance reasonably safe for use. If, after the master has performed this duty of furnishing a reasonably safe appliance, it becomes defective while in use, no recovery may be allowed as for a breach of the obligation with respect to that matter unless it appears the master either knew, or by exercising ordinary care in that behalf might have known, of the defect for a sufficient length of time to remove it. *Mueller v. Shoe Co.*, 109 Mo. App. 508, 84 S. W. 1010. However, this rule is beside the case here, for no complaint is made with respect to the failure of the master to perform his duty after the automobile was furnished to plaintiff reasonably safe for the purposes of demonstration; but, on the contrary, the petition proceeds on the theory that defendant breached the obligation, which the law cast against it, to exercise ordinary care in furnishing plaintiff with an appliance—that is, an automobile—reasonably safe for use in demonstration, in that it furnished him an automobile with a defective steering apparatus, which separated while running and occasioned his hurt. The averment touching this matter is: "Plaintiff further states that the injuries aforesaid sustained by plaintiff were the direct result of the negligence and carelessness of the defendant in furnishing him with a car with unsafe, dangerous, and defective steering apparatus as aforesaid." In other portions of the petition it is set forth that the sector lever, or, as some call it, the steering arm, separated from the tie link in the rod to which it was attached, and this, too, though the machine was apparently safe for use.

[2] The petition proceeds throughout upon the theory that defendant breached its obligation to exercise ordinary care in furnishing plaintiff a reasonably safe appliance. Such being true, it is not essential to aver that defendant either knew or might have known of the defect by exercising ordinary care to that end, and an averment that the master negligently furnished the appliance will suffice. See *Young v. Shickle*, etc., *Iron Co.*, 103 Mo. 324, 15 S. W. 771; *Fassbinder v. Mo. Pac. R. Co.*, 126 Mo. App. 363, 104 S. W. 1154.

It is urged the court should have peremptorily directed a verdict for defendant, but the argument is obviously without merit. The evidence tends to prove that the auto-

mobile furnished plaintiff was an old one, but had been overhauled by defendant and furnished to plaintiff as sufficient and asserted to be in fine shape but a week or ten days before. As before said, plaintiff was a demonstrator and salesman of automobiles for defendant. The automobile involved here was a large one which weighed about 3,500 pounds, possessing a minimum of 14 horse power and a maximum of 18 horse power. It had been in the service of defendant about a year and a half and was first used with a wagon body on it for the purpose of hauling express, castings, etc. Afterwards it was equipped with a touring car body, and plaintiff used it as a demonstrating car for some eight or ten months. About six weeks before plaintiff received his injury, he reported to the manager of defendant that there was a noise in the car designated as a "pound," and that it was unfit for demonstrating purposes, and, furthermore, that it needed new chains. Defendant's manager thereupon instructed plaintiff to send the car up to the factory and he would have it overhauled thoroughly and "go all the way through it." The car was delivered to the factory to be overhauled and made as it should be. Defendant overhauled the car and furnished it to plaintiff about a week or ten days before his injury to be used in demonstrating. Defendant's manager assured plaintiff at that time that the car was in "fine shape." Apparently the automobile was sufficient in all respects, but there was a defect thereabout in the steering gear beneath the body of the car which was concealed by means of a leather hood about the same. It appears the steering gear, which is connected with the steering wheel in the hands of the demonstrator, operates through the connection of a bar with a ball or knob on the end of it inserted in a slot in another bar. These two pieces of the machine are in evidence and are exhibited here through a call therefor in the bill of exceptions and by consent of the counsel. Exhibit A is a rod which was called a tie link, and Exhibit B is known as a sector lever, mentioned, too, as the steering arm. The rod, Exhibit A, is hollow for about four inches from each end and has a slot running along in the top of it for some distance from each end. The outer end of the hollow in the rod is closed by a nut. To fit the two parts together the nut is removed and the ball at the end of Exhibit B fitted closely into the hollow part of Exhibit A, the slender portion of Exhibit B above the ball extending up above the slot. These two parts appear to be much worn at their conjunction, that is to say, the ball or knob on the one is diminished in size by long use and the slot in the other is made larger and extended through the same means. The evidence tends to prove that because of this condition the ball or knob slipped out from the slot and thus separated the steering gear of the machine beneath the body of the car

while plaintiff was driving it at a rate of speed between 15 and 20 miles an hour. While the machine was thus moving at a rapid rate of speed, the wheels of the car refused to respond to the turn of the steering wheel held by plaintiff and, indeed, he says the steering wheel moved around in his hands like a toy. Thereupon the automobile left the roadway and collided with a tree with such force as to demolish it and throw plaintiff and his customer both to the ground, inflicting the injuries upon plaintiff for which he sues. It appears, too, that one of the tires of the automobile exploded immediately before the collision or contemporaneously therewith or immediately thereafter. A witness some distance away said he heard the explosion immediately prior to the collision, but another witness said it was immediately after the collision of the automobile with the tree.

[3] It is argued that the evidence is insufficient to suggest with certainty that the collision and consequent injury occurred because of the defective steering gear, for it is said it might as well be attributed to the exploding tire which likewise may occasion an automobile to leave the road. But it is clear this was a matter for the jury to answer, for it appears from the evidence of an automobilist that immediately after the collision the steering gear was found to be separated as above described. Moreover, in connection with this, there is the positive and direct testimony of plaintiff that the steering apparatus refused to respond and guide the wheels of the car when he turned the steering wheel and sought to apply it. Plaintiff says the steering wheel turned in his hand like a toy thus indicating, of course, that the connections were separated from the steering gear as above described and because of that the automobile collided with the tree for he could not control it. There is an abundance in this evidence to render the question as to the cause of the injury one for the jury. The matter of the exploding tire was properly submitted in an instruction for defendant, and the jury told that if the collision was caused by that without reference to the separation of the steering gear the judgment should be for defendant. There can be no doubt that, though the automobile was an old one and had been in use theretofore, it is to be treated in the instant case as newly furnished to plaintiff. On his complaint it was taken in charge by defendant with a view of overhauling it and it appears such was done. Thereafter the car was delivered again to plaintiff with the assurance on the part of defendant's manager that it was in fine shape for use.

[4] Obviously it became defendant's duty to exercise ordinary care in overhauling and reconstructing the automobile for use, and this obligation applied as well to the matter of the steering gear as to other parts. The evidence suggests with great force that de-

fendant was remiss in its duty with respect to this obligation and omitted to inspect the steering gear, for to do so would certainly reveal its defective condition and suggest the installation of a new one. The two parts, which, it appears, separated and occasioned the injury, are before the court here as they were before the jury, and it is obvious to any one that they may be pulled apart by the hands with but slight effort. In evidence as they are and subject to the inspection of the jury, they speak with telling force as to the defective condition of the steering gear and enforce a conclusion of the mind to that effect which may not be escaped. In this connection, it is argued, too, that the court should have peremptorily directed a verdict for defendant because the evidence does not reveal that defendant either knew, or might have known by the exercise of ordinary care, that the steering gear of the car was defective, for it is said the master is presumed to have done his full duty in the premises.

[5] Though such presumption usually obtains, it is certainly not a conclusive one, but may be overcome and removed entirely by the evidence given at the trial. There is an abundance in the facts stated tending to prove that the master omitted to do its duty in the instant case and that this omission was with respect to the matter of construction in overhauling the car, to the end of furnishing it for plaintiff's use. If, as before said, it appeared the car was furnished to plaintiff reasonably safe and that, though the master had exercised the full measure of care thereabout, the steering gear subsequently became defective, the matter of actual or constructive notice of the condition to defendant would inhere in the case as precedent to its liability to the end that an opportunity for repair might be had. But here the principle adverted to is wholly without influence, for the remission of duty laid against defendant and supported by the evidence relates to the matter of carelessly constructing the appliance and furnishing it to plaintiff in a defective condition.

[6] No one can doubt that the law requires the master to exercise ordinary care in furnishing the servant a reasonably safe appliance with which to perform the duties of the task assigned him. Moreover, if the master constructs the appliance or assumes as here to personally overhaul an old one as through a reconstruction and furnish it to the servant for use, the law devolves against him the duty of exercising ordinary care with respect to such reconstruction, for beyond question the servant is entitled to receive from the master a reasonably safe appliance; that is, in so far as is possible by the exercise of ordinary care on the part of the master.

[7] In such cases, where the master assumes to construct and furnish the appli-

ance, he is not entitled to notice of a defect if he might have discovered it by exercising ordinary care to that end in the course of construction and before furnishing it for use. *Malkmus v. St. Louis, etc., Cement Co.*, 150 Mo. App. 446, 458, 459, 131 S. W. 148; *Bowen v. Chicago, B. etc., R. Co.*, 95 Mo. 268, 8 S. W. 230; *Shearman & Redfield on Neg.* (5th Ed.) § 194.

[8] It is entirely clear that the case was one for the jury on the theory pursued, unless plaintiff's right of recovery should be denied as for his contributory negligence.

The answer pleaded contributory negligence on the part of plaintiff, and there is evidence tending to prove it. It is urged on this alone that plaintiff is not entitled to recover, and the court should have so directed the jury as a matter of law, for it is said plaintiff voluntarily testified that he was operating the automobile at the time of the injury at a speed between 15 and 20 miles per hour. The argument touching this matter predicates upon our statute which inhibits the running of an automobile on a public highway at a greater rate of speed than 15 miles per hour and within the limits of any city at a rate of speed greater than 10 miles per hour. The automobile in the instant case was being operated within the city of St. Louis and, as before said, plaintiff testified that he was then driving it at a speed between 15 and 20 miles per hour.

[9] Obviously such conduct on his part was violative of the statute, and it is to be conceded that the operation of a conveyance at a rate of speed exceeding that prescribed and in a manner inhibited by a statute or ordinance is regarded as negligence per se. Therefore such showing alone is usually treated as prima facie, though not conclusive evidence of negligence if an injury ensue on the part of the party so violating the statute; that is, as evidence tending to prove such negligence.

[10] But a recovery is not to be allowed for this unless it appears that such violation of the statute was a proximate cause of the injury. The mere fact that one is engaged in operating a conveyance at a rate of speed inhibited by the statute at the time an injury occurs is not sufficient in and of itself, in every case, together with the statute prescribing the rate of speed, to reveal conclusively that the injury resulted from such conduct. It must appear, too, that such violation of the statute operated proximately to cause the injury. *Kelley v. H. & St. J. R. Co.*, 75 Mo. 138; *Bluedorn v. Mo. Pac. R. Co.*, 121 Mo. 258, 25 S. W. 943; *Schmidt v. St. Louis Transit Co.*, 140 Mo. App. 182, 120 S. W. 96; *Campbell v. St. Louis Transit Co.*, 121 Mo. App. 406, 411, 99 S. W. 58. So, too, for the same reason in this case it must appear that such conduct on the part of plaintiff contributed proximately to or con-

curred in his injury. There may be cases where such conclusion of negligence must arise as a matter of law, but this is not one of them. It may be that, though the automobile here was running at but eight miles an hour, plaintiff would have received his injury from the breaking of the steering gear identically as he did with it running at more than 15 miles per hour. The matter of the rate of speed seems not to be conclusive at all, for a heavy machine weighing 3,500 pounds is likely to go astray and produce calamitous results from the breaking of the steering gear when running at a rate of speed even within the statutory inhibition.

[11] The question of plaintiff's contributory negligence and as to whether or not the high rate of speed contributed proximately to his injury was obviously for the jury. The instructions given properly submitted it, as they did other questions pertaining to the liability and nonliability of defendant on the facts of the case.

The substantial points made against the instruction on the measure of damages are identical with, and arise under like circumstances as, those considered in *Scholl v. Grayson*, 147 Mo. App. 652, 127 S. W. 415. In that case the arguments put forward here were duly considered and separately treated as unavailing in the opinion. What is there said is sufficient without more.

Other arguments pertaining to the instructions given for plaintiff are all disposed of by what we have said in the opinion, and no instructions were refused to defendant.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

#### STATE v. POWELL.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

LARCENY (§ 65\*)—PETIT LARCENY—EVIDENCE. Evidence held to sustain a conviction of petit larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 160; Dec. Dig. § 65.\*]

Appeal from St. Louis Court of Criminal Correction; Calvin N. Miller, Judge.

Landon Powell was convicted of petit larceny, and he appeals. Affirmed.

Fish & Fish, of St. Louis, for appellant. Howard Sidener, of St. Louis, for the State.

NORTONI, J. Defendant appeals from a judgment of conviction on a charge of petit larceny. Though the record proper and bill of exceptions are before us, it appears neither party has filed a brief in the case. However, it is our duty under the statute to examine the record for error, and this we have done.

The information is in the usual form and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sufficient in all its parts. By it the prosecuting attorney, under his oath of office, charged defendant with having stolen, taken, and carried away certain dishes and edibles of the value of \$8, the property of Fred Harvey, a corporation. There is an abundance of evidence in the record tending to prove the charge as laid. It appears that Fred Harvey, a corporation, the owner of the edibles and dishes, which it is alleged defendant stole and carried away, owns and operates the dining service on the St. Louis & San Francisco Railroad. In connection with this business, Fred Harvey, the corporation, operates certain dining cars thereon. An inspector in the employ of Fred Harvey boarded one of its incoming dining cars at Tower Grove Station in the city of St. Louis and discovered defendant in possession of the stolen edibles and dishes, which it appears he packed away in his grip and was about to remove from the car. Upon being confronted with the charge of theft concerning these articles by the inspector, it is said defendant substantially admitted it. According to the evidence, defendant said: "You have gotten me. I am damnably guilty." The court found defendant guilty of the charge laid—that is, petit larceny—and assessed as his punishment confinement in the workhouse for a term of three months, on which finding and assessment of punishment it appears a judgment of conviction was duly entered. The evidence is ample to support the conviction, and no error of law appears in the record.

The judgment should therefore be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

# CITIZENS' BANK OF SENATH v. DOUGLASS et al.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

## 1. APPEAL AND ERROR (§ 1042\*)—REVIEW — ACTION OF TRIAL COURT.

Where a case was tried as though the matters alleged in defendants' special answer had not been stricken, the appellate court may disregard the action of the lower court in striking the principal allegations of defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.\*]

## 2. NOVATION (§ 5\*)—WHAT CONSTITUTES.

The essentials of a novation being a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new, there was no novation where third persons agreed to pay defendants' note in favor of plaintiff bank, and the bank, with knowledge of the agreement, extended the time of payment in favor of the third persons, there being no release of defendants or extinguishment of the old obligation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. § 5.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4848-4851; vol. 8, p. 7733.]

## 3. PRINCIPAL AND SURETY (§ 14\*)—CREATION OF RELATION.

Where third persons agreed with defendants, for a valuable consideration, to assume and pay a debt they owed a bank, the relation of principal and surety was created between the parties, even though the bank was not a party to the agreement.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 33; Dec. Dig. § 14.\*]

## 4. CONTRACTS (§ 187\*)—REMEDIES OF CREDITOR—RIGHTS OF ACTION.

A contract between two or more persons for the benefit of a third party may be enforced by the latter, for whose benefit it is made, if he thereafter adopts it, even though he had no knowledge of it at the time it was made; and hence a bank may enforce a contract whereby third persons agreed to assume payment of a note defendants had executed in its favor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.\*]

## 5. MORTGAGES (§ 283\*)—SALE OF LAND—ASSUMPTION OF MORTGAGE.

Where a grantee accepts a conveyance, covenanting to assume a mortgage on the premises executed by the grantor, not only does the grantee become the principal debtor between the parties, but the owner of the mortgage, after notice of the assumption, must treat the grantee as the principal and the grantor as surety.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 756-758; Dec. Dig. § 283.\*]

## 6. FRAUDS, STATUTE OF (§ 18\*)—ASSUMPTION OF MORTGAGE—ORIGINAL PROMISE.

An agreement whereby a grantee assumes a mortgage executed by the grantor need not be incorporated in the conveyance, but may be entirely oral, not being within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 27-31; Dec. Dig. § 18.\*]

## 7. PRINCIPAL AND SURETY (§ 14\*)—CONTRACTS OF SURETYSHIP—ADOPTION.

Where a creditor accepts a promise of third parties, made to the debtor, to discharge the latter's obligation, the creditor is bound to respect the contract of suretyship between them; the right of a party upon a contract between others, made for his benefit, being dependent upon and subordinate to the terms of the contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 33; Dec. Dig. § 14.\*]

## 8. PRINCIPAL AND SURETY (§ 14\*)—CREATION OF RELATION—RATIFICATION BY CREDITOR.

Where third persons agreed with defendants to pay their note due a bank, and the bank not only accepted the promise of the third persons, but induced them to assume payment of the debt, granting an extension of time without notifying defendants, the bank must be held to have elected to accept the third persons as principals, and can look to defendants merely as sureties.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 33; Dec. Dig. § 14.\*]

## 9. BANKS AND BANKING (§ 105\*)—POWER OF CASHIER.

As only the board of directors may, under Rev. St. 1909, § 1112, appoint or remove a cashier, one who has been appointed as cashier of a bank and has not been removed, has authority to bind the institution, where he still attends to its more important affairs, even though he is principally occupied with other business in another city.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 249-252; Dec. Dig. § 105.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**10. BANKS AND BANKING (§ 109\*)—CASHIER—POWER OF CASHIER.**

The cashier of a bank has prima facie authority to extend the time for payment of negotiable paper; this being particularly true where he has virtual control of the bank's entire business.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 257-260; Dec. Dig. § 109.\*]

**11. BANKS AND BANKING (§ 116\*)—CASHIER—IMPUTATION OF HIS KNOWLEDGE.**

Where the cashier of a bank in his private capacity learned that payment of a note given by defendants had been assumed by third persons, and he later extended the time of payment of the note, the bank was chargeable with his knowledge.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282-287; Dec. Dig. § 116.\*]

**12. PRINCIPAL AND SURETY (§ 104\*)—DISCHARGE OF MAKER—LIABILITY AS SURETY—EXTENSION OF TIME OF PAYMENT.**

Where defendants, who were the makers of a note providing that time of payment might be extended without notice, entered into an agreement with third persons that the latter should discharge the note, and the payee bank, with knowledge of their agreement, extended the time of payment, the extension relieved defendants of their liability as sureties; the suretyship relation being entirely independent of the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186-190, 193-195, 197-199, 200; Dec. Dig. § 104.\*]

**13. BILLS AND NOTES (§ 49\*)—LIABILITY OF MAKER.**

Under Negotiable Instruments Law (Rev. St. 1909, § 10,161), providing that the person primarily liable on the instrument is the person who, by the terms of the instrument, is absolutely required to pay the same, those who sign as joint makers are persons primarily liable, even though they sign for the accommodation of one of their number and that fact is known to the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 66; Dec. Dig. § 49.\*]

**14. PRINCIPAL AND SURETY (§ 14\*)—CONTRACTS OF SURETYSHIP—NEGOTIABLE INSTRUMENTS LAW.**

Where defendants, who were the persons primarily liable for the payment of a note, became sureties, owing to a subsequent agreement with third persons that the latter should pay it, their liability was unaffected by the Negotiable Instruments Law.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 33; Dec. Dig. § 14.\*]

**15. PRINCIPAL AND SURETY (§ 108\*)—RELEASE OR DISCHARGE OF SURETY—EXTENSION OF TIME.**

For an extension of time of payment to discharge a surety on a note, such extension must be supported by a valid consideration, and be binding upon the creditor; this also being the rule of Negotiable Instruments Law (Rev. St. 1909, § 10,090).

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 213-218; Dec. Dig. § 108.\*]

**16. PRINCIPAL AND SURETY (§ 162\*)—JURY QUESTION.**

Where defendants, who had executed a note, but who were liable only as sureties, owing to a subsequent agreement made by third persons to pay the same, claimed that they had been discharged by the creditor's extension of

time, the question was for the jury, where the evidence was conflicting.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 442-445; Dec. Dig. § 162.\*]

**17. PRINCIPAL AND SURETY (§ 46\*)—EQUITABLE ESTOPPEL—WHAT CONSTITUTES—"ESTOPPEL IN PAIS."**

Defendants executed a note to a bank, and thereafter made an agreement whereby third persons were to discharge the obligation. *Held*, that the bank's subsequent extension of time of payment, so as to induce another to assume payment instead of the parties who contracted with defendants, would not work an estoppel on the bank, an "estoppel in pais" being a right arising from acts, admissions, or conduct which have induced a change of position, and the extension in the present instance inducing no change of position.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 91-95; Dec. Dig. § 46.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2497-2508; vol. 8, p. 7655.]

**18. CANCELLATION OF INSTRUMENTS (§ 6\*)—RIGHT TO CANCELLATION.**

Where defendants executed a note, but later became only sureties, owing to an agreement whereby third persons assumed payment of the debt, an extension of time of payment did not entitle defendants to a cancellation of the instrument, although discharging them from any liability; the instrument evidencing the obligation assumed by others.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 4; Dec. Dig. § 6.\*]

**19. TRIAL (§ 250\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE AND ISSUES.**

Instructions inapplicable to the issues and evidence are improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.\*]

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Action by the Citizens' Bank of Senath, Missouri, against W. H. Douglass and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Tribble & Smith, of Kennett, and W. H. Douglass, of St. Louis, for appellants. Bradley & McKay, of Kennett, for respondent.

ALLEN, J. This is an action by plaintiff bank upon a promissory note executed by the defendants. Plaintiff had judgment for the amount remaining unpaid on the note, with accrued interest thereon, and the defendants have appealed.

The note in suit was originally for the sum of \$2,250, dated January 10, 1906, due March 1, 1906, and payable to the order of plaintiff. It bore interest at the rate of 8 per cent. per annum, and contained the following provision: "Makers and indorsers of this note hereby severally waive presentment of payment and notice of nonpayment, protest and consent that time of payment may be extended without notice." A notation appeared upon the back of the note, to the effect that the maturity thereof had been extended to July 1, 1910, "Interest paid."

The petition declares upon the note, admits the payment of \$700 thereon on November 30, 1908, and prays judgment for \$1,550, with interest at the rate of 8 per cent. per annum from March 1, 1909. The amended answer admits the execution of the note by defendant; avers that on November 30, 1908, not only \$700 was paid upon the principal, but that all interest accrued to that date was paid thereon, leaving a balance due at said date of \$1,550. And it is averred that defendants Jas. M. Douglass and A. T. Douglass were but accommodation makers for defendant W. H. Douglass, and as between themselves and the latter were sureties, and that this was known to the plaintiff. The amended answer then proceeds to set up in detail certain facts, by reason of which it is averred that these defendants were released from all liability on the note. In substance these averments are that the payment of the note was first extended to July 1, 1909; that on June 15, 1909, defendant W. H. Douglass entered into a contract with one Gillespie and one Caneer, the latter being then the cashier of plaintiff bank, whereby said Gillespie and Caneer, for certain valuable consideration, assumed and agreed to pay the note at and when the same should become due and payable, in accordance with the extension made thereof; that on the following day, to wit, June 16, 1909, a contract was entered into between said Gillespie and Caneer on the one hand and one Gardner on the other, whereby, for like valuable consideration, the said Gardner in turn assumed and agreed to pay the note, and that as an inducement to the said Gardner to so assume the payment thereof the said Caneer, acting for and on behalf of plaintiff bank, and being clothed with full power and authority in the premises, agreed on behalf of plaintiff to extend the time of payment thereof to September 1, 1909, and that plaintiff bank did so extend the time of payment of the note, without the knowledge and consent of defendant, W. H. Douglass, or of his codefendants; that the plaintiff thereafter dealt with and recognized the said Gardner as payor of the note, and fully ratified the said acts of its alleged cashier in the premises. The foregoing are the essential averments of the answer, as well as of a so-called supplemental answer filed, and it is averred that the facts pleaded constituted a novation, and gave rise to an equitable estoppel against plaintiff. The reply controverted the facts pleaded in defense.

The evidence shows that A. A. Caneer had been the cashier of plaintiff bank, residing at Senath, Mo., but that he became interested with the defendants W. H. Douglass, Gillespie, Gardner and others in promoting certain insurance companies having offices in the city of St. Louis; that early in June he came to the city of St. Louis on account of his connection with these insurance companies, and that for some months he spent the greater portion of his time at the latter place;

that upon his leaving Senath one O. H. Story was called upon to perform the active duties of cashier in the bank, though the records of the meetings of the board of directors of the bank show that Story was not elected cashier until August 16, 1909, and no resignation of Caneer as cashier appears to have been tendered or acted upon in the meantime. During this period it seemed that Caneer, while in the city of St. Louis, represented and acted for the bank in many particulars, apparently having full power and authority so to do; and various letters of his were put in evidence, showing that he continued to exercise supervision and control over the affairs of the bank, though certain of his letters offered by defendants were excluded. It was shown that Caneer, while acting as cashier, conducted practically all of the important business of the bank himself, and that he seldom consulted either the board of directors or a finance committee thereof.

On behalf of defendants it was shown, by the testimony of defendant W. H. Douglass and that of Gillespie, that prior to June 15, 1909, the relations between the said Douglass and Gardner had become strained, Douglass claiming that Gardner was improperly applying funds of the insurance companies in question; that this matter was brought to a crisis by defendant W. H. Douglass notifying a bank or banks not to pay out certain funds on checks signed by Gardner; that defendant W. H. Douglass was unwilling to continue his connection with the companies, under the circumstances prevailing, and that about this time Caneer and Gillespie undertook to arrange a settlement or adjustment of matters between W. H. Douglass and Gardner, whereby the former would deliver to Gardner certain stock, surrender certain contracts, and release his rights thereunder, and resign from a board of directors; and that in consideration thereof Gardner would assume the payment of the note here in suit and another note upon which defendant Douglass was liable at the Union Station Bank of St. Louis. It appears, however, that Gardner finally refused to make the contract, upon the ground that he would not deal directly with defendant W. H. Douglass; that upon the matter taking this turn, Caneer and Gillespie, on June 15, 1909, entered into a similar contract themselves with W. H. Douglass, agreeing to assume and pay the two notes mentioned, for the consideration above referred to; this being done, it seems, with the understanding with Gardner that he in turn would relieve them of the obligations and liabilities thus assumed, upon the transfer to him of the consideration received. At any rate it appears that on the following day a contract was entered into between Caneer and Gillespie on the one hand and Gardner on the other, whereby the latter assumed and agreed to pay the two notes mentioned, to wit, the note sued upon and the

one at the Union Station Bank, and that in consideration therefor Caneer and Gillespie delivered to him the said consideration, which they had received from the defendant W. H. Douglass. It seems, however, that Gardner declined to make the agreement in question, assuming the payment of the note in suit, unless the time of payment of the latter were extended from July 1, 1909, to September 1st of that year.

Gillespie testified that Caneer, purporting to represent plaintiff bank, and for and on behalf of the latter, did in fact agree to so extend the time of payment of the debt, as an inducement to Gardner to assume the payment thereof; neither defendant W. H. Douglass nor his codefendants being present or knowing thereof. Defendant W. H. Douglass testified that Caneer shortly thereafter told him over the telephone that he (Caneer) had so agreed to extend the same, and that such extension was without the witness' knowledge or consent. He also testified as to the contents of a letter written by Gardner to plaintiff, containing a promise of the writer to pay the note sued upon on or before September 1, 1909. It seems that there was a written contract prepared, between W. H. Douglass and Gardner, which the latter did not sign. This, it appears, contained the terms of the agreements afterward made, but what, if anything, the parties signed does not appear. The evidence shows that the paper just referred to, and the above-mentioned letter, had been attached to a deposition as an exhibit in another case, which deposition and the exhibits attached thereto had disappeared.

Caneer did not testify as to the details of the transactions, either between himself and Gillespie on the one hand and Douglass on the other, or between himself and Gillespie on the one hand and Gardner on the other; nor did he deny making the contract with Gardner, whereby the latter assumed the note. He denied that there was any agreement whereby, on behalf of the bank, he released the defendants from liability on the note; denied in terms that he extended or undertook to extend the payment of the latter; denied that at that time he was "the cashier" of plaintiff bank, stating that O. H. Story was then the cashier.

Touching the question of Caneer's authority to bind the bank in the premises, the record contains much testimony and many exhibits offered to show the course of dealing between Caneer and the bank and the relation which he sustained to the latter at or about the time in question; but it is unnecessary to review this evidence in detail.

No extension of time beyond June 1, 1909, appears upon the back of the note. A letter written by Caneer on June 16, 1909, to Gillespie, was put in evidence, whereby the writer stated: "I phoned W. H. Douglass that I was willing to hold the note until September, so do as you can, or whatever

you think best." It appears that subsequent to June 16, 1909, the plaintiff bank at no time notified or made demand upon the defendants, or any of them, with respect to the note until the 9th of the following September.

Story testified that the bank had another note of Gardner's and that some correspondence was had with the latter, but that he did not remember "whether it was about this note or not." On September 9th defendant W. H. Douglass was notified that the note was past due, the printed notice sent him having on it this notation: "Please have the parties fix." The note not having been paid, on February 12, 1910, plaintiff bank notified Gillespie that the note had not been paid, saying: "It was our understanding that same was to have been paid last September. \* \* \* Please let us hear from you or some one in this connection. \* \* \* Let us hear from you by early mail with remittance." And defendant W. H. Douglass testified as to the contents of a letter written by plaintiff to Gardner early in 1910, demanding payment from the latter, which letter the witness said he had seen in the insurance company's files, but which could not later be found.

The cause came on to trial before the court and a jury, and upon motion then made by plaintiff the court ordered that part of the amended answer stricken out "which deals with the allegation of an agreement, to wit, the assuming of this note and the release of the makers and sureties thereon." Despite this action of the court, and which ruling, as made, purported to have the effect of striking out practically all of the answer, the cause proceeded to trial before the court and a jury upon the issues raised by the amended answer relative to the assuming of the payment of the note, first by Caneer and Gillespie, and then by Gardner, and the alleged release of the defendants from liability thereon by the acts of plaintiff in the premises.

Upon the trial before the jury, the foregoing evidence was adduced by the parties, and the cause referred to the jury under certain instructions which we shall notice later, and resulted in a verdict for plaintiff. Thereafter, at the same term, by agreement of counsel for both plaintiff and defendants, the cause, upon the same evidence adduced before the jury, was submitted to the court sitting as a chancellor upon the so-called equitable plea of estoppel set up in defendants' answer. The court, upon considering the same, found for plaintiff, and thereupon rendered judgment in its favor for the amount of the jury's verdict.

I. There was much confusion with respect to the trial of the real issues involved. Both in the taking of the testimony and in the instructions, the court appears to have proceeded in the main upon the theory that it was necessary for the defendants to establish a complete novation, Gardner becoming the



new debtor; that is to say, that not only had Gardner assumed payment of the note in question, but that the plaintiff had agreed to release these defendants from liability thereon—had discharged the original debt, and substituted Gardner as the new debtor in lieu of these defendants.

[1] No such issue as this was raised by the pleadings. We may disregard the ruling of the trial court upon plaintiff's motion to strike out parts of the amended answer, for the case was tried as though such ruling had not been made. It is true that the word "novation" is used in the answer, but the answer nowhere avers that plaintiff agreed to release the defendants from their liability on the note and discharge the indebtedness as to them. Such were not the facts pleaded in defense, nor was there any evidence whatsoever in support of such theory. In fact the defendants at the trial, in open court, disclaimed that there was any such defense interposed, as they do in their brief before us.

The defense which was in fact attempted to be set up by the answer, and which was supported by the evidence adduced on behalf of defendants, was that Caneer and Gillespie, for a valuable consideration, contracted and agreed with the defendant W. H. Douglass to assume and pay the note, that thereafter Gardner, for like valuable consideration, contracted and agreed with Caneer and Gillespie to assume and pay the same, and that as a part and parcel of this subsequent agreement, and as an inducement to Gardner to agree to assume the payment of the note, Caneer, acting for and on behalf of plaintiff, and clothed with power and authority to bind it in the premises, and without the knowledge and consent of the defendants, agreed to extend and did extend the time of payment thereof from July 1, 1909, to September 1, 1909, and, further, that plaintiff bank thereupon ratified the acts of its alleged cashier in the premises.

Appellants nowhere contend that the mere agreement on the part of Caneer and Gillespie to assume and pay the note in any wise released them from liability thereon, but say that it did not. The theory of the defense interposed by appellants is that when Caneer and Gillespie assumed payment of the note, the defendants, as between themselves, Caneer and Gillespie, became sureties for the payment of the debt; that when thereafter the subsequent agreement was sought to be made with Gardner, with not only Caneer and Gillespie as parties, but the bank also, the latter, acting through its alleged cashier and representative, then plaintiff bank, by assuming to thus deal with Gardner, became bound to recognize and regard defendants as being sureties merely, and that the acceptance of Gardner as the primary obligor, and the extension of time alleged to have been granted by plaintiff, without the knowledge and consent of the defendants, operated in law to re-

lease the latter, as such sureties, from all liability upon the obligation in question.

This, we say, was the real defense sought to be interposed, and it remains to be seen whether such defense is available to these defendants under the circumstances appearing in evidence.

[2] II. That the facts pleaded and appearing in evidence did not constitute a novation we think is clear. It is said that to establish a novation it is essential that four things be shown: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one. 29 Cyc. 1130. See, also, *Babbitt v. Railroad*, 149 Mo. App. 439, 130 S. W. 364; *Elliott v. Qualls*, 149 Mo. App. 482, 130 S. W. 474. The creditor must have consented to the discharge of the original debtor, accepting in his stead the new debtor. 29 Cyc. 1132; *Leckie v. Bennett*, 160 Mo. App. 145, 141 S. W. 706; *Babbitt v. Railroad*, supra; *Elliott v. Qualls*, supra; *Brown v. Croy*, 74 Mo. App. 462; *Lumber Co. v. Meffert*, 59 Mo. App. 437.

In the instant case the defendants were not parties to the agreement with Gardner; neither did they plead nor did the evidence show any agreement on the part of plaintiff to release the defendants and altogether substitute some one else in their stead. The contract on the part of Gardner was supported by a valuable consideration, but essential elements of a complete novation are lacking; and, as we have said, such does not appear to be the theory of the defense.

[3] III. There can be no doubt that the agreement between defendant W. H. Douglass and Caneer and Gillespie operated to create the relation of principal and surety as between the parties themselves. That is to say, as between themselves and the defendants, Caneer and Gillespie, having for a valuable consideration agreed to assume and pay the debt, became the principals with respect to the obligation in question, and the defendants were relegated to the position of sureties with respect to the payment thereof. It is not claimed that plaintiff bank was in any way a party to this agreement. It is not contended that, with respect to this first agreement, Caneer acted for the bank, or contracted otherwise than in his personal capacity.

[4] It is unnecessary for us to decide what, at this stage of the matter, would have been plaintiff's position had it been merely notified of the agreement made with Caneer and Gillespie, and that as between them and the defendants the latter had become sureties for the debt. Whether the plaintiff upon merely being notified of such agreement would, under these circumstances, have been bound to recognize and respect the relation thus created between defendants and the parties assuming the debt is a matter not here directly involved. Certain it is that the plaintiff, upon becoming aware of the con-

tract made by Caneer and Gillespie, could have chosen, at the maturity of the note as it then stood, to have proceeded against the latter as well as the defendants for a recovery of the debt; and likewise Gardner's assumption of the debt caused him in like manner to become liable to plaintiff. For it is well established that a contract made upon a valid consideration, between two or more persons for the benefit of a third party, may be enforced by the latter for whose benefit it is made, if he thereafter adopts it, and though he had no knowledge thereof at the time. See *Beattie Mfg. Co. v. Clark*, 208 Mo. 89, 106 S. W. 29, and cases cited; *Lumber Co. v. Banks*, 136 Mo. App. 44, 117 S. W. 611; *Bank v. Commission Co.*, 139 Mo. App. 110, 120 S. W. 648.

[5] However, the liability of Caneer, Gillespie, and Gardner in the premises is not here directly involved. The question is whether, by virtue of assuming to become a party to the subsequent contract with Gardner, in the manner and under the circumstances aforesaid, the plaintiff placed itself in a position where it became bound to respect the suretyship, so far as concerns these defendants; and, if so, whether the alleged extension of time on the note operated to release the defendants.

This is not a case where a grantee of premises accepts a conveyance thereof from his grantor covenanting to assume and pay the grantor's note, secured by a mortgage or deed of trust upon such premises. In such cases it is well established that, not only as between such grantor and grantee does the latter become the principal debtor and the former a surety for the payment of the mortgage debt, but our courts hold further that, although the owner of the mortgage note may enforce the liability against both such grantor and grantee, nevertheless, after receiving notice of such assumption of the debt, he is bound to recognize the suretyship, and to respect the rights of the surety in his subsequent dealings with the parties and any act on his part which in law will release a surety will operate to release the mortgagor. See *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755; *Regan v. Williams*, 185 Mo. 620, 84 S. W. 959, 105 Am. St. Rep. 600; *Laumeyer v. Hallock*, 103 Mo. App. 116, 77 S. W. 347; *Wonderly v. Giessler*, 118 Mo. App. 708, 93 S. W. 1130; *Van Meter v. Poole*, 130 Mo. App. 433, 110 S. W. 5.

[6] And such promise of the grantee of the land to pay the mortgage debt need not be incorporated in the deed of conveyance itself, nor even evidenced by a written instrument, but may be entirely oral. It is not within the statute of frauds and required to be in writing, nor is it an agreement to pay the debt of another, but an original undertaking. See *Van Meter v. Poole*; *Nelson v. Brown*, *supra*.

[7] In the case before us the obligation assumed was not a mortgage note secured by the property which was transferred from de-

fendants to Caneer and Gillespie and by the latter to Gardner, but, if the facts are as defendants contend, there are strong reasons why the same rule should obtain so far as concerns the duty of plaintiff to respect the relation of principal and surety; there being no equities with respect to mortgaged property to be dealt with. We are not embarrassed by the question as to what the bank's rights and duties might have been, in dealing thereafter with these parties, had the bank not been itself a party to the final agreement, and had been merely notified that these respective agreements had been entered into. Defendants' theory, which there is evidence tending strongly to support, is that plaintiff bank was in fact, through its cashier, a party to the agreement with Gardner; that is to say that Caneer acted in that transaction, not only for himself personally, as one of the parties who had theretofore assumed the payment of the note, but as the plaintiff's representative, and that as an inducement to secure Gardner's agreement made a binding contract on the part of plaintiff to extend the time of payment of the note from July 1, to September 1, 1909.

Even aside from the fact that plaintiff, as appellants contend, was a party to the very contract itself with which we are now dealing, there is ample authority for the proposition that if a creditor accepts a promise of a third party made to his debtor, he becomes bound to respect the relationship of principal and surety existing between such third person and the promisee. In *Malanaphy v. Mfg. Co.*, 125 Iowa, 719, 101 N. W. 640, 106 Am. St. Rep. 332, the court in treating of this question said: "Necessarily the rights of a party for whose benefit a promise is made must be measured by the terms of the agreement between the principal parties, and the right to recover from the promisor is not absolute in all cases. Among other limitations, the party to be benefited takes subject to all inherent equities arising out of the contract, as affecting the principal parties one with the other. This follows naturally from the relation of privity which the law implies. *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Brandon v. Hughes*, 22 La. Ann. 360; *Trimball v. Strother*, 25 Ohio St. 378; 7 Am. & Eng. Enc. Law (2d Ed.) 109. Turning our attention to the principal parties to the contract, it is quite clear that, as between them, the promisor became primarily liable for the debt. It assumed the relation of a principal, and, as to it, the obligation of the promisee became that of a surety only. \* \* \* Now, as a creditor for whose benefit a promise is made takes subject to the equities existing between the principal parties, it follows conclusively that, if he accepts of such promise, he becomes bound to observe the relationship of principal and surety existing between the principal parties, and must act in recognition thereof." In this same

connection see 1 Brandt on Suretyship (3d Ed.) § 1; section 46, note 15, 32 Cyc. 35.

That the right of action by a party for whose benefit and advantage a contract is made between two other persons is dependent upon and subordinate to the terms of the contract as made is fully recognized by our courts. See *Ellis v. Harrison*, supra; *Davis v. Dunn*, 121 Mo. App. 490, 97 S. W. 226; *Beattie Mfg. Co. v. Clark*, 208 Mo. 89, 106 S. W. 29. Certain it is that the right of the creditor to proceed against the third party so assuming the debt is measured by the contract of assumption. And, as said in *Malanaphy v. Mfg. Co.*, supra, it would seem to follow that when he does elect to adopt the promise of such third party, he must take it cum onere, and must respect the relation existing between the promisor and the promisee.

[8] But the instant case presents a further reason for holding that plaintiff became bound to observe and respect the relation of defendants as sureties. For indeed, if plaintiff not only accepted the promise of Gardner, but actively took part in inducing the latter to assume the debt, and assumed to treat and deal with him as a principal, without consulting the defendants, then we think it cannot be doubted that the plaintiff should be held to have elected to accept Gardner as the primary debtor, and should be permitted to look to the defendants merely as sureties.

In this connection we may say that after the contract was entered into, whereby Caneer and Gillespie assumed the note, the latter became obligated to pay the same when it matured July 1, 1909, and had they failed to do so, the defendants would have been entitled to pay the debt and at once proceed to protect themselves in the premises. Defendants were not parties to the subsequent agreement, had nothing to do with it in fact, and their rights may have been seriously prejudiced by a valid extension of time, if there was one. And if the plaintiff was a party to the contract with Gardner, and actively participated in procuring the same, then it seems clear that if plaintiff, either at the time or thereafter, did anything which would in law release a surety, it should operate to release these defendants.

[9] IV. That Caneer was cashier of plaintiff bank, with authority to act for it in the premises, at the time the contract with Gardner was made, we think cannot be doubted. Indeed it fully appears that he had been appointed cashier by the board of directors, who alone may lawfully appoint or remove a cashier (Rev. Stat. 1909, § 1112), and had performed the duties of this office for some considerable period of time; that upon coming to St. Louis he did not resign as cashier or sever his connection with the bank, but that he represented the bank in many transactions, and kept in constant communication with the latter, supervising and directing its

more important affairs. It is true that the evidence shows that Story was engaged to and did perform such of the active duties pertaining to this office as were required to be performed at the bank, though the evidence is quite convincing that he reported to Caneer and looked to the latter for advice and direction during this period. The bank's records show that he was not elected cashier until August 16, 1909, two months after the making of the contract with Gardner. It is quite clear, therefore, that Caneer was lawfully authorized to represent the bank as cashier during this period. And there is abundant evidence that he did exercise such authority.

[10] V. As to the authority of a cashier to bind a bank by a contract such as it is contended was made with Gardner, there can be no serious doubt. The cashier is the executive officer of the bank through whom the bank's business of this nature is ordinarily conducted; and he is held out to the public as having authority to act in accordance with the general custom, practice, and course of business of such institutions. Consequently an act such as is claimed was done by him in the present case must be regarded as being, prima facie at least, within the scope of his duties and authority. See *Hughes v. Bank*, 62 Mo. App. 576; *Bank v. Dick*, 73 Mo. App. 354; *Bank v. Loyd*, 89 Mo. App. 262; *Houston v. Kirkman*, 156 Mo. App. 309, 137 S. W. 38; *Bank v. Bank*, 244 Mo. loc. cit. 577, 149 S. W. 495. And should there be any doubt as to this question, the evidence respecting the course of dealing on the part of the bank, through Caneer, was such that the latter's authority in the premises may well be inferred, particularly from proof that he had virtually been intrusted with the entire management of the bank's business. See *Bank v. Hughlett*, 84 Mo. App. 268; *Marshall v. Bank*, 76 Mo. App. 92.

[11] In this connection it may be well to notice that the evidence adduced by defendants went to show that, in making the contract with Gardner, Caneer acted both for himself and the bank; that the agreement in fact was one between himself, Gillespie, and the bank on the one hand, and Gardner on the other. This it was competent for him to do; and, if he was clothed with authority to act for the bank, the latter is bound by the agreement, and his knowledge in the premises is imputed to the bank. See *Stonecutter Co. v. Myers*, 64 Mo. App. 527; *Withers v. Bank*, 67 Mo. App. 115; *Latimer v. Loan & Inv. Ass'n*, 78 Mo. App. 463.

[12] VI. But, conceding such contract to have been made with Gardner as defendant charges, and the authority of Caneer to bind the plaintiff in the premises, it remains to be seen whether defendants should be released by reason of the alleged extension of time on the note, under the circumstances appearing. At the threshold of this question the provisions of the note itself should be con-

sidered. As we have said above, the note provided that the "makers and indorsers" thereof made certain waivers, and consented that the time of payment might be extended without notice. In the face of this provision in the note it cannot well be doubted that, had there been any party to the instrument originally entitled to be treated by plaintiff as a surety, such surety would not have been released by an extension of time to the primary obligor. That is not the question with which we are now dealing, however, for the promise of a third party to pay the debt, and which it is said was not only accepted, but was induced by the plaintiff, was a separate and distinct contract, and an original undertaking in itself. See *Van Meter v. Poole*; *Nelson v. Brown*, *supra*. It had the important affect of creating entirely new relations between the parties, independent of the original instrument, and of relegating the original makers of the note to the position of sureties upon a new and independent undertaking; their liabilities being measured no longer by the original instrument, but by the new obligation and the relation which they bore to the latter. In this view, if plaintiff by the new contract made a valid agreement to extend the time of payment for a definite period of time, we think there can be no doubt that these defendants were released as such sureties.

[13] VII. And in this same connection should be considered the effect of the Negotiable Instruments Law of 1905, upon the matter in hand. Upon the question of the discharge of a surety by the granting of an extension of time to the principal debtor, sections 10,161, 10,089, and 10,090, Rev. Stat., have an important bearing. Section 10,161, *supra*, provides: "The person primarily liable on the instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." Section 10,089 makes provision as to what will discharge a negotiable instrument. Section 10,090 sets out those things which will discharge a person secondarily liable on the instrument, among these being "an agreement binding upon the holder to extend the time of payment," etc. And under these sections of the statute it is now held that those who sign as joint makers, and therefore "by the terms of the instrument" are absolutely required to pay the same, are by the statute made "persons primarily liable," and that, therefore, none of them will be permitted to show that they signed as sureties merely, and hence none of them will be released by an extension of time. See *Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514 and authorities cited. In the case before us one feature of the defense pleaded was that W. H. Douglass was in fact the party primarily liable, and that his codefendants, who signed the note as comakers, were accommodation makers, which was known to plaintiff, and that

they were therefore sureties from the beginning. The note, however, was executed January 10, 1906, after the above-mentioned statute had become effective, and hence all of the signers of the note were originally "parties primarily liable," and none of them sureties.

[14] However, the above-mentioned change in our law, effected by the adoption of the statute in question, is without influence here so far as concerns the real matter under consideration. That is to say, though all of these defendants were originally parties primarily liable, and none of them then entitled to be treated as sureties, the making of a distinct, new contract with a third person, as of an original undertaking, such as it is said was here done, has the effect of relegating the original makers of the note to the position of sureties with respect to the obligation of the new promisee to pay the debt. In this regard, the operation of the new agreement made with a third person is unaffected by the Negotiable Instruments Law, for the relationship thereby created between the parties arises independent of the original instrument.

[15] VIII. In order for an extension of time of payment to operate to release one who occupies the position of surety, such extension must not only be for a fixed and definite period of time, but must be supported by a valid consideration, and binding upon the creditor, so that the latter is thereby precluded in the meantime from proceeding to enforce the collection of the debt. Such is the rule declared by numerous decisions of our courts; and it is in no wise altered by the Negotiable Instruments Law. See Rev. Stat. 1909, § 10,090.

[16] But the evidence adduced on behalf of defendants went to show the making of a binding agreement based upon a valid consideration, to extend the time of payment of the debt for a period of two months, such as would perforce have stayed the hand of plaintiff during such period. Defendants' evidence on this score, though quite persuasive; was not, however, conclusive; for Caneer testified that he did not extend or undertake to extend the time of payment. The question is therefore one for the consideration of the jury upon proper instructions.

[17] IX. We are unable to see that the facts pleaded in defense were such as to raise an equitable estoppel, though, if true, they constituted a valid defense. "An estoppel in pais is defined as a right arising from acts, admissions, or conduct, and which have induced a change of position in accordance with the real or apparent intention of the parties against whom they are alleged." *Withers v. Railroad*, 226 Mo. loc. cit. 399, 126 S. W. 432, and authorities cited. But it does not here appear that the alleged acts and conduct of plaintiff can well be said to have induced the defendants to change their position to their detriment. Defendant W. H. Douglass had parted with the consideration,

which passed from him to Caneer and Gillespie prior to any act on the part of the bank in the premises, and it does not appear that thereafter the defendants in any way altered their position to their injury in reliance upon the conduct of plaintiff. It is true that mere silence may, under some circumstances, raise an estoppel, but it does not appear that it was here such as to so operate. See *Withers v. Railroad*, supra, loc. cit. 399-402, 126 S. W. 432; *Palmer v. Welch*, 154 S. W. 433.

[18] Defendants claimed that the facts pleaded by them raised an estoppel against plaintiff, and prayed that the note be canceled and returned to them; and this matter was passed upon by the court sitting as a chancellor, after the jury trial was had. The case was one to be tried by the jury, however, under appropriate instructions. And though the original makers be relieved from liability upon the note, it does not follow that they are entitled to have it canceled; for the instrument evidences the obligation assumed by others.

[19] X. Instruction No. 1, given for the plaintiff, authorized a verdict for plaintiff unless the jury found that the latter agreed to release the defendants and to accept Gardner as the payor of the note. And instruction No. 2, given on behalf of plaintiff, told the jury that the defendants relied upon what is termed in law a novation, and that to constitute the same the jury must find that for a valuable consideration Gardner agreed with W. H. Douglass to pay the note, that the latter consented thereto, and that plaintiff agreed to accept Gardner as the payor thereof, and further agreed to release the defendants. From what we have previously said, it follows that these instructions were based upon an altogether erroneous conception of the defense pleaded and sought to be proved, were highly prejudicial to the defendants, and should not have been given.

Instruction No. 5, given for plaintiff, told the jury that the cashier could not release the principal on the note and accept in lieu thereof another as payor, without authority in writing from the board of directors, and that if a cashier undertook so to do, the bank would not be bound thereby, unless it afterwards adopted and ratified the transaction. This instruction was also improper, in that it related to a defense not sought to be interposed, and it conveyed an altogether erroneous impression as to the authority of the cashier to bind plaintiff bank under the facts in evidence.

It is unnecessary to notice the instructions given for defendants, or those which were offered by them and refused.

There are various assignments of error pertaining to the court's rulings on the admission of evidence; but, in view of what we have said above, we deem it unnecessary to consider these in detail. From the foregoing

it will appear that the defense attempted to be interposed was a valid one, and the evidence adduced tended very strongly to support it. But it cannot be said that the evidence conclusively established such defense, particularly in view of Caneer's testimony denying the granting of an extension of time for the payment of the debt.

The judgment should therefore be reversed, and the cause remanded, with leave to appellants to amend their answer if so advised. It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

## RUNDELMAN v. JOHN O'BRIEN BOILER WORKS CO.

(St. Louis Court of Appeals. Missouri.  
Dec. 2, 1913.)

### 1. APPEAL AND ERROR (§ 193\*)—OBJECTIONS TO PETITION—FAILURE TO STATE CAUSE OF ACTION—TIME TO OBJECT.

The objection that the petition does not state a cause of action is available at any stage of the proceedings, even in the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.\*]

### 2. JUSTICES OF THE PEACE (§ 101\*)—SUFFICIENCY OF PETITION—OBJECTIONS.

Objection in a justice's court to the reception of any evidence under the petition for failure to state a cause of action merely challenges its sufficiency for a total failure to state a cause of action and cannot fulfill the purpose of a motion to make more definite and certain.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 942; Dec. Dig. § 101.\*]

### 3. JUSTICES OF THE PEACE (§ 91\*)—PROCEDURE—SUFFICIENCY OF STATEMENT.

The following account sued on in a justice's court:

To 51 hrs. work at Belleville, Ill., at 40 cts. per hour .....	\$20 40
Received from company.....	\$ 7 00
Paid out for company paid out.....	3 30
Due company .....	\$ 3 70
Cash .....	6 80
	<hr/> \$10 50

—was sufficiently definite and specific to apprise defendant of the nature of the claim against him and to bar another action on the same demand, and hence sufficient to support a judgment for plaintiff.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 307-323; Dec. Dig. § 91.\*]

### 4. JUSTICES OF THE PEACE (§ 91\*)—PLEADINGS—CONSTRUCTION.

A very liberal rule prevails with respect to statements filed before justices of the peace, in view of the character of such courts and the fact that they are intended as a forum, where small litigants may obtain redress without the expense of employing counsel.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 307-323; Dec. Dig. § 91.\*]

### 5. JUSTICES OF THE PEACE (§ 100\*)—PLEADING—VARIANCE.

It is no more permissible for a party to bring a suit before a justice of the peace on one cause of action and recover on another than it is in a court of record.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 336-341; Dec. Dig. § 100.\*]

### 6. APPEAL AND ERROR (§ 197\*)—PLEADING—FORM OF OBJECTION.

A party must interpose timely objection to the admission of evidence outside of the scope of the pleadings, grounding such objection upon such variance and supporting it by affidavit setting forth the respect in which he has been misled, as required by Rev. St. 1909, § 1846.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197.\*]

Appeal from St. Louis Circuit Court; Eugene McQuillen, Judge.

Action by Ferdinand Rundelman against the John O'Brien Boiler Works Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Leahy, Saunders & Barth, of St. Louis, for appellant. F. A. C. MacManus, of St. Louis, for respondent.

ALLEN, J. This is an action begun before a justice of the peace by filing the following account:

St. Louis, Mo., Aug. 17, 1911.

John O'Brien Boiler Works Co. to Ferdinand Rundelman, Dr.

To 51 hrs. work at Belleville, Ill., at 40 cts. per hour .....	\$20 40
Received from company .....	\$ 7 00
Paid out for company paid out .....	3 30
Due company .....	\$ 3 70
Cash .....	6 80
	\$10 50

Room rent .....	\$2 00
Helper O'Brien .....	1 00
Car fare .....	30

\$2 30 Wages .....	\$20 40
Moneys rec'd .....	10 50
Balance due .....	\$ 9 90

Plaintiff prevailed in the justice court, and defendant appealed to the circuit court, where the cause was tried before the court without a jury, a jury having been waived, resulting in a judgment for plaintiff for the balance claimed to be due, to wit, \$9.90. From this judgment defendant has prosecuted its appeal to this court.

I. Appellant contends that the statement filed before the justice does not measure up to the requirements respecting such statements, and is insufficient. With regard to this question we may say, in the first place, that the case is not one where the defendant moved below to make the account more definite, properly saved its exceptions to the overruling of such motion, did nothing to waive the point, and brought that question here for us to review. No such motion was here made.

[1] It is true, however, that the defendant interposed an objection to the introduction of any evidence in the case "for the reason that the petition filed in the justice court is not sufficient under the law to constitute a cause of action," which objection was overruled; defendant excepting. Such objection, however, merely had the effect of challenging the sufficiency of the account as for a total failure to state a cause of action under the rule respecting the sufficiency of statements before justices of the peace. Consequently it does not affect the question on appeal, for, if the statement is in fact fatally deficient, such deficiency may be taken advantage of at any stage of the case, even in the appellate court.

[2] Such objection cannot fulfill the office of a motion to make the account more specific and definite. *Jarrett v. Mohan*, 142 Mo. App. 29, 126 S. W. 212.

[3] The question, then, before us in this regard is whether the account filed is fatally defective and insufficient to support the judgment. The rule is well established that the test of the sufficiency of a statement filed before a justice of the peace is that it must be sufficiently definite and specific to apprise the defendant of the nature of the claim against him and to operate as a bar to another action on the same demand. As to this numerous cases might be cited, but see *Rechnitzer v. Vogelsang*, 117 Mo. App. 148, 93 S. W. 326; *Fixture Co. v. Baseball Co.*, 152 Mo. App. 601, 133 S. W. 849.

Tested by this well-known rule, is the statement before us sufficient? It must be conceded that the cases in this state, in which the sufficiency of various statements filed before justices of the peace have been passed upon, are by no means harmonious. Such lack of harmony, however, at least in all of the more recent cases, does not arise because of any conflict as to the rule to be applied in testing the sufficiency of such statements but from the application of the rule to the particular statements under consideration. Appellant relies, in large measure, upon the decision of this court in *Rechnitzer v. Vogelsang*, supra. There the account under consideration was as follows:

St. Louis, 720 Century Bldg., June, 1903.

Mr. Henry Vogelsang, acct. for Edw. J., 10th and Olive.

To mdse. as per bills .....	\$58 00
To mdse. as per bills .....	11 80
	\$79 80
1903.	
June 9. By cash .....	\$5 00
June 16. By cash .....	2 00
	7 00
	\$72 80

Of this we said, through Goode, J.: "It will be observed that the statement contains no description of the merchandise sold or the dates on which the sales were made. For aught it contains, the goods may have

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

been as well groceries or hardware as stationery, and the dates may have been during any period preceding June, 1903. In fact, the sales occurred on different dates in the year 1899. The statement was insufficient to apprise the defendant of the nature of the claim against him or to bar another action on the same demand. This is true, because there is nothing in it by which the particular merchandise that is the subject-matter of the action can be identified; nothing to show what sort of articles composed the claim, or when they were sold and delivered. Therefore the facts needed for identification are not given."

The statement was held to be insufficient to support the judgment; the following cases being cited in support of such ruling, viz.: *Brashears v. Strock*, 46 Mo. 221; *Swartz v. Nicholson*, 65 Mo. 508; *Butts v. Phelps*, 79 Mo. 302; *Boughton v. Railroad*, 25 Mo. App. 10; *Doggett v. Blanke*, 70 Mo. App. 499; *Moffett-West Drug Co. v. Johnson*, 80 Mo. App. 428; *McCrary v. Good*, 74 Mo. App. 425. In a later case in this court, viz., *Moffett-West Drug Co. v. Crider*, 124 Mo. App. 109, 100 S. W. 1099, a similar account was condemned as insufficient, under the authority of *Rechnitzer v. Vogelsang*, supra, and the authorities there cited, although the items thereof were dated. However, the still more recent decision of this court in *Mercantile Co. v. Devore*, 130 Mo. App. 339, 109 S. W. 808, should be considered in this connection. There the action was not one originating before a justice of the peace, but the sufficiency of an account annexed to a petition in the circuit court was under consideration. The items of this account were specified to be for "merchandise," and the petition itself alleged that the account was for "goods, wares, and merchandise." The account, as aided by the answer, showed the dates of the various items. It was held, in the majority opinion written by Norton, J., that the allegation in the petition included all kinds of goods, wares, and merchandise sold by plaintiff to defendant on the specified dates; and that it was sufficient to bar another action between the same parties for goods, wares, or merchandise of any character sold on such dates. The *Rechnitzer* Case, supra, was distinguished upon the ground that the account in that case did not show the dates or even the months upon which the alleged merchandise was purchased, and that it was not there aided by an answer.

The foregoing cases involved accounts for goods sold and delivered, and many other cases might be referred to involving like accounts. In the case before us the action is one for services. The account is for 51 hours work at Belleville, Ill., at 40 cents per hour. No dates are given, excepting the date appearing at the head of the account, which was the date of the institution of the suit. It is not contended that the latter

has any reference to the time at which the work in question was performed.

It will be observed that the decision in *Rechnitzer v. Vogelsang*, supra, is based upon the ground that since the account was merely for merchandise, and no dates were given, it was, taken as a whole, so vague and indefinite that it did not serve to identify the subject of the action and was not sufficient to operate as a bar to another suit upon the supposed claim. The account before us is for work alleged to have been performed at Belleville, Ill.; the number of hours being specified, though no dates appear. By the account it would seem that the plaintiff sought to charge the defendant for everything due plaintiff for work performed by him at the place designated in the account. It would seem to be sufficient as against the charge that it fails to apprise the defendant of the nature of the claim, especially when the latter did not move to make it more definite. The only argument against the account which appears to inhere with any force is that it will not bar another action on the same demand. However, a consideration of this subject has led us to the conclusion that it should also be upheld as against this attack. This is for the reason that we think that plaintiff, as we have said above, must be deemed to have sought to charge the defendant with all of the work which he had performed at Belleville, Ill., at least for all compensation therefor which was due and owing at the institution of the suit. It is well established that a judgment concludes the rights of the parties with respect to the cause of action stated in the pleadings on which such judgment was rendered, whether the pleadings embrace all or only a portion of the demand involved in the cause of action. This is for the reason that a plaintiff may not split one entire claim into two or more actions, whether it arise upon contract or in tort. See *Union R. R. & Transportation Co. v. Traube*, 59 Mo. 355; *Puckett v. Annuity Ass'n*, 134 Mo. App. 501, 114 S. W. 1039. It is true the rule is otherwise where demands are necessarily separate and distinct causes of action. But even where there are claims payable at different times, as where installments fall due at different periods, arising out of the same contract, even though a separate action may be brought as each amount or installment falls due, nevertheless, if an action is brought when two or more such amounts or installments are due, all then due must be included in that action; and if any be omitted the judgment will operate as a bar to the prosecution of another suit therefor. *Union R. R., etc., Co. v. Traube*, supra; *Puckett v. Annuity Ass'n*, supra.

It would seem that plaintiff's account should and will operate as a bar to any claim for work performed by him prior to the institution of the suit that can be said

to be identified by the account filed. The latter identifies work performed at Belleville, Ill., which it is said consisted of 51 hours work. And we think that it should be held to state a cause of action for any work thus designated and which was performed by plaintiff; that it will operate as a bar to any future action for any such work; and that, should plaintiff have omitted to claim compensation for any other work that may be so classed and identified, he will be precluded by this judgment from asserting such claim. In this view we are of the opinion that the account, though no dates appear, is not in the same category as the vague and indefinite account appearing in the *Rechnitzer Case*, *supra*. The subject-matter of the action is so far identified, we think, as to render the account sufficient to support the judgment.

[4] A very liberal rule prevails with respect to statements filed before justices of the peace; and this should be so because of the character of such courts, and the fact that it is common for a plaintiff there to prepare and file his own statement or account. In fact, such court is intended as a forum where the poor man, or the small litigant, may obtain redress without the expense of employing counsel. It is necessary, however, that any statement filed be sufficient to sustain a judgment, when tested by the liberal rule applicable thereto. The account before us, when tested by that rule, with every reasonable intendment which should now be indulged in its favor, does not appear to be fatally insufficient.

In *Grabbe v. Drayage Co.*, 42 Mo. App. 522, this court, in an opinion by Rombauer, P. J., held an account for services to be sufficient which was in the following form, *viz.*: "To balance due for wages as common laborer, ten days, \$16.00"—the date of the rendition of the services not appearing. And in this connection see, also, *Allen v. McMonagle*, 77 Mo. 478; *Weese v. Brown*, 102 Mo. 299, 14 S. W. 945; *Jarrett v. Mohan*, *supra*; *Finley v. Dyer*, 79 Mo. App. 604; *Fixture Co. v. Baseball Co.*, *supra*.

We do not undertake to harmonize the various cases on the subject, nor to justify the ruling in all of the cases just referred to, under the rule stated and here sought to be applied. We refer to a few of the many cases that might be cited merely as showing the lengths to which our courts have gone in sustaining informal and rather indefinite accounts filed before justices of the peace.

II. Appellant assigns as further error that plaintiff was permitted to recover for services rendered other than that called for in the account; and that thereby plaintiff was permitted to plead one cause of action and recover, in part at least, upon another. This assignment of error is predicated upon testimony of plaintiff at the trial which made it

appear that a part of the services rendered and for which the plaintiff claimed compensation were performed in the city of St. Louis and not in Belleville, Ill., as charged in the account.

[5] It is quite true that it is no more permissible for a party to bring a suit before a justice of the peace on one cause of action and recover on another than it is in a court of record. *Turner v. McCook*, 77 Mo. App. 196; *St. Louis Trust Co. v. Real Estate Co.*, 82 Mo. App. 260; *Green v. Crutcher*, 143 Mo. App. 595, 128 S. W. 768; *Griswold v. Haas*, 145 Mo. App. 578, 122 S. W. 781.

In the case before us, there was not a total failure of proof as contemplated by section 2021, Rev. Stat. 1909, but a variance between the allegations of the statement of the cause of action, as contained in the account, and the proof offered in support thereof.

[8] And section 1846, Rev. Stat. 1909, provides the manner in which the objecting party must proceed to take advantage of such variance. It is also well settled that a party must interpose timely objection to the admission of evidence outside of the scope of the pleadings, grounding such objection upon such variance between the pleadings and the proof.

In *Fisher, etc., Co. v. Realty Company*, 159 Mo. 562, 62 S. W. 443, the court said: "It has always been the law that the allegata and probata must correspond. \* \* \* That a party cannot declare upon one cause of action and recover upon another is axiomatic in our law. \* \* \* But it is also equally well settled in our state that timely and appropriate objection must be made to the introduction of the evidence offered on the distinct ground of a variance between the allegata and probata, and that the objecting party must proceed in the manner provided by section 2096, Rev. Stat. 1889 (now section 1846, Rev. Stat. 1909), otherwise his objection will not be considered. \* \* \* And the affidavit setting forth in what respect a party has been misled is the sole test of the materiality of a discrepancy between the allegata and probata. \* \* \* If a party fails to avail himself of section 2096, *supra*, in the trial court, it is too late to complain in the appellate court." Many authorities are cited. See, also, *Mellor v. Railway Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Harrison v. Lakenan*, 189 Mo. 581, 88 S. W. 53; *Donovan v. Brewing Co.*, 92 Mo. App. 341; *White v. Gilleland*, 93 Mo. App. 310; *Litton v. Railroad*, 111 Mo. App. 140, 85 S. W. 978, and authorities cited; *Avery v. Tucker*, 137 Mo. App. 428, 118 S. W. 672. And the fact that the suit is one originally begun before a justice of the peace cannot affect the application of this rule.

In the case before us the record discloses that appellant did not interpose timely objection below to the introduction of the evidence which it is now claimed permitted a



recovery upon a cause of action different from that stated in the account. It is true that the record reveals a brief colloquy between counsel and the court respecting a portion of the services which from the testimony appeared to have been rendered in the city of St. Louis. However, no objection whatsoever appears to have been interposed; nor was any exception preserved to any action of the court in the premises; and no affidavit of surprise was filed. This being true, under the authorities to which we have above referred, it is now too late for the appellant to complain of a variance between the pleading and proof, for as to this the appellant is now concluded by the judgment.

The foregoing are the only assignments of error before us. We have carefully examined them, and our conclusion is that they must be ruled against the appellant. The judgment should therefore be affirmed. It is so ordered.

REYNOLDS, P. J., and NORTON, J.,  
concur.

#### GREISSER v. EMMONS et al.

(Springfield Court of Appeals. Missouri.  
Dec. 11, 1913.)

#### 1. APPEAL AND ERROR (§ 1008\*)—REVIEW—QUESTIONS OF FACT.

In cases tried by the court without a jury, where no findings of fact are requested and no declarations of law given, the judgment will be affirmed, unless it is so manifestly erroneous that it cannot be sustained upon any theory under the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

#### 2. APPEAL AND ERROR (§ 842\*)—REVIEW—QUESTIONS OF LAW OR FACT.

Under Rev. St. 1909, § 10,023, providing that, where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not a holder in due course, where, in an action on a check which after being indorsed by the makers and a third person was returned to the makers from whom it was stolen, it appeared that plaintiff about 30 days after the theft indorsed it at a bank for the benefit of the thief, who then collected the proceeds and appropriated them to his own use, it was a question for the trial court sitting without a jury whether, in view of the delay in the presentation of the check and the manner in which plaintiff became indorser, he was a holder in due course.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.\*]

Appeal from Circuit Court, Jasper County;  
J. D. Perkins, Judge.

Action by Wilhelm Greisser against R. B. Emmons and others. Judgment for defendants, and plaintiff appeals. Affirmed.

I. N. Threlkeld and C. V. Buckley, both of Joplin, for appellant. H. S. Miller, of Joplin, for respondents.

ROBERTSON, P. J. The defendants Howard & Brown issued to the other defendant,

R. B. Emmons, checks on a bank in Joplin, Mo., which said Emmons indorsed in blank and returned to Howard & Brown. The checks were thereafter stolen from Howard & Brown, and about 30 days later the plaintiff indorsed them at a bank in Denver, Colo., for the benefit of the thief, who then collected the proceeds thereof and appropriated the same to his own use. At the time the plaintiff indorsed the checks they had the forged firm name of Howard & Brown thereon. This suit was instituted to recover the amount of the checks and protest fees.

The answer sets up as a defense the facts as to the theft of the checks and the indorsement by plaintiff, and alleges that the indorsement by Howard & Brown was a forgery, that the plaintiff was not a holder in due course because he "did not negotiate the same in the regular course of business and in good faith," and because at the time the plaintiff indorsed the checks they were more than 30 days old, "thus losing their negotiability, all of which the plaintiff could and did know from the date of said checks."

A trial was had before the court without a jury and resulted in a judgment for the defendants and the plaintiff has appealed.

[1] No declarations of law were requested or given, and no complaint is made in the brief filed here by the appellant questioning the admission or rejection of testimony. "Where no specific findings of fact are requested and no declarations of law given, unless we can say that upon the evidence the judgment of the circuit court is so manifestly erroneous that it cannot be sustained upon any theory, the judgment must be affirmed." *Stoepler v. Silberger*, 220 Mo. 258, 269, 119 S. W. 418, 421. The logical result of the contention of the plaintiff here is that we should declare, as a matter of law, that the judgment of the trial court should have been for the plaintiff and against these defendants. To so hold would be equivalent to saying that if there had been a jury trial, the court should have directed a verdict for the plaintiff. Ordinarily, and in this case, this cannot be done. *Cleveland & Aurora Mineral Land Co. v. Ross*, 135 Mo. 101, 107, 36 S. W. 216; *Gannon v. Gas Co.*, 145 Mo. 502, 517, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Dyer v. Tyrrell*, 142 Mo. App. 467, 472, 127 S. W. 114; *Johnson v. Grayson*, 230 Mo. 380, 394, 130 S. W. 673.

[2] Our Negotiable Instrument Law (section 10,023, R. S. 1909) reads: "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." The plaintiff in making out his case developed the delay in the presentation of the checks and the manner in which he became indorser, and therefore raised as an issue of fact to be determined by the trial court the question of the unreasonable length of time in the presentation, and raised the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

issue as to whether or not he could be deemed a holder in due course upon this one point alone. What was a reasonable length of time under the circumstances in this case, to say the most in behalf of the plaintiff, was solely a question of fact for the court as a trier of the facts. If the burden of proof was not cast upon the plaintiff by section 10,029, R. S. 1909, by reason of the fact that it may be said that defendants became bound on the checks prior to the acquisition of the defective title by the thief, yet there was testimony tending to prove, if not conclusively proving, that plaintiff was not a holder in due course under section 10,023. Under the law, as it stood in this state before the enactment of the Negotiable Instrument Law, we should have to affirm the judgment. *Farmers' Nat. Bank v. Dreyfus*, 82 Mo. App. 399. We do not see that any change has been made by that act on this point.

There being no declarations of law, nor objections to the introduction or rejection of testimony, there is nothing left for us to do but affirm the judgment of the trial court. Affirmed.

STURGIS, J., concurs. FARRINGTON, J., concurs in a separate opinion.

FARRINGTON, J. (concurring). I concur in the foregoing opinion, and believe the judgment should be affirmed for the further reason that the trial court was amply justified in finding that the handling and keeping of the checks by respondents was not such as to convict them of negligence.

#### BATTLES et al. v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

#### 1. TRIAL (§ 418\*)—DEMURRER TO EVIDENCE—WAIVER.

Defendant by itself putting in evidence, after demurring to plaintiff's evidence, thereby waived its demurrer, so that both plaintiff's and defendant's evidence will be considered on appeal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 981; Dec. Dig. § 418.\*]

#### 2. STREET RAILROADS (§ 102\*)—INJURIES—PROXIMATE CAUSE.

The injury must have proximately resulted from the negligence complained of to authorize a recovery, though such negligence was alleged to be in violating a speed ordinance.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 186, 194, 200, 203; Dec. Dig. § 102.\*]

#### 3. STREET RAILROADS (§ 112\*)—INJURIES—PRESUMPTIONS OF NEGLIGENCE.

The fact that a street car, which caused the injury, was running at the time at a speed prohibited by ordinance does not raise the presumption that the injury was caused by such excessive speed.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.\*]

#### 4. NEGLIGENCE (§ 134\*)—PROXIMATE CAUSE—EVIDENCE.

A causal connection between the alleged negligence and the injury need not be shown by direct evidence, but may appear by a fair inference from the circumstances proved.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

#### 5. STREET RAILROADS (§ 114\*)—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

Evidence in an action for the death of a small boy by being struck by a street car held not to show that the excessive speed of the car was the proximate cause of death.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

#### 6. APPEAL AND ERROR (§ 927\*)—REVIEW ON DEMURRER TO EVIDENCE.

In reviewing a ruling overruling a demurrer to plaintiff's evidence, plaintiff must be given the benefit of every reasonable inference fairly deducible from the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

#### 7. NEGLIGENCE (§ 134\*)—PROOF—PROXIMATE CAUSE.

Plaintiff must prove that the alleged negligence proximately caused the injury, by evidence which amounts to more than mere conjecture.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

#### 8. STREET RAILROADS (§ 112\*)—INJURIES—BURDEN OF PROOF—PROXIMATE CAUSE.

The burden was on one suing for a boy's death by being struck by a street car to show that the accident was proximately caused by the negligence alleged.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.\*]

#### 9. STREET RAILROADS (§ 81\*)—INJURIES—NEGLECT.

The failure of a street car to give warning on approaching a crossing is negligence per se.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.\*]

#### 10. STREET RAILROADS (§ 114\*)—INJURIES—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

Evidence in an action for the death of a small boy by being struck by a street car held to show that failure to sound a gong was not the proximate cause of the boy's death.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

#### 11. STREET RAILROADS (§ 114\*)—INJURIES—SUFFICIENCY OF EVIDENCE—DEFECTS IN FENDER.

Evidence in action for the death of a small boy by being struck by a street car held not to show that there was such an impact of the body against the front of the fender so as to cause it to automatically drop, and hence its failure to drop did not show that it was defective.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

#### 12. STREET RAILROADS (§ 95\*)—INJURIES—NEGLECT—ACT IN EMERGENCY.

Where, when he saw a boy on the track, the motorman had only an instant in which to act, and immediately reversed and applied the air brakes, believing he did not have time both to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

do that and lower the fender, it cannot be said that he was negligent in not lowering the fender, though he may have erred in judgment.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 179, 180, 202; Dec. Dig. § 95.\*]

### 13. DEATH (§ 58\*)—PRESUMPTIONS—CONTRIBUTORY NEGLIGENCE.

The rule that it is presumed that a decedent was not guilty of contributory negligence, where no one saw the accident, would not apply where there was evidence by eyewitnesses tending to show contributory negligence.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 75-78; Dec. Dig. § 58.\*]

### 14. NEGLIGENCE (§ 85\*)—CONTRIBUTORY NEGLIGENCE—INFANT.

A child of tender years may comprehend certain dangers so as to be guilty of negligence as a matter of law, and will be held negligent if he does so, or if the danger is obvious to one of his age.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 121-128; Dec. Dig. § 85.\*]

### 15. STREET RAILROADS (§ 114\*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a street car company for the death of a small boy by being struck by a car held to show that the boy's death was caused by his own negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

Appeal from Circuit Court, St. Louis County; G. A. Wurdeman, Judge.

Action by Carroll W. Battles and another against the United Railways Company of St. Louis. From a judgment for plaintiffs, defendant appeals. Reversed without remand.

Boyle & Priest, of St. Louis, Kiskaddon & Kiskaddon, of Clayton, and Elmer C. Adkins, of St. Louis, for appellant. Francis M. Curlee, of St. Louis, for respondents.

ALLEN, J. This is an action instituted by respondents, husband and wife, for the death of their minor son, Shelby Battles, through the alleged negligence of the defendant. Plaintiffs recovered, and the defendant prosecutes the appeal.

Respondents' minor son met death by being struck and run over by one of defendant's street cars in the city of Maplewood, St. Louis county, on Manchester avenue, a public street of said city, on October 31, 1910, at about 11 o'clock a. m.

#### The Pleadings.

The petition, which is quite lengthy, counts upon several different theories of negligence.

The first assignment of negligence charges, in substance, that the car which struck and killed deceased was being operated at the time at an "excessive, dangerous, and unlawful rate of speed," and one that was negligent at common law, in view of the fact that it was being operated through a thickly populated portion of the city of Maplewood, and which was much frequented by children.

The second charge of negligence is that defendant's motorman in charge of the car

which struck and killed deceased was negligent in failing to sound a gong or bell as the car approached and passed another car going in the opposite direction upon an immediately adjacent and parallel track.

The third assignment of negligence charges a violation of a municipal ordinance of the city of Maplewood, in that the car which struck and killed deceased was being operated at a rate of speed in excess of 15 miles per hour, in violation of said ordinance.

The fourth assignment of negligence charges a violation of another ordinance of said city of Maplewood requiring street cars to be equipped with fenders "projecting from the front platforms of all said cars, and designed to catch and sustain any human being who may be in the way of said car."

The fifth assignment of negligence also charges defendant with a failure to equip its cars with a fender of the design required by the municipal ordinance aforesaid, and that in lieu thereof, defendant had equipped the car in question with a fender of a different character and design, describing the latter. And it is alleged that the device which defendant thus adopted was defective in design and construction, and ineffective to accomplish the results intended by the ordinance.

The sixth assignment of negligence also charges a violation of the ordinance respecting the equipment of cars with fenders, and charges that the defendant had undertaken to provide and equip its said car with a device or guard intended to accomplish the same result as was intended by said ordinance, viz., to catch and sustain any person in the way of and struck by said car; but it is charged that the defendant negligently failed to keep such device or guard in working order and condition, and permitted it to become broken, defective, and out of order, whereby it failed to operate, and by reason whereof the deceased was drawn under the car and killed.

The seventh charge of negligence is, in substance, that the defendant's motorman in charge of the car which struck and killed deceased could have lowered the fender with which the car was equipped, by operating a certain lever, in time to have prevented the injury and killing of deceased, and negligently failed so to do.

The answer is a general denial and a plea averring that the deceased was killed through his own negligence and inevitable accident.

#### Plaintiffs' Case.

Manchester avenue, at and about the point where plaintiffs' son was struck and run over by defendant's car, extends east and west, the central portion of the street being, at the time, occupied by double, parallel, street car tracks of the defendant, which extended west to Sutton avenue, where they turned to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

south along the latter street. Plaintiffs' son, a boy of nine years of age, was struck by a west-bound car on Manchester avenue, between two cross streets, viz., Sutton avenue on the west and Arthur avenue on the east, and run over and killed; his body being dragged some distance west. The evidence discloses that the car which struck him did not carry passengers, but was an "express car," which made but few stops.

Plaintiffs offered no eyewitness to the accident. That is to say, none of plaintiffs' witnesses saw the boy before he was struck by the car. Some of them heard the crunching and grinding noise made by the car when the motorman thereof attempted to stop it, their attention being attracted thereby, and saw a cloud of dust raised by the car in thus coming to a stop. And two witnesses testified to seeing the boy's hat fly in the air at this time. Other witnesses for plaintiffs only saw the car after it had stopped. The testimony of plaintiffs' witnesses, and which is undisputed, was that when the car came to a stop the boy's body was under the rear wheel of the forward truck of the car, on the south rail of the west-bound or north track; and that he was then dead, and his body frightfully mangled.

Plaintiffs' evidence went to show that the boy was struck by the car in front of the Banner Lumber Company's building, situated on the north side of Manchester avenue, and that, after striking him, the car dragged his body west until it came to a stop about opposite Mrs. Ray's restaurant, or lunch room, also situated on the north side of the street. Plaintiffs' evidence was that the distance which the car thus ran after striking the boy, before coming to a stop, was about 116 feet.

The testimony of plaintiffs' witnesses was to the effect that the car was going quite rapidly at the time that it struck the boy, though much of this was by way of conclusions or opinions of the witnesses, who used such expressions as: "Awful fast"; "very fast"; "much faster than ordinary." One witness, however, estimated that the car was running from 20 to 25 miles per hour. This witness stated that he first saw the car when it was east of Arthur avenue; that his attention was attracted to it because of its rapid speed; that he came out of Mrs. Ray's restaurant, or lunch room, and started to cross the street, when he hesitated on account of the speed with which the car was approaching; that he saw a passenger car going east on the other or south track, and which passed the west-bound express car; but that though he was looking east, toward the approaching express car, he did not see it strike the boy; that he saw a cloud of dust rise from the car, opposite the Banner Lumber Company's building, and noticed that the car began to slacken speed, and he then proceeded on across the street.

One witness said that the car was going

twice as fast as she had ever seen passenger cars run in that neighborhood. And another witness testified passenger cars ordinarily ran along there about 15 miles per hour—sometimes as high as 20.

Witnesses for plaintiffs, who were near the scene of the accident, testified that they heard no bell or gong sounded. It was shown that this part of Manchester avenue was a mixed business and residence street of the city of Maplewood, frequented by children, especially by those attending a school some blocks west. On behalf of plaintiffs there was testimony that the car was equipped with a fender; that the latter consisted of two parts, one part, the bumper, being made of perpendicular slats extending along the front end of the car, and the other part being underneath the platform in front of the trucks, and which was referred to as an "apron" or "scoop." It was shown that the latter normally stood seven or eight inches above the street, and could be lowered by the motorman by pulling "a handle." And there was testimony to the effect that, after the car in question had stopped, this "apron" or "scoop" stood in its normal position, indicating that it had not been lowered.

An ordinance of the city of Maplewood was introduced in evidence limiting the speed of street cars to 15 miles per hour. The ordinance of said city providing that street cars should be equipped with fenders of a certain design was also introduced, but the court, at the instance of the plaintiffs, charged the jury not to consider the provisions of that ordinance in arriving at a verdict.

Such was the case made for plaintiffs.

#### Defendant's Evidence.

On behalf of defendant several eyewitnesses to the tragedy were produced. One of these was a boy ten years of age, who had been a playmate of plaintiffs' deceased son. This witness was riding on a bicycle along the north side of Manchester avenue, about opposite the Banner Lumber Company's building, at the time of the accident. He testified that he saw Shelby Battles on the lower step of the east-bound car; that the latter got on this car just as it came around the curve at Sutton avenue, the next street west, and where the car had stopped to take on passengers; that when this east-bound car got opposite the Banner Lumber Company's place, the deceased jumped off of the car and ran behind it toward the north; that he passed about a foot or two feet behind the rear end of the east-bound car, and ran directly in front of the west-bound car at about two feet from it; that "the two cars were even when he got hit," meaning that the front end of the west-bound car was about even with the rear end of the east-bound car when the boy was struck. The witness stated that the deces-

ed "grabbed for the window, and, just as he missed the window, he hollered, and the car knocked him." He stated that he meant the front window of the express or west-bound car, i. e., a window in the vestibule around the front platform thereof. He stated that the express car had stopped east of Arthur avenue, at a dairy, which it appears was about 410 feet from the point where the boy was struck. He said that the car was going quite rapidly, however, when it struck the boy, and that the witness heard no bell or gong.

The motorman in charge of defendant's west-bound car testified that at the time of the accident it was proceeding, in his judgment, at about the rate of 10 or 12 miles per hour; that he had stopped at the dairy east of Arthur avenue; that he sounded the gong at the crossing of the latter street, and that he also sounded it as the east-bound car approached and passed him; that the first that he saw of plaintiffs' son was just when the front end of his car became even with the rear end of the east-bound car; that the boy came around from behind the east-bound car and that the witness didn't see him until he was about two feet from the west-bound car, when the boy dropped on the track, striking the fender, going under the car along the south rail. The motorman further testified that upon seeing the boy he immediately "reversed the car"; that the wheels began to grind, and threw up dust as high as the car; that when he felt the reverse "take," he was afraid that he might back the car over the boy, and he applied the air brakes; and that he thought that the car came to a stop in "about a car length, or a car length and a half," the car being about 38 feet long; that when the car came to a stop the boy's body was under the second wheel of the front truck on the south rail of the west-bound car, and that the car had to be moved slightly forward to extricate it. The motorman testified that he did not drop the fender. He explained in a general way the construction of the fender, which went to show that the portion thereof extending across the front of the car was intended as a sort of bumper; and that the latter was connected with a wheel guard, which plaintiffs' witnesses referred to as an "apron" or "scoop"; that a fender of this design is intended to operate automatically, so that when something hits the front portion or bumper it will cause the wheel guard underneath the platform of the car and immediately in front of the front wheels to drop to the track; but that the wheel guard may also be operated by a lever in reach of the motorman on the car. The witness testified that he had never theretofore had an occasion to drop this wheel guard, and that he did not attempt to do so at the time in question. In this connection he stated, on direct examination, that the boy was under the car before

he could operate the fender, saying: "The whole thing happened in a couple of seconds from the time I saw the boy until the time I ran over him." On cross-examination, he said that the fender could be operated or dropped by giving it a little jerk, pulling it a few inches, though the handle of the lever to be used therefor was situated lower than the air brake and "controller." On cross-examination, he was pressed to state why he did not pull the lever and drop the fender. A portion of his testimony was as follows: "Q. Now, why did you not pull that lever and drop that fender? A. I told you I did not think I had time, the boy was out of my sight so fast and I just thought I would make the stop. Q. You thought you could stop in that distance? A. I thought I had better try to make the stop. Q. You saw the boy disappear, as you say, under the car? A. I know I could not stop. Q. Then why did you not lower the fender? A. I reversed the car; I didn't know that I would go over him at all. Q. You thought you had time to stop the car so that you would not go over him? A. Yes, sir. Q. Then why did you not lower the fender? A. Just like I told you, I didn't have the time. \* \* \* Q. You just didn't think about it? A. I just didn't have the time. I thought I would rather try, I better try to stop the car. Q. Even though you saw him going down? A. I never saw the boy until he was about two feet away from me right in front of my car. Q. That is the only explanation you can give as to the reason why you did not drop that fender under the circumstances? A. Of course I did not think I had time; I thought I would do better by stopping. Q. Even under the circumstances in which you saw that boy? A. Yes, sir; it was just as I say, he was only a foot or two away from me when I saw him. \* \* \* Q. If you hadn't attempted to stop you would have had plenty of time? A. If I just dropped the fender? Q. Yes, sir. A. I could not do the both things in just a second." Respecting the manner in which the boy was struck, as bearing upon the automatic operation of the fender, the motorman, on direct examination, testified that the boy "dropped on the track and went under, hit the fender, and the boy went right down on the south rail." On cross-examination, on being questioned in regard to the fact that the fender had not worked automatically, he said: "It didn't have no chance"; that "just his hand was hit by the fender"; that the boy was on the south rail and seemed to sink down upon the track, before the car itself struck him; and that he didn't see the fender strike any part of his body. On redirect examination he said: "His little hand just hit the corner of the fender; and his other hand hit the bumping thing out in front; it is below the outside of the fender; his one hand hit that and the other hit the fender."

A young man named Aubrey Koelling, a

witness for defendant, testified that he was standing in front of a tin shop just east of the Banner Lumber Company's building; that his attention was first attracted by the ringing of the bell or gong of the west-bound car as the latter was passing the east-bound car; that he stepped from where he was first standing to a little hallway or alleyway between the Banner Lumber Company's building and the building immediately east thereof; that he saw the deceased run behind the east-bound car directly in front of the express car; that the boy "just sunk right down and fell on the south track, just laid his one hand on the fender and the other hand on an iron piece that comes around the fender, underneath the fender; and I heard him scream;" that the deceased "was no more than two or three feet from the car when he sunk." This witness testified that the west-bound car was running a little faster than the ordinary passenger car, and, as he thought, about 10 or 12 miles per hour.

Mrs. Anna Grant, a witness for defendant, testified that she walked along Sutton avenue, and then turned into Manchester avenue, at which time she saw two little boys on a bicycle, and deceased, running along near the bicycle; that the east-bound car then passed, stopping at the Sutton avenue crossing to take on passengers; that the boys on the bicycle crossed over the tracks to the north side of the street, but that the deceased kept running along the south side thereof, near the car which was proceeding east at a moderate rate of speed; that she watched the boy, and the conductor of that car, who was on the back platform, and that the boy, instead of jumping on the car, suddenly "dodged back of the car, and the first thing I saw him on the ground." That the boy got no farther than the south rail of the west-bound track; that she had not noticed the west-bound car until "the boy got right against it"; "his little left hand, I saw that just in motion like that, but his little right hand I did not notice at all; he just hesitated like that and that was the end of it, it just went as quick; when I looked I just, well, it was done so quickly I could not tell it or express it." Again this witness says that the deceased "dodged the car (meaning the east-bound car) and went right in front of the express car." And again she said "he dodged back of the car and run into the other car, it wasn't a second of doing the whole performance." And she stated that "the back of the passenger car and the front part of the express car just came on a level there, just as the boy ran in front of it." She stated that she heard no bell or gong, but that all of her attention was directed to the boy's movements.

Frank Derkoviz, a barber, was a witness for defendant. He testified that he was standing in his barber shop on the south side of the street; that he saw deceased pass on the step of the east-bound car, and that

he saw him jump down about the middle of the block and run behind that car in front of the express car. He said that the boy ran perhaps two or three feet behind the passenger car, across the track; that "he got kind of excited, and I saw him at the same time he run right under the car himself; he could not miss the car, and in less than a second that happened;" that the boy ran perhaps two or three feet in front of the express car. When asked as to how the boy fell, he said: "I don't know myself; when he was going towards the car, I mean the express car, I saw him just so, when he had gone so far I got kind of excited, he was so scared because he could not go back, he was too close to the express car." This witness said that he did not hear any bell or gong, but could not say that one was not sounded "for he paid no attention to that"; that the express car was "going pretty fast." On cross-examination, the witness stated that when he first saw the boy he became excited, thinking that the boy would be killed, and that at that instant his telephone rang, and he says, "I run to the 'phone but I could not answer the 'phone, I come right away back and I see that car was stopped and he was under the car. He could not escape, he was too close to the car." And in response to a question as to how far the express car was away when he started to answer the telephone, he said: "It was right on him, but I never knew myself whether what to do, where to go first, there or to the telephone \* \* \* when he started to run (it) was two or three feet, I don't know because I never was measuring that, but that was about the distance."

Of the demurrer to the evidence:

I. The defendant offered a peremptory instruction in the nature of a demurrer to the evidence, at the close of plaintiffs' case, which the court refused, and in like manner interposed a demurrer to the evidence at the close of all the evidence in the case, which was also overruled.

[1] Respondents now say that since appellant failed to stand upon its demurrer offered at the close of the plaintiffs' case, and proceeded to put in its own evidence, it thereby waived the demurrer to plaintiffs' evidence, and that all of the evidence must now be considered, in reviewing the action of the trial court in permitting the case to go to the jury. This is quite true. That is to say, appellant, in introducing evidence after the overruling of its demurrer at the close of plaintiffs' case, took the chance of curing any defect or supplying any omission in the case as made by plaintiffs. It did not, however, waive its right to have the court's ruling reviewed, but, touching that question, the whole evidence is now to be looked to, no matter by whom offered. See *Klockenbrink v. Railway Co.*, 172 Mo. 678, 72 S. W. 900; *Graefe v. Transit Co.*, 224 Mo. 232, 123 S. W. 835; *Weber v. Strobel*, 236 Mo. 649, 139 S.

W. 188; *Milem v. Freeman*, 136 Mo. App. 106, 117 S. W. 644; *Bailey v. Dry Goods Co.*, 149 Mo. App. 656, 129 S. W. 739; *Hitt v. Hitt*, 150 Mo. App. 631, 131 S. W. 369.

II. Respecting the rate of speed at which the car was being propelled at the time that it struck plaintiffs' son, the evidence, as we have seen above, was conflicting. However, the evidence adduced by plaintiffs tended to show that the car was being operated at a rate of speed in excess of that permitted by the ordinance, and at a speed which the triers of fact would perhaps have been justified in finding to be negligent, in view of the circumstances, regardless of the ordinance. Had the evidence properly connected the striking and killing of plaintiffs' son with this alleged negligence on the part of defendant, the issue would undoubtedly have been one for the jury, on this phase of the case.

[2] But it is axiomatic in the law of negligence that a causal connection must be established between the injury or loss suffered and the negligence charged. In other words, a recovery cannot be had unless it appear that the injury sustained resulted proximately from the negligence complained of, and which is the basis of plaintiffs' action. See *Kelley v. Railroad Co.*, 75 Mo. 138; *Warner v. Railroad*, 178 Mo. 125, 77 S. W. 87; *King v. Railroad*, 211 Mo. 1, 109 S. W. 871; *McGee v. Railroad*, 214 Mo. loc. cit. 544, 114 S. W. 33; *Schmidt v. Transit Co.*, 140 Mo. App. 182, 120 S. W. 96. And this is true even though the negligence charged is the violation of a municipal speed ordinance. *King v. Railroad Co.*; *Schmidt v. Transit Co.*, supra.

[3] For the fact that a car is run at a rate of speed prohibited by an ordinance, at the time one is injured by it, raises no presumption that the injury was caused by such excessive speed. *Schmidt v. Transit Co.*, supra; *Bluedorn v. Railroad Co.*, 121 Mo. 258, 25 S. W. 943; *Kelley v. Railroad Co.*, supra. For, as is said in *Schmidt v. Transit Co.*, supra, 140 Mo. App. loc. cit. 187, 120 S. W. 97, "in order to support the action, it should appear that the injury would not have occurred if the car were running at a speed within the ordinance limit."

[4] However, it is not necessary that such causal connection be shown by direct and positive testimony; it is sufficient if it be made to appear by reasonable and fair inference from facts and circumstances established in evidence. See *Schmidt v. Transit Co.*, supra, 140 Mo. App. loc. cit. 187, 120 S. W. 96; *Stotler v. Railroad Co.*, 200 Mo. loc. cit. 135, 136, 98 S. W. 509, and cases cited.

[5] In the case before us, it is quite clear that the evidence adduced on behalf of plaintiffs wholly failed to establish any causal connection between the alleged excessive speed of the car and the killing of plaintiffs' son. Not only was there no direct and positive testimony tending to show that the in-

jury would not have occurred had the car been running at a rate of speed within the ordinance limit, or at a rate which could not be found to be negligent at common law, but there were no facts or circumstances in evidence from which this could be fairly and reasonably inferred. From plaintiffs' evidence, as detailed above, it will be readily seen that, so far as concerns this phase of the case, nothing was shown respecting the killing of plaintiffs' son, beyond the fact that he was struck and killed by the car, coupled with testimony tending to show that the car was being propelled at the time at an unlawful rate of speed. Manifestly this alone was insufficient to entitle plaintiffs to recover, for the vital link is missing, necessary to couple the injury with the negligence sought to be established, and to show that the latter was the proximate cause of such injury.

Learned counsel for respondents invoke the aid of friendly presumptions and inferences, which counsel say may be drawn from the facts and circumstances in evidence, in aid of plaintiffs' case. It is clear, however, that no presumption can be indulged to supply the causal connection between the injury and the negligence charged; for, indeed, no such presumption obtains. *Schmidt v. Transit Co.*, supra.

[6] So far as concerns the inferences to be drawn from the facts developed by plaintiffs' evidence, it is elementary that, in considering the demurrer to the evidence, plaintiffs are to be accorded the benefit of every reasonable inference which may be fairly drawn in their favor from the facts in proof; and furthermore, that the evidence must be considered in the light most favorable to them. However, giving plaintiffs the benefit of every possible inference which could in any manner be said to be fairly deducible from the proof offered, and viewing their evidence in the light most favorable to them, it is impossible to gleam therefrom any proof of a causal connection between the accident and the alleged negligent speed of the car. On the contrary, so far as concerns plaintiffs' evidence, the record is barren of anything to supply that necessary link.

The contention is made, in effect, that such causal connection was established inferentially by the showing made by plaintiffs respecting the character of the neighborhood through which the car was being propelled at the time, and the testimony that many children lived thereabout and frequented the street. This is upon the theory that the motorman in charge of the car knew, or should have known, of the likelihood that children would be upon the street at that time, and that proof that the car was propelled at an excessive rate of speed through such a district raises an inference that the injury inflicted upon this child resulted proximately from such excessive and negligent speed. The difficulty with this, however,

aside from other considerations, is that the evidence, taken in its entirety, failed to show such condition with respect to the use of the street at this place, at least at the time in question, as would support plaintiffs' theory in this regard. In the first place, it is not contended that the street was a narrow and congested one, such as may be found in the heart of a more populous city. On the contrary, the evidence adduced tends to show that the street is one of considerable width; and it does not appear that there was any heavy or congested traffic thereupon by pedestrians. It is true that it was shown that quite a number of children lived in the neighborhood thereabout; that the Maplewood school was located some few blocks west; and that many children used this thoroughfare in passing to and from school. However, it was not shown that such school children were so passing at the time, and this doubtless for the reason that the accident occurred at about 11 o'clock on Monday, October 31, 1910, a time and hour of the day when school children are not likely to be passing to and from school. And it was not, in fact, shown that many children were upon the streets or even the sidewalks at that time. Indeed it cannot well be inferred from the evidence touching this question that there were any children actually out in the street itself near the scene of the accident, at the time when it occurred, except plaintiffs' son and two boys, who it seems were riding a bicycle, and certainly no other than plaintiffs' son shown to be near the car tracks; though there was testimony that a few others were on the sidewalks in the vicinity at that time. A condition was therefore not shown to exist such as would justify the inference that the motorman ran the car at an excessive rate of speed at a time and place when and where he knew, or should have known, that children were congregated or playing in the street and about the car tracks.

Turning to defendant's evidence respecting this phase of the case, it is quite clear that there was nothing adduced in its evidence which supplied the causal connection in question. Quite on the contrary, the defendant's evidence, which we have detailed above and which we need refer to but briefly here, went to show that the unfortunate child ran or dodged behind the moving east-bound car, which screened and hid him from the view of the motorman of the express car, immediately in front of the latter car, and in such close proximity thereto that it was impossible for the motorman thereof to avoid striking and injuring him; that in so running he merely reached a point about or near the south rail of the west-bound track, when he was immediately struck by or sank and went down under the south corner of the front portion of this car, and was thereby killed. From the testimony of defendant's witnesses, detailed

above, it is quite clear that what happened took place in a very brief interval of time—in the twinkling of an eye, as it were. Such is the sworn testimony of the disinterested eyewitnesses to the accident, very closely corroborating the testimony of the motorman in this regard. Manifestly this testimony of the only eyewitnesses produced to the accident lends no aid to plaintiffs' theory that the injury could have been averted had the car been proceeding at a lawful rate of speed. Granting that the car was proceeding at a rate of speed in excess of the ordinance, certainly defendant's testimony had no tendency whatever to show that the boy could have escaped injury and death had the car been running within the ordinance limit. In view of the testimony respecting the rapid movement of the child in running to the north across the track, it is only reasonable to suppose that the lapse of a further brief interval would merely have placed him directly in front of the central portion of the express car. In other words there is no reasonable inference that can be drawn that the car would not have struck and killed him, as it did, had it been running at a rate of speed less than 15 miles per hour, or even at a considerably slower rate of speed, and one which could in no way be held to be negligent.

It is urged that had the car been proceeding less rapidly, the little fellow might have dodged back and saved himself. And stress is laid upon the testimony of the deceased boy's playmate, who said that plaintiffs' son grabbed for the window in the front of the car; upon the theory that had the car been running at a lawful rate of speed, this last desperate effort of the little fellow, as related by this witness, might have been successful, and that this was a question for the consideration of the jury. We cannot accede to this, however, in view of all the evidence in the case.

[7] The most that we can say of it is that it rests upon conjecture and speculation, and, as said in *McGee v. Railroad*, supra, "to get to the jury plaintiffs must get their case out of the fog of conjecture and plant it on the basis of fact." See, also, *Giles v. Railway*, 169 Mo. App. 24, 154 S. W. loc. cit. 855.

[8] This burden was upon the plaintiffs in this case; and we would be highly remiss in the performance of our duty were we to permit a verdict to stand based simply upon conjecture as to what might possibly have happened. In fact, as we have said, the evidence respecting the movements of the boy tended only to show that in all probability he would have simply been cast more directly in the path of the oncoming car, had the latter been running at a somewhat slower rate of speed, and it would appear that he could not have escaped unless the car had been but very slightly in motion.

Some stress is also laid by learned counsel for respondents upon the testimony of two of



defendant's witnesses, from which it is sought to draw the inference that the motorman saw or could have seen the boy in time to avert the injury, and thus make this a question for the jury. This has reference, in part, to the testimony of the witness, Aubrey Koelling, to the effect that, after his attention was attracted by the ringing of the bell or gong of the west-bound car, as the latter was passing the east-bound car, he went from where he was first standing, in front of the tin shop, to the hallway just next to the Banner Lumber Company's building, from which position he saw the boy run in front of the car which killed him. It is argued that if the witness had time to do this, it was a question for the jury to say whether or not the boy would have had time to escape if the car had been running at a lawful rate of speed. The difficulty about this, however, is that, according to the witness' testimony, the ringing or clanging of the gong, which attracted his attention, occurred when the west-bound car began to pass the other car; and to this extent corroborates the testimony of the motorman that he did sound the gong at such time. It is true that the witness says that he stepped to the hallway in question because he heard the bell ringing rapidly, indicating, as he thought, that something was wrong. However, it was shown that the express car was equipped with a gong which made a louder noise or clang than that of the ordinary passenger car, and it could not be inferred, from the mere fact that the gong was sounded in quick succession in approaching and passing the east-bound car, that the motorman saw the boy at that time, or had any reason to suppose that he would run in front of his car. On the contrary, if the testimony of the several witnesses is to be believed, the boy was in such position that he was then completely hidden from the motorman's view by the east-bound car. And the physical facts lend no aid to the drawing of any such inference, in view of the fact that, though the little fellow evidently darted quickly to the north, he merely reached the nearer rail of the west-bound track. And in any view of this evidence, there was nothing to indicate that the car could have been stopped or the injury averted had it been proceeding at a slower rate of speed; leaving this question at best to the purest conjecture.

The other witnesses to whose testimony our attention is directed in this same regard was Frank Derkoviz, the barber, who testified that just as he saw the boy's danger his telephone rang, and he started to answer it; that he did not do so, but left the telephone to see what was happening to the boy. And it is urged that if this witness had time, after seeing the impending danger, to go to the telephone, it was a question for the jury to say whether or not the boy would have had time to get out of the way of the car had it been running at a lawful

rate of speed. This overlooks the fact, however, that the witness, after stating that he ran to the telephone, but did not answer it, said: "I come right away back and I see the car was stopped, and he was under the car." From this it is quite evident that when the witness returned from the telephone the whole thing was over, and the car had been brought to a stop some distance down the street. And hence the inference which is sought to be drawn from the testimony of this witness is by no means deducible therefrom.

A very careful and painstaking examination of the record has convinced us that there was nothing adduced to establish a causal connection between the killing of plaintiffs' son and the alleged negligent speed of the car; and that therefore, so far as concerns this charge of negligence, plaintiffs failed to make out a case entitling them to go to the jury.

III. We pass now to the consideration of the charge of negligence with respect to the alleged failure of the motorman in charge of the car which struck and killed plaintiffs' son to sound a gong or bell as the car approached and passed the passenger car proceeding in the opposite direction on the other track.

The point at which these two cars passed was in the block on Manchester avenue between the two cross streets above referred to. It was nearer Arthur avenue, the eastern-intersecting street, but still a considerable distance west of that crossing. At the time that the cars passed each other both were in motion, and, so far as the evidence discloses, there was nothing to give any warning to the motorman in charge of the west-bound car that any one was upon the street in the vicinity of either track, or of the probability that any one would leave the moving east-bound car and come upon the track in front of him. On the contrary it appears that the motorman had every reason to expect a clear track; and it was broad daylight, and his view down the track was unobstructed.

Respondents do not contend that there was any ordinance requiring a bell or gong to be sounded at this place, nor that any positive duty was cast upon the motorman to ring a bell or gong so that the violation thereof would be negligence per se; but they do contend that the circumstances and conditions here shown to exist were such as to make this a question for the jury. And in this connection, we are cited to the rulings in *Schmidt v. St. Louis R. R. Co.*, 163 Mo. 645, 63 S. W. 834; *Conrad v. Ry.*, 89 Mo. App. 391; *Noll v. Transit Co.*, 100 Mo. App. 367, 73 S. W. 907; *Baxter v. Transit Co.*, 103 Mo. App. 597, 78 S. W. 70; *Zander v. R. R.*, 206 Mo. 470, 103 S. W. 1006; *Koenig v. Union Depot Co.*, 173 Mo. 698, 73 S. W. 637; *Frank v. Transit Co.*, 99 Mo. App. 323, 73 S. W. 239. An examination of these

cases, however, will disclose that in each instance the facts and circumstances in evidence differ quite widely from those here appearing. From the evidence as we have stated it above, it will be seen that the only thing which could be said to cast any duty upon the motorman to give warning of the approach of his car was the bald, bare fact that it was approaching, and about to pass, a car in motion and going in the opposite direction. It is not a case where the motorman failed to give warning of the approach of his car at a crossing, nor where he was proceeding at a rapid rate of speed through darkness, or where his view was obstructed, and where he had reason to apprehend the presence of persons or vehicles on the track ahead of him, nor where he was passing a stationary car discharging or taking on passengers, and might anticipate that persons would come from behind such car in front of his own. No such situation, nor anything of like character, presents itself here. On the contrary, if we are to hold that the defendant could be convicted of negligence because of a failure to ring a bell or sound a gong, we must be prepared to plant such holding solely upon the ground that a duty was cast upon defendant to sound a gong as this car passed another moving car, the latter moving, as it appears, rapidly enough to raise no suspicion that a passenger would attempt to leave it and thus come upon the other track.

In *Theobald v. Transit Co.*, 191 Mo. loc. cit. 432, 90 S. W. 364, the court said: "The place of accident was 150 feet west of Union avenue, and there is nothing in the statement which tends to even cast a duty upon the defendant to sound a gong at the point, it not being an intersecting street and the presence of the wagon on the street not being known." See, also, *McGauley v. Transit Co.*, 179 Mo. loc. cit. 592, 79 S. W. 461.

[9] Had the car in question been approaching a crossing the matter would be altogether a different one, and under many circumstances, the failure to thus sound the warning of approach is negligence per se. *Koenig v. Union Depot Ry. Co.*, 173 Mo. 725, 73 S. W. 637. Undoubtedly under many other circumstances and conditions, the court should refer to the jury the question of whether or not a motorman is negligent in failing to thus give warning of the approach of his car; but the court should not submit this question as a predicate of liability, where neither the proof shows a positive duty to give such warning, nor that the motorman had any reason whatsoever to anticipate the need of giving warning to any one. Here, as we have said, so far as appearances went, the street was clear before him; and certainly the motorman had no reason to suspect that plaintiffs' son or any one else, under such circumstances, would suddenly dart from behind another moving car.

It must be borne in mind that we are deal-

ing alone with the duty which was owing to plaintiffs' son, under the circumstances of this particular case. That he was either upon the lower step of the east-bound car or running along near the same is undisputed. Nearly all of the eyewitnesses said that he was on the car step. At any rate it is quite clear that he could not then be seen by the motorman of the west-bound car, or his later sudden movements anticipated. If the motorman sounded his gong as he approached the other car, as he said he did, it does not appear that it was because of the presence of the boy on or near the rear step on the farther side of the east-bound car. There is no evidence that the boy's presence there was known to the motorman, but all of the evidence touching this question goes to show that the latter could not have discovered the boy's position in time to sound a warning. And when the little fellow darted in front of the oncoming car, obviously, neither gong nor emergency brake could have averted the disaster.

[10] And under such circumstances, manifestly the failure to sound a gong could not be the proximate cause of the injury, but the latter must be referred to the act of the unfortunate child in suddenly darting immediately in front of the moving car.

We are therefore of the opinion that the case could not go to the jury upon this assignment of negligence.

IV. The negligence charged and sought to be established with respect to the fender of the car proceeds upon two different and distinct theories. One of these relates to the failure of the fender to operate automatically, and thus prevent plaintiffs' son from going beneath the wheels of the car and being killed. Plaintiffs took out of the case the ordinance respecting the installation and operation of fenders. Plaintiffs' theory, however, is that, since defendant undertook to equip its car with an automatic device of this character, it became its duty to keep the same in good order and working condition; and it is contended that the failure of the fender to operate automatically, and the apron or wheel guard beneath the car to drop and catch and sustain plaintiffs' son, was evidence that the mechanism of the fender was broken, out of order or defective. Respondents proceed upon the theory that the doctrine of *res ipsa loquitur* here applies, and refers us to such cases as *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149; *Scheurer v. Banner Rubber Co.*, 227 Mo. 347, 126 S. W. 1037, 28 L. R. A. (N. S.) 1207, 21 Ann. Cas. 1110; *McCarty v. Railroad*, 105 Mo. App. 598, 80 S. W. 7; *Lee v. Railroad*, 112 Mo. App. 372, 87 S. W. 12. It is argued that the fact that the motorman testified that plaintiffs' deceased son "hit the fender," and the failure of the device to thereupon act in the manner in which it was designed to operate, showed *prima facie* that it was defective, broken, or out of order. And on this evidence, this

theory of negligence was presented to the jury by an instruction. There is not a scintilla of evidence otherwise to show that there was anything wrong with the fender. Without conceding respondents' theory to be tenable at all, in a case of this character, it is sufficient for the purpose of this case to say that the evidence did not even reveal that the boy struck the fender in a way which was designed to cause it to operate automatically. It is true that the motorman stated that the boy "hit the fender," but this was later explained, as we have shown above, when the motorman said that the boy's "little hand just hit the corner of the fender; and his other hand hit the bumping thing in front, it is below the outside of the fender." And this is fully corroborated by the witness, Aubrey Koelling, who stated that the boy "just laid his one hand on the fender and the other hand on an iron piece that comes around the fender, underneath the fender."

[11] This being the only evidence on that subject, there was clearly nothing to give rise to any inference that the fender was broken, defective, or out of order, merely because it failed to operate automatically. For it was not shown that there was such an impact of the boy's body against the front portion of the fender as would or should cause it to operate automatically, as it is claimed it was intended to do.

[12] V. The other theory of negligence respecting the fender is predicated upon the failure of the motorman to operate it by means of a lever at his command, when the boy ran in front of the car. Touching this question, we have detailed above, somewhat at length, the testimony of the motorman. And as to this assignment of negligence, it is sufficient to say that the motorman cannot be convicted of negligence in failing to lower the wheel guard, under the circumstances, when it is plain that he had but an instant in which to act, and that acting upon impulse he did that which his judgment told him to do. It appears that he immediately "reversed" the car; later applying the air brakes. He testified that he did not have time to both reverse the car and operate the lever to lower the fender; and, indeed, the evidence makes it appear that he had but the very briefest interval of time in which to do anything. And if he erred in judgment when so acting, under the stress of excitement and the impending danger, such error constitutes no proof of negligence. That he honestly attempted to prevent injury to the boy is quite evident, and he should not be condemned for failing to do more than he did. Many cases might be referred to in this connection, but the following will suffice: *Matthews v. Railway Co.*, 156 Mo. App. 715, 137 S. W. 1003; *White v. Railroad*, 159 Mo. App. 508, 141 S. W. 436.

It follows that it was error to submit the case to the jury upon this theory of negligence, as was done by the lower court. And

thus a consideration of the various assignments of negligence makes it quite clear, we think, that plaintiffs failed to make out a case entitling them to a judgment of a jury thereupon. The accident was a most distressing one, and plaintiffs' loss irreparable; but courts have stern duties to perform, and where, as here, no actionable negligence is shown, liability cannot be cast upon a defendant, no matter how serious may be the injury and loss to the plaintiff. Under the facts disclosed by this record, it is clear that the trial court should not have permitted the case to go to the jury; for it is evident that plaintiffs' minor son met his injury and death either through inevitable accident or his own negligence.

VI. In the view which we take of the case, as shown above, it is unnecessary for us to dwell at length upon the question of the child's own negligence. Respondents say that the deceased must be presumed to have been exercising ordinary care at the time, invoking the doctrine which has been applied in *Buesching v. Gas Light Co.*, 73 Mo. 219, 39 Am. Rep. 503, and other cases of that character.

[13] Of this it is sufficient for us to say that the presumption, which is often indulged, that a decedent was in the exercise of ordinary care at the time he met his death, does not here obtain; and a discussion of the many interesting cases that might be referred to in this connection would here serve no useful purpose. This is for the reason that presumptions of this character are presumptions of fact; and such a presumption takes flight and disappears from the case altogether upon the appearance of the facts themselves. The latter leave no room for the presumption. Had there been here no eyewitnesses to the injury and death of plaintiffs' son, such presumption could properly be invoked, and the plaintiffs could rely thereupon. However, as we have seen, there were a number of eyewitnesses to the accident, and they have revealed the facts and circumstances attending the same, thus putting the presumption out of the case. See *Mockowik v. Railroad*, 196 Mo. 550, 94 S. W. 256; *Higgins v. Railway Co.*, 197 Mo. loc. cit. 317, 95 S. W. 863; *Stotler v. Railroad*, 204 Mo. 619, 103 S. W. 1; *Rodan v. Transit Co.*, 207 Mo. 392, 105 S. W. 1061; *Tetwiler v. Railroad*, 242 Mo. loc. cit. 194, 145 S. W. 780.

It is also urged by respondents that whether or not this child used such care as would reasonably be expected of one of his years and capacity, under like circumstances, is a question for the jury; and in this regard respondents rely upon *Holmes v. Railroad*, 190 Mo. 98, 88 S. W. 623.

[14] But more recent cases are to the effect that a child, even though of quite tender years, may be held to understand and comprehend certain dangers, and may be held guilty of negligence as a matter of law. In the case before us, the evidence is quite meager touch-

ing the child's knowledge of the danger in question. Defendant offered to show that this boy had knowledge thereof, and that he had been warned concerning the same. This, however, the lower court excluded, upon objection thereto upon the ground that it had "no bearing on this case." But it does appear that he resided in that immediate neighborhood, and was evidently familiar with the operation of these very cars, and that he was in the full possession of all his faculties. Though he was but nine years of age, he must have known and been able to appreciate the danger of placing himself immediately in front of a moving car. The danger to be apprehended therefrom is within the easy comprehension of a child of his age familiar with the operation of such cars. To the extent that a child knows and understands a danger, or where the latter is of such a character that it must be perfectly obvious to one of his years, a legal duty rests upon him to avoid it; and failing to do so, he may be declared negligent as a matter of law. See *Herd v. Koenig*, 137 Mo. App. 589, 119 S. W. 56; *McNulty v. Railroad*, 166 Mo. App. 439, 148 S. W. 973; *Hight v. Bakery Co.*, 168 Mo. App. 431, 151 S. W. 776; *McGee v. Railroad*, supra.

[15] Each case must necessarily rest largely upon its own facts. Here, as we have said, the death of plaintiffs' son must be regarded as having been proximately caused either by inevitable accident or his own negligence. Under all the facts shown in evidence, we think that it is properly to be attributed to the latter. It is unnecessary to notice other assignments of error.

The judgment must be reversed, without remanding the cause. It is so ordered.

REYNOLDS, P. J., and NORTONI, J., concur.

# CENTURY REALTY CO. v. FRANKFORT MARINE ACCIDENT & PLATE GLASS INS. CO. et al.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

## 1. INSURANCE (§ 666\*)—LIABILITY INSURANCE—CONTRACT—INTEREST.

A policy insuring the owner of a building from liability for damages on account of the bodily injury or death of any person from accident in or about the premises of the assured limited the liability of the insurer as to any one person to \$5,000. Subsequent clauses of the policy provided that, in case legal proceedings were taken on a claim against the assured, the insurer should at its own cost defend, and should have entire control of the defense, but if it should offer to pay the assured the full amount for which it is liable it should not be bound to defend, nor be liable for any costs or expenses which the assured might incur in defending, and that the insured should not, except at his own cost, settle any claim nor incur any expenses without the consent of the insurer. *Held* that, a judgment against the owner having been affirmed on appeal, the insurer,

which conducted the defense and prosecuted the appeal, was liable, not only for the amount of the judgment, which was \$5,000, but for the costs and the interest which, pending the appeal, accrued thereon, in accordance with Rev. St. 1909, § 7181, for interest is the compensation which is paid by a debtor for the detention of the debt, and, the insurer having delayed the payment, the interest must be considered as part of the costs and expenses; its liability not depending upon judgment first being rendered against the insured and payment made.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1791; Dec. Dig. § 666.\*]

## 2. INSURANCE (§ 146\*)—CONTRACTS—CONSTRUCTION.

In case of ambiguity, a contract of insurance should be construed most strongly against the insurer.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

Appeal from St. Louis Circuit Court; Eugene McQuillan, Judge.

Action by the Century Realty Company against the Frankfort Marine Accident & Plate Glass Insurance Company, of Frankfort-on-the-Main, Germany, and the Travelers' Insurance Company, of Hartford, Conn. From a judgment against the first-named defendant, it appeals. Affirmed.

On April 29, 1903, one May Travis Cooper sustained injuries from an accident in a passenger elevator located in the Century Building in the city of St. Louis, the elevator owned and operated by the Century Realty Company. She instituted action against that company to recover her damages, placing the amount at \$25,000. The cause came on for trial and, on January 12, 1906, resulted in a verdict for her in the sum of \$5,000, judgment following on that day for that amount and costs, the judgment to bear interest at the rate of 6 per cent per annum from that date. On motion for a new trial, filed by the Century Realty Company, defendant in that case, respondent here, the circuit court set aside the verdict and judgment and ordered a new trial. From this May Travis Cooper appealed to the Supreme Court. That court, on December 23, 1909, set aside the order of the circuit court granting a new trial and reversed the judgment with directions to the circuit court to reinstate the judgment as of date January 12, 1906, the judgment to bear interest from that date. See *Cooper v. Century Realty Co.*, 224 Mo. 709, 123 S. W. 848. The mandate of the Supreme Court was thereafter filed in the circuit court, and on January 5, 1910, that court entered up judgment in favor of May Travis Cooper and against the Century Realty Company for \$5,000, as of date January 12, 1906, that amount to bear interest at 6 per cent from that date, and also for costs and charges therein expended. Execution issued on this judgment under which, property of the Century Realty Company having been levied upon and advertised for sale, the Century Realty Company, on June 25, 1910, paid in satisfaction of the judgment the sum of \$6,753.40,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that amount made up of the \$5,000 damages, \$1,337.50 interest accruing from January 12, 1906, and \$415.90 for court costs.

At the time the accident above referred to happened, the Century Realty Company held policies in two companies, both policies having first been issued in the name of the Century Building Company and others named, payable to them, "as their interests might appear," but afterwards, and before the happening of the accident, the Century Realty Company was substituted as the assured in place of the Century Building Company. Each of these policies covered the freight and passenger elevators situated in the building then owned by the Century Building Company, later by the Century Realty Company. For convenience and brevity, in speaking of the insured, we will designate it either as the Century Company, or as the Realty Company, although in the policies the former name, Century Building Company, is in fact used. It is conceded that the accident happened to May Travis Cooper while a passenger in one of the passenger elevators operated by that company in its building.

The policy issued by the Frankfort Marine Accident & Plate Glass Insurance Company, of Frankfort-on-the-Main, Germany, hereinafter called the Frankfort Company, being the appellant herein, is designated "General Liability Policy." By it that company, in consideration of a premium stated, agreed to indemnify the Century Company "against loss arising from legal liability for damages on account of bodily injury or death suffered by any person or persons whomsoever resulting from any and every accident of whatsoever nature or cause happening in, upon, or about the premises of the assured, or happening in, upon or about any of the seven passenger elevators and freight elevators, \* \* \* or the machinery and appliances connected therewith and together comprising the elevator service, \* \* \* but the liability of the company in respect to any one person suffering injury or death shall in no case exceed the sum of \$5,000, nor shall the total liability of the company in respect to any one accident resulting in injury to or the death of several persons in any event exceed the sum of \$10,000." It is expressly warranted and agreed: (1) \* \* \* (2) That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall give immediate notice in writing of the accident to the company and shall likewise give immediate notice of any legal proceedings instituted to enforce such claim.

"(3) That if any legal proceedings are taken to enforce a claim against the assured, covered by this policy, the company shall, *at its own cost*, undertake the defense of such legal proceedings in the name and on behalf of the assured and shall have the entire control of such defense. But if the company shall offer to pay to the assured the full amount for which the company is liable in

respect to the claim sought to be enforced, it shall not be bound to defend any legal proceedings *nor be liable for any costs or expenses which the assured may incur in defending the same*. The assured at all times shall under the direction of the company, render all reasonable and necessary assistance to enable the company to effect settlements or to properly conduct a defense or to prosecute an appeal.

"(4) That the company may undertake *at its own cost* the settlement of any claim, duly reported to it as before provided, and the assured shall not, except at *his (etc) own cost*, settle any claim nor incur *any expense* without the consent of the company thereto previously given in writing; provided however that such immediate medical and surgical relief to the injured may be furnished as may be imperative at the time of the accident and reasonable expenses thus incurred shall be deemed a part of the liability of the company." (Italics ours.)

The policy of the Frankfort Company was dated June 7, 1902, was for a term of one year but was extended June 18, 1902, for a term of twelve months, the accident occurring within this second period.

The policy issued by the Travelers' Insurance Company, of Hartford, Conn., hereinafter referred to as the Travelers, or Travelers' Insurance Company, in consideration of premiums stated, agreed to indemnify the Century Company for a period of three years, beginning on the 11th of June, 1902, "against loss from common law or statute liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy, by any person or persons, while in the car of the elevator mentioned in said application, or in the elevator well or hoistway of same, or while entering upon or alighting from the car," and it is set out in the policy that, "in consideration of the rate of premium at which this policy is issued, it is hereby understood and agreed that other like and prior insurance shall be maintained by the assured in some other company, with like limits of liability, under said prior insurance, of \$5,000 in respect to any one person and \$10,000 in respect to any one accident causing injury to more than one person; and that this company shall only be held liable under this policy (subject to the limits of insurance therein made) for any loss sustained by the assured in excess of the amount covered by said prior insurance."

Among the conditions written in the policy and here involved, are, first, "the company's liability for an accident resulting to, or in the death of, one person is limited to \$5,000."

(14) "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of

*a judgment after trial of the issue.* No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiration of such period, there is such an action pending against assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above," etc. (*Italics ours.*)

Holding these two policies when the accident happened, the Century Company forthwith notified the two companies of it and likewise at once notified them of the bringing of the action against it by May Travis Cooper. Thereupon the Frankfort Company took charge of the action through its own attorneys and followed it through the circuit court and the Supreme Court and again in the circuit court to its termination, as hereinbefore noted. The Travelers took no active hand whatever in the management of the case, although its local attorneys kept watch of it in its progress through the courts, but in no manner whatever interfering or controlling its management. The Frankfort, it was admitted, had paid all attorney's fees, printing of briefs, travelling and all other expenses incident to the defense in the circuit and Supreme Courts, barring interest, if we are to class that as an "expense."

After the reversal of the judgment in the Cooper Case by the Supreme Court and the payment of that judgment in the amount before stated, the Century Realty Company demanded payment of the amount which it had paid by way of debt, interests and costs from the two companies. The Frankfort Company, on August 6, 1910, in and through a written notice, offered and tendered to the Century Realty Company \$5,035.08, as in full settlement and satisfaction of any and all claims of whatsoever nature, which the Century Realty Company had or might thereafter have against it under the policy referred to, that is, \$5,000 on the debt and \$35.08 interest on that sum, at the rate of 6 per cent from June 25, 1910, the date the judgment was finally entered, to August 16, 1910, the date of the tender. The Realty Company refused to receive this in full settlement. The Travelers, denying any liability whatever, made no tender.

Thereupon the Century Realty Company instituted separate actions against each of the companies. On motion and by agreement of parties the two actions were consolidated by the circuit court and heard as one action before the court and a jury. At the trial the facts were practically undisputed and were developed as we have set them out. The Frankfort Company introduced no evidence, its counsel stating he was satisfied to rest upon the evidence which had been introduced by the plaintiff. The Travelers introduced evidence tending to show that it had taken no active part whatever in the

management of the case of May Travis Cooper v. The Century Realty Company, but had been satisfied to leave the defense of that case in the hands of the attorneys for the Frankfort Company; had paid no part of the expense connected with the litigation, none of which had ever been demanded of it; that its local counsel "in a way" watched the case, not as of counsel in the case, but simply watched the attorneys for the Frankfort Company try the case, watching what was going on, and reporting to their client what had happened, but they took no part in the trial, filed no pleadings nor did anything else in connection with the case, apparently satisfied, as counsel for the Frankfort modestly suggested, that the conduct of the defense was in able hands.

At the close of the testimony in the case at bar, the Frankfort Company, among other requests, asked the court to instruct the jury that under the law and the evidence in this case, the plaintiff "cannot, under any circumstances, recover against the Frankfort Marine Accident & Plate Glass Insurance Company for an amount in excess of \$5,035.08." This was refused. Of its own motion the court instructed the jury, that under the pleadings and evidence it would find and return a verdict in favor of defendant Travelers' Insurance Company, and would find and return a verdict in favor of plaintiff and against defendant Frankfort Marine Accident & Plate Glass Insurance Company, in the sum of \$6,753.40, with interest thereon from June 25, 1910, at the rate of 6 per cent per annum. Verdict accordingly, judgment following. Saving exception to the refusal of the instruction it had asked and to the giving of the one above set out, the Frankfort Insurance Company filed its motion for a new trial. Plaintiff also filed its motion for a new trial as to Travelers' Insurance Company, treating it as filed both in the original case of the company and in the consolidated case. These motions were overruled, exceptions saved by the several parties and the causes appealed to this court.

Seddon & Holland, of St. Louis, for appellant. Dawson & Garvin, of St. Louis, for respondent.

REYNOLDS, P. J. (after stating the facts as above). While all three of the cases were briefed and argued together before us, the case now to be considered is on the appeal of the Frankfort Marine Accident & Plate Glass Insurance Company, but in the consideration of that we are compelled, in a measure, to consider the position of the Travelers' Insurance Company also, more incidentally, however, than directly.

Taking up this Frankfort Case, counsel for that company, the appellant here, make two assignments of error: First, that the court erred in giving the peremptory instruction for a verdict in favor of plaintiff and against

defendant Frankfort Insurance Company, in the sum of \$6,753.40, with interest from January 25, 1910; second, that the court erred in refusing to give the instruction asked by the Frankfort Company at the close of all the evidence.

[1, 2] These two assignments of error present two theories in antithesis; if the one is right, the other is wrong. The consideration of the action of the court in refusing one instruction necessarily involves that of its action in giving the other.

In support of their assignments, learned counsel for appellant, in brief, contend that the court erred in giving the instruction directing a verdict for the respondent against the Frankfort Insurance Company, because the policy of that company, it is claimed, was "a contract of indemnity against loss," and it was not liable to the Realty Company in any amount until the Realty Company sustained a loss; that when that loss was sustained the limit of the liability of the Frankfort Company was \$5,000, the amount specifically mentioned as the limit in the policy. As necessarily following from this, it is argued, that the special agreement under which the Frankfort Company agreed to defend suits at its own cost, did not impose any liability on that company to pay interest on the judgment in excess of the limit of the policy, and that the special agreement under which the Frankfort Company agreed to defend suits at its own cost, did not impose upon that company any obligation to pay court costs incurred in any proceeding of an injured party against the Realty Company.

Counsel for appellant cite *Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co.*, 152 Mo. App. 332, 133 S. W. 156, in support of their contention. The decision in that case is against counsel in so far as concerns the matter of court costs, for there it is distinctly held that the insurer is responsible to the assured, in addition to the maximum amount of indemnity provided for in the policy, for the court costs incurred and paid. It is true that it is further there held that the insurer was not liable for interest that had accrued on the judgment. That part of this decision is not determinative here. The policy involved in the *Conqueror Zinc & Lead Company Case* is identical in its provisions, so far as this point is concerned, with that issued by the *Travelers' Insurance Company*, but it differs in its language from that of the *Frankfort*, and the conclusion that the *Aetna Life Insurance Company* was not liable for more than the assured had in fact paid only up to \$5,000, is reached on the ground that its policy distinctly provided: "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after trial of the issue." On this provi-

sion it was held the *Aetna Company* was not liable for interest, and that plaintiff there could only recover what it had paid out up to \$5,000. Hence the *Conqueror Zinc & Lead Company Case* lends no aid to the contention of the appellant here, unless we are to hold that the *Frankfort policy*, under its wording, is susceptible of the same interpretation. That is a question which we will consider hereafter.

Counsel for the *Frankfort* also rely upon *Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 157 Fed. 514, 85 C. C. A. 106; *Finley v. United States Casualty Co.*, 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; *Davison v. Maryland Casualty Co.*, 197 Mass. 187, 83 N. E. 407; *Puget Sound Improvement Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 52 Wash. 124, 100 Pac. 190; *Frye v. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; and *Henderson v. Maryland Casualty Co.*, 29 Pa. Super. Ct. 398, in support of the proposition that the *Frankfort* was liable only for the amount paid, after payment by the assured. The policies in each of these cases expressly provided, as did that in the *Conqueror Zinc Company Case*, and as does that of the *Travelers' Insurance Company*, that no action should lie against the company except to reimburse the assured "for loss actually sustained and paid by him in satisfaction of a judgment, after trial of the issue;" if not in these words, in words of like tenor. These are all the cases cited by counsel for the *Frankfort* in support of their first proposition.

In support of their proposition that "court costs" are not to be included when they exceed the \$5,000 maximum, counsel for the *Frankfort* cite *Munro v. Maryland Casualty Co.*, 48 Misc. Rep. 183, 96 N. Y. Supp. 705, and *National & Providence Worsted Mills v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 28 R. I. 126, 66 Atl. 58. The learned judge in the *Munro Case*, supra, reaches his conclusion mainly on the authority of *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981. But that case was on a policy similar in respect to those in the cases above cited and is not in point here. Moreover, so far as he holds the insurer not liable for costs, his decision runs counter to the majority of the above cases cited by counsel themselves on the first proposition, and as to non-liability for costs, is disaffirmed by the Supreme Court of New York, Appellate Division, in *Brewster v. Empire State Surety Co.*, 145 App. Div. 678, 130 N. Y. Supp. 439. The *Munro* decision was by the Supreme Court at nisi prius, not in an appellate division. The *Rhode Island* decision confessedly rests on the *Munro* decision, supra, inadvertently treating it as a decision in the Appellate Division of the New York Supreme Court. The *Rhode Island* court, while following the *Munro* decision, says, as is also said in the *Munro Case*, that the cases are conflicting and the *Rhode*

Island court concludes to follow the Munro Case.

Counsel for the Frankfort Company cite *Finley v. Casualty Co.*, supra. That case as well as *Frye v. Bath Gas & Electric Co.*, supra, was one in which the party injured attempted, by suit in equity, to hold the insurer liable for injuries sustained, on the ground either that the assured was bankrupt or had made a fraudulent settlement, so that plaintiffs, as employees covered by the policies, claimed a right, in equity, to subrogation to the rights of the assured, and sought to hold the insurer. The claim was denied. The policy was on like conditions as those of the Travelers in the case before us, requiring, as a prerequisite to a right of recovery, payment by the assured. After pointing out the difference between the effect of a policy which insures directly against liability and one that insures against loss or damage by reason of liability, it is said in the *Finley* Case, 113 Tenn. loc. cit. 598, 83 S. W. 3, 3 Ann. Cas. 962: "Under the policies of the second kind, to which the one before us belongs, the amount of the insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy."

We do not think that these cases, and they are the only cases cited by learned counsel for the Frankfort Company, meet or cover the conditions of the policy of that company which is before us. The first and principal contracting clause is, that the Frankfort Company "does hereby agree to indemnify \* \* \* the assured \* \* \* against loss arising from any legal liability for damages on account of bodily injury or death \* \* \* suffered by any person \* \* \* resulting from any and every accident \* \* \* happening in, or about the premises of the assured \* \* \* but the liability of the company in respect to any one person suffering injury or death shall in no case exceed the sum of \$5,000," etc. This is all there is to it. Not a suggestion can be drawn from any of this language that the payment is only to be made by the insurer in reimbursement of what the assured shall or may have paid. On the contrary, as we understand it, it is more in the nature of "a policy which insures directly against liability (than) one that insures against loss or damage by reason of liability." *Finley v. Casualty Co.*, supra. See also *Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504. If it was the intention to pay only when and to the amount the assured had paid, a reference to clause 14 of the Travelers policy shows how easily that intention could have been expressed. The most that can be said for the Frankfort Company is that, failing to so write its policy, it has given one which is ambiguous and any ambiguity must be resolved against it. We conclude on this point then, that it was not within the expressed intention of this policy issued by the

Frankfort, that liability to make payment to the assured should fall in only after the assured had paid whatever damage may have been awarded to the injured party.

It would seem on careful reading of the third and fourth warranty clauses, that the words "cost" and "costs" are used in a different sense in those clauses and that payment is not confined to mere taxable court costs, as that term is technically used. Thus in the third clause it is provided that, "if the company shall offer to pay to the assured the full amount for which the company is liable in respect to the claim sought to be enforced, it shall not be bound to defend any legal proceedings nor be liable for any costs or expenses which the assured may incur in defending the same." Surely this means that if the claim is put in suit, and the company defends, the company will then be liable for the costs and expenses of the action. That is a reasonable construction, at least.

In the fourth clause it is provided that the company may undertake "at its own cost" the settlement of any claim, and the assured shall not "except at its own cost settle any claim nor incur any expense without the consent of the company." Here again the terms "cost" and "expense" are used as inclusive. But grant that the meaning of the words "cost" and "costs" is ambiguous, as used, then, as before remarked, we are to apply the well settled rule that the terms and conditions employed in a policy of insurance are to be construed, if ambiguous or of doubtful meaning, most strongly against the insurer. *Grocery Co. v. Fidelity & Guaranty Co.*, 130 Mo. App. 421, 110 S. W. 29; *Rochester Mining Co. v. Maryland Casualty Co.*, 143 Mo. App. 555, 128 S. W. 204; *Belle v. Travelers' Protective Ass'n*, 155 Mo. App. 629, 135 S. W. 497. Construing the words "cost" and "costs," in the connection used, they have a much broader meaning than mere taxable court costs.

Construing this contract in its most favorable light for the assured, and having in mind the dual meaning of the word costs, and mindful of the use of the word "expenses" and the contracts as to their payment, we come to a consideration of the question as to the liability of the Frankfort Company for payment, not only of the court costs but of interest accruing between the date of the judgment, as originally entered and the payment thereof, payment having been suspended pending the determination of the case by the Supreme Court.

It is provided by section 7181, Revised Statutes 1909, that interest shall be allowed on all moneys due upon any judgment from the day of rendering the same until satisfaction be made by payment, at the rate of 6 per cent per annum, unless a higher rate is fixed by the contract, in which case interest shall be at the contract rate. "It is a general rule, that an action cannot be sustained for the interest of a demand after the princi-



pal has been paid; but this rule is only applicable where there had been no contract for the payment of interest. In such cases, interest could only be recovered as damages for the non-payment of the principal debt, and therefore, where the debtor (creditor?) accept the full amount agreed to be paid, without saying anything about interest, such payment is presumed to be in full satisfaction of the demand." *Stone v. Bennett*, 8 Mo. 41, loc. cit. 43. "Interest is a compensation for the use of money, for its detention." *Borders v. Barber*, 81 Mo. 636, loc. cit. 646; *McDonald v. Loewen*, 145 Mo. App. 49, loc. cit. 59, 130 S. W. 52. "Interest (on money) is the compensation which is paid by the borrower of money to the lender for its use, and generally by a debtor to his creditor in recompense for his detention of the debt." 4 *Words & Phrases*, 3706. "Interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." *Black's Law Dict.* (2d Ed.) 647. At common law, "interest is the legal damages or penalty for the unjust detention of money." *Madison County v. Bartlett*, 2 Ill. (1 Scam.) 67. "Interest is in the nature of damages for improperly withholding a debt, beyond the time when it ought to be paid." *Farmers' Bank v. Reynolds*, 4 Rand. (Va.) 186. Interest, therefore, when not awarded as a matter of contract, is given by law outside of the contract, when the contract has been breached. One promises to pay a fixed sum, at a definite time, on the happening of a named event. He does not promise to pay any larger sum; does not promise to pay interest. But if he fails to perform his contract, and is sued, he must pay, not only the fixed sum but interest on it, not by his contract, but by force of law by way of penalty for non-payment in the amount and at the time when he should have paid it. If the debtor contests the claim, puts it in litigation, he has incurred, added, an obligation to pay interest as part of the price—part of the cost—of the litigation. So it is here. The Frankfort Company undertook at its own cost and expense, unwilling to pay for any injury to one who fell within the protection of the contract, to litigate the cause, conduct the defense, and pay the costs of the litigation. That means the expenses. That more than mere court costs is meant, is clear by the construction put upon it by the insurer itself, for as we have seen, it paid attorney's fees, printing, travelling and all other expenses connected with the defense of the case both in the circuit court and before the Supreme Court.

As we have before noted, it is said in *Munro v. Maryland Casualty Co.*, 48 Misc. Rep. 183, loc. cit. 706, that the authorities are conflicting as to the liability for interest when the interest added to the principal exceeds the maximum sum tendered, and that the divergent views are well stated in two cases, namely, *Sanders v. Frankfort Marine Acci-*

*dent & Plate Glass Ins. Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, and *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981, and that in each case the policy involved was similar to that under consideration in the *Munro Case*. As we have also noted, the policy in the latter corresponded to the policy in *Travelers Case* and contained the provision that no action should lie for any loss under the policy unless brought by the insured to reimburse him for loss actually sustained and paid by him in satisfaction of the judgment after trial of the issue, it being held that payment of the judgment was a condition precedent to liability on a policy, and the question of interest was not involved. The policy in *Sanders v. Frankfort, etc., Ins. Co.* was issued by the same company, appellant here, and is in the same form, with this very important difference: in the policy before the Supreme Court of New Hampshire, the condition in clause 8 of the policy before the court was, "no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

Curiously, also the seventh clause in this same Frankfort Company's policy which was before the Supreme Court of Washington, in *Puget Sound Improvement Co. v. Frankfort, etc., Ins. Co.*, supra, corresponds to this eighth clause in its policy which was involved in the *Sanders Case*. No like clause or provision is in the Frankfort policy now before us, or has been called to our attention and we find none in the abstract of the record, which purports to set out the policies in full. Even with this eighth clause in the policy, however, it is held by the Supreme Court of New Hampshire that the insurer, if he elects to defend an action brought against the assured, is bound to protect the insured against liability at all stages of the litigation to the extent of the agreed indemnity, and he is not absolved from this obligation by the fact that the insured has not paid the amount of the judgment against him or is unable to do so by reason of insolvency, and it construes this eighth clause as applying solely to cases where the insurer denies liability for injuries which were made the subject of suit and refuses to defend.

In *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Me. 574, 43 Atl. 503, the policy was limited to the payment of \$1,500 for the death of any one person. There it is held that the plaintiff, the assured, was entitled to recover in an action against the insurer the amount of the insurance specified in the policy, that is \$1,500, with interest thereon from the time when the verdict was rendered in the former action and the costs recovered in that action with interest thereon from the time when they were paid.

In *Anoka Lumber Co. v. Fidelity & Casual-*

ty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689, it is held that an employé having been injured while in the service of the assured and having recovered judgment thereon against the assured, the insurance company was liable upon an action against it, without the employer having first paid the judgment.

Possibly the most recent and certainly one of the most carefully considered opinions is that of *Ætna Life Ins. Co. v. Bowling Green Gas Light Co.*, 150 Ky. 732, 150 S. W. 994, 43 L. R. A. (N. S.) 1128. In that case it was held by the Court of Appeals of Kentucky, that where the contract of insurance stipulated that the insurer would pay a fixed sum of \$5,000 as indemnity to the assured, and in addition thereto would pay "the expense of litigation," if litigation was engaged in by its direction, the words "expense of litigation," include the costs of the suit incurred by the assured, the damages awarded the claimant on an appeal by the assured, and the interest that accrued on the judgment against the assured, the argument of the court being that as the insurance company has the right to compel the assured, against his will, to engage in litigation or else forfeit the right to any part of the indemnity he had contracted for, when it elects to burden the assured for the cost and expense of an action, the provisions of the policy should be liberally construed for his benefit.

In *Saratoga Trap Rock Co. v. Standard Accident Insurance Co.*, 143 App. Div. 852, loc. cit. 855, 128 N. Y. Supp. 822, loc. cit. 825, discussing the contract of insurance involved, it is said: "The contract embraced in the policy which the defendant issued to the plaintiff is one of indemnity merely. It is not an agreement to save harmless or to pay when liability shall be established. If the first part of the agreement was not qualified by a subsequent clause, and if the only provision contained in the policy was that the insuring company would indemnify the assured against loss by reason of liability because of an accident happening to its servant, obligation to pay would arise when judgment determining liability was entered against the insured (*Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 97 N. W. 686 [3 Ann. Cas. 478]), and whatever interest accrued in an ineffectual effort to get rid of the judgment the insuring company would be bound to pay. But this broad part of the agreement is qualified by a subsequent provision of the policy that no action shall lie against the company to recover for any loss under the policy, unless it shall be brought by the assured for 'loss actually sustained and paid in money after actual trial of the issue.' This clause is a substantive part of the policy, and has the effect of changing the policy from one of indemnity when liability shall be established to one for indemnity for money paid out on the occurrence of a particular event, to-wit,

payment of the judgment obtained because of such liability." That is a very clear illustration of the difference between the two policies before us. That of the Travelers does contain this limitation: that of the Frankfort which is before us, does not. It contains no clause providing for payment only in the amount and after the assured has paid.

In *Brewster v. Empire State Surety Co.*, supra, following *Saratoga Trap Rock Co. v. Standard Accident Ins. Co.*, supra, which latter rests mainly on *Creem v. Fidelity & Casualty Co.*, 141 App. Div. 493, 128 N. Y. Supp. 555, it is held that interest over the maximum amount cannot be recovered. But in all these cases, the insurer was only liable "for loss actually sustained and paid by him."

Our conclusion upon consideration of all the cases, is that the better authority leads to the result that under this form of policy issued by the Frankfort Company, the right of action of the assured did not depend upon judgment first being rendered against it and payment made by it thereof, but that its right to the indemnity accrued when the accident occurred for which it was liable; that the assured having turned over the defense of the action to the insurer and the insurer having taken up the defense of it, it is liable for all the costs and expenses incurred in that action from the date the judgment against the assured was ordered to stand until its final payment; and that the fact that interest had accrued on that in excess of the maximum \$5,000, did not exempt the insurer from the payment of that interest. It follows from this that the trial court committed no error in giving the instruction in favor of the Travelers and in refusing the instruction asked by the Frankfort Company, nor in giving that under which the jury returned a verdict against that Company and in favor of the plaintiff.

In so holding we are not to be understood as holding that if the Frankfort policy before us contained the provision contained in the Travelers policy, there would be no liability for interest on the amount of a judgment rendered, accruing after judgment and before payment, that interest bringing the amount to be paid above the maximum. That question is not here before us and is not decided.

The judgment of the circuit court in this case is affirmed.

NORTONI and ALLEN, JJ., concur.

**CENTURY REALTY CO. v. TRAVELERS' INS. CO.**

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

Appeal from St. Louis Circuit Court, Eugene McQuillin, Judge.

Action by the Century Realty Company

against the Travelers' Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Dawson & Garvin, of St. Louis, for appellant. Watts, Dines, Gentry & Lee, of St. Louis, for respondent.

REYNOLDS, P. J. The proposition involved in this case and its determination rests upon the same facts and principles as those involved in Century Realty Co. v. Frankfort, etc., Insurance Co., 161 S. W. 624. For the reasons stated in the opinion in that case, the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

**CENTURY REALTY CO. v. FRANKFORT MARINE ACCIDENT & PLATE GLASS INS. CO. et al.**

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913. Rehearing Denied Dec. 16, 1913.)

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by the Century Realty Company against the Frankfort Marine Accident & Plate Glass Insurance Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Dawson & Garvin, of St. Louis, for appellant. Watts, Dines, Gentry & Lee and Seddon & Holland, all of St. Louis, for respondents.

REYNOLDS, P. J. The proposition involved in this case and its determination rests upon the same facts and principles as those involved in Century Realty Co. v. Frankfort, etc., Insurance Co., 161 S. W. 624. For the reasons stated in that case, the judgment of the circuit court is affirmed.

NORTONI and ALLEN, JJ., concur.

**MARTIN v. BUTLER COUNTY R. CO.**

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

**1. JUSTICES OF THE PEACE (§ 100\*)—JURISDICTION—PLEADING AND PROOF.**

Where a suit for killing stock is brought against a railroad in a township other than that where the stock was killed, the fact that the townships adjoined is jurisdictional and must be averred and proved.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 336-341; Dec. Dig. § 100.\*]

**2. JUSTICES OF THE PEACE (§ 91\*)—PLEADINGS—SUFFICIENCY.**

A statement, in an action in justice's court against a railroad company for killing stock, which averred that plaintiff owned the animal killed, that the company owned and operated a railroad, that on a certain date the animal strayed on the track, that the company, by its agents and employes, negligently ran its train against the animal, killing it, and that the company, its agents and employes, by ordinary care could have avoided the killing, sufficiently stated a cause of action under the liberal rules for justice's courts.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-323; Dec. Dig. § 91.\*]

**3. RAILROADS (§ 419\*)—KILLING ANIMALS—LIABILITY.**

Where the engineer or fireman saw, or could with due care have seen, an animal on the track or coming onto it in time to have avoided killing the animal by either scaring it from the track by an alarm or by stopping the train, the railroad company was liable for the killing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1489-1500; Dec. Dig. § 419.\*]

**4. RAILROADS (§ 415\*)—KILLING STOCK—LIABILITY.**

Where an animal killed was at or on a public railroad crossing, the statutory duty to ring the bell was mandatory, regardless whether the trainmen saw or could have seen the animal, but, if the animal was not killed at a crossing, the liability rested on the common-law duty of the trainmen to avoid injury if it could reasonably be done by giving any available alarm after the peril was seen or reasonably could have been seen.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1476-1482; Dec. Dig. § 415.\*]

**5. RAILROADS (§ 447\*)—INSTRUCTIONS—SUFFICIENCY.**

An instruction, in an action against a railroad company for killing an animal, which submitted the question of the company's negligently running its engine against the animal but failed to point out what facts, if found, constituted negligence and to require the jury to find such facts under the pleadings and evidence to render a verdict for plaintiff, was defective.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1642-1650; Dec. Dig. § 447.\*]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by Lillie Martin against the Butler County Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Lew R. Thomason, of Poplar Bluff, for appellant.

STURGIS, J. [1] This case must be reversed for the reason that it originated before a justice of the peace in Poplar Bluff township in Butler county, Mo., and the allegation is that plaintiff's cow was killed by defendant in Ash Hill township in said county, and that these two townships adjoin each other; but there is no proof whatever of this latter fact. It has been ruled in this state time and time again that under our statute, where a suit for killing stock is brought against a railroad in a township other than the one in which the animal was killed, the fact that such townships adjoin is jurisdictional and must be both averred and proven. In this case such fact is averred but not proven. This is error. Mitchell v. Railroad, 82 Mo. 106, 110; Wiseman v. Railroad, 30 Mo. App. 516; Kinion v. Railroad, 30 Mo. App. 573; Ellis v. Railroad, 83 Mo. 372; Jones v. Railroad, 52 Mo. App. 384; Backenstoe v. Railroad, 86 Mo. 492; Palmer v. Railroad, 21 Mo. App. 437; Briggs v. Railroad, 111 Mo. 168, 20 S. W. 32; Shaw v. Railroad, 110 Mo. App. 561, 85 S. W. 611; Rosentingle v. Railroad, 122 Mo. App. 492,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

495, 99 S. W. 788. It may be that this fact was so well known to the parties trying the case that they overlooked proving it. If so, the proof can be made at another trial.

[2] The defendant's objections to the sufficiency of plaintiff's statement as not stating a cause of action are not well taken. The case originated in a justice court, and it is not necessary to decide whether the facts stated are sufficient to constitute a good pleading according to the rules applicable to cases originating in the circuit court. The cases cited by defendant relate to the latter class of cases. After stating that plaintiff owned the cow and defendant owned and operated a railroad through Ash Hill township in Butler county, it is alleged that on a certain named date the cow strayed on defendant's track, and that "defendant, by its agents, servants, and employes, carelessly and negligently run its engine and cars upon and against said cow, at said point in Ash Hill township, Butler county, Mo., on said 30th day of May, 1912, thereby killing said cow. That the defendant, its servants, agents, and employes, saw or by the exercise of ordinary care, diligence, and caution could have seen and avoided the killing of said cow." This, we think, is a sufficient statement under the liberal rules applicable to justice courts. *Windle v. Railroad*, 168 Mo. App. 596, 602, 153 S. W. 282, and cases cited.

[3] As we understand the case from the meager evidence: Defendant's engine had been standing still some time, perhaps over night. That the cow was lying down close to the track, about 30 or 40 feet from the engine. That, as soon as the engine first "commenced escaping steam, the cow got up and walked over on the track. She was then standing up. The engine at that time was about a rail's length south of her. There was no object at that time between the engine and the cow." That the engine started slowly and could be easily stopped, but was not, and ran against and killed the cow. No bell or other alarm was sounded to scare the cow from the track. The evidence is such that the jury might rightly find that the engineer or fireman either saw, or could with due care have seen, the animal on the track or coming on it in time to have avoided killing her by either scaring her from the track by some alarm, or by stopping the engine before the collision, or by both methods. If these trainmen did or with due care could have seen the cow lying close beside the track, they should have taken notice that she was likely to go on the track as the engine approached and governed themselves and the engine accordingly. *Young v. Railroad*, 79 Mo. 336, 340. The case is therefore one for the jury.

[4] What we have said also disposes of the alleged error in admitting evidence that no whistle was sounded or bell rung. The court ruled that plaintiff could not recover

on that ground but that it was a proper evidentiary fact as showing no attempt to scare the cow from the track. Defendant cites *Coffin v. Railroad*, 22 Mo. App. 601, as holding that a railroad is not required to sound the whistle within the limits of an incorporated town, but it is held in that case and in *Turner v. Railroad*, 134 Mo. App. 397, 402, 114 S. W. 1026, that if the engine was approaching a street or road crossing, and within 80 rods thereof in such town, the bell must be rung continuously. As said in the *Coffin Case*, *supra*, the sounding of the whistle might have served the same purpose as ringing the bell and thus rebutted the inference of the injury being the result of a failure to ring the bell. We cannot see how defendant was injured by proving that the whistle was not sounded, and it ought not to complain that plaintiff proved that it neither rang the bell nor did anything as a substitute therefor. These statutory signals, however, have little or nothing to do with the case, except that, if the cow was at or on a public crossing, the statutory duty to ring the bell was mandatory, regardless of whether the persons operating the engine did or could have seen the cow. If the animal was not injured at a public crossing, the case rests on the common-law duty of the persons operating an engine or any such machinery to avoid injury to persons or animals, if same can reasonably be done by giving any available alarm after the peril is seen or reasonably could have been seen. Whether the "could have been seen" doctrine applies to this case is noted later.

[5] Defendant's criticism of instruction numbered 1, given for plaintiff, is well taken. It submits to the jury the question of defendant's negligently running its engine upon and against the cow without in any manner instructing them as to what facts, if found, would constitute such negligence. The jury should not in a case like this be allowed to wander without chart or compass in search of a verdict and find negligence on any theory that might be suggested to or imagined by it but, on the contrary, should be limited and required to find those facts which under the law constitute negligence and which are within the pleadings and find support in the evidence. *Sommers v. Transit Co.*, 108 Mo. App. 319, 324, 83 S. W. 268; *Casey v. Bridge Co.*, 114 Mo. App. 47, 65, 89 S. W. 330; *Nagel v. Transit Co.*, 169 Mo. App. 284, 288, 152 S. W. 621; *Allen v. Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Duerst v. Stamping Co.*, 163 Mo. 607, 63 S. W. 827; *Miller v. United Railways*, 155 Mo. App. 528, 546, 134 S. W. 1045.

The record is too meager to determine accurately whether defendant's refused instruction numbered 2 should have been given or not under the rule laid down in *Hoffman v. Railroad*, 24 Mo. App. 546, and *Jewett v. Railroad*, 38 Mo. App. 48. If the

facts are that the animal came on the track at a public crossing or from an unfenced common near thereto frequented by cattle, then the defendant was obligated to anticipate cattle being dangerously near or on its track and to use ordinary care to discover them, as well as to avoid injuring them after being discovered. The third instruction refused was properly so refused, as there was no evidence of the engineer being "engaged giving his attention to his engine," or other duties as engineer, to such extent as to in any way excuse his failure to give a proper outlook for animals on the track, and such instruction is misleading.

The case is reversed and remanded.

ROBERTSON, P. J., and FARRINGTON, J., concurs.

### HODGES v. HILL.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

#### 1. NEGLIGENCE (§ 125\*)—ADMISSIBILITY OF EVIDENCE—SIMILAR OCCURRENCES.

In an action for damages for negligence, proof of specific acts similar to those on which the action is grounded, rather than a custom or habit to do such acts, is inadmissible.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 239-244; Dec. Dig. § 125.\*]

#### 2. NEGLIGENCE (§ 124\*)—ADMISSIBILITY OF EVIDENCE—REPUTATION FOR CARE OR NEGLIGENCE.

In an action for negligence, the general reputation of the party charged with the negligence in respect to his being careful or negligent is generally inadmissible.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 235-238; Dec. Dig. § 124.\*]

#### 3. HIGHWAYS (§ 184\*)—COLLISION—ADMISSIBILITY OF EVIDENCE—HABIT.

In an action for damages for the killing of plaintiff's mare by collision with defendant's horse and buggy on the highway, evidence that plaintiff's son, who rode the mare at the time of the accident, was in the habit of riding her along the highway at the place of the accident at a high speed, was admissible.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

#### 4. NEGLIGENCE (§ 125\*)—ADMISSIBILITY OF EVIDENCE—SPECIFIC ACTS OF CARELESSNESS.

In an action for negligence, evidence as to specific acts of carelessness or to general traits of negligence of the party charged therewith, without reference to the particular act in issue, is inadmissible.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 239-244; Dec. Dig. § 125.\*]

#### 5. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EXAMINATION OF WITNESS.

In an action for damages for the killing of plaintiff's mare by collision with defendant's buggy while traveling on a public highway, a cross-examination of plaintiff's son, who was riding the mare at the time of the accident, as to an incident where he nearly ran over a boy, explained by him in a way to show him entirely blameless, though erroneous, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

#### 6. EVIDENCE (§ 122\*)—RELEVANCY—RES GESTÆ.

In an action for the killing of a mare ridden by plaintiff's son by a collision with defendant's buggy, statements of the son, before starting on his ride, that he must get home in a hurry and that the mare could travel fast, were so intimately connected with his riding as to be admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 339-350; Dec. Dig. § 122.\*]

#### 7. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—EXAMINATION OF EVIDENCE.

In an action for the death of a mare ridden by plaintiff's son in a collision with defendant's buggy, where the evidence was such as would only warrant a verdict for defendant, error, if any, in admitting evidence that the son was accustomed to and in the habit of riding the mare along the highway at a fast rate, was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Appeal from Circuit Court, Lawrence County; Carr McNatt, Judge.

Action by T. R. Hodges against E. C. Hill. Judgment for defendant, and plaintiff appeals. Affirmed.

J. L. Maynard, of Okmulgee, Okl., and I. V. McPherson, of Aurora, for appellant. William B. Skinner, of Mt. Vernon, for respondent.

STURGIS, J. This lawsuit grows out of the fact that plaintiff lost a valuable mare by reason of a collision between such animal while being ridden by his son and a one-horse buggy being driven by defendant on the public road leading north from Stotts City, in Lawrence county, Mo. This road is one of the "special roads" of the county, being 60 feet wide, in splendid condition, and much used and traveled by the public. It was on this highway that plaintiff's mare was injured on the night of March 4, 1913. The night was a very dark one, and the defendant, who had been out on his farm, was returning home, travelling south on this road. He was driving a small, gray pony, of uncertain age, hitched to a rather dilapidated buggy, without a top, and using ropes for lines. George Hodges, the son of plaintiff, about 20 years of age, who had been to Stotts City, was riding the mare in question, a large, fast pacing animal, and was returning to his father's home and traveling north on this same road. These two individuals, thus traveling, collided with each other at or near a culvert in the road some distance north of the town of Stotts City. The result was that by force of the impact one of the shafts of defendant's buggy penetrated the breast of plaintiff's mare some six to nine inches, and from the effects of which she died two weeks later. The defendant suffered no injury further than being thrown from his buggy into a ditch and having the shaft of his buggy splintered and the horse's harness somewhat broken. The boy also says that he was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thrown from his horse into the ditch and received a bruised leg. Each party admits that it was so dark that he did not see the other until almost the time and place of the collision. Each claims that he heard the other coming down the road just before the collision, and each claims that he turned somewhat to the right, slowed up to a practical stop, and tried to let the other pass; each claims that he was, at and before the collision, traveling at a very moderate speed.

The plaintiff's petition charged that, while his son was riding along the road in careful manner, the defendant caused this injury to his mare by negligently driving his buggy and horse at a high rate of speed, thereby violently striking and running against his mare. The defendant by his answer charged that, while he was with due care driving his horse and buggy along this road, the plaintiff's son caused the injury by riding the mare at a rapid rate of speed on this highway and violently running her upon and against his horse and buggy. The answer is treated as containing a plea of contributory negligence, but that is hardly correct. Each party charged the other with the same negligence, and each charged that the negligence of the other was the sole cause of the injury. Neither party, either in their pleadings or evidence, admits or even intimates that there was any concurrence of negligence; but each maintains, and the evidence of each shows, that the other was alone negligent. No one witnessed the collision except the parties themselves, and the other evidence is largely circumstantial. The jury found for the defendant.

The main point relied on for reversal, and which is not without much difficulty, arises on the action of the trial court in permitting the defendant to prove, first by cross-examination of plaintiff's son, who rode the mare at the time of the accident, and afterward by independent witnesses, that the said son was accustomed to and had the habit of riding this mare along this road between his home and town at a rapid rate of speed. In this connection it was also shown, without objection, that the animal was a fast pacer of racing stock and had been in training on a race track on plaintiff's farm. Stated in a more general way, the question presented is whether, in order to prove that a person did a particular act amounting to negligence only and which is without moral turpitude or evil intent, it is competent to prove that such person had a habit or custom of doing such particular act.

While many kindred propositions have been before the courts of this state, learned counsel have not cited, nor have we found, a case in this state involving this precise question. The case nearest in point is that of *Calcaterra v. Iovaldi*, 123 Mo. App. 847, 100 S. W. 675, where Judge Goode stated that the question was one of great difficulty, and, placing doubt on the correctness of the ruling,

held that, where a child was hurt by a barrel falling from defendant's second story window to the sidewalk, it was not competent to show negligence of defendant by proving that on other occasions barrels had fallen from the same window. The reasons assigned for rejecting the evidence are that it was not shown whether defendant was in any way connected with such act and that it would "raise collateral issues as to whether the incidents related actually occurred or not, and, if so, under what circumstances, and to spring a surprise on appellants." It will be seen that the question there raised is quite different than the one here, and some of the reasons for rejecting the evidence in that case do not apply here. Judge Goode, as if to distinguish that case from one like this, said: "In certain classes of negligence cases, evidence of other negligent acts besides the one charged has been received, as tending to prove negligence in the act charged. It is said the collateral act may be proved if the inference may be drawn from it that the act charged was or was not negligent; but a study of the cases reveals, we think, that the admissibility of proof of the collateral act depends finally on the cogency of the proof it affords regarding the main issue—on whether it is so closely related to the main issue that its value as evidence is high enough to justify disregarding the objections to the reception of proof of collateral acts." And again: "The competency of a collateral fact in a given case turns, as we have said, on whether or not the court deems its bearing on the main issue to be so intimate and valuable as proof of the main fact that the objections to collateral evidence may be disregarded. Obviously there will often be a diversity of views on such a matter; hence the conflict in the opinions dealing with the subject. Likely proof of a negligent custom is admissible as tending to show negligence in an alleged instance of the custom. 1 Wigmore, Evidence, § 97; *Brunke v. Telephone Co.*, 115 Mo. App. 36, 90 S. W. 753. In the present case the petition does not count on a custom or habit of appellants to throw barrels into the street; nor, indeed, can it be said the evidence received tended to establish such a custom. It simply showed, at most, that this was done on two occasions prior to the fatal accident; whether by an employé of appellants or a stranger does not appear."

[1, 2] It will be seen that what the court did in that case was to reject proof of similar specific acts, rather than a custom or habit to do such acts, and that ruling is good law. 1 Wigmore on Evidence, § 199. This is also a different question than proving the general reputation of a party charged with negligence as to his being negligent or prudent, as that is not generally admissible. 1 Wigmore on Evidence, § 65. But it is there said that this class of evidence must be distinguished from "habit, i. e., of prudent or

negligent methods," as the latter is admissible. It is also a different question than proving that other similar accidents have arisen from the same or similar cause, and such proof is generally rejected. *Smart v. Kansas City*, 91 Mo. App. 588; *Goble v. Kansas City*, 148 Mo. 470, 50 S. W. 84; *Calcaterra v. Iovaldi*, 123 Mo. App. 347, 351, 100 S. W. 675.

[3] Many authorities will be found upholding the admissibility of evidence of the particular kind now under discussion. In 1 Wigmore on Evidence, § 92, the author says: "Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough." Then, after stating some exceptions, the author adds: "Subject to the foregoing distinctions, the admissibility of a person's habit, usage, or custom as evidence that he did or did not do the act in question may be said to be universally conceded." See, also, section 97, dealing with the admissibility of "habit of negligence." "The weight of authority favors the view that, where the direct evidence shows that an act was done or omitted, it is competent to prove that a custom existed prior to that time to do or not to do such act, as such evidence legitimately tends to uphold the theory of one of the contending parties." *Gillet's Indirect & Collateral Evidence*, § 68. The case of *State v. Railroad*, 52 N. H. 528, 529, is a leading case on that point. That was a case of personal injury at a crossing in which the speed of the train became material. The court admitted proof of the usual rate of speed of that train, run by the same engineer, at the same crossing. This was held proper, and the court said: "It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done, or omitted to be done, without any particular intent or purpose to injure any one. It cannot apply to acts that are done intentionally, willfully, or maliciously, because such acts are done with a specific object in view, and they are performed, not by force of habit, but with a definite purpose. \* \* \* But when the question is, did these servants of the road, without any intention whatever, and through mere negligence or carelessness, omit to give these signals on that occasion, we think the inquiry was properly made as to what they had done before in that regard, and whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible, not as evidence of character, not as evidence of fitness or unfitness, but simply as having some tendency to show that on this particular occasion these agents were

more probably negligent and careless, because they had before frequently neglected the same duty with impunity, and had thus become habitually negligent in that regard." The courts of New Hampshire have several times followed this ruling. In *Smith v. Railroad*, 70 N. H. 53, 82, 47 Atl. 290, 291 (85 Am. St. Rep. 596) the court said: "Cate's uniform habit of slackening the speed of his horse to a walk at the Waukegan crossing, and looking and listening for the approach of a train before attempting to pass the crossing, tended to show that he did so on his fatal trip. It was substantial evidence of the exercise of care on that occasion. *Davis v. Railroad*, 68 N. H. 247, 248, 44 Atl. 388, and authorities cited." See, also, *Stone v. Railroad*, 72 N. H. 208, 55 Atl. 359. The Supreme Court of California, in *Craven v. Pacific R. Co.*, 72 Cal. 345, 13 Pac. 878, in speaking of evidence as to a person's habit in jumping off a moving train, said: "But when, in the absence of any question of evil intent, or of any intent at all, the point of fact to be determined is whether or not a person did a certain thing, or did it in a particular way, and the direct testimony as to the fact is conflicting, then evidence is admissible to show that he was in the habit of doing the thing in question, or accustomed to do it in a particular way. A sensible man called upon, out of court, to determine whether or not a certain person had, on a certain occasion, carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give some weight to the fact that the person was in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned in court. The evidence, at least, had some legal tendency to show that plaintiff's conduct at the time of the injury was such as defendant ascribed to her." In *Louisville & N. R. Co. v. McClish*, 115 Fed. 268, 53 C. C. A. 60, the Circuit Court of Appeals ruled just to the contrary. In *Shaber v. Railway Co.*, 28 Minn. 103, 9 N. W. 575, the court said: "Where the evidence is conflicting as to the speed in a particular instance, proof of the customary or habitual speed at which the engines of defendant ran under like circumstances may be given, to show that the evidence for plaintiff or for defendant is the more probable." The Appellate Court of Indiana, in *Pittsburgh, C. & St. L. Ry. Co. v. McNeil*, 66 N. E. 777, 779, said: "As we have said, the theory of appellant's defense was that appellee was injured by reason of his own negligence in jumping on its train while it was moving. This rejected evidence was competent to go to the jury upon the theory that, as the appellee had been in the habit of jumping on moving trains at that particular place, the jury were entitled to consider that fact, as tending to corroborate the evidence of the witness who testified that he saw him,

at the time he was injured, jumping on the train. The jurors, being sensible men, of fair reason and discernment, were called upon to determine the pivotal question in the case—as to the manner in which appellee was injured. As to this question there was direct conflicting evidence. The manner of the injury being in conflict, a sensible and reasonable man would naturally and properly give some weight to the fact that the injured party was in the habit of jumping on and off of moving trains in the manner indicated by one witness, on the reasonable and well-supported theory that a person is more likely to do or not to do a thing, or to do a thing or not to do it in a particular way, as he is in the habit of doing or not doing it. The rejected evidence had a legal tendency to show that appellee's conduct at the time he was injured was such as appellant ascribed to him." See, also, *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218. The Supreme Court of Colorado, in *Denver Tramway Co. v. Owens*, 20 Colo. 107, 124, 86 Pac. 848, 854, said: "If it had been proposed to show that the gripman had been in the service of the company for considerable time, and that it had been his particular habit or custom not to stop in the middle of the block, this would have lent corroboration to his testimony that he did not so stop; for, in case of doubt as to what a person has done, it may be considered more probable that he has done what he has been in the habit of doing than that he has acted otherwise. *Lawson, Usages & Cust. § 46*; *State v. Manchester & L. R. Co.*, 52 N. H. 529."

[4] Several of the cases cited by appellant as supporting the proposition that this character of evidence is not admissible are cases not strictly in point, as they relate to the proof of specific acts of carelessness or to the general reputation of a party as to being negligent, or as to traits of negligence generally without reference to the particular act in issue. *Boick v. Bissell*, 80 Mich. 260, 45 N. W. 55; *Wooster v. Broadway R. Co.*, 72 Hun, 197, 25 N. Y. Supp. 378; *Glass v. Railroad*, 94 Ala. 581, 10 South. 215; *Aiken v. Railroad*, 184 Mass. 269, 68 N. E. 238. The trend of these decisions, however, is against the admissibility of such evidence, and other cases will be found to the same effect and more nearly in point. *Eppendorf v. Railroad*, 69 N. Y. 195, 25 Am. Rep. 171; *Guggenheim v. Railroad*, 66 Mich. 150, 33 N. W. 161; *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145, 23 Pac. 113; *Maguire v. Railroad*, 115 Mass. 239.

The courts of Illinois seem to have adopted the rule that such evidence is admissible only in the absence of any direct evidence as to how the accident occurred. *City of Salem v. Webster*, 192 Ill. 369, 61 N. E. 323; *Railroad v. Clark*, 108 Ill. 113; *Quincy Gas Co. v. Clark*, 109 Ill. App. 20; *Cox v. Railroad*, 92 Ill. App. 15. As this is not a question of resorting to secondary evidence, we fail to see

the force of this distinction. If the evidence has probative force and is otherwise admissible, then the fact that there is stronger and more direct evidence should not warrant its rejection. The Supreme Court of Georgia, when confronted with this question in *Savannah R. Co. v. Flannagan*, 82 Ga. 579, 588, 9 S. E. 471, 472 (14 Am. St. Rep. 183), ruled thus: "The habitual high speed of this same engine, when run previously by the same engineer, on the same street, was of doubtful admissibility. The authorities upon the question conflict. For the affirmative might be cited *State v. Railroad Co.*, 58 N. H. 410; *State v. Railroad Co.*, 52 N. H. 528; *Shaber v. Railroad Co.*, 28 Minn. 103, 9 N. W. 575; *Randall v. Telegraph Co.*, 54 Wis. 140, 11 N. W. 419 [41 Am. Rep. 17]; *Craven v. Railroad Co.*, 72 Cal. 345, 13 Pac. 878; *Henry v. Railroad Co.*, 50 Cal. 176; *Sheldon v. Railroad Co.*, 14 N. Y. 218 [67 Am. Dec. 155]. For the negative, see *Gahagan v. Railroad Co.*, 1 Allen [Mass.] 187 [79 Am. Dec. 724]; *Railroad Co. v. Lee*, 60 Ill. 501; *Railroad Co. v. Woodruff*, 4 Md. 242 [59 Am. Dec. 72]; *Parker v. Publishing Co.*, 69 Me. 173 [31 Am. Rep. 262]. *Patt. Ry. Accident Law*, 421, throws the weight of his opinion on this side. Upon so doubtful a question we think the court did not err in admitting the evidence. There are several cases in our reports holding that doubtful evidence is to be admitted, rather than excluded. What has been said upon this point applies equally to evidence touching habitual failure to ring the bell."

There is no doubt that the admissibility of this character of evidence should be restricted and kept within narrow limits. The principal objection to its admissibility is that it raises collateral issues and detracts the attention of the jury from the real point at issue, to wit, whether the party charged with negligence was negligent at the particular time in question, and that it raises issues which the opposite party will not be prepared to meet. This objection is largely avoided when the evidence is confined to the general habit of the party with reference to the particular act in issue. The jury should in such case be made to understand the purpose and scope of the evidence. We think this was done in this case. The learned trial judge, when ruling on this question, said: "Gentlemen, in the evidence, as I understand it, it seems there is a sharp contest over the cause of this collision. Contributory negligence is pleaded, and the contention is that one of the parties caused the injury, and the contention of the other side is that the other one. There seems to have been no eyewitness except the two men. That may throw some light. The manner in which the two men drove their buggies may throw some light to the jury as to who did the negligent acts that day, that brought on a collision, and I am going to let it go to the jury



for what it is worth. Under the law and the circumstances, they will have to determine the truthfulness of these two men, as to which one is telling the truth about the collision. Any circumstance which shows the habits of the two men might throw some light on it. He may tell what the habits of the boy was as to his own riding." While this was not an instruction to the jury, it had much the same effect and advised the jury at the time as to the only purpose for which the evidence was admitted. While the court refused an instruction altogether eliminating this evidence from the consideration of the jury, the court gave this instruction: "You are further instructed that in determining the issue of whether or not plaintiff's son, George, was guilty of negligence at the time and place of the accident, causing or contributing to cause the injury, it is not material that plaintiff's said son at other or different times or occasions may have ridden on the highway at a rapid or fast rate of speed." We will therefore rule, though with some doubt as to its correctness, that the court did not commit reversible error in admitting this evidence.

[5] The defendant was verging on still more dangerous ground on his cross-examination of plaintiff's son, who was the rider of the injured mare, as to some specific incidents of fast riding—nearly running over a boy—and objection thereto should have been sustained. But as the boy explained the one incident mentioned so as to show him entirely blameless and denied other incidents inquired about, and no further evidence was offered as to these incidents, we will not hold same reversible error.

[6, 7] We are also convinced that none of the foregoing evidence so prejudiced the jury as to warrant a reversal, even if improperly admitted. The other facts of the case are such that a different result could have hardly been reached by the jury. The plaintiff's son was asked on cross-examination and denied that, at the time and in the very act of starting from town on this occasion, he stated that he must go home in a hurry on account of having some work to do that night, and that he had a horse which could, and that he would, make the distance of  $2\frac{1}{2}$  miles in six to eight minutes. It is shown that he then started at a fast gait, and he admits that he traveled fast for the first quarter of a mile and until he left the outskirts of the town. The defendant was then allowed to contradict and impeach this witness by proving by other witnesses who heard the same that he did make these statements. Besides this, these statements of the son are so intimately connected with his riding home as to be a part of the *res gestæ* and were properly admitted. This is not a question of the statement of an agent being or not being binding on the principal, as the son was not in any proper

sense the agent of his father in riding this horse. He must be treated as one of the actors and the fact that he was riding his father's horse instead of his own has little to do with the case. Then, there were other witnesses who saw him riding at a fast gait at various points on the road between town and the place of the accident. One witness, his grandfather, who lived about a quarter of a mile from the starting place, said that he wanted to speak to the boy and heard him coming; but before he could get to the door he was gone. Another witness saw him pass about one mile from town and only a short distance from the place of the accident and stated that he was then going a mile in three minutes. Another witness, still closer—250 yards—to the accident, stated that he was going like a "bat of lightning," and his evidence is sought to be discredited because the darkness of the night prevented his recognizing very clearly the fast flying phantom. This however, was for the jury. The descriptions given by the witnesses of this boy's ride on this dark night as he approached the culvert in question on his flying steed remind one of the description of the ride of Tam o'Shanter as he seeks to cross the bridge on his good nag, Meg, with the witches fast following:

"Now, do thy speedy utmost, Meg,  
And win the key stane of the brig:  
There at them thou thy tail may toss,  
A running stream they darena cross.  
But ere the key stane she could make,  
The fiend a tail she had to shake."

There is no question and the physical facts showed that defendant and his buggy were wrecked at a point some 20 to 30 feet north of the culvert on the west side of the road, where defendant says the horse struck him. The boy's evidence was that he stopped his horse just south of the culvert on the east side of the road, and that the buggy struck his horse at that point. He admits, however, that when he got up and went to defendant's buggy it was 20 to 30 feet north of the culvert. It would seem impossible that, if the buggy going at a rapid rate struck the horse standing still south of the culvert, the recoil could have driven the horse and buggy backward some 30 to 40 feet. It is proper to here state that the record shows that defendant's buggy wheel skidded two or three feet to the northwest and not the southwest, as claimed by appellant. It was also shown that defendant's horse was a worn-out, farm pony, that could hardly be whipped out of a walk.

When we take into consideration the facts of this case, including the different "mounts" of these parties, we feel that a retrial could not result different from this one and that the judgment should be and is affirmed.

ROBERTSON, P. J., and FARRINGTON J., concur.

**RUSSELL v. ST. LOUIS & S. F. R. CO.**  
(Springfield Court of Appeals. Missouri.  
Dec. 11, 1913.)

**1. CARRIERS (§ 330\*)—INJURIES TO PASSENGER.**

Where a passenger, though ordered by the porter to remain in the smoking car and was told that the smoke would not bother him, remained without protest to the conductor or any other member of the crew, and no one knew that the smoke was making him sick, he could not recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1370, 1372, 1373; Dec. Dig. § 330.\*]

**2. TRIAL (§ 141\*)—QUESTIONS OF LAW OR FACT.**

No court should leave it to the jury to find a specific verdict when the facts which the jury are to find as compelling such verdict are uncontradicted, but the court should declare the legal effect of such facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 836; Dec. § 141.\*]

Appeal from Circuit Court, Greene County; Alfred Page, Judge.

Action by W. M. Russell against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. F. Evans, of St. Louis, and Mann, Todd & Mann, of Springfield, for appellant. Hamlin & Seawell, of Springfield, for respondent.

**STURGIS, J.** Plaintiff sued the defendant because of being compelled to ride in a smoking car on one of its trains from St. Louis to Springfield, Mo., the effect of which was to make him sick from the tobacco smoke. He also complains that this car was dirty, but there was little proof of this, and that charge was not submitted to the jury. He was 52 years old and was traveling from Knoxville, Tenn., to Springfield, Mo., on a first-class ticket. Plaintiff's evidence is that when he got to St. Louis he passed through the gate at Union Station and to defendant's train, which left there about 9 o'clock in the morning arriving at Springfield in the afternoon; that, when he came to the rear end of the chair car, the brakeman and porter directed him to go on to the next car. There was no pretense, however, that the brakeman knew that plaintiff objected to going to the smoking car or that he was susceptible to sickness from any such cause. On plaintiff's going to and discovering that the next car was the smoking car, he states that he went out on the platform and informed the porter, who had evidently followed him there, that tobacco smoke would make him sick and objected to riding in such car, but that the porter told him that it would not bother him and insisted and ordered him to go back in the smoker. He also says that the conductor soon came along there and went up the steps, opened the door to the chair car next to the smoker, and went in, shutting the door; that plaintiff tried to follow him into the chair

car but found that the door was locked, and the conductor merely looked around and went on without opening it. Plaintiff, however, said nothing to the conductor, and there is no pretense that he knew of plaintiff's objection to riding in the smoker or his susceptibility to sickness from such cause. Plaintiff then remained in the smoker without further protest to any one and says that he became sick about a half hour after the train pulled out. It is therefore evident that no one in charge of the train, except the colored porter, knew at any time anything of plaintiff's objection to riding in the smoker or of the possible effects of tobacco smoke on him. It is further shown that only a few passengers were in this smoking car on that trip.

Defendant proved, without contradiction, that this was one of its fast and best trains out of St. Louis, that it carried none but first-class passengers, and all the cars were designed and suitable for that class; that, in receiving passengers at St. Louis, the rule was that the brakeman stays at the rear end of the chair car and when men, not accompanied by women or children, came along that he frequently directed them forward to the smoker so as to save the chair car for women and children, but that no one who objected was ever coerced into going to the smoker or staying there; that the door of the chair car next to the smoker was kept locked so that if any intoxicated person should happen to get on the smoker he would not pass back to the chair car unnoticed. These were certainly reasonable regulations and well calculated to benefit the traveling public. It was also shown that this was a vestibule train; that the car doors were all unlocked immediately after the train started; and that passengers were free to go from one car to another at will throughout the day's journey. It took about eight hours to run from St. Louis to Springfield, during which time plaintiff says he remained in the smoker and was sick and unable to eat in consequence thereof. He frankly admits however, that after the train started he made no complaint to any one, not even the porter, and made no effort or request to go to another car; he made no mention of his sickness or discomfort from riding in the smoker to the conductor, collector, or brakeman, and none to the porter after the train started or he became sick. Nor is it claimed that his sickness was such as to appraise any one, trainmen or fellow passengers, of his being so.

The following questions and answers are taken from plaintiff's evidence: "Q. So you never said anything to anybody except the porter? A. I made my complaint before I got on the train. Q. And never made any complaint after the train started? A. No, sir. Q. It was all before the train started? A. Yes sir. \* \* \* Q. The thing that affected you was the tobacco smoke? A. Yes,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sir. Q. Don't you know as soon as that train left St. Louis, as soon as it pulled out of the shed, the door into this car back of you, the chair car, was open? A. No, sir; I didn't know it. There wasn't much crowd in there before the train started. Q. After that train started did you go to the door? A. No, sir; I thought they had given me to understand I had to ride there. Q. Who had given you to understand that? A. The colored man. Q. You just rested right there? A. I took it for granted there was where they were going to make me ride. \* \* \* Q. You never attempted to get out of that smoking car from that time on? A. I didn't try to get off the train, but I came out on the platform at Newberg, where they changed engines. Q. Did you attempt to go back in the other car then? A. No, sir."

Plaintiff offered no evidence except his own. He further testified that he was 52 years old, had made three trips to east Tennessee, going over various railroads, and had made frequent trips on the train from his home at Republic, Mo., to Springfield. He showed himself familiar with the usual incidents of railroad travel and the titles and general authority of the various employes having charge of the train. It was shown, if such proof was necessary, that the colored porter merely looks after the wants and comfort of the passengers and had no authority to direct passengers where to ride. All the trainmen were examined as witnesses, and none of them had any recollection whatever of the occurrence testified to by plaintiff.

Under these facts the court should have sustained the demurrer to the evidence as requested. This case is almost *sui generis*. Only one case has been discovered by the diligence of able counsel on either side where the facts resemble this one. *Bresewitz v. Railroad*, 75 Ark. 242, 87 S. W. 127, 70 L. R. A. 212. There the facts are similar. The plaintiff was boarding an Iron Mountain train at St. Louis to go to Texas; tried to go into the chair car; was ordered by the porter to go to the smoker; obeyed the order; rode in the smoker all the way; got sick; made no further complaint, etc. The court denied a recovery and said: "According to his own statement he voluntarily submitted to the discomfort of the smoking car without objection or complaint and cannot therefore claim damages therefor. He was not justified in accepting the directions given him by the train porter at the station as to the car which he should enter as a command to remain therein throughout his journey. The train was in charge of the conductor, and, when appellant found that the car to which he had been assigned by the porter was uncomfortable and not such accommodations as he was entitled to on his ticket, he should have appealed to the conductor for more comfortable quarters. Failing to do so he is deemed to have voluntarily accepted the place assigned him with its dis-

comforts. He had reached the age of discretion and cannot be allowed to claim damages on account of a situation caused by a mistake of the porter which he accepted and gave the railroad company, through its proper officers in charge of the train, no opportunity to correct." See *Hemmingway v. Railroad*, 72 Wis. 42, 87 N. W. 804, 7 Am. St. Rep. 823, and note thereto.

The respondent relies on *Roark v. Railroad*, 163 Mo. App. 705, 147 S. W. 499, where plaintiff sued for damages caused by riding in a car not sufficiently heated, and the court held that she would not be denied recovery for failure to request to be allowed to go to another car or for not taking advantage of sufficient wrappings. It is there shown, however, that she did complain to the conductor as to the car being too cold and in effect asked that it be heated. Besides this, the temperature of a car is a matter open to the observation of the trainmen as well as to any one, and they ordinarily need no information or warning of such condition. The case of *Taylor v. Wabash Ry. Co.* (Sup.) 38 S. W. 304, 42 L. R. A. 110, a Missouri case but never officially reported, is like the *Roark Case*, supra, being a cold car case, where the passenger remonstrated with the conductor as to the car being too cold. The difference between such cases and this one is well illustrated by the charge to the jury, affirmed as good law, in *Hastings v. Railroad* (C. C.) 53 Fed. 224, as follows: "If they [trainmen] knew, without being told, that they were neglecting the car, and showed a disposition to disregard the comfort of the passengers, so that a passenger would deem it unnecessary to give the information, for the mere purpose of giving information, it would not be regarded, under those circumstances, as being negligence not to complain. If the car was left in charge of the brakeman, who was not attending to his duty, and the conductor was ignorant of that fact, and the passengers had an opportunity to tell this conductor and call his attention to it and ask for relief, but suffered him to remain in ignorance and made no complaint, then it would be such negligence as would preclude the passenger from any right to complain." This proposition is also recognized in 8 *Thompson on Negligence*, § 2833.

[1] We need not go to the extent of holding that complaint to the brakeman would not have been sufficient, but we do hold that the mere direction of a colored porter to remain in the smoker and that the smoke would not bother him, where no complaint was made to or information had by any one thereafter and after he found out he was actually getting sick, and no effort made to go to the other car where he could have gone at will any time after the train started, precludes a recovery under the other facts of this case.

[2] In this view of the case it is not ma-

berial whether the instructions given were correct or not. However, we find that the fourth instruction, given for defendant, directs a finding for the defendant if the jury found that: "The passageway from said smoking car to the chair car or other coaches in said train was open, and that plaintiff could have ascertained said fact that said door was open by the exercise of reasonable care on his part, and that he could have passed from said smoking car into the other cars of said train at any time he saw fit and failed to do so; or if they found that, when plaintiff ascertained and determined that riding in the smoking car would make him sick, he did not appeal to the conductor in charge of said train for permission to leave said smoking car and ride in another coach, and was refused such admission, but that he voluntarily, after being directed into said coach, remained there during said trip without either leaving the same or seeking permission to do so from the conductor in charge of said train." Now these are the uncontradicted facts of the case, and the jury could not find otherwise. Why, then, cast doubt on the matter by submitting it as a doubtful proposition to the jury. No such instruction should ever be given to a jury. It is the duty of the court to declare the legal effect of uncontradicted facts where only one conclusion can be drawn. No court should leave it to a jury to find a specific verdict when the facts which the jury are to find as compelling such verdict are undisputed. In such case the duty devolves on the court to direct a verdict.

It results that this case is reversed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

### BUNYARD v. FARMAN.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

#### 1. BROKERS (§ 88\*)—ACTIONS FOR COMMISSIONS—QUESTIONS FOR JURY.

In a real estate broker's action for commissions, evidence held to make a question for the jury as to whether the prospective purchaser procured by the broker was ready, willing, and able to purchase, if a merchantable title had been offered.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

#### 2. BROKERS (§ 54\*)—RIGHT TO COMMISSIONS—ABILITY AND WILLINGNESS OF PURCHASER TO PERFORM.

Under the rule that a purchaser produced by a broker must be ready, willing, and able to purchase, it is sufficient if he is so ready, willing, and able to complete the purchase within a reasonable time.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81; Dec. Dig. § 54.\*]

#### 3. BROKERS (§ 60\*)—RIGHT TO COMMISSIONS—RIGHT OF OWNER TO REASONABLE TIME.

Under a contract with a real estate broker by which an owner of land agreed, upon the pro-

duction of a purchaser therefor by the broker, to furnish a good and sufficient warranty deed, together with an abstract showing a merchantable title, the owner was entitled to a reasonable time after the production of the purchaser in which to make the deed, prepare an abstract, and correct any curable defects therein pointed out by the purchaser, and he was not liable for the stipulated commissions if the purchaser refused to allow such reasonable time.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. § 60.\*]

#### 4. BROKERS (§ 60\*)—RIGHT TO COMMISSIONS—RIGHT OF OWNER TO REASONABLE TIME.

What is a reasonable time for an owner of land to make a deed, prepare an abstract, and correct any curable defects therein after the production of a purchaser by a broker depends on the facts of each case.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. § 60.\*]

#### 5. BROKERS (§ 88\*)—ACTIONS FOR COMMISSIONS—INSTRUCTIONS.

In a broker's action for commissions under a contract which bound the owner to furnish a good and sufficient warranty deed, together with an abstract showing a merchantable title, the broker's evidence tended to show that the purchaser procured was ready, willing, and able to purchase if a merchantable title had been offered, while that for the owner tended to show that he offered to cure defects in the title but that the purchaser, upon examination of the abstract, refused to go on with the trade under any circumstances. The court charged that if the broker procured a purchaser ready, able, and willing to buy, and if the sale was prevented by the fact that the owner could not or did not furnish an abstract showing a merchantable title, to find for the broker. Held, that this instruction was erroneous as it required the owner, at any time a purchaser was produced, to immediately deliver an abstract showing a merchantable title and denied him a reasonable time within which to perform.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\*]

#### 6. BROKERS (§ 85\*)—ACTIONS FOR COMMISSIONS—EVIDENCE.

In a broker's action for commissions, where the owner claimed that the prospective purchaser procured by the broker upon examination of the abstract refused to complete the purchase because of curable defects in the title, a decree correcting a misdescription in the deed to the owner, though it had not been recorded, was not shown by the abstract and, though the broker knew nothing about it, was admissible to show that the owner might have recorded it and had it shown on the abstract within a reasonable time.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106-115; Dec. Dig. § 85.\*]

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Action by Claud D. Bunyard against B. H. Farman. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John M. Stephens, of Salem, and Lamar, Lamar & Lamar, of Houston, for appellant. J. D. Gustin and Wm. P. Elmer, both of Salem, for respondent.

FARRINGTON, J. This is a suit by a real estate broker to recover commission. Upon trial by jury, plaintiff recovered a judgment for \$800, and the appeal is brought by the defendant.

Bunyard, the respondent, a real estate broker, entered into a contract with the appellant, dated February 1, 1911, by the terms of which respondent paid appellant \$300 for the exclusive right to sell, within one year from the date of the contract, certain land belonging to the appellant (320 acres), which, according to the contract, respondent could sell and retain for his commission all over the sum of \$8,000, and it was agreed that a purchaser might pay one-half the purchase price in cash and the remainder within five years at 6 per cent. interest. The contract also contained this provision: "It is further agreed that first party is to furnish a good and sufficient warranty deed conveying said land which may be sold unto the purchaser thereof, together with an abstract showing merchantable title to said land." The land in question is some six or eight miles from Salem, in Dent county, Mo.

Respondent claims to have procured a purchaser in the person of one George T. Walters on January 31, 1912, which was the last day the contract had to run. This alleged purchaser reached Salem on a train at 3:55 p. m., January 31, 1912, and in company with the respondent drove in a buggy to the land in question. Not finding appellant on the place, they drove to a neighbor's house where appellant was to stay over night, his family being in the town of Salem, and during the conversation which followed \$10 was paid to appellant, and it was agreed that appellant would go to Salem the next morning and the contract of purchase would be consummated. It was agreed by the parties that the price to be paid for the land was \$8,800, which would give respondent, the agent, \$800 as his commission. There is some conflict in the evidence as to whether the purchase price was to be paid in cash or part cash and time given for the balance, but this is immaterial to the decision of the case. The next day, which was February 1, 1912, appellant went to Salem and, in company with respondent and Walters, went to the office of an attorney (G. C. Dalton), in whose keeping the abstract of title had been left by the appellant. It developed at the trial that appellant, prior to the transaction in question, had made an application for a loan to a loan company which had objected to the title as shown by the abstract in two particulars. The objections to the record title arose out of the following facts, about which there is no dispute: The land at one time belonged to Mary S. Clark, who died owning the land, and by her last will and testament, which was probated in Phelps county, Mo., made one of her children, Lilly E. Clark, executrix, and by the terms of said will gave to the said Lilly E. Clark the right to sell and dispose of the land whenever in her discretion the sale would be for the benefit of the estate, and further provided that the said Lilly E. Clark was to take possession of said land and manage it

until in her discretion it should be sold. By another clause in the will it was provided that "Lilly E. Clark should then sell and convey said land, after obtaining the consent of her brothers, William E. Clark and George W. Clark, and her sister, M. Della Gay, and of the husband of said sister, Frank M. Gay." In August, 1906, Lilly E. Clark did sell the land to B. H. Farman, which deed was recorded in Dent county. The heirs, as a matter of fact, had all filed a petition in the probate court of Phelps county requesting the sale of this land as provided in the will, which written request was on file in the office of the probate court of Phelps county, but a certified copy of which was not attached to the abstract. However, quitclaim deeds had been secured from all the heirs of Mary S. Clark, except one. After the deed had been executed by Lilly E. Clark, the executrix, it was discovered that by mistake of the scrivener the land had been misdescribed in the deed, and a suit was brought, returnable to the November, 1910, term of the circuit court of Dent county, against the heirs of Mary S. Clark to correct the defect in the numbers of the land, and a decree was duly rendered at said term reciting in full all the facts concerning the execution of this deed of the executrix and reciting the consent of all the heirs to its execution, and finding that said deed conveyed the identical land in controversy herein and other land. That was some 15 months prior to the transaction with which we are concerned. The abstract exhibited to Walters showed quitclaim deeds from all the heirs except William E. Clark. After February 1, 1912, upon inquiry, it was discovered that in 1906 all these heirs had filed the petition in writing in the probate court of Phelps county asking that the land be sold. The other objection related to a deed of trust which William E. Clark had given at one time to one Diehl, of Phelps county, which had been paid off by Lilly E. Clark, the executrix, the record of which was yet unsatisfied.

Plaintiff's testimony is to the effect that Walters was ready, willing, and able to purchase the land and was willing to allow a reasonable time to appellant to show good title. Defendant's testimony is to the effect that, on learning of the two defects, Walters, the proposed purchaser, on February 1, 1912, the day the parties met in Salem to consummate the deal, refused to go on with the trade and "would make it under no circumstances." Much of the record is taken up in an attempt to show bad faith on the part of the respondent and Walters; that Walters was merely a "straw purchaser"; and that it was a scheme to hold appellant for the commission. However, the evidence on this question was conflicting, and the fact whether Walters was a bona fide purchaser, ready and able to buy the land, was determined by the jury.

[1] The first point raised by appellant, that

his peremptory instruction should have been given, must be ruled against him for the reason that Walters testified he was ready, willing, and able to buy the land on February 1, 1912, or within a reasonable time thereafter, and that at any time within 30 days from that date he was ready, willing, and able to buy and would have bought the land had appellant been ready, willing, and able to give a merchantable title and an abstract showing the same. While there is evidence tending to show that Walters had only a small portion of the purchase price with him, this would not be conclusive proof that he was not ready, willing, and able to purchase, because to hold otherwise would be to say that Walters must have had at least \$4,400 with him at the time in order to meet the requirements of "a bona fide purchaser." His showing of ability to raise the necessary fund within a reasonable time was sufficient to sustain the verdict, the effect of which was that he was able to pay. As to being willing, his testimony that he wanted the place for the price named and paid \$10, that he went to the farm and found the owner and by agreement met him the next morning for the purpose of consummating the deal, and in a way examined the abstract, is sufficient to take the question of his willingness to purchase to the jury. It is true defendant testified that the alleged purchaser, when shown the defects in the abstract, refused to go further with the trade and refused to give defendant any time within which to make the title merchantable, if it was not already so, and "said he didn't want it at all; said he wasn't tying up no money." Defendant also testified that he then said to Walters: "We will give you— You put up your money and I will put up a warranty deed and give you possession, and, not only that, I will guarantee you a merchantable title within 30 days, and he wouldn't accept it under no circumstances." Thus was established a conflict in the evidence, on the one side that the purchaser produced was ready, willing, and able to purchase on February 1, 1912, or within 30 days from that time, provided a merchantable title was offered, and that none was offered, and on the other that, when certain defects in the record title were pointed out, the alleged purchaser refused to proceed with the deal and would consummate the purchase under no circumstances, although appellant was offering to make a warranty deed and guarantee a merchantable title within 30 days. Such conflict existing, no authorities are necessary to support the proposition that the issue was rightly put to the jury.

[2-4] The contract between appellant and respondent required that respondent within one year procure and produce a purchaser ready, willing, and able to buy (that is to say, time was of the essence of their contract); it fixed the period within which there must be produced such a purchaser as

is defined by law. But nowhere in the contract is there any provision requiring the vendor to have his deed ready and his abstract prepared showing a merchantable title or requiring him to deliver a merchantable title on any fixed date. If appellant as a witness is to be believed, because his abstract failed in two particulars to show a merchantable title, the alleged purchaser refused to proceed with the deal, denying appellant a reasonable time within which to correct such defects. Where no specific time is fixed in the contract of sale, both parties have a reasonable time within which to prepare for the final delivery of title and payment of the purchase price. The rule that a purchaser produced by the broker must be ready, willing, and able means that he must be ready, willing, and able to carry out the purchase within a reasonable time; and this rule applies with equal force to the vendor, both as to his duty to his agent and to the purchaser. The vendor must, in the absence of any agreement fixing the time, be ready, willing, and able to convey the title contracted for (i. e., make a deed, prepare an abstract, and correct any curable defects therein pointed out by the purchaser) within a reasonable time; what would be a reasonable time depending on the facts of each case. *Mastin v. Grimes*, 88 Mo. 478; 39 Cyc. 1326-1333.

In the case of *Lumagli v. Abt*, 126 Mo. App. 221, loc. cit. 232, 103 S. W. 104, 107, the court, in discussing this question, used the following language: "Time was of the essence of the option agreement to the extent of requiring Abt to give notice by December 17th of his election to take the land. \* \* \* Whether it was of the essence of the contract so as to make it obligatory on Lumagli to convey on that very day depends on the terms of the instrument and the circumstances of the case." Again (126 Mo. App. loc. cit. 233, 103 S. W. 107): "In transactions like this, the owner of the land need not prepare a deed for delivery until he is notified by the holder of the option that he intends to conclude the purchase. *Smith & Flack's Appeal*, 69 Pa. 474. Where one party is required by the terms of a contract to do an act on demand or on the performance of some act by the other party, the former is allowed a reasonable time for performance after the contingency happens. 29 Am. & Eng. Ency. Law (2d Ed.) 69; *Mason v. Payne*, 47 Mo. 517; *Wells v. Smith*, 2 Edw. Ch. (N. Y.) 78; *McNamara v. Pengilly*, 58 Minn. 353 [59 N. W. 1055]; *Dunbar v. Stickler*, 45 Iowa, 385; *Gregory v. Christian*, 42 Minn. 304 [44 N. W. 202, 18 Am. St. Rep. 507]; *Russell v. Copeland*, 30 Me. 322."

Under his contract, appellant had the right to expect that any purchaser produced within the year would enter into such a contract as would give him a reasonable time within which to convey a merchantable title and accompany his deed with an abstract showing

a merchantable title; and, if the purchaser produced was unwilling to take on such terms, he was not the purchaser contemplated by the agreement between appellant and respondent. No time being fixed in the contract for the conveyance of a merchantable title accompanied by an abstract showing same, a reasonable time within which to perform after notice to appellant that a purchaser was found was impliedly given the vendor, and he had the right to expect that the purchaser would take on such terms. Page on Contracts, vol. 2, § 1154; *Chunn v. O'Neill Lumber Co.*, 158 S. W. 94; *St. Clair v. Hellweg*, 159 S. W. 17. Appellant correctly maintains that, under the law as announced in these decisions, the trial court erred in the refusal of his instruction No. 1 and in the giving, of its own motion, of the principal instruction in the case. Instruction No. 1, which was refused, correctly declares the law as to the question of reasonable time. The latter part of this instruction it is true, placed upon appellant a greater burden than the law placed upon him, and this should be corrected upon retrial.

[5] The instruction given by the court of its own motion contained, among others, the following paragraphs:

"The contract is dated February 1, 1911, and the right to sell under the contract extended for a period of 12 months.

"The defendant was obligated under said contract to furnish an abstract showing a merchantable title to the land. Now, if within the said time the plaintiff procured a purchaser who was ready, able, and willing to buy the land upon the said terms, and if the sale was prevented on account of the fact that defendant could not or did not furnish such abstract, then you will find the issues for the plaintiff and assess his damages at whatever sum in excess of \$8,000 that you may find from the evidence that such purchaser agreed to and was willing to pay for said land."

This instruction clearly required the defendant to stand prepared at any time a purchaser was produced to immediately deliver an abstract showing a merchantable title or answer to respondent for his commission. In other words, this instruction required defendant to have his abstract ready on February 1, 1912, and denied him a reasonable time within which to perform, to which he was entitled under his contract. The giving of this instruction and the refusal of defendant's instruction No. 1 clearly mark out the theory on which the trial court put the case to the jury; i. e., a construction of the contract between plaintiff and defendant making time of the essence in requiring the defendant to be ready immediately on the production of a purchaser.

[6] Error is assigned in the action of the trial court in excluding the decree rendered

at the November, 1910, term of the circuit court of Dent county, hereinbefore mentioned. The record before us does not show any infirmity in this decree. It contained a finding that all the Clark heirs had given their consent to the execution of the deed by the executrix. Although it is true there was no showing that the decree had been recorded, or that it was shown by the abstract, or that respondent knew anything about it, this decree is admissible for the purpose of showing that appellant might have recorded it and had his abstract show it within a reasonable time after February 1, 1912.

It follows from what has been said that the judgment should be reversed, and the cause remanded.

ROBERTSON, P. J., concurs in the result.  
STURGIS, J., concurs.

### PERRY v. VAN MATRE.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

#### 1. APPEAL AND ERROR (§ 699\*)—PRESENTATION FOR REVIEW—INSTRUCTIONS.

Where the record shows that instructions were given which are not brought up, there can be no reversal for error in instructions, unless substantially prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.\*]

#### 2. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action on a note for the price of a jack, plaintiff admitted an express warranty that the jack was sound and a good breeder, an instruction on implied warranty, though not warranted by the evidence, was harmless, and under R. S. 1909, §§ 2082, 1850, requiring that errors not injurious be disregarded, was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

#### 3. APPEAL AND ERROR (§ 1032\*)—PREJUDICIAL ERROR—PRESUMPTION.

Where appellant complains of the giving of an instruction, he must show, not only that it was erroneous, but that it was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.\*]

#### 4. SALES (§ 446\*)—ACTION FOR PRICE—INSTRUCTIONS—EVIDENTIARY MATTERS.

Where, in an action on a note given for a jack, the answer alleged breach of a warranty that the animal was a good breeder and sound, and pleaded evidence of the details of the unhealthy condition, instructions relative to the warranty were not erroneous for failure to include such evidentiary matters, which were disputed, and tell the jury that if these matters were established, the animal was unhealthy.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309-1317; Dec. Dig. § 446.\*]

#### 5. SALES (§ 446\*)—ACTION FOR PRICE—INSTRUCTIONS—VARIANCE.

Where, in an action for the price of a jack, defendant testified that plaintiff represented the jack as a great breeder, it was not error to use the term "great breeder" in an instruction on the warranty, though the warranty

as pleaded in the answer was that the jack was a "good breeder and a sure foal-getter."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309-1317; Dec. Dig. § 446.\*]

**6. SALES (§ 279\*)—WARRANTY — CONSTRUCTION—"GOOD BREEDER"—"GREAT BREEDER."**

There is no difference between a warranty that a jack is a "good breeder" and a warranty that he is a "great breeder," except possibly in degree; if there is any difference, a great breeder would be a more than ordinarily good breeder.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 783-792; Dec. Dig. § 279.\*]

**7. SALES (§ 446\*)—ACTION FOR PRICE—CONFLICTING INSTRUCTIONS.**

Where, in an action for the price of a jack, the warranty set up in the answer was double, that the animal was sound and that he was a good breeder, and plaintiff secured an instruction predicated upon only one-half of such warranty, an instruction given for defendant, and covering the entire warranty, was not erroneous as conflicting with plaintiff's instruction; it being no objection to an instruction, correct in itself, that it conflicts with erroneous instructions.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309-1317; Dec. Dig. § 446.\*]

**8. SALES (§ 446\*)—ACTION FOR PRICE—INSTRUCTIONS.**

Where, in an action for the price of a jack, the warranty set up in the answer was double, an instruction which, though purporting to cover the case and directing a finding, covered only one-half of such warranty, was erroneous.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309-1317; Dec. Dig. § 446.\*]

**9. SALES (§ 446\*)—ACTION FOR PRICE—INSTRUCTIONS.**

In an action for the price of a jack, an instruction to find for defendant if plaintiff warranted the animal to be sound and a good breeder, and he was not such, was not erroneous for failure to fix any time at or within which the warranty must be found to be operative, since the jury must have understood from the language used that the condition must have existed at the time of the sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309-1317; Dec. Dig. § 446.\*]

**10. PLEADING (§ 34\*)—ANSWER—CONSTRUCTION—"DISEASE."**

The word "disease," as used in an allegation of the answer in an action for the price of a jack, that the jack was not a good breeder and sure foal-getter because of the disease, meant any derangement of the functions or alteration of the structure of the animal organs, a morbid condition, resulting from some functional disturbance, or failure of physical condition which tended to undermine the constitution.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2100, 2101; vol. 8, p. 7639.]

**11. SALES (§ 441\*)—ACTION FOR PRICE—BREACH OF WARRANTY—SUFFICIENCY OF EVIDENCE.**

Evidence, in an action for the price of a jack, wherein the defense was breach of a warranty that the animal was sound and a good breeder, held to sustain a finding that the animal, on the date of sale was diseased, and thereby rendered unfit for breeding purposes.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1288; Dec. Dig. § 441.\*]

**12. SALES (§ 284\*)—ACTION FOR PRICE—BREACH OF WARRANTY—WHAT CONSTITUTES.**

Where an animal warranted to be of sound and healthy condition has within it, on the date of the sale, the seeds of disease from which a condition of unfitness develops, there is a breach of the warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803-805; Dec. Dig. § 284.\*]

**13. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF CUMULATIVE EVIDENCE.**

The admission of evidence as to a matter concerning which another witness had testified fully without objection, if erroneous, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

**14. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EXAMINATION OF WITNESS.**

Error in overruling an objection to a question is harmless, where the question is not answered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

Appeal from Circuit Court, McDonald County; Carr McNatt, Judge.

Action by E. N. Perry against F. M. Van Matre. From judgment for plaintiff for less than was claimed, plaintiff appeals. Affirmed.

J. A. Sturges, of Pineville, for appellant.  
O. R. Puckett, of Pineville, for respondent.

FARRINGTON, J. Rube, a big Kentucky jackass, is the subject of this action. Rube died before the litigation commenced, and knows nothing of the trouble he left behind. An alleged warranty concerning what he was and what he was capable of doing at the time he was sold to defendant by the plaintiff is presented for review. The petition counts on a note for \$1,000, given by defendant to plaintiff in consideration of two jacks, Rube and Frank, on which note with interest, after deducting credits, there was alleged to be due the sum of \$750. Defendant in his answer admitted buying the jacks and executing the note, but pleaded: "That said jacks were purchased to be used for breeding purposes, and to be stood by defendant at his farm in this county and to be let to service of mares on custom for profit, which fact was well known to plaintiff at the time; that plaintiff, well knowing the purpose for which defendant wanted said jacks, and in order to induce him to make said purchase, represented to defendant that said jacks were sound and healthy, and the larger jack, Rube, was a good breeder and sure foal-getter, and defendant, relying on plaintiff's said representations, was induced thereby to purchase said jacks and execute the note sued on; that the jack Rube was unsound and unhealthy, was not a good breeder, and was not a sure foal-getter; that he was infected by a secret malady and an undeveloped latent disease at the time, and shortly thereafter his legs and



body broke out in enormous sores, his hair came off in large quantities, he refused to eat, and continued to decline from the date of his purchase until the month of October, 1910, when he died. That the mares served by him failed to get with foal, and he was worthless for the purpose for which he was purchased, or for any other purpose. That the relative value of the jack Frank does not exceed \$500 on the basis of the agreed value of \$1,000 for the two jacks. Wherefore defendant says that after deducting the credits indorsed on said note, he is indebted to plaintiff in the sum of \$67.55." The reply is not set out in the abstract, but it is stated that the reply denied each and every allegation *as to failure of consideration*. The jury returned a verdict for plaintiff for \$67.55, and the case is here on his appeal.

Defendant's testimony as to the warranty is as follows: "He represented this Jack Rube as a great breeder and a sure foal-getter and sound and all right. Q. I believe you said these representations as to his being a good breeder and a sound animal were made by Mr. Perry before you bought the jack? A. Yes, sir." Plaintiff as a witness did not deny this. Indeed, there is at no place in the record a denial that plaintiff made the warranty set up in defendant's answer. Plaintiff proceeded at the trial on the theory of admitting the making of the oral warranty, but denying that a breach had occurred. Plaintiff and his witnesses testified that the jack, at the time of the sale and at different times during the year 1909 after defendant bought him, was fat, in good flesh, in good condition, in good life, quick to serve, appeared healthy, and had no scars or sores.

As appellant's assignments of error do not require a detailed review of the evidence introduced at the trial, it is enough to say that as to the jack's condition at the time of the sale, and for some months thereafter, the evidence is in irreconcilable conflict. The purchase occurred at plaintiff's farm in Arkansas on March 16, 1909, and the jack died at defendant's farm in Missouri in October, 1910.

As it will be necessary to refer to the instructions from time to time throughout the opinion, they are here set out.

The court, at plaintiff's request, gave this instruction: "(1) The note sued on in this case was given as the purchase price of two jacks sold by the plaintiff to the defendant, and defendant seeks to avoid the payment of the balance due on the note on the ground that one of the jacks was diseased at the time of the sale, and finally died of such disease. You are therefore instructed that it rests on the defendant to prove to your satisfaction by a preponderance of the evidence that the disease from which the jack died was not caused by the acts or treatment of him by the defendant, but existed at the time of such purchase and giving of said note."

The court, at defendant's request, gave these instructions:

"(A) The court instructs the jury that one who sells personal property to be used for a particular purpose impliedly warrants that it is reasonably suitable for the use and purpose for which it is sold and purchased; therefore, if the jury believe and find from the evidence in this case that the note sued on was given for the purchase of two jacks, to be used and stood for breeding purposes, and to be let to service to mares on custom, and that the use and purpose for which defendant purchased said jacks was known to plaintiff when selling the same, and that the jack Rube was worthless for the purpose for which he was sold, and was of no value for any other purpose, then there was a partial failure of consideration for said note, leaving the jack Frank as the only consideration therefor, and your verdict should be in favor of the plaintiff for the balance you may find due on the jack Frank, after deducting the credits indorsed on said note.

"(B) The court instructs the jury that if you find and believe from the evidence that the note sued on was given for the purchase price of two jacks, and that the plaintiff then and there represented and stated that the jack Rube was a great breeder and a sure foal-getter, sound, and healthy, and that said jack was sold and purchased for breeding purposes for hire; and if you further find and believe from the testimony that the said jack Rube was not a great breeder or not a sure foal-getter, or that he was not sound and healthy, and that by reason of any or all of said facts, if you believe them to be facts, said jack Rube was worthless in value for breeding purposes, and had no value for any other purpose, then there was a partial failure of consideration for said note, and your verdict should be in favor of the plaintiff for balance you may find to be due him on the jack Frank, after deducting the credits on said note."

[1] It appears by appellant's motion for a new trial that another instruction, C, was given for the defendant, but it is not set out in this record. Since appellant relies almost entirely on error in the instructions for reversal, he should have brought all the instructions to this court. *Guinn v. Boas*, 31 Mo. App. loc. cit. 134. The rule was long ago announced that: "Where a record discloses that other instructions were given, which are not stated, we cannot reverse for the giving of instructions which do not involve some substantial error prejudicial to the appellant." *Haegle v. Western Stove Co.*, 29 Mo. App. loc. cit. 494; *Harris v. Powell*, 56 Mo. App. loc. cit. 26.

[2] Appellant contends that since respondent defended by alleging an express warranty in his answer, it was error to instruct on an implied warranty, as was done by instruction A. The plaintiff, having to all in-

tents and purposes admitted that he made the warranty alleged in defendant's answer, to wit, that the jack was sound and healthy, a good breeder and sure foal-getter, could not complain of an instruction on such warranty, for example, an instruction along the line followed in instruction B. The undisputed evidence is that defendant bought the jack to use in the breeding business, and that plaintiff knew this fact, and that a jack worthless for breeding purposes is entirely worthless for any purpose. It is manifest that the express warranty alleged and proved was no greater than the implied warranty referred to in instruction A. It must be assumed that the jury believed the express warranty was made, since the plaintiff did not, by pleading or proof, deny that it was made, and the only issuable fact for the jury's determination was whether there was a breach of the warranty. Therefore, although an express warranty is said to exclude an implied warranty as to matters the former embraces (*Alvin Fruit & Truck Ass'n v. Hartman*, 146 Mo. App. loc. cit. 168, 123 S. W. 957), and, conceding that the implied warranty set up in defendant's instruction A was fully embraced in the express warranty set up in defendant's instruction B, and that the trial court erred in giving instruction A, it is manifest that under the peculiar circumstances of this case the error was nonprejudicial. Wherein was plaintiff prejudiced by the jury being informed that the law implied a warranty which defendant admitted he expressly made? We are required by statute (sections 2082 and 1850, R. S. 1909) to disregard such errors as produce no injury. An erroneous instruction must be prejudicial in order to warrant a reversal. *Bradford v. Railroad*, 136 Mo. App. loc. cit. 711, 119 S. W. 32.

[3] "Where an error in an instruction to a jury occurs at a trial, and it is followed by a result prejudicial to the excepting party (as, for instance in this case, by an adverse verdict), a reviewing court cannot properly consider the error otherwise than as a cause contributing to that result, unless the exact bearing it has had thereon can be discerned, and is found to have been harmless to the rights of the complaining party. This is all that is meant by the declaration that has occasionally been made to the effect that 'error is presumptively prejudicial.'" *Morton v. Heldorn*, 135 Mo. loc. cit. 617, 618, 37 S. W. 504. The burden is always on the appellant to convince the court, not only that error was committed against him, but that it was prejudicial. *Lower v. Coal & Min. Co.*, 142 Mo. App. 351, 126 S. W. 987. When no injury could result from the giving of an erroneous instruction, it is no cause for disturbing the judgment. *Gray v. Mo. R. P. Co.*, 62 Mo. loc. cit. 50; *Cordes v. Straszer*, 8 Mo. App. 61. Upon this record we are convinced that the substantial rights of the appellant

were in no way prejudiced by the giving of instruction A. See *Haines v. Neece*, 116 Mo. App. 499, 92 S. W. 919.

[4] Appellant contends that defendant's instructions do not conform to the pleadings; that defendant's answer went into detail concerning an alleged disease; that the case was tried on the theory that the jack was so diseased and died therefrom; that instruction A entirely ignores any disease; and that instruction B merely mentions it. The gist of the warranty alleged in defendant's answer is that the jack was sound and healthy, a good breeder and sure foal-getter. In pleading the breach, it was alleged that the jack was not a good breeder and sure foal-getter, and was unsound and unhealthy, going on to set out the details concerning the alleged unhealthy condition—merely pleading evidence. The evidence before the jury was squarely in conflict as to the healthy or unhealthy condition of the jack at the time of the sale. Does appellant ask us to hold that the trial court should have lifted bodily from the answer the evidentiary facts pleaded—facts which were disputed—and placed them in the instruction and told the jury that if those facts were established to their satisfaction, the animal was unhealthy? The answer to this contention is that it is error in instructions to assume facts which are in issue. *Caldwell v. Stephens*, 57 Mo. 589.

[5] As another branch of this contention it is pointed out that the answer used the term "good breeder," whereas the term "great breeder" is used in instruction B. The warranty, as pleaded, was that the jack was a "good breeder and sure foal-getter." Defendant testified that plaintiff represented this jack as a *great* breeder. *No objection was made.* See *Bird & Co. v. Gustin-Boyer Supply Co.*, 123 Mo. App. 36, 38, 99 S. W. 775; *Liddell v. Fisher*, 48 Mo. App. 449. "The rule is that a party may, during a trial, object to evidence on the ground that it is irrelevant to the issue, or he may raise the question of variance after it is introduced, but if he does neither, the trial court has the right to instruct on the evidence as introduced." *Mitchell v. Samford*, 149 Mo. App. loc. cit. 77, 130 S. W. 99. "If a variance occurs it may be either material or immaterial. If immaterial, the trial court, in the exercise of its discretion, may direct the facts to be found according to the evidence, or order an immediate amendment without costs." *Hensler v. Stix*, 113 Mo. App. loc. cit. 175, 178, 88 S. W. 108. In the case at bar, under the authorities the trial court pursued the proper course in the instruction.

[6] Nor is there any difference between a good breeder and a great breeder except possibly in degree; if there is any difference, a great breeder would be a more than ordinarily good breeder.

[7] It is insisted that defendant's instruc-

tion B is in conflict with plaintiff's instruction No. 1. It is obvious that the latter does not contain all the elements which *defendant* was entitled to have submitted to the jury. The warranty set up in the answer was double: (1) That the jack was sound and healthy; (2) that the jack was a good breeder and sure foal-getter. Merely because plaintiff was successful in having the court give an instruction which contained but half the alleged warranty should afford no ground for a contention in this court that the trial court, by giving an instruction at defendant's request which did contain both branches of the alleged warranty—that is, which covered the whole case—was guilty of "giving conflicting instructions." The converse of this situation is found in the case of *Kelley v. United Rys. Co.*, 153 Mo. App. 114, 132 S. W. 269, where plaintiff's instruction covered the whole case, while defendant's instructions erroneously stated but one of the two elements which were necessary to be found before defendant would be relieved of liability, so that the instructions were in irreconcilable conflict. The *defendant* prevailed, and the trial court granted plaintiff a new trial because of the conflict in the instructions. In upholding this action of the trial court, the following language was used (at page 119 of 153 Mo. App., at page 270 of 132 S. W.): "The rule requires instructions to be in harmony with each other, and if it appears those given for one side are sound in doctrine and those for the other are conflicting therewith as to grounds of recovery or defense, the verdict should be set aside if it is in favor of the party for whom the erroneous instruction is given, unless it be in a case where on all the proof it appears the verdict is for the right party." But in the case at bar, the verdict was not in favor of the party for whom the erroneous instruction was given. However, this contention is clearly overruled by the case of *Moore v. St. Louis T. Co.*, 193 Mo. 411, 91 S. W. 1060, where it is distinctly held that it is no objection to an instruction, correct in itself, that it conflicts with erroneous instructions.

[8] Plaintiff's instruction was clearly erroneous, for an instruction which purports to cover the case and directs a finding must not omit any material defense within the just scope of the pleadings and evidence. *Link v. Westerman*, 80 Mo. App. loc. cit. 596.

[9] Now it is contended that instruction B is not a correct instruction, but is erroneous in that it did not fix any time at which or within which the alleged warranty must be found to be operative. We do not believe the jury was misled in this particular. The answer had stated that the warranty was breached at the time the sale took place, and defendant testified that the conditions complained of existed from the beginning. The instruction treats of an alleged warranty made at the time of the sale, and sets forth

the elements constituting the alleged warranty—I. e., that the jack was sound and healthy, and was a good breeder and sure foal-getter—and then tells the jury that if they believe the jack *was* not sound and healthy, or *was* not a good breeder and sure foal-getter, etc. We do not think this was calculated to mislead the jury in this case, but that the jury, as reasonable men, would understand that the condition must have existed at the time of the sale, and not have been contracted or brought about months or years afterward. See *Layson v. Wilson*, 37 Mo. App. 636; *Hobart v. Young*, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693, 695, 696.

[10] The time was clearly fixed in the instructions given as of the date of the sale and the breach went to the latent and hidden disease. Defendant charged there was a breach of the warranty that the jack was sound and healthy owing to the diseased condition, and that the jack was not a good breeder and sure foal-getter because of the disease. The definition of "disease," as given in *Cyc.* (volume 14, p. 385) is: "Any derangement of the functions or alteration of the structure of the animal organs; a morbid condition, resulting from some functional disturbance or failure of physical condition which tends to undermine the constitution."

[11] The evidence is undisputed that at the time defendant purchased the jack there was no apparent disease or symptom from which the defendant should have known of any latent or hidden disease. Where an express warranty as to soundness is made, and a breach is alleged because of a latent defect or a latent unsoundness, it becomes a question for the jury to determine from the evidence whether the unsoundness or unhealthy condition existed at the time of the sale. In determining this question they will of course consider the evidence of the plaintiff that the jack, the subject of the warranty, was in good, sound condition, and a good breeder up to the time the sale was made. On the other hand, they will consider the evidence of the defendant showing the symptoms as they developed, the appearance of the disease, and the unfitness of the animal for breeding purposes. The defendant swore positively that the jack would eat very little and immediately began to decline in health from the date of sale to the time it died. Likewise, his testimony was positive that among 49 mares served by this jack only 11 or 12 became in foal, and that the average jack that is a great breeder and sure foal-getter will foal from 65 to 85 per cent. of the mares served. His evidence tended to show the condition of the jack as soon as purchased, to wit, that he was not a great breeder and sure foal-getter; that he immediately began to decline in weight, appeared dispirited, and gradually declined until sores came and he died, and this was evidence from which the jury had a right to draw an inference that

the jack was diseased, or that this condition of the jack existed in a latent or hidden form on the date of the sale.

[12] If the seeds of disease were in the animal on the date of the sale, and from that condition his unfitness developed, the law is settled that the warranty of sound and healthy condition is breached. See *Woodbury v. Robbins*, 10 Cush. (Mass.) 520. The evidence that the jack refused to eat, was dispirited, and was not a great breeder and sure foal-getter was enough to justify the jury in finding that both the alleged warranties were breached, without having to go further and find that the sores caused the infirmity, as it is the holding of many courts that a warranty of soundness or healthy condition is breached by a temporary ailment or disease, provided the temporary ailment or disease renders the animal unfit for the use to which he is to be adapted. See *Roberts v. Jenkins*, 21 N. H. 116, 53 Am. Dec. 16. In *Elton v. Brogden*, 4 Camp. 281, Lord Ellenborough said: "I have always held, and now hold, that a warranty of soundness is broken if the animal, at the time of the sale, had any infirmity upon him which rendered him less fit for present service." It is held in *Kornegay v. White*, 10 Ala. 255, that a warranty of soundness covers all diseases which affect the value of the things sold, whether temporary or permanent, and to the same effect is *Schurtz v. Kleinmeyer*, 36 Iowa, 392.

In determining questions as to soundness on a certain date, where the proof is that prior to that date the animal was sound and subsequent to that date he was unsound, the only way to proceed is for the jury from these facts to draw an inference concerning the condition on the date of the sale. Such a fact cannot, in a case like the present, be positively and actually known. A finding must necessarily be based on inference; and, if the evidence that the jack was healthy prior to a certain date is true, and it should be shown that he was not a great breeder and sure foal-getter immediately after the sale on said date, it would certainly not be an unwarranted inference that this changed condition was brought about by disease, because any animal that is shown to be capable of procreating its species necessarily continues capable until there is some derangement of the functions or alteration of the structure of the animal organs, which is *disease*. The testimony of the defendant that the jack was thin on the day he went to get it, and the explanation made by plaintiff's agent, the keeper, that the jack was thin because the timothy hay had burned, and that it did not like to eat prairie hay, followed by the testimony of defendant that he procured timothy hay for the jack after taking it home, and that it refused to eat the same and continued to lose in weight, would certainly be some evidence that the

condition of unfitness and disease existed on the date of the sale. The jury having so found upon sufficient evidence, its verdict will not be disturbed.

[13] Appellant complains of error in the admission of testimony. Defendant's witness, Jones, had stated that he commenced working for defendant in March, 1910. He was then asked this question: "Try and describe the appearance of that jack as to whether he appeared healthy and sound or diseased at the time you first knew him in March, 1910." He answered: "When I first commenced working there he had sores from his knee down." No objection was made. Then the witness was told to "describe these sores to the jury," whereupon plaintiff objected "to any sores that come there a year after the jack was bought," which was overruled, and plaintiff excepted. The witness answered: "Those sores were there when I commenced working there, and they became worse during the season." The defendant, as a witness, had previously testified fully as to the sores, covering the time witness Jones testified to, and no objection had been made by the plaintiff, so that Jones' testimony, at which the objection was aimed, was, at most, cumulative, and, even though its reception could be said to be erroneous, it would not constitute reversible error. *Powers v. Union Ry. Co.*, 60 Mo. App. loc. cit. 482.

[14] Appellant presses another point. Defendant's witness Jones was asked on direct examination: "Do you know of any veterinary surgeon who treated the jack during that time?" Plaintiff objected, stating grounds, and the court overruled the objection, and plaintiff excepted. However, the contention falls down by reason of the fact that the witness did not answer the question, and no other attempt was made to elicit the information called for by the question objected to.

Finding no reversible error, the judgment is affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

#### MARQUEZ v. KOCH et al.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

1. MASTER AND SERVANT (§§ 101, 102\*)—LIABILITY OF MASTER—"REASONABLY SAFE" MEANS.

The term "reasonably safe," within the rule requiring an employer to adopt a reasonably safe manner of doing work, means safe according to the usages, and habits, and ordinary risks of the business, and employers need not adopt a better or less dangerous way.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*

For other definitions, see *Words and Phrases*, vol. 7, p. 5985.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. MASTER AND SERVANT (§ 293\*)—INSTRUCTIONS—CONFLICTING STATEMENTS.

An instruction, in an action for the death of an employé engaged in excavating a sewer trench caused by an explosion of dynamite, that, when an employer is engaged in a business in its nature dangerous, and a casualty occurs which could reasonably have been foreseen, and the employer might have reasonably adopted rules rendering the place reasonably safe, and would probably have prevented the casualty, but failed to do so, he was liable to an employé injured by reason of the failure, though others engaged in the same general line of business might not have adopted any such rules, contained inconsistent statements, for the first part proceeds on the theory that, if the employer could reasonably have foreseen the accident, and might have reasonably adopted rules rendering the place reasonably safe, but failed to do so, he was liable, while the latter part of the instruction eliminated that element in determining the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

## 3. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where, in an action for the death of an employé excavating a sewer trench, caused by an explosion of dynamite, plaintiff introduced evidence on the issue of the usual way commonly adopted of firing shots by others engaged in the same kind of business, an instruction authorizing a recovery if the employer failed to adopt a system that would render the place reasonably safe, though others engaged in the same general line of business might not have adopted any such system, was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

## 4. TRIAL (§ 252\*)—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

An instruction, in an action for the death of an employé, authorizing a recovery on the jury finding that the employer might have reasonably adopted rules rendering the place reasonably safe, was abstract for failing to point out one or more systems of rules which under the evidence were reasonably safe and might have been adopted to prevent the injury, and to confine the jury to them in determining the question of the employer's negligence, within the issues made by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

## 5. TRIAL (§ 258\*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.

Where the court gave ten instructions requested by an employer when sued for the negligent death of an employé, the refusal to give seven other requested instructions was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 646, 647; Dec. Dig. § 258.\*]

## 6. DEATH (§ 32\*)—ACTION FOR NEGLIGENT DEATH.

A widow suing for the negligent death of her husband, leaving surviving children, must sue for herself and as trustee for the children, so that all the damages may be recovered in one action.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 47, 48; Dec. Dig. § 32.\*]

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by Maria Rodrigues Marquez against V. E. Koch and another, partners as Koch & Kost. From a judgment for

plaintiff, defendants appeal. Reversed and remanded.

Mercer Arnold, of Joplin, and Skidmore & Walker, of Columbus, Kan., for appellants. O. A. McNeill, Chas. Stephens, and E. V. McNeill, all of Columbus, Kan., and Lee Shepherd and I. N. Threlkeld, both of Joplin, for respondent.

ROBERTSON, P. J. Action for death of plaintiff's husband by wrongful act of the defendant. Plaintiff prevailed below, and the defendants have appealed.

The petition alleges that on and prior to August 13, 1912, the defendants were excavating in Columbus, Kan., preparatory to the construction of a sewer, and that the plaintiff's husband, Clemente Marquez, was killed on that day by reason of an unexpected explosion of dynamite in the ditch where the plaintiff's husband was working; that plaintiff and the deceased were married about two years prior to the accident; that her husband died intestate, and without issue, and that no administrator, executor, or other legal representative of his estate had been appointed at any place or time; and that "the plaintiff is the widow and next of kin of the deceased," and that any sum recovered in this action will inure to her sole benefit. Then follows allegations specifically describing the excavation, and that after the excavation proceeded a short depth stone and rock were encountered that could not be removed without blasting, and in order to accomplish that end, and to expedite the work, dynamite was used; "that it was the custom and practice of said defendants to insert a large number of pieces or sticks of dynamite in said holes drilled in said sewer ditch; \* \* \* that defendants had drilled about 30 or 40 such holes, \* \* \* and had inserted in each of the same a large number of sticks of dynamite, \* \* \* and same had fuses attached thereto; that said defendants caused the fuses to be lighted and the dynamite fired for the purpose of shooting on and discharging the same; and that on said 13th day of August, 1912, one of the charges so placed by the defendants prior to said time failed to explode from the lighted fuse, and failed to go off, and the said Clemente Marquez was sent by the defendants, with other employés, to the said ditch to work as a picker and shoveler, and, while striking with a pick while at work in the line of his duty as such employé in said ditch, he struck said undischarged and unexploded load and charge of said dynamite, which was covered up and concealed by dirt and rock, which said charge exploded with great and terrible force and violence," thereby killing the plaintiff's said husband. The petition then charges the negligence of the defendants as follows:

"Plaintiff alleges and avers that defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ants were guilty of gross carelessness and negligence in that they failed and neglected to keep, maintain, and promulgate a reasonable code of rules, plan, or system whereby it could, with reasonable certainty, ascertain whether or not all of the said charges of dynamite so placed in the various holes as aforesaid had exploded or had been discharged, and in carelessly and negligently failing and neglecting to have and maintain a proper plan or system of inspecting the said sewer ditch and working place at the point where said charges of dynamite had been placed, and in failing to use any reasonable means, system, or method for the purpose of ascertaining whether or not all of said dangerous and explosive charges of dynamite theretofore placed therein had been exploded, and said shots and charges of dynamite were so placed, arranged, and fired so that from 4 to 10 of the same would go off at once, so that defendants did not know and could not tell how many of said shots had gone off, and by reason of such carelessness did not and could not inform the plaintiff and its employes, and they could not know the number of shots that had gone off or the number that had failed to go, and had no knowledge or means of knowledge thereof, and said defendant failed and neglected to furnish said Clemente Marquez a reasonably safe place in which to work, which failure on the part of said defendants caused his death at the time and place and in the manner and by the means aforesaid, all of which facts were to defendants well known, or with the use of reasonable care would have been known, and to plaintiff's damage in the sum of \$10,000."

The petition alleges that two sections of the 1909 General Statutes of Kansas were, at the time of the accident, and are now, in force in said state, as follows:

"Sec. 6014. Action for Death by Wrongful Act—Limitations—Damages. 419. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"Sec. 6015. When Action may be Brought by Widow or Next of Kin. 420. That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the

widow, or where there is no widow, by the next of kin of such deceased."

Code Civ. Proc. §§ 419, 420.

The defendants' answer contained a general denial and the usual pleas of contributory negligence, assumption of risk, and the existence in Kansas of the common law applicable thereto. Plaintiff filed a general reply to the defendants' answer.

The deceased was 24 years of age and about one year older than his wife at the time of his death.

There were from 25 to 40 men working on the ditch, divided into what were called the drill gang, shot firers, and shovelers. The drill gang was in charge of a superintendent or foreman by the name of Bomhoff; George Rich was foreman of the shovelers; and a colored man was the shot firer, though he was sometimes assisted by Bomhoff and others. It was the custom to drill the holes for the dynamite  $2\frac{1}{2}$  or 3 feet deep and about the same distance apart in the bottom and center of the ditch, and to load 50 or 60 of these holes with from 2 to  $3\frac{1}{2}$  sticks of dynamite. For each hole the fuse was cut the same length, and extended about 6 inches above the ground preparatory to firing. The fuse lighter and one other person generally commenced in the center of the ditch and worked towards each end when lighting the fuses, which required about two minutes. After the explosions occurred, the shot firer and one or both of the foremen would walk along the bank of the ditch, and undertake to ascertain from the appearance of the fuses and the ground whether all the shots had exploded. Defendants' testimony was that the usual examination was made after this particular shot; but there is a conflict in their testimony, and that of plaintiff's testimony as to when the string of shots in which was this unexploded one was fired. Plaintiff's testimony tended to prove that they were fired at the noon hour, just after the men had gone off of the work, on the day on which the accident occurred, and that upon going to work after noon the foreman of the shovelers' gang ordered them to proceed into the ditch and go to work.

Plaintiff offered testimony tending to prove that the usual method adopted and employed by others engaged in the same line of business and using explosives of this character in this kind of work was to cut the fuse into different lengths, causing the shots to explode at different intervals, so that it could be ascertained when all of the shots had exploded. In behalf of the defendants the testimony tended to prove that such a method would not accomplish the end contended for by plaintiff, because different pieces of fuse burned at a different rate, and that the adoption of that method would not enable them to ascertain when all of the shots had been fired, or to distinguish the shots, and for the further reason that often one shot would explode another; also, that the method they had

adopted was the usual and customary method adopted by all those engaged in the same line and character of work which they were doing when plaintiff's husband was killed.

At the time plaintiff's husband was killed he was using what is called a mattock, and the defendants' testimony tended to prove that they were not expected to use this tool nor a pick for the purpose of loosening the solid ground or rock, but that the shovels were placed in the ditch solely for the purpose of shoveling out the loose dirt. On the other hand, plaintiff's testimony tends to prove that the employees uniformly used both of these tools at their own pleasure for digging in the solid earth. Defendants introduced testimony to the effect that the employees had strict orders not to use these tools in the manner aforesaid; but there is abundant testimony tending to prove that no such orders were ever sought to be enforced.

There is no testimony tending to prove that the deceased left surviving him no children.

At the conclusion of the testimony the court, after giving instruction No. 1 in behalf of plaintiff upon the whole case following the charges of the petition, and instruction No. 2, defining ordinary care and negligence, gave instruction No. 3 in behalf of plaintiff as follows: "You are instructed that, when an employer of servants is engaged in a business that is in its nature and character hazardous and dangerous, a casualty occurs which could reasonably have been foreseen, and such employer or master might have reasonably adopted and promulgated a plan or system of rules that would have rendered the place reasonably safe, and would *probably* have prevented the casualty, but such master or employer fails and neglects to so adopt such plan or system of rules, he would be liable, to a servant or another injured or damaged by reason of such neglect or failure, if it was the proximate cause of the injury, and that notwithstanding the fact that others engaged in the same general line of business may not have adopted any such plan or system of rules."

The instructions in behalf of the defendants covered: (A) The theory of a mere accident; (B) assumption of the risk; (C) hidden or improbable dangers; (D) that defendants were not insurers of the safety, but only required to exercise ordinary care; (E) that negligence is never presumed, and that the fact of the explosion alone did not raise the presumption of negligence; (F) that, if orders were given not to dig or pick in the solid ground, or to use a pick or mattock in the loose rock, or to use a pick or mattock about or near unexploded shots, it was the duty of plaintiff's husband to obey such instructions, and, if his death was caused by reason of his failure in that respect, the verdict should be for the defendants; (G) if the deceased was given orders not to use the mattock or pick in the sewer ditch, and vio-

lated such orders, and was injured as a result thereof, the plaintiff could not recover.

Instruction H was given at the request of the defendants, reading as follows: "You are instructed that, if you find from the evidence that after the firing of the round of shots, preceding the explosion which caused the death of deceased, which were fired in the trench where deceased was engaged to work, and before the explosion that killed deceased occurred, the defendants had inspected said trench with reasonable care to determine whether or not any shots had misfired in order to remove the same, or guard against injury from the same, if any remained unexploded, and that such inspection was the usual and ordinary manner employed by persons of ordinary prudence engaged in that line of business to determine the presence of unexploded shots, then the defendants are not liable to the plaintiff for the death of deceased, even though such inspection failed to reveal the presence of an unexploded shot, which afterwards exploded, and caused the death of the deceased."

Instruction I is on the question of the credibility of the witnesses.

The defendants requested the court to give instructions numbered from J to P, inclusive, which were refused.

[1, 2] Instruction No. 3 given in behalf of the plaintiff and instruction H given in behalf of the defendants are alleged by appellants to be in conflict, and so we think they are, and that No. 3 contains inconsistencies within itself; the latter part of it being in conflict with the first part thereof. The rule in this state is that: "In regard to the \* \* \* nature of the mode of the performance of any work, 'reasonably safe' means safe according to the usages, and habits, and ordinary risks of the business. \* \* \* No man is held by the law to a higher degree of skill than a fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed." *Coin v. Lounge Co.*, 222 Mo. 488, 506, 121 S. W. 1, 25 L. R. A. (N. S.) 1179, 17 Ann. Cas. 888.

The first portion of instruction No. 3 proceeds on the theory that, if defendants could reasonably have foreseen the accident which happened, and might have reasonably adopted and promulgated rules that would have rendered the place reasonably safe, but failed in that regard, then they were liable. "Reasonably" as used in this instruction is a relative term to be determined by the facts and circumstances in this particular case, and one of the tests, as repeatedly laid down by the Supreme Court of this state and as

above quoted, to determine when an employer has exercised reasonable judgment is by the standard of what is usual and ordinary in the same line of business. For the jury to determine whether the defendants could reasonably have foreseen the dangers, and have reasonably adopted rules that would have prevented the injury complained of, they had a right to determine that fact by taking into consideration what was usually and ordinarily done by those engaged in the same line of business. This is a rule that adjusts itself to all lines and character of businesses, however free from danger or fraught with hazards. The rule does not tend to discourage progress or improvements, because the man who adopts a better method than others engaged in the same line of business could not under that test be held to be guilty of negligence, nor can the rule be made more than evidential to be considered by the jury in each given case. *Brunke v. Telephone Co.*, 115 Mo. App. 36, 39, 90 S. W. 753. The latter part of instruction No. 3 eliminates the very elements which the jury had a right to consider in arriving at their conclusion under the first proposition therein contained.

[3] Not only is instruction No. 3 erroneous for the reasons above noted, but for the additional reason that the plaintiff voluntarily introduced testimony to a considerable extent on the question of the usual and ordinary way commonly adopted for firing shots by others engaged in the same kind of business as defendants, and, even though the closing portion of instruction No. 3 might be good law under ordinary circumstances, it was error to give it in this case, as that issue was invited and invoked as a test by the plaintiff to convict the defendants of negligence, and met by the defendants with testimony to the contrary.

[4] Instruction No. 8 is also too abstract and general to furnish a proper guide to the jury. The jury should not be left to speculate as to what plans or system of rules might be adopted so as to make the work reasonably safe; but the instruction should point out the one or more safe plans or system of rules, if any, which the evidence tends to show were reasonably safe, and which might have been adopted to prevent the injury, and confine the jury to a consideration of such designated plans or system of rules in determining defendants' negligence, and to such as come within the issues made by the pleadings.

[5] The defendants complain of the refusal of the court to give seven instructions requested by them; but, as the court did give ten instructions in their behalf, we are of the opinion that they are not entitled to further consideration on the subject of instructions, if they were not able to incorporate in that number of instructions given the vari-

ous matters they desired to have called to the special attention of the jury.

[6] It has been noted that this suit is by the widow as an individual, and that the petition herein alleges that the deceased left no children; that plaintiff is his widow, and all damages recovered will inure to her; that no personal representative of the estate has been appointed. These allegations were all proven except as to there being no children. Much is said by counsel in their briefs and argument as to the right of the widow as an individual, and especially when claiming as her own all damages to be recovered, to maintain this suit in the absence of proof that there are no children. It is evident that, if there are surviving children, the damages should be all recovered in one action for the benefit of both such widow and children.

No case cited from Kansas or Oklahoma which has a similar statute is in point. We are reluctant to construe a statute of a sister state except when necessary, preferring to leave that to the courts of such state. We think it unnecessary in this case for us to express any opinion on the Kansas statute. The failure to make proof in this case that there were no children seems to have been an oversight on the part of the plaintiff. Should the case be retried, this proof will likely be made. Should it be shown that there are surviving children, the plaintiff can obviate all objections upon this subject by amending her petition so as to sue for herself and as trustee for such children.

The instruction on the measure of damages is based on the theory that there are no children, and that the plaintiff is entitled to all damages recovered. This is unobjectionable should the proof show such to be the fact, and can be modified on a retrial if the proof shows otherwise.

We have examined all of the other points insisted upon by the appellants, and consider that their importance does not justify further consideration.

The errors above noted in the instructions necessitate a reversal of the judgment, which is accordingly reversed, and the cause remanded.

STURGIS and FARRINGTON, JJ., concur.

#### BANGE v. SUPREME COUNCIL LEGION OF HONOR OF MISSOURI.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1918.)

#### 1. INSURANCE (§ 819\*)—LIFE INSURANCE—ACTIONS—BURDEN OF PROOF.

In an action on a benefit certificate, proof by the beneficiary of the death of the insured, coupled with the introduction in evidence of the certificate, makes out a prima facie case, cast-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



ing on the defendant the burden of establishing its defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.\*]

**2. INSURANCE (§ 751\*)—MUTUAL BENEFIT INSURANCE—NOTICE OF CONTRIBUTIONS.**

Where the by-laws of a mutual benefit association required notice of contributions called to be mailed to the member at his regular address, the mailing of such notices was a condition precedent to the right of the association to declare a forfeiture of the member's right to participate in death benefits.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1897-1902; Dec. Dig. § 751.\*]

**3. INSURANCE (§ 756\*)—MUTUAL BENEFIT ASSOCIATION—SUSPENSION.**

Where the by-laws of a mutual benefit association vested a discretion in the council whether to assume the burden of paying contributions for a member, and it was the custom to defer action thereon to the next meeting, the provisions for forfeiture of the member's rights for nonpayment of contributions are not self-executing, and the suspension, if made, is necessarily deferred, even though notice is given, until the action of the council is had and the member is declared suspended.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.\*]

**4. INSURANCE (§ 751\*)—MUTUAL BENEFIT INSURANCE—NOTICES.**

Parties to an insurance contract may agree that the mailing of notices for contributions shall be notice to the member.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1897-1902; Dec. Dig. § 751.\*]

**5. INSURANCE (§ 825\*)—MUTUAL BENEFIT INSURANCE—ACTIONS—JURY QUESTION.**

In an action on a benefit certificate, the question of the insured's regular address held for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.\*]

**6. INSURANCE (§ 756\*)—MUTUAL BENEFIT INSURANCE—NOTICES.**

Where the by-laws of a mutual benefit insurance association required the mailing to the members of notices of calls for assessment and of suspensions for nonpayment, and a member had 30 days after suspension in which to reinstate himself by payment, proof of actual receipt of the notice in time for the member to have exercised his rights is necessary to sustain a suspension, where they were not mailed to his regular address.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.\*]

**7. INSURANCE (§ 756\*)—MUTUAL BENEFIT INSURANCE—NOTICES.**

For the notice of suspension to conclude a forfeiture against a member of an insurance order, the notice must be an official one.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.\*]

**8. INSURANCE (§ 756\*)—MUTUAL BENEFIT INSURANCE—"REGULAR ADDRESS."**

The question of the regular address of a member of an insurance order is not identical with that of domicile, which depends on intention; the expression, "regular address," merely referring to the place where the member would be likely to get his mail.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.\*]

**9. INSURANCE (§ 757\*)—MUTUAL BENEFIT ASSOCIATIONS—SUSPENSION—ACQUIESCENCE.**

Where a member of an insurance order acquiesced in a suspension, his beneficiary is

bound by such acquiescence, even though the suspension was not legal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1919; Dec. Dig. § 757.\*]

**10. INSURANCE (§ 756\*)—MUTUAL BENEFIT INSURANCE—SUSPENSION—NOTICE.**

For the acquiescence of a member of an insurance order in an illegal suspension to bind his beneficiary, it need not appear that the member had official notice of his suspension.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.\*]

Appeal from St. Louis Circuit Court, Eugene McQuillin, Judge.

Action by Minnie E. Bange against the Supreme Council Legion of Honor of Missouri. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

See, also, 153 Mo. App. 154, 132 S. W. 276.

James J. Donohoe, of St. Louis, for appellant. Kinealy & Kinealy, of St. Louis, for respondent.

**NORTONI, J.** This is a suit on a benefit certificate. The finding and judgment were for defendant, and plaintiff prosecutes the appeal.

Defendant is a fraternal association, and the defense is that the insured forfeited his membership through nonpayment of contributions prior to his death, and because of which he was suspended from the order. A second defense is to the effect that, though the suspension of the insured member was illegal, he nevertheless acquiesced therein after having received due notice of such suspension.

The case has been reviewed here on two prior appeals. We find the relevant facts to be substantially the same as those stated on the first appeal. We copy that statement here as sufficient for the purposes now in hand. See *Bange v. Sup. Council, etc.*, 128 Mo. App. 461, 105 S. W. 1092.

"The insured was Julius A. Bange. He was a member of Irving Council No. 2 of the defendant order, the Supreme Council Legion of Honor of Missouri. Minnie Bange was the wife of the insured and the beneficiary of the certificate, in which the order obligated itself to pay her \$2,000 on due notice and proof of the death of her husband. Bange joined the order and took out the certificate April 5, 1902. At that time he was a resident of the city of St. Louis and lived at 3546 Henrietta street. He died February 19, 1905, in Texas, while traveling there as a salesman for a Chicago business concern. Subsequently Bange moved from No. 3546 Henrietta street, St. Louis, to 2637 Park avenue. This removal was in October, 1903, and plaintiff with his family, consisting of himself, wife, and child, went to live with his mother-in-law, Mrs. Hobie. Thereafter the recorder of Irving Council would sometimes call at 2637 Park avenue to collect the dues, and sometimes send a written notice of a call for payment, to that address. A by-law

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the order provided that a notice to pay dues should be 'directed to the regular address of the member and deposited in the post office,' provided, further, that this should be a sufficient notice to bind a member. Contributions to the relief fund were called monthly, and during the year 1904 Bange's dues were \$1.39 a month. In May of that year, and while still residing at 2637 Park avenue, he paid the order \$6, which sum discharged his dues to June 30, 1904, and left 33 cents standing to his credit. The call due June 1st, and payable as late as June 30th, was No. 128, and was the last call paid by Bange. During the summer, and some time, it seems, after June, Bange, being out of employment, went to Chicago to seek work. When he left St. Louis he stored his furniture in the cellar of his mother-in-law's home on Park avenue and his wife and child remained there. His wife visited him for six weeks during the summer in Chicago. Bange worked for a time in Chicago, and in January, 1905, got a position as traveling salesman, his territory being in Texas. In the meantime, he had lived with his sister at No. 2094 Wilcox avenue, Chicago; that is to say, he stayed at said number from some time in July, 1904, until January, 1905, and then went to Texas. There is evidence tending to show his mail address continued to be in Chicago, or that such of his mail as came to 2637 Park avenue, St. Louis, was forwarded to his Chicago address. Mrs. Hobie swore that during the summer of 1904, after Bange had left St. Louis, and while his wife was visiting him in Chicago, Malcolm A. Lindsley, the recorder of Irving Council, called once or twice at 2637 Park avenue to collect Bange's dues, and Mrs. Hobie told Lindsley Bange's Chicago address. She testified, further, Lindsley said the lodge would keep up the assessments for a year. It is not shown positively that Mrs. Hobie communicated this statement to Bange, but it is fairly inferable that she did. This occurred in August, 1904. In point of fact the Irving Council did pay Bange's dues for three months; that is, for July, August, and September, and had previously paid his calls for April, May, and June, though for the latter three months he had reimbursed the council. Such payment of dues for delinquents was in accordance, not only with the custom, but with a by-law of the order. Said by-law is as follows: 'Each member shall pay the amount due as his contribution to the relief fund within thirty days from the date of such call, and any member failing to pay such contribution on or before the first meeting of his council after the expiration of said thirty days, shall stand suspended from the order and from all benefits therefrom; provided, however, that any council may, by a majority vote of the members present at said meeting, authorize the payment of a member's contribution as a loan or as a gift, from its general or any fund, other than the relief fund, but

such payment must be made within the time herein specified.' There is another by-law which provided methods for the reinstatement of suspended members. Within 30 days from the date of suspension a member may file with the recorder of the council a written application for reinstatement, and pay to said recorder all dues and fines in arrears from the date of suspension, and thereupon be reinstated. If the suspended member waits 90 days after his suspension before seeking reinstatement, he must file a written application, accompanied by the certificate of some physician, and pay up his contributions. In such instance he can only be reinstated by making an application in that form and obtaining a favorable vote of his council. If a suspended member waits longer than 90 days before applying for reinstatement, it seems he must be elected as a new member. The testimony of Lindsley was the council usually carried a delinquent for three months, or sometimes longer when solicited. On October 1, 1904, call No. 132 for contributions from members was issued, and a notice of the call sent by the recorder Lindsley to Bange to No. 2637 Park avenue, so Lindsley swore, and, further, that he sent a notice of said call again on November 1st. Lindsley is a man upwards of 70 years old. His testimony on this point is that he would write out a large number of notices of assessment, 30 or more, place them in stamped and addressed envelopes, take a batch to a mail box, and deposit them. His testimony is quite positive that he mailed Bange, on October and November 1st, notices of the call for assessment No. 132. This assessment would be \$5.67 for three months' dues. Mrs. Hobie's testimony tends to prove no notice was sent; for she swore that, to her knowledge, no letters came for Bange to her home with the card of Irving Council stamped on the corner of the envelope. Lindsley testified the notices were sent out in envelopes with said card on them. Mrs. Hobie swore any mail that came to her home for Bange was forwarded to Chicago; that she told Lindsley Bange's regular address was 2094 Wilcox avenue, Chicago, and Lindsley promised to write to him at that address. The by-law of the order regarding the duties of the recorder, provided that said officer of each subordinate council should 'conduct all its correspondence.' On November 9, 1904, Bange was suspended, and his suspension was entered on the minutes of Irving Council at one of its monthly meetings, for nonpayment of dues. Lindsley swore he sent a notice of his suspension to him; and the Supreme Recorder of the Legion of Honor, whose office is at 410 Fullerton Building, St. Louis, testified that after he was notified of the suspension by Irving Council, he, too, sent a notice of it to Bange. Both notices were addressed to 2637 Park avenue, St. Louis, Mo. Some correspondence took place between Bange and Lindsley after the former went to

Chicago. Bange must have written to Lindsley in the fore part of August, because, on the 18th of that month, Lindsley wrote to him as follows:

"Irving Council No. 2, L. of H. Meets Second and Fourth Wednesdays Masonic Temple, Grand and Finney Avenues. M. A. Lindsley, Recorder, 3696 Finney Ave. St. Louis, 18th August, 1904."

"Bro. J. R. Bange, Chicago, Ill.—Dear Sir: I am in receipt of your esteemed favor of recent date. Irving Council will not suspend you; it will pay your assessments for a reasonable length of time hoping that you may find employment and be able to reimburse them. Present my regards to your wife, who, I learn, is with you. After the receipt of your letter I called to see her to assure her Irving Council would treat you kindly and from her mother learned that she was with you. Fraternally, M. A. Lindsley, R.' That letter was offered in evidence by the plaintiff, but excluded by the court. It was in an envelope addressed as follows: 'J. A. Bange, Esq., Chicago, Illinois, 2094 Wilcox Avenue. Return to 3696 Finney avenue. Postmark St. Louis, August 18th, 1904, 2 p. m. Chicago postmark, August 19th, 1904, 9 a. m.' The court admitted the envelope in evidence. Bange never afterwards paid dues, tried to be reinstated, or participated in any way in the proceedings of Irving Council."

For a further statement, see *Bange v. Sup. Council Legion of Honor*, 153 Mo. App. 154, 132 S. W. 276.

Of its own motion, the court instructed the jury as follows:

"On the points of law arising in this case the court instructs you as follows:

"(1) The evidence establishes that the defendant is a fraternal benefit association operating under the lodge system of government, that plaintiff is the wife of Julius A. Bange, deceased, who became a member of Irving Council No. 2 (a subordinate council of defendant) in the year 1902, that the defendant issued the certificate mentioned in the evidence, and agreed to pay plaintiff the sum of \$2,000 on the death of her husband, provided he was a member of defendant order in good standing at the date of his death. Defendant order sets up a forfeiture of the membership of Julius A. Bange prior to his death, on the ground of nonpayment of the October, 1904, contribution. Contribution for October, 1904, was not paid, and on November 9, 1904, Irving Council No. 2 declared deceased suspended and his membership in defendant order forfeited. Julius A. Bange died February 19, 1905.

"(2) In order for the plaintiff to recover in this action it is not necessary for her to prove that Bange at the time of his death was in good standing in the defendant order, but, on the contrary, to defeat recovery the defendant must establish by a preponderance or greater weight of the evidence that Bange was lawfully suspended on the 9th day of

November, 1904, or that said Bange acquiesced in such suspension, although you may believe and find from the evidence that such suspension was illegal.

"(3) Before the defendant can avail itself of the defense of acquiescence in the suspension on the part of deceased it must establish by a preponderance or greater weight of the evidence that defendant mailed a notice addressed to Bange's regular address, informing him of said suspension *or that he had notice of said suspension in some other way.*

"(4) The law presumes knowledge on the part of deceased, Julius A. Bange, of the constitution and general laws of the defendant order and of the by-laws of Irving Council No. 2, which were in force during the entire time that he was a member of defendant organization.

"(5) Unless you believe and find from the evidence that the recorder of Irving Council No. 2 deposited in the United States mail a notice to deceased directed to his regular address of the call of the October contribution, 1904, or that said deceased received such notice in some other manner and in time to have enabled him to pay such contribution within 30 days from the date of such notice—the limit named in the law of defendant order—and unless you further find and believe from the evidence that defendant's supreme recorder deposited in the United States mail a notice to deceased directed to his regular address, informing him of his suspension on November 9, 1904, for the nonpayment of the October contribution, *or that deceased received notice of such suspension in some other manner, you will find a verdict for plaintiff.*"

"(12) The letter read in evidence, dated August 18, 1904, signed by M. A. Lindsley, the recorder of Irving Council No. 2, was no excuse or justification for the nonpayment of the October contribution by deceased. This letter was introduced solely for the purpose of evidence relating to Lindsley's knowledge of where notice should have been sent of the call of the October contribution.

"(13) Even though you may find and believe from the evidence that at the time of the death of Bange he was indebted to defendant for dues and per capita tax, you are instructed that his delinquency in these respects cannot affect the right of this plaintiff to recover in this action.

"(14) Even though you may find and believe from the evidence that at the time of the death of Bange he was indebted to defendant for contributions for the months of July, August, September, and December, 1904, and January and February, 1905, you are instructed that the nonpayment of said contributions for said months, or for any of said months, must not be taken into consideration by you in determining the question whether deceased was lawfully suspended for the nonpayment of the October, 1904, contribution.

"(15) If you find for the plaintiff you will allow her the sum of \$2,000, with interest thereon at the rate of 6 per cent. per annum from the 18th day of July, 1905 (date of filing suit), to this date."

We have italicized portions of the instructions given by the court of its own motion, with the view of inviting attention thereto in the opinion.

At the instance and request of defendant, the court instructed as follows:

"(6) The defendant's laws read in evidence required the recorder of Irving Council No. 2, of which the deceased was a member, to send notices of contributions, which he was required to pay, to his regular address. The words, 'regular address,' as used in said by-laws, mean the place where the member is known by the recorder to receive customarily his mail. That is, the place where he is known to expect his mail to be addressed to him, and where he usually receives it, although he may not always be present at such place. In determining whether at the time mentioned above the regular address of the deceased was at No. 2637 Park avenue, in the city of St. Louis, Mo., or at No. 2094 Wilcox avenue, Chicago Ill., you are to take into consideration all the facts and circumstances in evidence in this case tending to show whether the deceased expected to receive regularly his mail at one place rather than at the other, in the absence of any special direction, and also tending to show what knowledge or information, if any, the Recorder of Irving Council No. 2 had of this intention. If you believe and find from the evidence in this case that No. 2637 Park avenue, in the city of St. Louis, Mo., was the regular address of the deceased at the time mentioned above, and that the recorder of Irving Council, on or about the 1st day of October, 1904, deposited in the United States mail postage prepaid, addressed to the deceased to such place, a notice or call for a contribution due from him for the month of October, 1904, that said contribution was not paid by the deceased or by any person for him on or before the first meeting night of said council in November, 1904, and that thereupon he was suspended by said council at said meeting for the nonpayment of said contribution, and that notice of such suspension was deposited in the United States mail by the supreme recorder of defendant, postage prepaid, and addressed to the deceased at said number on Park avenue, in the city of St. Louis, and that thereafter the deceased made no application to be reinstated in said council prior to his death, then your verdict must be in favor of the defendant.

"(7) If you believe from the evidence that on or about the 1st day of October, 1904, the recorder of Irving Council deposited in the United States mail, postage prepaid, and addressed to deceased, Julius Bange, at 2637 Park avenue, St. Louis, a notice or call for a contribution due from him for the month of

October, 1904, and that such notice was forwarded from said Park avenue address to the deceased at 2094 Wilcox avenue, Chicago, Ill., and was there received by him in time to have enabled him to have paid said contribution within 30 days from the date of said notice, and that he failed to make such payment, and was suspended by said council at its first meeting in November, 1904, on November 9th, then the question of the regular address of the deceased is immaterial, and your verdict must be in favor of the defendant.

"(8) If you believe from the evidence that on or about October 1, 1904, M. A. Lindsley, recorder of Irving Council, sent to Julius A. Bange a notice requiring him to pay contribution No. 132, within 30 days from said date, and sent said notice by mail addressed to said Bange, at 2637 Park avenue, and that that was the address to which said Lindsley had theretofore been in the habit of sending these notices to said Bange, and that said Bange knew that fact, and if you further find from the evidence that when said Bange went to Chicago about June, 1904, he did not go there with the *intention of making a permanent change in his place of residence*, but only went there for the purpose of seeking employment, and afterwards returned to St. Louis, and if you further believe from the evidence that said Lindsley, when he sent said notice to said Bange at 2637 Park avenue, did not know whether or not said Bange was in Chicago, and did not know and had no reason to know that he had gone to Chicago with an *intention of remaining permanently*, then the court instructs you that if said Bange neglected to pay said contribution No. 132 on or before the first meeting night of Irving Council in November, 1904, and if neither said council nor any one else paid said contribution for him, then said Bange became suspended from membership in defendant organization, and your verdict must be for the defendant.

"(9) If you believe from the evidence that on or about the 1st day of October, 1904, M. A. Lindsley, recorder of Irving council, mailed to Julius A. Bange a notice, notifying him that contribution No. 132 had been called, payable within 30 days from October 1, 1904, and sent said notice by mail to the said Bange, addressed to him at 2637 Park avenue, and that said notice was received at said address, and at once forwarded by mail by the wife or mother-in-law of said Bange to him, and addressed to him at 2094 Wilcox avenue, Chicago, Ill., and was received at said Chicago address in time to have enabled said Bange to have paid said assessment within said 30 days, and that the said Bange failed to pay said assessment No. 132, and was at the first meeting of Irving Council in November, 1904, and on November 9, 1904, declared suspended from membership, then the plaintiff is not entitled to recover, and your verdict must be in favor of the defendant, pro-

vided you further believe and find from the evidence that defendant's supreme recorder deposited in the United States mail a notice to the deceased, directed to his regular address, informing him of such suspension, or that deceased received notice of such suspension in some other manner.

"(10) If you believe from the evidence that Julius A. Bange was declared suspended at the meeting of Irving Council held on November 9, 1904, and his suspension reported to the supreme recorder of defendant, and that notice of his suspension was mailed to him by said supreme recorder directed to him at 2637 Park avenue, St. Louis, Mo., and that said notice was at once forwarded by mail from said Park avenue address by the wife or mother-in-law of said Julius A. Bange, to his Chicago address, No. 2094 Wilcox avenue, Chicago, Ill., and was received at said Chicago address in time to have enabled said Bange to have applied for reinstatement as a member of Irving Council, within 30 days from date of said suspension, and that thereafter he made no application to be reinstated as a member of defendant organization or of said Irving Council, and neither paid nor offered to pay any assessments or dues, and never did anything indicating that he considered himself a member of said council or of defendant, or indicating any desire on his part to continue such membership, then the verdict of the jury must be in favor of defendant.

"(11) If Julius A. Bange in any manner obtained knowledge that he was or had been suspended from membership in the Legion of Honor, then if he did not desire to acquiesce in such suspension it was his duty, within a reasonable time, to make known such fact to the officers of the defendant or the officers of said Irving Council, and if you believe from the evidence that after becoming aware of said suspension from membership in Irving Council on November 9, 1904, if you find as a fact that he did so become aware thereof, he took no steps to protest against such suspension or to procure his reinstatement as such member, or in any way express to any officer of the defendant or to said Irving Council that he did not consent to such suspension, then the plaintiff is not entitled to recover, and your verdict must be in favor of the defendant."

We have italicized portions of defendant's instructions also with the view of inviting attention thereto in the opinion. It appears the issues were fairly presented to the jury by the instructions given by the court of its own motion and for defendant, except in so far as the italicized portions are objectionable.

[1] The benefit certificate, together with the established fact of the death of the insured, made a prima facie case for plaintiff, and it devolved upon defendant: First, to show a forfeiture of the rights of the in-

sured because of his nonpayment of contribution No. 132 after notice of its call was either made out and deposited in the United States mail, directed to his regular address, or that such notice was actually received by him through the process of forwarding in time to have enabled him to make payment of the contribution before the 30 days stipulated in the by-laws had expired, and that notice of his suspension was duly mailed as well; or, second, that the insured had acquiesced in his suspension from the order and to the forfeiture declared with full knowledge of the fact, and treated the matter of his relations with defendant as an insured severed thereby.

There are two defenses set forth in the answer. The first goes to the effect that the insured, Julius A. Bange, forfeited his membership in the order, and likewise his insurance, through failing to pay contribution No. 132 duly called in October 1, 1904, and of which he was then notified through the mailing of a notice thereof by the recorder to his regular address, and through the action of Irving Council No. 2, of which he was a member, on November 9th thereafter, in refusing to pay the contribution for him and declaring him suspended for nonpayment thereof, followed by a proper notice, duly mailed him by the supreme recorder, of such suspension. This defense, if established to the satisfaction of the jury, would suffice, of course, to defeat plaintiff's suit. The second defense set forth in the answer goes to the effect that plaintiff was declared suspended by the local council as a member of the order on November 9th, for the reasons above stated and with full knowledge of such suspension he thereafter acquiesced. By this defense it is sought to preclude plaintiff's right of recovery through the acquiescence of her husband in his suspension from the order, whether such suspension was regularly made or not, for the evidence tends to show that he paid no contributions thereafter, and did nothing to signify his intention to continue his relations as a member of the order. The instructions above copied deal with both of these defenses, and are to be viewed accordingly.

[2] Defendant's by-law required the notice of contributions called to be mailed to the member at his regular address, and, of course, this was a condition to be complied with by defendant before a forfeiture could be declared. After the mailing of such notice to the regular address, an insured member was entitled to 30 days in which to pay the contribution. The by-law further provided that in event a member omitted to pay, then the local council might, by a majority vote, assume the burden and make the payment for him. The custom established goes to the effect that the local council acted on such matters at the next meeting after the contribution was called.

[3] In the instant case, the contribution was called on October 1st and the council acted thereon as if a failure to pay appeared on November 9th thereafter, and declined to make the payment for Bange. Having so declined to make the payment for him, the council declared Bange suspended for the nonpayment of contribution No. 132. Because the by-law vested a discretion in the council to assume or not the burden of paying a contribution for a member, and the custom obtained thereunder to defer action until the next meeting, we declared on both the first and second prior appeals that the by-law was not self-executing in operating ipso facto the suspension of the member at the end of the 30-day period, after notice of the contribution was mailed by the recorder to his regular address. The suspension, if made, is necessarily deferred, even though the notice is mailed to the regular address of the member, by the authorized proceedings of the council, under the by-law and the custom established in connection therewith, until the action of the council is had and its refusal to pay the contribution and the suspension of the member declared. See *Bange v. Supreme Council Legion of Honor*, 128 Mo. App. 461, 105 S. W. 1092; *a. c.* 153 Mo. App. 154, 132 S. W. 276.

There is evidence tending to show that 2637 Park avenue, St. Louis, was the regular address of Bange, and that the recorder of the local council, Lindsley, mailed the call for contribution No. 132 to him at that address, also that the supreme recorder mailed to the same address a notice of the suspension of Bange within due time after it was made.

[4] Of course, if such address, 2637 Park avenue, St. Louis, was the regular address of Bange, then the notices above mentioned sufficed, whether he received them or not, for the parties may agree, and it is competent to contract, that such mailing of the notices to the regular address constitutes notice to the member. See *Hannum v. Waddill*, 135 Mo. 153, 36 S. W. 616.

[5, 6] But it appears that Bange went to Chicago during the summer with a view to seek employment there. It appears, too, that his wife joined him there for a time. While in Chicago, Bange received his mail at 2094 Wilcox avenue, the residence of his sister, with whom he stopped. The evidence reveals that Lindsley, the recorder, knew such to be the fact, for he wrote Bange a letter directed to his Chicago address in August. On this it is urged that we should declare, as a matter of law, that 2094 Wilcox avenue, Chicago, was Bange's regular address. It is conceded throughout the case that Lindsley did not direct the call for contribution No. 132, nor was the notice of suspension mailed by the supreme recorder directed to Bange at Chicago. Both of these notices were mailed, if at all, to him at 2637

Park avenue, St. Louis. However, the record abounds with evidence tending to show that Bange had abandoned 2094 Wilcox avenue, Chicago, as his regular address, for Lindsley, the recorder, testifies that Mrs. Bange, plaintiff, returned to St. Louis and told him, at her mother's residence here, that Bange had disappeared. It appears he and his wife were not separated, and she, together with her child and the family household goods, was here at the St. Louis address when contribution No. 132 was called. In view of these facts, we declared on the second appeal that the matter of Bange's regular address was a question for the jury to decide, and we adhere to that view. See *Bange v. Sup. Council Legion of Honor*, 153 Mo. App. 154, 132 S. W. 276. Though it appears conclusively that neither Lindsley nor the supreme recorder mailed notices to Bange at the Chicago address, it does appear that Mrs. Hoble and Mrs. Bange, residing at 2637 Park avenue, forwarded such mail as was received there for Bange to him at the Chicago address. In view of this it was declared on the first appeal that though the notices were not mailed to the regular address of Bange, if they were, in fact, forwarded to him at the Chicago address, 2094 Wilcox avenue, and actually received by him within time to enable his paying the contribution within 30 days after it was called, and thus preserve his rights, such would suffice, for it constituted actual notice of the call. See *Bange v. Sup. Council Legion of Honor*, 128 Mo. App. 461, 105 S. W. 1092. This view was adhered to on the second appeal. *Bange v. Sup. Council Legion of Honor*, 153 Mo. App. 154, 132 S. W. 276. In so far as the instructions deal with this question, they seem to be well enough, but both those given by the court of its own motion and those given at defendant's request are objectionable in the portions italicized, relating to the notice which Bange may have received, touching his suspension from the order.

It is to be noted that two notices are required under the by-laws of the order. The first is a notice to be mailed to the regular address, but which we have said is sufficient if forwarded to and actually received by Bange, informing him of the call of contribution No. 132, provided it was received on such forwarding in time to enable him to make the payment within 30 days; that is, the time specified by the by-laws in which payments should be made. The second notice contemplated by the by-laws is one to the effect that the defaulting member had been suspended by the action of the council, and, of course, this notice is to be mailed after the suspension is made. The duty of sending out this notice is cast upon the supreme recorder of the order. The by-law (13) provides that within 30 days of the date of his suspension a member may be reinstated in the order by the mere filing of a written application therefor and the pay-

ment of the contribution, dues, and fines in default. No medical examination is required for such reinstatement if applied for within 30 days. Neither is it necessary for the council to vote on the matter; however, both a medical examination and a vote of the council is to be had if an application for reinstatement is made after the expiration of 30 days and within 90 days. From this it appears that, though a member be suspended, his right of reinstatement continues for 30 days upon mere request, and by payment of the sums in default. Obviously, a forfeiture, not acquiesced in may not be successfully sustained unless the member has been accorded his right to a reinstatement within the 30 days prescribed in this law, for until the 30 days after suspension have expired, he may acquire his former status as a member of the order without medical examination, and without submitting to the discretion of the council thereon. In this view, we declared on the first appeal that the by-laws contemplated notice of the suspension should be mailed to Bange at his regular address that he should be accorded his right of reinstatement within 30 days thereafter. We said, too, that if the notice of such suspension was not mailed to the regular address, but forwarded to him and actually received by him, it would suffice as actual notice from the order of his suspension. But all of this was said in contemplation of his right to have 30 days to procure a reinstatement if desired. See *Bange v. Sup. Council Legion of Honor*, 128 Mo. App. 461, 105 S. W. 1092. If both the notice of the call and of suspension was mailed in due course to 2637 Park avenue, St. Louis, and such address was Bange's regular address, then his right to reinstatement was concluded thereby at the end of 30 days from the date of suspension. On the other hand, if 2637 Park avenue, St. Louis, was not Bange's regular address and the notice of the call and suspension was mailed to him there and then forwarded to him at Chicago, it must appear that he actually received such notices, in order to conclude his right of reinstatement and that he received it in time to enable him to exercise his right of reinstatement within 30 days contemplated.

[7] Instructions numbered 3 and 5, given by the court of its own motion are erroneous in this respect, in that they suggest the notice of suspension to Bange was sufficient if received by him in any manner, without regard to time. Obviously the notice must, to fulfill the office of concluding a forfeiture, be an official one and emanate from the order. It will not suffice, on this phase of the case, where a legal suspension is asserted and no acquiescence involved, that Bange "had notice of said suspension in some other way," or that he had notice "of such suspension in some other manner." The question here is not to be confused with that of acquiescing

in a void suspension which operates as an abandonment of the order and insurance.

Instruction No. 9, given at the instance of defendant, deals with the question of the notice of the contribution No. 132 being mailed to 2637 Park avenue, St. Louis, and then forwarded to 2094 Wilcox avenue, Chicago, and is well enough in so far as this matter is concerned, but the concluding lines of the same instruction deal with the notice of the suspension to Bange, and as if it was mailed to his regular address, informing him of such suspension. Then the part italicized informs the jury that notice of suspension would suffice if received "in some other manner." This is erroneous for the same reasons as above stated. Moreover, such notice of suspension would not suffice even if it emanated from defendant and was mailed to the St. Louis address and then forwarded to Chicago, in event the St. Louis address was not the regular address of Bange, unless it was actually received by him, and this, too, within the 30 days' limit prescribed, to the end of enabling him to seek reinstatement in the order.

[8] Much is said in defendant's instruction No. 8 about Bange's intention to make Chicago his home. All of this should be eliminated, for the question of regular address is not identical with that of domicile, which depends on intention. This was pointed out on the second appeal. See *Bange v. Sup. Council Legion of Honor*, 153 Mo. App. 154, 132 S. W. 276. The words "regular address" refer to the place where the member would be likely to get his mail, as was said on the first appeal. See *Bange v. Sup. Council Legion of Honor*, 128 Mo. App. 461, 105 S. W. 1092.

[9, 10] It is urged that defendant's instruction No. 11 is erroneous but we are not so persuaded. This instruction pertains alone to the second defense set forth in the answer; that is, it treats with the matter of Bange's acquiescence in his suspension from the order, and that, too, even though it was void, for the omission to give the required notices pertaining to the call of contribution No. 132. When the case was here on the first appeal, the court thus expressed its views on the question of a void suspension and an acquiescence therein: "It is the doctrine of this court as well as of the tribunals of other jurisdictions, that by remaining silent after he is notified of a void expulsion or suspension, a member of a fraternal society will forfeit his rights in the society, including his insurance. This is because the existence of such associations depends on the prompt payment of dues, and they would be destroyed if members were allowed, after a suspension technically invalid, to retain their insurance without paying assessments. As has been pointed out in other opinions, such a rule would put a suspended member on a better footing than an active one, because the former would continue to enjoy his insurance

without paying for it; whereas the latter would pay. Bange died in March, 1905, four or five months after his suspension, and seven months after he had paid any dues. If he received notice of the action of the council, and did nothing in the premises, nor treated himself as a member of the order and bound to contribute to its burdens, no recovery can be had on his benefit certificate. *Glardon v. Sup. Lodge*, 50 Mo. App. 45; *Miller v. Grand Lodge*, 72 Mo. App. 499; *Supreme Lodge v. Willson*, 66 Fed. 785 [14 C. C. A. 264]. See *Bange v. Sup. Council Legion of Honor* 128 Mo. App. 461, 475, 105 S. W. 1092. Instruction No. 11 was given in conformity with this view, for it appears that though Bange lived four or five months after his suspension, he paid no other contributions, or dues, or did anything signifying an intention to further affiliate with the order. The principle pertaining to the abandonment of one's rights under his certificate of insurance, through acquiescing in a void suspension, proceeds in accord with the precepts of mutual duty which obtains between the co-contributors to the insurance fund and in support of the order. It is said that even when an expulsion or suspension of a member is void, he is nevertheless under a duty to his co-contributors to affirm or disaffirm the act of expulsion or suspension within a reasonable time, and this, too, in some distinct manner under the circumstances. See *Mulroy v. Sup. Lodge*, 28 Mo. App. 463; 1 *Bacon, Benefit Societies* (3d Ed.) 104; *Slater v. Sup. Lodge*, 78 Mo. App. 387; *Lavin v. Grand Lodge*, 112 Mo. App. 1, 86 S. W. 600. Therefore, where such suspended member takes no step of any kind to secure his reinstatement, allows contributions which had accrued and were payable prior to the date of his expulsion to remain unpaid, and neither tenders such contributions, nor any subsequently accruing contribution and dues, he must be treated as having acquiesced in and consented to the sentence of expulsion or suspension and thereafter abandoned the order and his insurance contract therewith. See 1 *Bacon Benefit Societies* (3d Ed.) § 104, and authorities supra. But it is urged defendant's instruction No. 11 authorizes the jury to find an acquiescence on the part of Bange in a void suspension, even though he received no notice directly from the order that he was suspended. The matter of a void suspension presupposes, of course, irregularities throughout, and, among other things, that a notice of such suspension was not transmitted to the insured as it should have been. This being true, the instruction should not be condemned for failing to require the jury to find the insured had received notice of suspension from the order directly; for if he actually knew the fact pertaining to it, and acquiesced therein through discontinuing the payment of contributions or further attempting to affiliate and by treating the insurance contract as

abandoned, it is immaterial how such knowledge was obtained. It is to be observed that instruction No. 11 requires the jury to find that Bange received "knowledge" of the fact of the suspension, and was thereafter "aware" of it. These words as employed in the context imply, of course, that the insured knew the fact of his purported suspension, which, of course, is more than to say he had heard a mere rumor to that effect. There can be no doubt that, if Bange knew that he was declared suspended as for the nonpayment of contribution No. 132, and with this knowledge thereafter acquiesced therein until he died four or five months later, such acquiescence should be treated as an abandonment by him of his rights in the premises, and this, too, notwithstanding that he acquired such knowledge of the suspension from some other source than the order itself. In this connection see *Konta v. St. Louis Stock Exch.*, 189 Mo. 26, 87 S. W. 969, where it appears the expelled member was declared to have acquiesced in his expulsion after having received notice from a friend who merely told him of it, and without it appearing that notice was conveyed to him to that effect by the association.

An amended answer was filed in the case after its remand on the former appeal. The averments of fact in this answer are meager. It should be enough to merely suggest an amendment. If defendant is so advised, it may file an amended answer before a retrial of the cause.

For the errors in the instructions above pointed out, the judgment should be reversed, and the cause remanded. It is so ordered.

REYNOLDS, P. J., not sitting; ALLEN, J., concurs.

#### CLARKSON v. LAIBLAN et al.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

#### 1. INJUNCTION (§ 99\*)—SUBJECTS OF PROTECTION—PERSONAL RIGHT—OCCUPATION.

A man's occupation partakes of the character of property entitled to the protection of an injunction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 172; Dec. Dig. § 99.\*]

#### 2. INJUNCTION (§ 101\*)—PERSONAL RIGHT—INTERFERENCE OF LABOR UNION.

A conspiracy of officers of a local trade union to interfere with, and their actual interference with, the pursuit of plaintiff's business by a threat to his employer to order a strike, whereby plaintiff lost his position as foreman and suffered the cancellation of a subcontract to his substantial injury, might be enjoined.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.\*]

#### 3. CONSPIRACY (§ 1\*)—ELEMENTS—INJURY.

A combination of two or more persons by some concerted action, either for the purpose of accomplishing an unlawful act or for the pur-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



pose of accomplishing a lawful act by unlawful means, constitutes a conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

#### 4. CONSPIRACY (§ 8\*)—ELEMENTS—INJURY TO BUSINESS OR OCCUPATION.

Since a man's occupation partakes of the character of property, and since he is entitled to life, liberty, and pursuit of happiness so long as he does not infringe upon the rights of others, it is unlawful for several persons to conspire together to oppress him through substantial injury to his lawful business or means of livelihood, as by coercing his employer to discharge him and to cancel a subcontract.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7-11; Dec. Dig. § 8.\*]

#### 5. WORDS AND PHRASES—"BOYCOTT."

A "boycott" is a combination of several persons to cause a loss to a third person, by coercing others to withdraw their business through threats that, unless a compliance with their demands is made, they will cause loss or injury to him; or an organization to form and exclude a person from business relations by intimidation and other acts tending to violence, thereby causing him through fear of injury to submit to dictation in the management of his affairs.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 855, 856; vol. 8, p. 7592.]

#### 6. INJUNCTION (§ 114\*)—SUBJECTS OF PROTECTION—INTERFERENCE WITH EMPLOYMENT — PERSONS LIABLE.

The rules of a local union, of which defendants were officers, forbade the employment of union workmen before, with, or to follow non-union workmen, unless specially authorized; and its business agent, charged with enforcing its regulations, coerced plaintiffs' employer by threat of a strike, so that plaintiff lost his job as foreman and also lost a subcontract. *Held*, that as the agent's acts were done under the established regulations and customs of the union, its other officers were also guilty of a conspiracy, and should be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.\*]

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Injunction by James L. Clarkson against Frederick Laiblan, or Frederick Laibly, and others. Decree for plaintiff, and defendants appeal. Affirmed.

T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe, all of St. Louis, for appellants. Albert R. Hausman, of St. Louis, for respondent.

**NORTON, J.** This is a suit in equity for injunctive relief. The finding and decree were for plaintiff, and defendants prosecute the appeal.

Plaintiff is a journeyman roofer by occupation, and defendants are the business agent and officers of an unincorporated organization known as Local Union No. 1 of the International Brotherhood of Composition Roofers, Damp and Waterproof Workers of St. Louis, Mo. This organization of which defendants are members is affiliated with a central organization known as the Building Trades Council in the city of St.

Louis. At the time complained of, defendant Frederick Laiblan, or Laibly, was president of Local Union No. 1, while defendant Eugene Moriarity was vice president thereof; and defendant Michael McCarthy was recording secretary and Michael Shannon, its financial secretary; Edward J. McCarthy, its treasurer; William Holstein, its doorkeeper; and defendant Patrick F. Garvey, its business agent. The several other defendants named in the bill were members of the executive committee of such local union. These defendants were all members of the voluntary association known as Local Union No. 1, and, as before said, were, through it, affiliated with the Central Building Trades Council. All of the building trades, save the bricklayers of the city of St. Louis, were affiliated together in the Building Trades Council but Local Union No. 1, of which these defendants are members, was constituted solely through the co-operation and affiliation of members engaged in the occupation of journeymen composition roofers.

It appears that plaintiff had been a member of Local Union No. 1 from 1903 to 1906, that then he was a journeyman waterproof roofer, and eligible to membership therein. In 1906 he embarked in the roofing business on his own behalf, and became an employer of journeymen roofers, which, under the rules of the union, ipso facto terminated his membership therein. While thus engaged as a contracting roofer, plaintiff employed only members of Local Union No. 1, and complied with all of its rules. In the latter part of January, 1909, plaintiff sold out his business to the St. Louis Roofing Company and was employed by the general manager of that concern as a roofer. He worked one day for that company and was laid off. Thereupon Mr. Holland, the manager of St. Louis Roofing Company, sent word from his office to the shop foreman that plaintiff should be placed in charge of a gang of men as foreman at 60 cents per hour. On the morning of February 21, 1909, plaintiff appeared at the shop of the St. Louis Roofing Company and reported for work to the foreman. Defendant Patrick F. Garvey, business agent for Local Union No. 1, was at the shop of the St. Louis Roofing Company at the time, as was his custom, for it is said he was present there every morning to see that no non-union workmen were given work in preference to those who were members of the union. The foreman of the St. Louis Roofing Company handed a yellow slip of paper to plaintiff, indicating his position as foreman of a gang of roofers to which he had been assigned by Mr. Holland, the general manager. When defendant Garvey, business agent of the union, saw plaintiff in possession of the yellow slip, he inquired of Haley, the shop foreman, whether or not all of the other men there in attendance were to be given work that morning, and Haley replied

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the negative. Thereupon, Garvey said to Haley, "This man (meaning plaintiff) don't go to work either then." In obedience to Garvey's command, Haley took from plaintiff his yellow slip of paper and dispensed with his services as foreman. Plaintiff and Garvey then entered into a conversation about plaintiff joining the union. On the following night, plaintiff applied to Local Union No. 1 for membership therein and was present in the ante room, waiting action on his application. All of the defendants here were at that meeting, unless it be Hurley, and it appears they considered plaintiff's application for membership, but deferred action thereon. Soon thereafter, plaintiff submitted another application, but it is said it was rejected, and plaintiff was advised by defendant Garvey that this was because he had applied to the office through Mr. Holland for work instead of coming to the shop where Garvey was stationed.

Thereafter, on March 16, 1900, plaintiff entered into a contract with St. Louis Roofing Company to roof a building to be occupied by the Rohan Boiler Works, and 14 houses in Parkview. He entered upon this work as subcontractor, and on March 20th, just as he was completing the task of roofing the building to be occupied by the Rohan Boiler Works, defendant Garvey called upon him there and inquired what plaintiff was doing. Plaintiff informed Garvey he was roofing the building as subcontractor for the St. Louis Roofing Company, whereupon Garvey said to plaintiff, "You know we ain't going to let you do that." And plaintiff said in reply, "I don't see why. I telephoned for men and you wouldn't send them to me, and I couldn't leave the job go." To this Garvey replied, "Well, if they (St. Louis Roofing Company) give you any more work Monday morning, I will call every man away from the St. Louis Roofing Company." It is in evidence that the St. Louis Roofing Company employed at the time from 75 to 100 union men, who were members of Local Union No. 1, of which Garvey was the business agent. This conversation between Garvey and plaintiff occurred on Saturday afternoon, and immediately thereafter, Garvey called Mr. Holland, manager of the St. Louis Roofing Company, over the telephone and made an appointment, stating, according to the evidence of Mr. Holland, "that there was trouble on account of Mr. Clarkson subcontracting, and that if we didn't change the arrangement that he would pull all the men off or there would be a strike of 100 men Monday morning, something to that effect." Mr. Holland continued, "He (Garvey) came up to the office about 5 o'clock, I guess it was, and we talked the matter over and decided that we wouldn't subcontract to Mr. Clarkson (the plaintiff)." Holland says that, while he could not state the precise conversation between him and Garvey, Garvey said, in effect, that a strike would be declared if he continued his con-

tracts with plaintiff. Because of this threat, Mr. Holland, for St. Louis Roofing Company, called off and canceled the contracts with plaintiff for the roofing of the 14 houses in Parkview, and plaintiff was therefore unemployed for a considerable time. The evidence of Holland, manager of the St. Louis Roofing Company, is that that company had in its employ from 75 to 100 union men, members of Local Union No. 1, at the time, and that its business was pressing, that the contracts with plaintiff were called off and its business relations with him terminated, because he knew Garvey was the business agent of the union, and was in a position to entail loss upon the St. Louis Roofing Company if the demand were not complied with.

It appears that there are about 225 roofers in all in St. Louis and all but about twenty of them belong to the union. Nearly, or about, one-half of this number were in the employ of the St. Louis Roofing Company at the time. Moreover, it appears that 90 per cent. of all of the men engaged in the various building trades, save bricklayers, are members of the various building trades local unions, which are affiliated together. It does not appear that any of the defendants personally, save Garvey, interfered with plaintiff, or that they personally threatened his employer, the St. Louis Roofing Company, but the case concedes that Garvey was the business agent of the union of which the other defendants were officers. It appears, too, that Garvey and others constituted a committee of delegates which represented Local Union No. 1, of which the other defendants are officers, in the Central Trades Council. It is in evidence, too, that no one of the mechanics affiliated with the Building Trades Council, whether through Local Union No. 1 to which the roofers belonged or others, is permitted to work with, before, or after any nonunion man, on pain of a fine or other penalty to be imposed. Moreover, it appears that, under the rules of the union in force at the time, any employer who employs nonunion men, without the consent of the union to which defendants belonged, is subject to a fine which the union will impose, and which must be paid before the embargo thus levied is raised and the union men permitted to engage again in his service.

[1,2] It appears that defendant Garvey had been the business agent for Local Union No. 1, of which his codefendants are officers, for a number of years, and visited the shop of the St. Louis Roofing Company and others engaged in that business daily. Among other things, it was the duty of Garvey to see that none but union men were permitted to work, without special permission from himself or the union. Among other things, plaintiff testifies that Garvey informed him that he "could stay at his own little business,"—that is the business which he had theretofore sold out. And it appears clear enough that Garvey's threats communicated

first to the foreman and then to the manager of plaintiff's employer caused him to lose his position as a foreman of the gang, and afterwards occasioned the cancellation of his several contracts. Besides the testimony of the manager of the St. Louis Roofing Company that he canceled plaintiff's contracts in order to obviate the trouble and loss which would be entailed as a result of Garvey's "pulling off his men," or ordering a strike, plaintiff testified, "Mr. Holland told me that they was too busy to have any trouble and he says, 'I will have to take them contracts away from you.'" None of the defendants took the stand, and the case rests alone upon the evidence of plaintiff and his several witnesses, who fully corroborate him throughout. Obviously the court did not err in decreeing a perpetual injunction against all of the defendants on this evidence. It is certain that a man's occupation, whether it be that of a roofer, laborer, or what not, partakes of the character of property, and he is entitled to have it protected by the process of injunction, when other persons confederate and conspire to and actually interfere with its prosecution in such a manner as to work substantial injury upon him. A recent judgment of our Supreme Court is authority in point to this effect. See *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492. Here it appears, and this too, without contradiction, that Garvey represented the other defendants, all of whom are officers of Local Union No. 1, in threatening to pull off the union men employed by plaintiff's employer, the St. Louis Roofing Company, unless it terminated all beneficial business relations with plaintiff. The evidence is abundant that Garvey was acting within the scope of his authority as business agent of the union, and carrying out both the letter and the spirit of its rules and regulations in so doing. It is certain that neither one man nor a multitude organized together have the right to coerce an employer, through threats to impair his business or cause a loss to him, to discharge another person from his services. See *Swaine v. Blackmore*, 75 Mo. App. 74.

[3, 4] Because a man's occupation partakes of the character of property, and for the reason, too, that every one enjoys the right to life, liberty, and the pursuit of happiness so long as he does not infringe upon the rights of others, it is unlawful for several persons to confederate, conspire, co-operate together, to the end of oppressing another through substantial injury from prosecuting his lawful means of livelihood. *Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492. It is certain that a combination of two or more persons by some concerted action, either for the purpose of accomplishing an unlawful act or for the purpose of accomplishing a lawful end by unlawful means, constitutes a con-

spiracy. See *State v. Dalton & Fay*, 134 Mo. App. 517, 114 S. W. 1132. Here, though the organization of the union and the membership therein were entirely proper and lawful, the end sought to be achieved in coercing plaintiff's employer to discharge him and to terminate and refuse further beneficial business intercourse with him was unlawful. Therefore, the confederation being present, a conspiracy against the rights of plaintiff appears well established.

[5] In this connection it is pertinent to copy the definition of a boycott, recently approved by our Supreme Court, for it reflects the principle involved in the judgment in the instant case. "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tended to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs. Such acts constitute a conspiracy, and may be restrained by injunction. \* \* \* All the authorities hold that a combination to injure or destroy the trade, business, or occupation of another by threatening or producing injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy regardless of the name by which it is known, and may be restrained by injunction." *Door Co. v. Fuelle*, 215 Mo. 421, 446, 447, 114 S. W. 997, 1003 (22 L. R. A. [N. S.] 607, 128 Am. St. Rep. 492).

[6] The evidence reveals that the rules and regulations of the union, with which all of defendants were affiliated and in which they occupied the several offices, forbade the employment of nonunion workmen either before, with, or to follow union workmen, unless specially authorized. Moreover, it appears to be the duty of the business agent, defendant Garvey, to proceed, as the representative of the union and its members, to enforce the regulations in respect of such matters. This being true, it is entirely clear that, though Garvey was the only one of the defendants actively pursuing the plaintiff and coercing his employer, he did so at the behest of all under the established regulations and customs of the union.

It seems to be tacitly conceded in the brief that a case is made against Garvey, but it is argued that the evidence fails to show he was authorized to call a strike or "pull off the men," as he threatened. It appears plaintiff had been a member of the union theretofore, and that Mr. Holland, manager of the St. Louis Roofing Company, had employed its members for years. Both of these

witnesses testified that Garvey possessed authority in this behalf, and, indeed, the entire evidence affords a strong inference to that effect. The court was certainly justified in finding such to be the fact. Moreover, rule 39 in the book of rules of the Building Trades Council, which was introduced in evidence without objection, provides that no member of any trade affiliated with the council shall be permitted to work on any job declared unfair, and must cease work thereon at the call of any duly authorized business agent. Though we regard the evidence sufficient without reference to this rule on the score of Garvey's authority, such authority is certainly set forth with clearness therein.

The judgment against all of the defendants should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

### CLARKSON v. GARVEY et al.

(St. Louis Court of Appeals. Missouri. Dec. 2, 1913.)

#### 1. APPEAL AND ERROR (§ 533\*)—RECORD — WHEAT CONSTITUTES — OPINION OF TRIAL JUDGE.

A written opinion, prepared by the trial judge on sustaining a motion for a new trial, to be available as disclosing the grounds for which new trial was granted must have been spread of record in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2339, 2400; Dec. Dig. § 533.\*]

#### 2. APPEAL AND ERROR (§ 706\*)—REVIEW—DISCRETION OF TRIAL COURT — GRANTING NEW TRIAL.

Upon a record showing only that motions for a new trial made by all the defendants were sustained and a new trial ordered, the case is to be reviewed with reference to the grounds for new trial set forth in the motion therefor, and the award of a new trial must be sustained if the granting of it on any one of such grounds was a proper exercise of the court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944-2947; Dec. Dig. § 706.\*]

#### 3. APPEAL AND ERROR (§ 979\*)—NEW TRIAL (§ 72\*) — REVIEW — DISCRETION OF TRIAL COURT—INSUFFICIENCY OF EVIDENCE.

It is proper to grant a new trial on the ground that the verdict is against the weight of the evidence, and an award of a new trial on that ground should be sustained, unless there appears an abuse of judicial discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.\* New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.\*]

#### 4. NEW TRIAL (§ 72\*)—GROUNDS—WEIGHT OF EVIDENCE.

The award of but one new trial will not be disturbed on appeal as for abuse of discretion, where there is in the record substantial evidence in favor of, or such as will sustain, a verdict for the party to whom the new trial is granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.\*]

#### 5. CONSPIRACY (§ 19\*)—ACTION—BURDEN OF PROOF.

In an action against the business agent and other officers of a local union for conspiracy, the plaintiff had the burden of proof throughout to show that the other defendants conspired with or were responsible for or ratified the business agent's acts.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.\*]

#### 6. NEW TRIAL (§ 78\*)—FIRST OR SECOND MOTION—STATUTES.

Under Rev. St. 1909, § 2023, providing that only one new trial shall be allowed to either party, except where the triers of the fact shall have erred in a matter of law, or where the jury is guilty of misbehavior, the rule is that if one verdict has been set aside on the ground of the insufficiency of the evidence, a second verdict cannot be set aside for the same cause.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 162-165; Dec. Dig. § 78.\*]

#### 7. NEW TRIAL (§ 78\*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

Under Rev. St. 1909, § 2023, which provides that only one new trial shall be allowed to either party, except where the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehavior, the trial court may grant one new trial to either party upon the ground of the insufficiency of the evidence, or that the verdict is against the weight of the evidence, regardless of the number of new trials that may have been theretofore granted to the same party upon other grounds.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 162-165; Dec. Dig. § 78.\*]

#### 8. NEW TRIAL (§ 72\*)—GROUNDS—SUFFICIENCY OF EVIDENCE.

In an action against the business agent of a local union for conspiracy by threatening plaintiff's employer with a strike, whereby plaintiff lost his job and also a subcontract, evidence held sufficient to support a verdict for defendant, if it should be found so that the court did not abuse its discretion in granting him a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.\*]

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Injunction by James L. Clarkson against Patrick F. Garvey and others. From an order setting aside a verdict for plaintiff and granting defendants a new trial, plaintiff appeals. Affirmed and cause remanded, with direction to proceed with a new trial.

Albert E. Hausman, of St. Louis, for appellant. T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe, all of St. Louis, for respondents.

NORTONI, J. This is a suit for both actual and punitive damages said to have accrued to plaintiff through the wrongful conduct of defendants in coercing his discharge from service, and causing the breach of certain contracts by another, to his detriment. Plaintiff recovered at the trial, but the court sustained defendants' motions for a new trial and set the verdict aside. The appeal is prosecuted by plaintiff from the order of the

court setting aside the verdict and granting defendants a new trial.

Plaintiff is a journeyman composition roofer by occupation, and defendants are all members and officers of Local Union No. 1, International Brotherhood of Composition Roofers, Damp and Waterproof Workers of St. Louis, Missouri. This organization is a voluntary one and unincorporated. It seems to be a branch and is affiliated with the Building Trades Council of the city of St. Louis, in which organization all of the building trades of the city, save the bricklayers, are affiliated. The several defendants are the officers of Local Union No. 1, and defendant Patrick F. Garvey is the business agent of the union. Frederick Laibly was president of Local Union No. 1 at the time complained of, while Eugene Moriarity was vice president thereof, Michael McCarthy was recording secretary, and Michael Shannon the financial secretary of the union. Edward J. McCarthy was its treasurer; William Holstein, its doorkeeper; and as before said, Patrick F. Garvey, its business agent. All of the men so named are defendants here, and the suit proceeds against them jointly for both actual and punitive damages.

It appears plaintiff was formerly a member of this union from 1903 to 1906, when he established a small roofing business for himself, and his membership in the union ceased because of that fact, that is because he became an employer and was no longer a journeyman. About January or February, 1909, plaintiff sold his business and tools to the St. Louis Roofing Company and entered into an arrangement with that concern whereby he was to enter its employ. Plaintiff worked for that company one day and was laid off. Thereupon Mr. Holland, the manager of the St. Louis Roofing Company, directed its shop foreman to place plaintiff in charge of a gang of men as a foreman, or gaffer. Plaintiff reported for work at the shop of the St. Louis Roofing Company and the foreman, Haley, in obedience to the order of the manager of the company, gave him a yellow slip which signified his assignment to duty as the foreman of a gang. Thereupon defendant Patrick F. Garvey, business agent for Local Union No. 1 inquired of Haley, who was then present, whether or not all of the other men there waiting were to be given work that morning, and Haley replied in the negative. Garvey then said to Haley, "This man (meaning plaintiff) don't go to work either then," and Haley took from plaintiff his yellow slip and dispensed with his services as foreman. Plaintiff then made application to become a member of the union, and Garvey and all of the defendants considered it that night, but deferred action thereon. Finally plaintiff's application for membership in the union was rejected because, as he was told by Garvey, that he had applied for work from the St. Louis Roofing Company through the office

and not at the shop where Garvey was stationed as the representative of the union.

Thereafter, on March 18, 1909, plaintiff entered into a contract with the St. Louis Roofing Company to roof a building to be occupied by the Rohan Boiler Works, and 14 houses in Parkview. He entered upon this work as subcontractor, and on March 20th, as he was completing the task of roofing the building to be occupied by the boiler works, defendant Garvey called upon him there and inquired what he was doing. Plaintiff informed Garvey he was roofing the building as subcontractor for the St. Louis Roofing Company, whereupon Garvey said to plaintiff substantially that he would not be permitted to continue working for that company. Garvey then said, "If the St. Louis Roofing Company gives you any more work, I will pull off every man they have on Monday morning," that is, he would call a strike of the union men in the employ of the roofing company. The evidence tends to show there were 75 or 100 union men, members of Local Union No. 1, of which defendants are officers, and Garvey was business agent, then in the employ of the St. Louis Roofing Company. During the same afternoon defendant Garvey called up Mr. Holland, manager of the St. Louis Roofing Company, over the telephone, and told him he wanted to see him about (Clarkson) plaintiff's working for the company. Holland replied he would have to hurry if he wanted to see him at the office. Garvey then said to Holland, "You had better wait or you will have 100 men walk out on you Monday morning." Holland waited and Garvey came to his office and told him that, unless he quit contracting with plaintiff Clarkson or giving him work, he would call all the roofers away from the St. Louis Roofing Company on a strike. It appears the St. Louis Roofing Company was pressed with business at the time, and could not afford to have its affairs interrupted as threatened. Moreover, it is in evidence, too, that if such threat were carried out it would entail a considerable loss upon the St. Louis Roofing Company, and therefore Mr. Holland notified plaintiff that that company would have to take the contracts out of his hands. Because of this, plaintiff lost his contracts with that company and remained unemployed for a considerable time.

The suit proceeds at law for both actual and punitive damages against all of the defendants, and the jury awarded plaintiff a recovery of \$1,200 actual damages, and \$2,500 punitive damages. It appears the case was tried once before, and the court nonsuited the plaintiff on his cause of action asserted against all of the defendants, save defendant Patrick F. Garvey, the business agent, against whom a recovery was had. Thereafter, the court sustained plaintiff's motion for a new trial, and reinstated the case on the docket for further proceedings against

Garvey's codefendants. At the same time, the court sustained defendant Patrick F. Garvey's motion for a new trial on the ground that the award of punitive damages by the jury in their verdict was excessive, and therefore the case was set down for trial again against all of the defendants. At the second trial, a verdict was given for plaintiff against all of the defendants, and two motions for a new trial were duly filed. One of these motions was filed by defendant Patrick F. Garvey, alone, while the other was filed by all of the defendants, save Garvey, jointly. The court sustained both motions, set the verdict aside, and granted a new trial to all of the defendants, but omitted to enter of record the ground or grounds upon which the new trials were ordered, as the statute requires.

[1] It is true a written opinion, said to have been prepared by the trial judge, indicating his views of the case, and delivered on sustaining the motions for a new trial, appears in the brief of defendants here. But be this as it may, such opinion is no part of the record, and it therefore may not be utilized as disclosing the grounds under the statute for which the new trial is granted. To render such opinion available for that purpose it should have been spread of record in the case, and it was not. Such has been expressly decided. See *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *Kreis v. Mo. Pac. R. Co.*, 131 Mo. 533, 33 S. W. 64, 1150.

[2] The record before us reveals no more than that the motions for a new trial were sustained on the part of all of the defendants and a new trial ordered. With the case in this posture, the matter is to be reviewed with reference to the several grounds for a new trial set forth in the motion therefor, and the action of the court in sustaining the motion and awarding the new trial must be sustained if it was a proper exercise of the discretion of the court to grant a new trial on any one of the grounds therefor, set forth in the motion. *Met., etc., Mining Co. v. Webster*, 193 Mo. 351, 92 S. W. 79; *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *Kreis v. Mo. Pac. R. Co.*, 131 Mo. 533, 33 S. W. 64, 1150. As before said, this is the first new trial granted to all of the defendants, save Patrick F. Garvey. In so far as the defendants, other than Garvey, are concerned, the question is not embarrassed by the new trial formerly granted in the case, for that was granted to plaintiff and not to them. This being true, it appears all of the defendants, save Garvey, stand in the position of having had awarded to them a new trial for the first time. Their motion for a new trial sets forth several grounds therefor, and among such grounds is that that the verdict is against the weight of the evidence.

[3] It is proper for the court to grant a new trial because it regards the verdict as against the weight of the evidence; and as to this, a broad judicial discretion is to be in-

dulged in favor of the trial judge. Indeed, when the new trial is granted on this ground, the ruling of the trial court with respect to that matter should be sustained, unless there appears an abuse of judicial discretion, that is that the court exercised its power in an arbitrary or improvident manner. See *Gould v. St. John*, 207 Mo. 619, 106 S. W. 23; *Rodan v. St. Louis Transit Co.*, 207 Mo. 392, 105 S. W. 1061; *Rigby v. St. Louis Transit Co.*, 153 Mo. App. 330, 133 S. W. 110.

[4-5] As a corollary to the rule of decision last cited, it is declared that the action of the trial court in granting but one new trial to the parties will not be disturbed on appeal in any case as for an abuse of discretion in thus exercising its office of supervisor on the facts of the case, if there is in the record substantial evidence in favor of, or such as will sustain, a verdict for the party to whom the new trial is granted. See *Rigby v. St. Louis Transit Co.*, 153 Mo. App. 330, 133 S. W. 110; *Loftus v. Met. St. R. Co.*, 220 Mo. 470, 481, 119 S. W. 942; *Met., etc., Mining Co. v. Webster*, 193 Mo. 351, 92 S. W. 79. It is certain that we cannot say the trial court abused its discretion in granting a new trial to all of the defendants save Garvey; for, in any view of the case, a verdict in their favor would have been amply sustained on the evidence. Of course, the burden of proof was on plaintiff throughout the case, and it devolved upon him to show that these defendants conspired with or were responsible for or ratified Garvey's acts. It is true the record seems to be replete with evidence tending to prove that Garvey was the business agent for the unincorporated, voluntary association of which his codefendants are officers. But be this as it may, there is evidence, too, tending to prove that these defendants did not conspire or co-operate with him, and that he was not authorized by them to perpetrate the particular wrong complained of, and that they did not ratify his acts. It is entirely clear that the evidence would support a verdict for these defendants if one should be awarded by the jury in their favor. The order granting a new trial to these defendants must therefore, of course, be affirmed. But the question recurs as to the new trial granted defendant Garvey on his motion therefor.

[6] In so far as defendant Garvey is concerned, this is the second new trial granted to him in this case. The first one was awarded because, in the opinion of the trial court, the award of punitive damages against him was excessive. The statute (sec. 2023, R. S. 1909) provides only one new trial shall be allowed to either party, except: First, where the triers of the fact shall have erred in a matter of law; or, second, when the jury shall be guilty of misbehavior. Under this statute, a rule of decision is established to the effect that, if the court has set aside one verdict on the ground of the insufficiency of the evidence, a second verdict cannot be set

aside for the same cause. See *Vermillion v. Parsons*, 98 Mo. App. 72, 71 S. W. 1092; *McFarland v. United States, etc., Assn.*, 124 Mo. 204, 27 S. W. 436; *Nicol & Co. v. Hyre & Co.*, 58 Mo. App. 134. But the prior verdict against Garvey was not set aside on the ground that it was against the weight of the evidence or for its insufficiency, but because the award of punitive damages was excessive.

[7] Under the statute above cited it is well settled by a judgment of our Supreme Court en banc that the trial court possesses power to grant one new trial to either party upon the grounds of the insufficiency of the evidence, or that the verdict is against the weight of the evidence, regardless of the number of new trials that may have been theretofore granted to the same party upon other grounds. See *Kreis v. Mo. Pac. R. Co.*, 131 Mo. 533, 33 S. W. 64, 1150.

[8] This being true, it would seem that the inhibition of the statute does not obtain even against the new trial granted to Garvey on the ground that the verdict is against the weight of the evidence. His motion for a new trial, like that of his codefendants, above discussed, sets forth, as one of the grounds for a new trial, that the verdict was against the weight of the evidence. In sustaining the motion without specifying other grounds under the statute of record, the court affirmed this among the others set forth in the motion as the reason for which the new trial was granted. Therefore the order granting a new trial to Garvey must be sustained, unless it appears the court abused its discretion in granting it. Such discretion, it is said, may not be regarded as abused when there is substantial evidence in the record tending to support a verdict in favor of the party to whom the new trial is awarded. *Rigby v. St. Louis Transit Co.*, 153 Mo. App. 330, 133 S. W. 110; *Canterbury v. Kansas City*, 130 Mo. App. 1, 108 S. W. 574; *Karnes v. Winn*, 126 Mo. App. 712, 105 S. W. 1098. Of course, plaintiff bore the burden of proof throughout the case, and, as defendant Garvey did not make such admissions either in the pleadings or at the trial as would authorize a verdict against him on that score alone, it would seem that a verdict in his favor would be supported by substantial evidence; for, after all, if the jury were to reject the evidence of plaintiff and his witnesses in toto as insufficient, it would suffice to support a verdict for Garvey. But beyond this there is an award of punitive damages to the amount of \$2,500 in the verdict, and there is much evidence for Garvey that though he perpetrated a wrong on plaintiff's rights he acted in good faith and without malice and offered him employment elsewhere. This being true, it is clear there is substantial evidence in the record sufficient to support a verdict for Garvey, if the jury should award one in his favor, and, because

of this fact, it cannot be said the court abused its discretion in granting him a new trial for the reason the verdict was against the weight of the evidence.

The judgment should therefore be affirmed, and the cause remanded with directions to the trial court to proceed with the new trial. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

#### GILLEN v. NEW YORK LIFE INS. CO.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

##### 1. INSURANCE (§ 367\*)—LIFE POLICY—CONSTRUCTION—LOAN ON POLICY.

Under Rev. St. 1899, § 7897, providing that no life insurance policy shall, after payment of three annual premiums, be forfeited for default in payment of premiums, but that three-fourths the net reserve value of the policy, after deducting any indebtedness for past-due premiums, shall be used for the purchase of temporary or extended insurance, a loan contract, entered into between the company and the insured subsequent to the issuance of the policy, by which the insured pledged his policy as security, and agreed in advance that, in case of default in payment of premiums or interest, the company could apply the net reserve value to the payment of the loan, was void in so far as it attempted to contract in advance that the net value should be applied other than for the purchase of extended insurance, since the statute enters into and forms a part of every policy and takes precedence over anything contained therein or in any subsequent or collateral contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. § 367.\*]

##### 2. INSURANCE (§ 240\*)—SURRENDER OF POLICY—ACTS CONSTITUTING.

A pledge by the insured of his life policy to the company to secure a loan, the contract providing that, in case of default in payment of premium or interest, the company could foreclose the pledge and satisfy the loan out of the net value of the policy, was not a surrender of the policy under Rev. St. 1899, § 7900, providing that the insured may at any time surrender his policy for a consideration adequate to himself.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 519, 522; Dec. Dig. § 240.\*]

##### 3. INSURANCE (§ 179½\*)—LOAN CONTRACT—PLEDGE—PERSONAL LIABILITY.

An insured, in accordance with the terms of a life policy, contracted with the company for a loan and pledged his policy as security, the contract containing an express promise by the insured to repay and redeem. *Held*, the contract created a personal obligation on the insured, and, though the pledge was void, the personal obligation remained.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 179½.\*]

##### 4. INSURANCE (§ 239\*)—RIGHT TO SURRENDER LIFE POLICY—STATUTES.

Though a loan contract by which the insured pledged his policy to the company as security and agreed in advance that, in case of default in payment of either premiums or interest on the loan, the company could foreclose the pledge and satisfy the loan out of the net value of the policy, was void under Rev. St.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1899, § 7897, providing that no life policy shall be forfeited for default in payment of premiums, but that the net reserve shall be used in the purchase of temporary insurance, yet, under Rev. St. 1899, § 7900, providing that the insured may, at any time, surrender the policy to the company for a consideration deemed adequate to himself, the insured could, after default in payment of the premiums, surrender the policy in consideration of the company canceling the personal indebtedness incurred by the loan.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 518; Dec. Dig. § 239.\*]

#### 5. INSURANCE (§ 241\*)—SURRENDER OF LIFE POLICY.

The insured could consent to a surrender of the policy and the application of its proceeds to the payment of his loan either directly or by way of estoppel.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 520; Dec. Dig. § 241.\*]

#### 6. INSURANCE (§ 367\*)—ACTS CONSTITUTING—SURRENDER OF LIFE POLICY—ESTOPPEL.

Where the insured was not sufficiently informed of his rights, his failure to reply to a notice from the company and protest against the application of the proceeds of the net reserve of his policy to the satisfaction of a personal indebtedness created by a loan was not an acquiescence by estoppel to such action by the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. § 367.\*]

#### 7. ESTOPPEL (§ 112\*)—PLEADING—SUFFICIENCY.

A plea of estoppel to be sufficient must plead the facts and elements of an estoppel, one of which is that the party invoking the estoppel was in some manner prejudiced thereby.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 302; Dec. Dig. § 112.\*]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by Mary C. Gillen against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones, Hocker, Hawes & Angert and J. Loinberger Davis, all of St. Louis, for appellant. James J. O'Donohoe, of St. Louis, for respondent.

STURGIS, J. The defendant appeals from a judgment recovered in the trial court on a policy of insurance issued by defendant on the life of Frank E. Gillen in favor of his wife, Mary C., the plaintiff herein, as beneficiary. The case was tried on an agreed statement of facts. The policy was issued in August, 1900, for \$2,000, and is conditioned on the payment of semiannual premiums of \$44.50 each, payable on the 28th days of February and August of each year. These premiums were paid until August 29, 1909, when default was made. In the meantime two loans were made to the assured under the terms provided in the policy; but, as the first loan was paid out of the proceeds of the second loan, we are concerned with that one only. This loan was for \$500, at 5 per cent. interest, payable in advance, and was made on April 29, 1909, and the interest then paid

in advance to August 28, 1909; so that both the premium and interest on the loan became due on that date and default was made in both. No further premium was paid on the policy nor interest on the loan prior to the death of the assured on May 28, 1911.

The plaintiff's case proceeds on the theory that this policy, being a Missouri contract and governed by the provisions of the non-forfeiture laws of this state in force at the time the policy was issued, being sections 7897, 7898, 7899, and 7900, R. S. 1899, and which are the same as sections 6946, before the amendment in 1903 (Laws 1903, p. 208), 6947, 6948, and 6949, R. S. 1909, was not forfeited by default in the payment of premiums, but was kept in force until after the death of the insured by automatically applying the net value of the policy available to purchase temporary insurance as a net single premium to that purpose. The defendant claims that such net value of the policy was with the implied consent of the insured used by it in discharging the loan of the insured, valid at least as a personal obligation, thereby surrendering the policy, and that nothing was left with which to purchase temporary insurance. It is conceded by both parties that this case is very similar to that of Christensen v. Insurance Co., 160 Mo. App. 486, 141 S. W. 6, recently decided by the St. Louis Court of Appeals after an opinion, though without authority, had been rendered by this court, reported in 152 Mo. App. 551, 134 S. W. 100. As this is the same defendant, and the policy, loan agreement, etc., are similar in both cases, and the company used the net value of the policy at the time of default, in that case as in this one, to pay off the loan of the assured instead of applying the same to purchase temporary insurance, a reading of that case will assist in understanding both the law and facts of this one and make a more detailed statement unnecessary.

The policy itself provides that cash loans at 5 per cent. interest can be obtained by the insured on the sole security of the policy after the policy has been in force for two years or more, if the premiums are paid to the anniversary of the insurance next after the date of the loan, in varying amounts as shown by a table of cash loans based on the age of the policy. This is one of the rights of the assured under the policy. The loan agreement signed by the assured and this plaintiff acknowledges the receipt of the money, \$500, agrees to pay interest on same in advance, pledges the policy as sole security for the loan and interest, and deposits same with the company for that purpose, and agrees to pay the loan when due, with the right to reclaim the policy at any time on repayment of the loan. It further provides that the loan shall become due and payable on maturity of the policy or on default in payment of any of the premiums



on the policy or the interest on the loan, in which event the pledge shall be foreclosed without demand or notice by satisfying the loan out of the net value of the policy in the manner provided therein. The provision thus referred to in the policy is to the effect that if any premium or interest is not duly paid, and if there is an indebtedness to the company, then paid-up insurance will be issued on demand made within six months to such amount as any excess of the reserve over such indebtedness will purchase, and, "if no such request for paid-up insurance is made, the net amount that would have been payable as a death claim on the date to which premiums were duly paid will automatically continue as term insurance from such date, for such time as said excess of the reserve will purchase according to the company's present published table of single premiums for term insurance, and no longer."

The agreed statement of facts further recites: "In accordance with said loan agreement and policy, the defendant duly foreclosed the lien on said policy on the 26th day of November, 1909, and neither the reserve held by the company on said policy on said date or at the time of its lapse, nor the reserve or net value of the policy on said date, computed upon the Actuary's or Combined Experience Table of Mortality, with interest at 4 per cent. per annum, nor the reserve or net value of the policy computed upon the American Experience Table of Mortality, with 3 per cent. interest per annum, exceeded the sum then due on account of said indebtedness, and interest. Defendant, at the same time, canceled said loan and canceled the indebtedness of the insured and of plaintiff. Thereafter, on November 26, 1909, the defendant wrote and mailed the following notice: 'New York, November 26/09. Mr. Frank E. Gillen, 3540a McKean Ave., St. Louis, Mo.—Dear Sir: Re policy No. 307116. By a loan agreement executed on the 29th day of April, 1909, the above policy on the life of Frank E. Gillen was pledged to and deposited with the New York Life Insurance Company as collateral security for a cash loan of \$500.00. The premium and interest due on said policy on the 28th day of August, 1909, not having been paid, the principal of said loan became due and has been settled according to the terms of the policy, and the policy has no further value. Yours truly, John C. McCall, Second Vice President, by E. L. H.' Said notice was received by the insured and his beneficiary on or about December 1, 1909, and thereafter no steps were taken by either the insured, the plaintiff, or the defendant until this action was begun. If the loan had not been made, and if the loan agreement had not been executed, and if the foreclosure had not been made and the notice thereof given and received, said policy would have had sufficient net value to have purchased extended in-

surance for the full amount of the policy, to wit, \$2,000, for a period beyond the date when the insured died."

[1, 2] It will thus be seen that the whole case turns on the right of the defendant to use the net reserve value of the policy at the time default was made in the payment of premiums or thereafter in paying the loan, instead of applying it as a net single premium to purchase temporary insurance for the full amount of the policy as provided by section 7897, R. S. 1899.

The question here presented is by no means a new one and has been before the courts under somewhat varying facts in several recent cases. *Christensen v. Insurance Co.*, 160 Mo. App. 486, 141 S. W. 6; *Christensen v. Insurance Co.*, 152 Mo. App. 551, 134 S. W. 100; *Burridge v. Insurance Co.*, 211 Mo. 158, 109 S. W. 560; *Smith v. Insurance Co.*, 173 Mo. 329, 72 S. W. 935; *Paschedag v. Insurance Co.*, 155 Mo. App. 185, 134 S. W. 102. Most of the collateral questions presented here have been settled beyond further controversy by the cases above cited, and learned counsel have so conceded in their briefs and arguments in this court. It is no longer a question that the provisions of the nonforfeiture statutes enter into and form a part of every policy of insurance issued in this state by foreign as well as domestic companies when authorized to carry on their business here. These statutory provisions become the supreme law of every policy "anything in the policy to the contrary notwithstanding." In the interpretation and construction of the policy contract, they dominate and override all conflicting provisions. As to the matters mentioned therein, these statutory provisions deprive the parties of freedom to contract. The object of these nonforfeiture statutes is to provide against forfeiture of policies for nonpayment of premiums by specifying that the net value of the policy shall be used in purchasing temporary insurance unless paid-up insurance is demanded within 60 days. These provisions cannot be contracted away except in the instance and in the manner provided by section 7900, R. S. 1899. *Smith v. Insurance Co.*, 173 Mo. 329, 340, 72 S. W. 935; *Cravens v. Insurance Co.*, 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628; *Burridge v. Insurance Co.*, 211 Mo. 158, 172, 109 S. W. 560. In *Christensen v. Insurance Co.*, 160 Mo. App. 486, 493, 141 S. W. 6, 8, the court said: "Our Supreme Court has twice ruled that no portion of the three-fourths of the net value of the policy may be appropriated to any purpose other than the payment for temporary or extended insurance or the liquidation of notes for past premiums, as the statute stood at the time the policy here in suit was issued. See *Smith v. Mutual Ben. Life Ins. Co.*, 173 Mo. 329, 72 S. W. 935, *Burridge v. New York Life Ins. Co.*, 211 Mo. 158, 109 S. W. 560. The theory of those cases goes

to the effect that the nonforfeiture statute in force at the time the policy is issued enters into it as a parcel of the contract and operates to prohibit any subsequent change or modification thereof between the parties thereto affecting the application of the net value."

It is also settled that what cannot be done by the original policy contract—"a straight line"—cannot be done by a supplemental or collateral contract, in this case a loan agreement; that is, "cannot be done in a circle." *Burridge v. Insurance Co.*, 211 Mo. 158, 178, 109 S. W. 560; *Head v. Insurance Co.*, 241 Mo. 403, 408, 147 S. W. 827.

It is also the settled law that, in determining the amount of the net value of the policy applicable to purchasing temporary or extended insurance, the insurance company has no right to demand, nor can it compel, a deduction of any indebtedness of the insured to the company except "notes given on account of past premium payments on said policy." *Smith v. Insurance Co.*, 173 Mo. 329, 341, 72 S. W. 935; *Burridge v. Insurance Co.*, 211 Mo. 158, 171, 109 S. W. 560; *Paschedag v. Insurance Co.*, 155 Mo. App. 185, 198, 134 S. W. 102. It must therefore be held that the defendant in this case acquired and had no right or authority either by the original policy or by the supplemental loan agreement, or both combined, to use the net value of the policy in paying off or canceling the loan made by it to the assured. Whether the assured could or did confer this right by consent and agreement after default was made in paying the premiums will be considered later.

The pledging of the policy as security for the loan and the foreclosure of the lien on the same and the application of the proceeds to a payment of the loan, in so far as such acts depend for their validity on any power or authority given by the policy and loan agreement, were a mere nullity. These matters and things did not have for their object and purpose and did not result in "a surrender of the policy to the company for a consideration adequate in the judgment of the legal holder thereof," which is a statutory exception to the application of the preceding nonforfeiture sections of the statute in question. Section 7900, R. S. 1899.

It is also conceded, and need only be mentioned, that the amendment of section 7897, R. S. 1899, by Acts of 1903, p. 208, permitting any indebtedness of the insured to the company to be deducted from the net value of the policy before applying the same to the purchase of temporary or extended insurance, is not applicable to this policy as it was issued before such amendment, though the loan was made after the amendment. That act is not retroactive. *Paschedag v. Insurance Co.*, 155 Mo. App. 185, 199, 134 S. W. 102; *Christensen v. Insurance Co.*, 152 Mo. App. 551, 556, 134 S. W. 100; *Christensen v. Insurance Co.*, 160 Mo. App. 495,

141 S. W. 6; *Burridge v. Insurance Co.*, 211 Mo. 158, 173, 109 S. W. 560.

[3] It is also suggested that the policy and loan agreement in question makes the loan payable solely out of the policy or its proceeds, pledged for its payment as collateral security, and imposes no personal liability on the insured. It is hence argued that, as there was no indebtedness of the assured to the defendant, none could by contract or consent be deducted from the net value of the policy before applying it to the purchase of temporary or extended insurance. We do not so read or interpret the policy and loan contract. The fact that the company mainly relied on the security to collect its money does not relieve the personal liability, as such is often the case in making loans with security. The transaction is denominated a loan throughout and bears interest. There is an express promise "to pay said company said sum when due with interest," and the privilege is given to pay the amount and interest at any time and reclaim the policy. The loan is specified to become due and payable "if any premium on said policy or any interest on said loan is not paid on the date when due," and such date is clearly fixed by the policy. In *Christensen v. Insurance Co.*, 160 Mo. App. 496, 498, 141 S. W. 6, 9, the court, in speaking of a similar loan agreement, said: "The fact that the attempted pledge of a portion of the net reserve available to the purchase of extended insurance was invalid is, of course, without influence as to the indebtedness itself. On December 18, 1905, the insured defaulted in the payment of his premium due on that date and defaulted as well with respect to the payment of interest on his loan. Because of such defaults, the loan became due, for such was the agreement between the parties, and in this respect the agreement was certainly valid, though it contemplated as well a pledge of a portion of the net reserve not authorized by the statute."

In *Paschedag v. Insurance Co.*, 155 Mo. App. 185, 197, 134 S. W. 102, 105, the court, speaking of such an agreement, said: "It is true enough the loan contract does not expressly provide for a repayment of the loan except in so far as it authorizes defendant to appropriate the cash surrender value of the policy to that purpose, but it nevertheless implies an agreement to that effect, for it recites the matter as a loan to bear interest until a definite time and pledges the policies as collateral security therefor. Both parties understood at the time that they were making a loan, and nothing appears whereby the intention is manifested to terminate the relation of insurer and insured by defendant paying to the insured the cash surrender value of the policies for their surrender and cancellation."

In *Smith v. Insurance Co.*, 173 Mo. 329, 340, 72 S. W. 935, 938, after holding that

the pledge of the net value of a policy to the payment of a similar loan was invalid, the court said: "Of course, if the assured should live beyond the period of the temporary insurance, the policy would become extinct and the defendant would have only the personal liability of the estate of the assured to depend on."

In *Bank v. Insurance Co. (C. C.)* 81 Fed. 935, the court said: "While it may be that in the settlement of an annual premium the portion thereof represented by the certificate of loan does not actually pass back and forth between the insured and the company, yet the transaction in substance is a loan of money. The certificate designates it a 'loan,' the amount bears 'interest,' and it is made a lien on the policy until 'paid.' No doubt the company's main reliance is upon this lien because of its effectiveness, but personal liability is not expressly or necessarily excluded. A loan imports an obligation to pay back. I do not see why an action could not be maintained on the certificate of loan after demand. Debt lies whenever a sum certain is due, without regard to the way in which the obligation was incurred, or by what it is evidenced. *Stockell v. U. S.*, 13 Wall. 531 [20 L. Ed. 491]."

We think, therefore, that the loan transaction and agreement had between the insured and the defendant created a personal obligation on the insured to pay the amount of the loan with interest and, as the pledge of the policy was invalid in so far as it authorized, or rather attempted to empower defendant to compel, the use of the net value of the policy in discharging the loan, such loan was, so far as this case is concerned, nothing but a personal obligation of the insured and plaintiff to the defendant.

[4] For the purpose of this case then, after the assured had defaulted in the payments of his premiums, the situation was this: He had to his credit with the defendant the net value of his policy, computed as specified by section 7897, R. S. 1909, which he had an undoubted right to have used to purchase temporary or extended insurance, and, unless he consented to use it in some different way permitted by the exceptions to the nonforfeiture statutes, the law itself would apply it to that purpose. On the other hand, he was indebted to the defendant as a personal obligation only in a sum equal to or greater than this net value. In this situation, could he contract to surrender his policy and terminate his relations with defendant? We think, as held in *Christensen v. Insurance Co.*, 160 Mo. App. 486, 141 S. W. 6, that, in view of the last clause of section 7900, R. S. 1899, he could. The reason for restricting by our nonforfeiture statutes the right to contract between the insurer and insured is well expressed by Judge Vallant in *Smith v. Insurance Co.*, 173 Mo. 829, 841, 72 S. W. 935, 938, as follows: "There is a great deal of technical learning in the subject of life in-

surance, and our lawmakers have proceeded on the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality on that subject to the experienced officers of the insurance company, and for that reason have written into such contracts some provisions which the parties to them cannot avoid." The right and power of the insured to contract with reference to the use of the net value of his policy otherwise than in purchasing extended insurance is restricted only and not entirely prohibited. The statute itself contains exceptions, and among other things provides that the nonforfeiture provisions shall not apply "If the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof." By the terms of this exception the assured may make a contract with the insurer having for its object and purpose and actually resulting in a surrender of the policy to the company and thereby terminating the relations of insurer and insured. The Legislature evidently thought the insured would be capable of making so simple a contract as surrendering his policy to the insurer for a consideration to be fixed and agreed to by himself. The insured cannot contract in advance, either in the policy or in the application for it or by any supplementary or loan agreement, that he will use the net value of his policy in case of default in payment of premiums for a purpose other than purchasing extended insurance except in the two cases provided for by the same statute where the policy contains a provision for the holder receiving unconditionally the full net value, either in cash or by new paid-up policy. Whenever the surrender of a policy is after or grows out of the default in paying the premiums, the consideration for the surrender must be fixed and agreed to after such default. The hands of the insured must be left untied until he is ready to and does actually surrender the policy to the company.

In speaking of the exceptions to our statute now under consideration, the Supreme Court of the United States, in *Equitable Life Society v. Clements*, 140 U. S. loc. cit. 234, 11 Sup. Ct. 825 (35 L. Ed. 497), which case has been the foundation of most of our state decisions, said: "In defining each of these two cases, the statute, while allowing the holder to make a new bargain with the company, at the time of surrendering the policy, and upon such terms as, on the facts then appearing, are satisfactory to him, yet significantly, and, it must be presumed, designedly, contains nothing having the least tendency to show an intention on the part of the Legislature that the company might require the assured to agree in advance that he would at any future time surrender the policy or lose the benefit thereof, upon any terms but these prescribed in the statute."

In *Smith v. Insurance Co.*, 173 Mo. 829, 842,

72 S. W. 935, 939, the court said: "True the plaintiff's husband did obtain that amount of money from the company, but not after default in the payment of the premium, not after the provisions of the statute under discussion took effect, not as in payment to him of the cash surrender value of the policy; but he obtained it as a loan for which he executed his note and gave collateral security and for which his estate is liable to the defendant, and for which also the defendant holds the policy in suit as security." And in *Burridge v. Insurance Co.*, 211 Mo. 158, 178-179, 109 S. W. 560, 566, the Supreme Court rejected the defense of the insurer because the insured was insane and could not contract, or agree as to a surrender of the policy or a consideration therefor at the time of the alleged actual surrender of the policy, though he had tried to do so by contract in advance, and because no consideration was shown to have been accepted at the time of the surrender. But the court also said: "That section plainly contemplates that the relation of insurer and insured may be brought to an end if the insurer complies with its provisions, and the policy is surrendered 'for a consideration adequate in the judgment of the holder.'"

In *Paschedag v. Insurance Co.*, 155 Mo. App. 185, 199, 134 S. W. 102, the court gives the reasons why a loan contract providing for a surrender of a policy in case of default in paying interest and premiums does not fall within the exceptions to the statute providing for a surrender of the policy "for a consideration adequate in the judgment of the legal holder thereof," in these words: "But, of course, this involves, too, a transaction where the parties contemplate a cessation of the insurance contract at the time. By the express provision of the statute, the insured may surrender the policy and terminate the relation of insurer and insured for any consideration which in his judgment is adequate therefor; but the consideration must be given by the company for such a surrender and not for some other purpose. \* \* \* Where the transaction is denominated by the parties as a loan and the pledge of the policies, and their dealings touching the matter manifest they did not intend the policy was thereby surrendered in the sense of the statute referred to for a consideration adequate in the judgment of the insured, the court is not justified in saying the transaction was a surrender. For a case directly in point, see *Raymond v. Insurance Co.*, 86 Mo. App. 391."

We therefore hold that, while the plaintiff did not and could not by the policy or loan agreement make a valid contract compelling him to surrender his policy in case of default in payment of premiums and interest and apply the net value of the policy or any part thereof in payment of such loan, yet he could after such default voluntarily agree to

and actually surrender his policy to the company in consideration of the payment of his personal debt to the company out of the net value of his policy.

[5, 6] Viewing this case as we must from the standpoint that the assured's pledge of his policy to the payment of his loan was void, that such loan was a personal debt only, that after his default in payment of the premium and interest he was perfectly free to refuse or give assent to the use of the net value of the policy to the payment of his indebtedness to the company instead of applying it to the purchase of temporary insurance—a proposition, which, if accepted, would result in a surrender of his policy for a consideration adequate in his judgment—the sole question remaining is to determine whether he did assent to this settlement and surrendered his policy. We will concede that he might assent to this arrangement either directly or by way of estoppel. It must be granted, however, that the defendant had no right to impose on the insured any such settlement, and it will be seen that when it wrote to him in effect that it had foreclosed the loan and applied the net value of the policy to the payment of the loan, thus canceling both the policy and his personal indebtedness to it, the letter in no wise suggested that he had any right to object and decline any such settlement. This letter was not designed to give the insured any freedom to contract with reference to this matter. It gave no figures or amounts and no information as to the method of computation used or how it arrived at the result that the policy is of no value. It is based on the assumption by the defendant that the loan agreement and pledge of the policy gave the defendant company the absolute right to apply the net value of the policy in payment of the loan and that it had exercised this right, and therefore the "policy has no further value." The letter does not call for any choice or answer, and the only thing suggested that the insured could do is to have protested against this arbitrary action of the company. The contention of the defendant is that the failure of the insured to so protest works an estoppel by acquiescence equivalent to a voluntary agreement that the policy be surrendered in consideration of the cancellation of the loan indebtedness. It must, however, be borne in mind that the insured was under no obligation to make any choice or request in order to obtain the extended insurance. The law gave him this benefit unless he voluntarily chose and assented to the other alternative of at that time surrendering the policy for a consideration adequate in his judgment.

[7] In thus charging against the insured a duty to protest against the company's action in this respect, defendant imputes to him and the beneficiary a better knowledge of their rights under the policy than was possessed by the company. We will accord to the com-

pany an honesty of purpose and that it honestly believed the loan agreement and pledge of the policy gave it a right to thus cancel the policy, although, as we have seen, it was mistaken in this. As said in *Smith v. Insurance Co.*, supra, the insured is not presumed to have the technical knowledge in reference to life insurance contracts possessed by the experienced officers of such companies; and, if they did not know the rights of the respective parties under this policy contract, how can the insured be charged with sufficient knowledge of his rights thereunder on which to base a protest? Logic and common sense demand that before there is a duty to protest against any action of another the party protesting must have sufficient knowledge of his rights to justify such protest and which suggests to him his duty to make protest. "Waiver is always a question of intention and rests upon a full knowledge of all the material facts upon the part of the person against whom the defense is interposed. In the case at bar there is no evidence that the present beneficiary had any knowledge or information whatever of her rights under the contract in suit as fixed by the statutes and laws of Missouri, and hence there is no evidence that she should have intended to abandon the enforcement of such rights." *Head v. Insurance Co.*, 241 Mo. 403, 419, 147 S. W. 832; *Burke v. Adams*, 80 Mo. 504, 514, 50 Am. Rep. 510; *Tennent v. Insurance Co.*, 133 Mo. App. 345, 362, 112 S. W. 754. Nor were there any sufficient facts pleaded to constitute an estoppel. A plea of estoppel to be sufficient must plead the facts and elements of an estoppel, one of which is that the party invoking the estoppel was in some manner prejudiced thereby—that he was induced to do or refrain from doing something to his injury. Whatever may be the facts, the defendant did not plead that it refrained from collecting the personal obligation arising from the loan agreement because of its reliance on such debt being fully paid by the application of the net value of the policy to such purpose. *Miller v. Anderson*, 19 Mo. App. 71, and cases cited; *Osburn v. Court of Honor*, 152 Mo. App. 652, 661, 133 S. W. 87; *Northrup v. Coulter*, 150 Mo. App. 639, 649, 131 S. W. 364.

In the *Head Case*, supra, as in this one, the insurance company undertook to enforce its supposed right under a similar loan agreement to apply the net value of the policy at the time of default in payment of premiums to the payment of the loan and gave the insured and beneficiary written notice of its action to that effect. The facts there show that the insured and beneficiary received and retained this notice without any response or objection for nearly a year and until the insured's death. Then, for the first time, the alleged settlement was repudiated by bringing suit on the policy on the theory that the policy was kept in force by applying the net

value to the purchase of temporary insurance alone. There was a small net-value surplus left after paying the amount of the loan, which was applied to purchase a paid-up policy amounting to \$89, and an indorsement to this effect was made on the policy and same returned to and retained by the insured along with the statement as to the use of the greater portion of the net value in paying the loan. The insurance company offered to pay and tendered the amount due as a paid-up policy. Responding to the question of waiver or estoppel under these facts, the court, in addition to what is above quoted, held: "Neither can it be urged that the \$89 tendered to plaintiff before and by this suit as the full amount of a paid-up policy under the New York law, and the fact that the policy was returned to her with that indorsement and retained for some months until after the death of her father, be held to operate as a waiver of any rights to which she was otherwise entitled."

On the point now being discussed, the *Head Case*, supra, seems to be in direct conflict with the case of *Christensen v. Insurance Co.*, 160 Mo. App. 486, 141 S. W. 6; the facts of the two cases being so near alike as to warrant no distinction in principle. The decision in the *Head Case* was rendered shortly after the decision in the *Christensen Case* and makes no mention of it. The only difference pointed out between the present case and the *Christensen Case* is that in the *Christensen Case* the whole net value of the policy was not used in paying the loan, and therefore the policy was returned and retained by the insured in that case with an indorsement on the policy as to how the net value had been applied; while in this case, the whole of the net value being so used, there was no need to return the policy and the notice as to the company's action in the matter was given by letter. The *Christensen Case*, however, does not differ from the *Head Case*, supra, even in that respect. In each case, however, a written notice in some form was sent to the insured notifying him as to what had been done in the way of applying the net value of the policy to a cancellation of the loan and the effect thereof on the policy. It is the acquiescence of the insured after full notice as to what had been done that constitutes the estoppel in either case, and it does not matter whether the notice comes from an indorsement on the policy or in a letter to the insured.

This court, of course, is bound by the *Head Case*, supra, as being the last decision of the Supreme Court. We have, however, sufficiently indicated our own views on the matter. It is conceded in this case, as in the *Head* and *Christensen Cases*, that there was no direct or express assent or agreement to a surrender of the policy for a consideration adequate in the judgment of the insured, and we hold, as did the Supreme Court, that the

facts here are not sufficient to show that such result was accomplished by acquiescence amounting to an estoppel.

The judgment will therefore be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

#### STATE v. LEIBTIG.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

#### CRIMINAL LAW (§ 1106\*)—APPEAL—TIME TO PERFECT.

An appeal not perfected by the filing in the Supreme Court of a transcript within the time prescribed by Rev. St. § 5313, must on motion be dismissed, unless accused shows good cause for delay in perfecting the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2890-2892; Dec. Dig. § 1106.\*]

Appeal from Circuit Court, St. Louis County; G. A. Wurdeman, Judge.

Frederick Leibtig was convicted of a felonious assault and he appeals. Dismissed.

B. L. Matthews, of Clayton, and F. W. Brooks, of Valley Park, for appellant.

ROY, C. The defendant was on March 16, 1912, convicted of a felonious assault and sentenced to two years in the penitentiary, and on the same day appealed. He was given leave to file a bill of exceptions on or before August 31, 1912, on which day the bill of exceptions was filed. The transcript of the record was filed in this court March 25, 1913, more than a year after the appeal was taken.

Section 5313, Revised Statutes, provides that, on the failure of the appellant in a felony case to perfect his appeal within 12 months from the time the appeal was granted, the appeal shall on motion of the Attorney General be dismissed, unless the defendant shall show to the satisfaction of the court good cause for not perfecting his appeal. The Attorney General has filed a motion to dismiss the appeal on account of the delay, and the appellant has made no attempt to explain or excuse the delay.

In accordance with our duty, we dismiss the appeal.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

#### STATE v. PRINTZ.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

#### CRIMINAL LAW (§ 1094\*)—APPEAL—BILL OF EXCEPTIONS.

Though motions for new trial and in arrest of judgment were filed, only the record

proper will be reviewed, if appellant did not file a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807, 3204; Dec. Dig. § 1094.\*]

Appeal from St. Louis Circuit Court; George C. Hitchcock, Judge.

Samuel Printz was convicted of receiving stolen property, and appeals. Affirmed.

John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for the State.

WILLIAMS, C. Upon an information charging defendant with receiving stolen property of the value of \$1,200, defendant was tried and convicted in the circuit court of the city of St. Louis, Mo.; the jury assessing his punishment at three years in the penitentiary.

Motions for new trial and in arrest of judgment were filed and overruled, and the defendant appealed, but failed to file his bill of exceptions in the cause. The appellate review is therefore limited to the record proper. Upon careful inspection of the information and other parts of the record proper, we find the same to be in due and proper form and free from error.

The judgment is affirmed.

ROY, C., concurs.

PER CURIAM. The above opinion by WILLIAMS, C., is adopted as the opinion of the court. All the Judges concur.

#### MERRILL et al. v. THOMPSON et al.

(Supreme Court of Missouri, Division No. 1.  
June 28, 1913. Rehearing Denied July 10, 1913. Transfer to Court in Banc Denied Dec. 6, 1913.)

#### 1. APPEAL AND ERROR (§ 994\*)—EVIDENCE (§ 598\*)—WEIGHT OF TESTIMONY—NUMBER OF WITNESSES.

The weight of testimony does not so much depend on the number of witnesses, as on their intelligence, honesty, and veracity, and a finding sustained by the testimony of a credible witness will not be disturbed merely because several witnesses contradicted him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.\* Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.\*]

#### 2. SPECIFIC PERFORMANCE (§ 121\*)—CONTRACTS—EVIDENCE—SUFFICIENCY.

In an action for the specific performance of an alleged oral contract to convey land, made by decedent with his daughters in consideration of their maintaining him and his wife during their lives, evidence held to sustain a finding of the making of the contract and of performance of the consideration by the daughters, entitling them to relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

#### 3. APPEAL AND ERROR (§ 843\*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where the court trying a case without a jury admitted evidence which was not consid-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ered by the trial court in determining the issue on which the determination on appeal depended, the court on appeal will not pass on the admissibility of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

Appeal from Circuit Court, Livingston County; Arch B. Davis, Judge.

Action by Harriett A. Merrill and another against Elliott W. Thompson and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

This was a bill in equity instituted in the circuit court of Livingston county, by the plaintiffs against the defendant, to quiet title, but, in reality, to specifically enforce an oral contract alleged to have been entered into by and between Harriett A. Merrill, née Thompson, and her sister Sophia, with Nathan Thompson, their father, whereby he agreed to convey to them a certain 40 acres of land situated in said county, and particularly described in the bill, in consideration that the former agreed to live with, care for, support, and maintain him and his wife, their mother, during their natural lives. Harriett alleging and claiming that she, prior to the institution of the suit, purchased the interest of her sister Sophia, and that she intermarried with her coplaintiff, William T. Merrill. The pleadings are in no manner assailed, and we will therefore put them aside. A trial was had, and the court found the issues as to the contract (title also having been alleged to have been acquired by the statute of limitation) in favor of the plaintiffs (there being no finding either way as to the claim of title by adverse possession) and in due time and in proper manner defendant duly appealed the cause to this court.

The evidence, as usual in such cases, is quite voluminous, which we have carefully read, and that for the plaintiff tended to prove the following facts:

That some time in the year 1869, Nathan Thompson acquired title to the land in controversy, moved thereon, and there resided until his death. His family consisted of himself, wife, and eight children. One, Dora, died without marrying. Prior to 1882, all of the other children married and left home, except the two daughters, Harriett and Sophia, who were living with their parents. At that date, both of them were past the age of minority, and the former had been teaching school for a number of years, in the neighborhood, but resided with her parents. For some two or three years prior to this time, the father and mother depended largely upon these daughters for support. Harriett, when not teaching, resided with her father, and assisted in doing the household work, and assisted her sister Sophia, who devoted all of her time to the house and to her parents. At and prior to that date, the father's health had failed and he was unable

to do scarcely any labor. Likewise, the mother was an invalid and needed care and attention. That it was common knowledge to the members of the family and to the community that, if left alone, they would not be able to make a living. That the rent of the farm would not be sufficient to support and maintain them. For years Nathan Thompson had been more or less in debt, some of which was secured by the land. I think the record shows practically without contradiction that at this time the condition of Nathan Thompson and his wife was such that they needed constant care and attention, and that they must depend upon some one for care and maintenance. They had no means practically, except this 40 acres of land, and were unable to earn a dollar, both having been in poor health for years, and were growing worse all the time. He was then 65 and she was 61 years of age.

It was under those conditions that in 1883 or 1884, not later than 1886, the father is alleged to have made and entered into the contract with his two daughters, which is the subject of this litigation. The evidence tended to show: That he agreed with them, if they would take care of and support him and their mother, as long as they lived, stay with and look after them and provide them a home on this tract of land so long as they lived, pay their debts, and keep the place in repair, that he would will the land to them when he died. That Sophia was to stay with them in the future and care for them and do the household work, as she had in the past, and that Harriett was to continue teaching and reside with them and assist in the household work and in caring for them while there. That she was to furnish the necessary means by which the house and premises were to be kept up, also the money necessary for the care and support of the father and mother, as well as for all medicines and medical attention as might be necessary. That she should procure the means for those purposes from the income, rents, and profits realized from the 40 acres of land and from her salary as teacher. That they agreed to all that and faithfully carried out the agreement. That they took charge of the place and maintained, cared for, and supported their father and mother; also provided them with all necessary medicines and medical attention as long as they lived. The former died in November, 1893, and the latter in February, 1899, he being about 75 and she about 77 when they, respectively, died. That Harriett paid all of her father's debts, in dividend, as well as those against the farm. She made all necessary improvements, kept the place in good repair, and paid all the taxes during all of those years, and after the death of her parents she paid all the funeral expenses and had suitable monuments erected at their graves. That at the time this agreement

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was made said 40 acres of land was worth from \$1,200 to \$1,400. The debts of the father amounted to several hundred dollars, the exact amount not shown, which were all paid by Harriett. She had also furnished her father considerable sums of money prior to making this agreement with him, in order to help him make a living.

That in 1886, in order to carry out his part of the agreement, her father made and published a will by which he devised all of said land to his daughters Harriett and Sophia, subject to a life estate to the mother. Fountain K. Thompson, a son, was made executor of the will, which after the death of Nathan Thompson was duly probated in the probate court of Livingston county, on March 7, 1894. After its probate and after the death of the mother in February, 1899, it was discovered that the will was defective, in that, through an error of the scrivener, it failed to name the other children or heirs of the testator. Upon the discovery of this defect, Harriett and Sophia undertook to correct the defect by getting quitclaim deeds from all of the children of Nathan Thompson, their father, conveying their interest in this land to them, Harriett and Sophia. That all the children except the defendant Elliott W. Thompson, in compliance with their request, without reward or compensation, executed and delivered such quitclaim deeds to them. That on August 3, 1899, this defendant brought a partition suit against all the children and heirs of Nathan Thompson, including Harriett and Sophia, to partition this land. This suit was returnable to the September term, 1899, of the circuit court. The plaintiff here, the defendant there, filed a motion requiring the plaintiff give security for the costs, for the reason that he had no interest in the property and was insolvent. The motion was sustained, and, defendant having failed to give security for costs, as ordered by the court, the cause was dismissed. That after the death of the mother, Harriett and Sophia continued in the exclusive possession of said property, claiming title thereto against every one; renting the same and receiving the rents thereof; also made valuable improvements thereon and paid the taxes thereon up to February 15, 1904, when Sophia conveyed her interest in said lands to Harriett; and from that date to the date of the trial, she had the sole, exclusive, and adverse possession thereof, claiming title against the world. That she continued to rent the land and receive the rents thereof. She constructed thereon a new house and made other improvements which cost her \$2,500. The defendant at all times knew of all these facts, but made no demands for his alleged interest therein, or protests arising out of the same.

There is but little difference between the foregoing summary of the evidence and that prepared by counsel for appellant; they dif-

fer in degree only. With no design to criticize counsel for appellant, yet no disinterested, unbiased mind can read this record and reach any conclusion except that in the statement of the case they have minimized some of the important facts thereof; otherwise, their statement is well enough, which I will here copy, and thereby greatly shorten the statement from what it would be, should I attempt to state even the substance of the evidence. Since counsel for both parties have seen proper to present this case upon the ultimate facts which the evidence tends to prove, we feel justified in disposing of the case upon that theory, without going into and setting out the details of the voluminous evidence. Said statement of counsel for appellant, omitting formal and undisputed matters, is as follows:

"About the year 1876, the family of Nathan Thompson then living with him on said farm consisted of himself and wife and two daughters, plaintiff and Sophia B. Fulkerson. All his other children had theretofore married and left home. The daughter Sophia had been married, but prior to 1876 had separated from her husband and returned to the home of her father and mother, where she lived during her father's life and up to the time of her mother's death in 1899. The plaintiff never left home, and the evidence is she had made her home with her parents and was making her home with them during all the time the parents lived on this farm. It is undisputed that both the daughters, plaintiff and Sophia B. Fulkerson, had made their home with their parents for years prior to the date of the alleged contract between the father and the two daughters, and during all that time had looked after and cared for their parents and assisted in performing the farm and household duties. It is also uncontroverted that the daughter Sophia had during this time stayed at home, attended to such duties as she could around the farm, and looked after and cared for her parents; while the plaintiff had been a school teacher for a number of years prior to the date of the alleged contract and had during that period borne more or less the expenses of the family, of which she was a member, as well as paying some of the taxes, some of the interest on debts her father owed, and otherwise contributing to the family support. After the date of the alleged contract and during the father's life and up to the mother's death, both of these girls continued to perform the same character of acts and do the same character of work they had done before. The daughter Sophia continued to live at home, look after the household duties, and do such work as she could about the farm, caring for and assisting her father and mother, the same as she had done prior to said alleged date. The daughter Harriett, the plaintiff, continued to make her home with her parents, bearing more or less of the family expenses, paying some of



the taxes, some of the interest on her father's debts, and otherwise contributing to the general family fund, the same as she had done previous to the alleged making of the contract.

"Thus it is seen that the affairs of this family followed the same course without interruption for years before as well as after the time of the alleged contract. In other words, the record shows no change in the situation, duties, acts, or work of these two girls as a result of such alleged contract. But, on the other hand, their situation remained unchanged; they performed the same acts and duties and did the same work as they had done before. There seems to have been no separate account kept of the amount spent by the plaintiff over and above the amount realized from the farm. Nor is the record clear that the income from the farm fell short, to any great extent, of maintaining the family. If it did, it is not stated how much. But it is clear they all lived together, each contributing in his own way to the maintenance of the family.

"The contract alleged and set forth in the plaintiff's petition as having been made between the father and the two daughters, for which specific performance was asked and decreed, is as follows: That on said \_\_\_\_\_ day of December, 1886, the said Nathan Thompson and the plaintiff Harriett A. Merrill, then Harriett A. Thompson, and the said Sophia B. Fulkerson, made an agreement by which the plaintiff Harriett and her said sister, Sophia B. Fulkerson, were to become the owners of the said land in fee simple in consideration that they would take possession of said land and take care of and support and maintain their father and mother in sickness and health, and see that they had food, shelter, clothing, nursing, medical attention, and all necessities; and the said plaintiff and her sister, Sophia B. Fulkerson, should live on the place with their father and mother and give them the benefit of their society and the comfort of their presence and help as long as their father and mother should live, and would farm said land and improve the same and maintain a home for their father and mother with them as long as their father and mother should live, and should see that their father and mother, when deceased, should receive proper burial and their funeral expenses paid. That the said Nathan Thompson, their father, was to convey them said land so as to make them owners thereof in fee simple. \* \* \*

"While the plaintiff procured deeds from the other children of the deceased, except the defendant Elliott W. Thompson (they making deeds voluntarily), for their interest in the farm, she made no claim to any of them that she was the owner of the land by reason of any contract. So far as the record shows, plaintiff's only claim to this land was based entirely on the intention of

the father expressed by his will. Her father made a will by which he devised the farm in question to his wife for life, the remainder to the plaintiff and her sister Sophia. The will did not mention the other children of the testator. So, as to such other children, the defendant being one, the father died intestate. \* \* \* Since the death of the father and mother, the farm has been rented, and the rent has been paid to plaintiff. As nearly as can be told from the record, there has been collected and paid to her at least \$1,000 in rent, and, as well as can be gleaned from the evidence, that amount will more than cover all the plaintiff has paid out of her own funds toward the performance of the alleged contract. \* \* \* Appellant contends that the evidence does not prove the contract as pleaded, does not show any contract was ever had, and that the finding was for the wrong party and should be reversed."

The following are the errors assigned by counsel for appellant: "The trial court erred in finding that there was an oral contract between the deceased, Nathan Thompson, and his two daughters, the plaintiff and Sophia B. Fulkerson, by which the said Nathan agreed to give or leave the land in question to such daughters, because: (1) The alleged oral contract was not clear, explicit, and definite. (2) If the contract was proved, it was not the contract pleaded. (3) The contract was attempted to be established by conversations too ancient and too loose and casual. (4) The proof was not such as to leave no reasonable doubt that the contract as pleaded was in fact made and that full performance has been had. (5) The work relied upon as constituting performance is not referable solely to the alleged contract sought to be enforced, but might be referable to some other cause. (6) The rent received by plaintiff will more than offset any sums paid out by her in the support, maintenance, and care of her father and mother; so no fraud will be worked on plaintiff by refusing to enforce the alleged contract. (7) The proof, at best, shows a mere disposition or intention to devise by will as a reward for services already performed and money already advanced, and does not show a contract to devise made before the act of performance relied upon were had."

John H. Taylor and Paul D. Kitt, both of Chillicothe, for appellants. Lewis A. Chapman, of Chillicothe, for respondents.

WOODSON, P. J. (after stating the facts as above). [1] I. By reading this assignment of errors, it will be seen by comparing it with the general rule announced by this court, in the case of Walker v. Bohannan, 243 Mo. 119, loc. cit. 135, 147 S. W. 1024, regarding the requirements of the al-

legations and proof in such cases, the counsel for appellant have predicated their assignment upon that rule, simply negating the requirements stated therein.

Before considering this assignment of errors, we will dispose of a general objection urged by counsel against the correctness of the decree, and that is that "the proof to sustain the alleged contract is based solely upon the evidence of Fountain K. Thompson, a brother of the plaintiff," and therefore the evidence is insufficient to sustain the decree. If we correctly understand this contention, it challenges the sufficiency of the strength of the testimony of any one witness to support a judgment or decree in a case of this character, regardless of his intelligence, character, and standing in the community for honesty, truth, and veracity. Even if this insistence was based upon undisputed facts (which it is not, for he is strongly corroborated by almost every physical and undisputed fact in the case, which are many, as will be presently noted), we would be unable to lend our concurrence thereto, for the simple reason that the weight and convincing character of testimony does not depend so much upon the number of witnesses who testify in a cause, but more upon the intelligence, honesty, and veracity of those who give evidence in a cause. This rule has been so long and so firmly established in our system of jurisprudence, it would be more than a useless waste of time and energy to cite authority in support thereof. We therefore rule this insistence against appellant.

[2] II. We now approach the main proposition involved in this case for determination, and that is: Was the evidence introduced sufficient to support the findings and the decree herein made and rendered in favor of the respondent, if tested by the following rule announced by this court in the case of *Walker v. Bohannon*, supra, viz.: "With the acquired experience the courts had gained before the passage of the original statutes of frauds and perjuries, they were slow to ingraft thereon any exception to the iron-clad rule of the statute. Later, however, it became apparent to courts of conscience that frauds were being perpetrated under the strict letter of the statute. To obviate these frauds, the exceptions to the statute here invoked was adopted by courts of equity, but not without well-defined rules of procedure—rules which, like the statute itself, would be a safeguard as against the perpetration of frauds. The rules cover many phases, i. e.: (1) The alleged oral contract must be clear, explicit, and definite; (2) it must be proven as pleaded; (3) such contract cannot be established by conversations either too ancient on the one hand, or too loose or casual upon the other; (4) the alleged oral contract must itself be fair and not unconscionable; (5) the proof of the contract as pleaded must be

such as to leave no reasonable doubt in the mind of the chancellor that the contract as alleged was in fact made and that the full performance, so far as lies in the hands of the parties to perform, has been had; (6) the work constituting performance must be such as is referable solely to the contract sought to be enforced, and not such as might be reasonably referable to some other and different contract; (7) the contract must be one based upon an adequate and legal consideration, so that its performance upon the one hand but not upon the other would bespeak an unconscionable advantage and wrong, demanding in good conscience relief in equity; and (8) proof of mere disposition to devise by will or convey by deed by way of gift, or as a reward for services, is not sufficient, but there must be shown a real contract to devise by will or convey by deed, made before the acts of performance relied upon were had."

Speaking of this rule generally, I wish to state that I have never indorsed it in the full sense in which it is there stated, but my views regarding it are fully stated in my dissenting opinion, filed in the case of *Collins v. Harrell*, 219 Mo. 279, loc. cit. 311-343, 118 S. W. 432. Since, however, the facts of this case are practically undisputed, we will have no necessity to attack the stringency and rigidity of that rule.

The undisputed facts are that Nathan Thompson, about the year 1869, owned a small farm of 40 acres of land situate in Livingston county, upon which he resided with his family, composed of himself, wife, and eight children, five boys and three daughters, the other having died without issue. Prior to 1882 all the sons had married and moved away, leaving the father and mother and the two daughters at home. In the meantime both the father and mother had greatly declined in health, and were, on that account, unable to make a living, and the rent of the farm was insufficient for that purpose. Under those circumstances, it became apparent to all that the father and mother would have to make some arrangement for their support and maintenance during their declining years. The sons were all married and had departed the parental roof. Sophia had been married and divorced, but was staying temporarily at the home of her father and mother, assisting in the performance of the household duties; and Harriett was and had, for several years, been teaching school, living however with the father and mother, and assisted in doing the work about the house nights and mornings, and had been contributing to the support of the family out of her salary as teacher. While Harriett and Sophia were not competent witnesses to testify as to the contract, yet one of their brothers, Fountain K. Thompson, and a brother of the appellant, testified in substance that, some time between 1884 and 1886,

Nathan Thompson, recognizing his enfeebled and helpless condition, made a contract with his two daughters, by which he agreed that if they would take care of and support him and their mother as long as they lived, stay with and look after them, and provide them with a home on said farm during said time, pay his debts, keep up the place, and furnish them with medicines and medical attentions, that he would will them the land in question. Also, that Sophia was to stay with them all the time and devote her time and attention to them, when necessary, and to look after the household duties. Harriett, likewise, was to reside at home with the parents, but to teach school, and while at home she was to assist in caring for them, and the household, as well as to furnish the means for their support and maintenance, pay the debts of the father, keep the house and improvements in repair, and pay the taxes, etc. That she was to have the rents of the farm, and out of that and her salary she was to meet all of said obligations, in consideration of which the father agreed to will them the 40 acres of land in controversy. Fountain K. Thompson also testified that Harriett and Sophia agreed with their father to do all of said things in consideration that he would will them said land.

The evidence is uncontradicted that they faithfully and religiously did and performed all of the matters and things required of them by the terms of said alleged contract. Even the defendant concedes that, but contends that all of those things were done by them as members of the family and for love and devotion to their father and mother, and not in pursuance to a contract imposing those duties and obligations upon them. It is also undisputed that the father, either in pursuance to that contract, or for some other reason not disclosed by this record, did as a matter of fact will said 40 acres of land to Harriett and Sophia, but, through the mistake or inadvertence of the scrivener who drew the will, omitted to name therein any of the other children, and in consequence thereof the will was, under our statutes of wills, insufficient to convey the entire interest of the father in and to the land to said daughters, leaving the other children as pretermitted heirs. Recognizing the justice of respondents' claim to the land, all of the children except the appellant conveyed by quitclaim deed their respective interest in and to said land to respondents; but the appellant, Elliott W. Thompson, at all times denied their right to his one-seventh interest therein. As far back as August, 1899, shortly after the death of his mother, he brought a suit against all of the children to partition the land, whereupon Harriett, one of the defendants in that suit, filed a motion for costs, stating therein that the plaintiff there, and the appellant here, had no interest in said land and that he was insolvent. The court sustained that motion, and, the plaintiff hav-

ing failed to secure the cost within the time fixed by the court, the court dismissed the suit at the January term, 1900, of the court; since which time appellant has not molested the possession of the land, or made any legal claim thereto. After the dismissal of that suit, the respondents have been in the exclusive, continuous, notorious, and adverse possession of the land, claiming title thereto against the world, and especially against the appellant, and long prior to that date for that matter. During all of these years the respondent has been receiving the entire issues, rents, and profits of the land, paid the taxes thereon, and has built a house and made other valuable improvements thereon, costing \$2,500, all of which was well known to the appellant. Upon this evidence and state of the record, the circuit court found the issues for the respondent, and entered judgment quieting the title to the land in their favor, and against the appellant.

There has been so much said and written by this court upon this question that I feel it would be useless to prolong this opinion by adding anything thereto; and will therefore curtail the same by stating that, in our opinion, the findings and decree of the court, quieting the title in favor of the respondents were correct, and are fully supported by the following cases: *Sutton v. Hayden*, 62 Mo. 101, loc. cit. 114; *Hiatt v. Williams*, 72 Mo. 214, 37 Am. Rep. 438; *Gupton v. Gupton*, 47 Mo. 37; *Healey v. Simpson*, 113 Mo. 340, loc. cit. 346, 20 S. W. 881; *Hall v. Harris*, 145 Mo. 614, 47 S. W. 506; *Koch v. Hebel*, 32 Mo. App. 103; *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; *Fuchs v. Fuchs*, 48 Mo. App. 18; *Carney v. Carney*, 95 Mo. 353, 8 S. W. 729; *Berg v. Morean*, 199 Mo. 416, 97 S. W. 901, 9 L. R. A. (N. S.) 157; *Nowack v. Berger*, 133 Mo. 24, 84 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Russell v. Sharp*, 192 Mo. 270, 91 S. W. 134, 111 Am. St. Rep. 496; *Walker et al. v. Bohannon et al.*, 243 Mo. 119, 147 S. W. 1024; *Forrister v. Sullivan*, 231 Mo. 345, 132 S. W. 722; *Collins v. Harrell*, 219 Mo. 279, 118 S. W. 432; *Wales v. Holden*, 209 Mo. 552, 108 S. W. 89; *Kirk v. Middlebrook*, 201 Mo. 245, 100 S. W. 450; *Oliver v. Johnson*, 238 Mo. 376, 142 S. W. 274; *Kinney v. Kurray*, 170 Mo. 700, 71 S. W. 197. If, perchance, any member of the bar wishes to read the views of this court regarding this class of cases, he will find them fully expressed in the cases cited.

[3] III. Appellant complains of the action of the trial court in permitting Harriett and Sophia to testify to certain matters which transpired subsequent to the death of their father. Since this testimony was admitted upon other theories of respondents' case and not considered by the trial court in its determination of this branch of the case, which alone involves the contract in question, we deem it unnecessary to pass upon that testimony or on the legal propositions predicated

thereon, for in no event could a ruling thereon affect the conclusions reached in paragraphs 1 and 2 of the opinion.

Finding no error in the record, the judgment of the circuit court is affirmed.

#### STATE v. BURNETT.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

##### PERJURY (§ 11\*)—WHAT CONSTITUTES.

Accused, who was a hotel porter, was called before the grand jury to testify as to the guilt of the proprietor, suspected of keeping a bawdyhouse. Accused falsely denied that he had acted as a panderer in bringing lewd men and women together in the hotel. *Held*, that accused's testimony was material, and, if knowingly false, it constituted perjury, under Rev. St. 1909, § 4344.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.\*]

Appeal from Criminal Court, Greene County; C. H. Skinner, Special Judge.

Richard Burnett was convicted of perjury, and he appeals. Affirmed.

Convicted in the criminal court of Greene county of the crime of perjury, defendant appeals from a judgment fixing his punishment at two years in the penitentiary. He was charged with having sworn falsely before the grand jury of Greene county, when called by said grand jury on December 4, 1911, to testify as to his knowledge of the guilt or innocence of one M. K. Watts, who was suspected of keeping a bawdyhouse in said county. Before the grand jury defendant admitted that he had in the months of October and November, 1911, acted as a porter for a hotel kept by said Watts, but denied that he had done anything towards bringing men and women together in said hotel for the purpose of enabling or encouraging them to engage in sexual intercourse.

Two witnesses testified positively that defendant did act as a panderer in bringing together lewd men and women for immoral purposes in a hotel kept by said Watts, and that when so brought together by defendant said men and women indulged in illicit sexual intercourse with each other in said hotel. It was also proven that defendant, in his capacity as porter, represented to prospective patrons of the hotel that if they would come there he would arrange to bring "girls" to their rooms for immoral purposes. This evidence tended to prove that Watts was running a bawdyhouse, and that defendant, as his porter, had knowledge of that fact. When sworn as a witness before the grand jury, defendant testified positively that he had never taken any women to the rooms of guests of the hotel for immoral purposes; consequently, if the witnesses on behalf of the state testified truthfully upon the trial, then he (defendant) undoubtedly swore falsely when giving his evidence before the grand jury.

Geo. Pepperdine, Val Mason, and W. R. Self, all of Springfield, for appellant. John T. Barker, Atty. Gen., and Ernest A. Green, Asst. Atty. Gen., for the State.

BROWN, P. J. (after stating the facts as above). Defendant's testimony before the grand jury was material to the investigation of the matter of inquiry then pending before that body, and if knowingly false it constituted willful and corrupt perjury, as denounced by section 4344, R. S. 1909. *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

The defendant has not furnished us with a brief pointing out the alleged errors upon which he relies for reversal, but we have examined the whole record for errors assigned in his motion for new trial and motion in arrest of judgment, but find no errors that warrant a reversal. Upon his trial defendant strenuously contended that his testimony as given before the grand jury was true; but a petit jury of his county disbelieved him and believed the witnesses who testified for the state. He was represented by able counsel and had a fair trial.

The judgment should be affirmed. It is so ordered.

FARIS and WALKER, JJ., concur.

#### STATE v. WADE.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

##### CRIMINAL LAW (§ 1106\*)—TIME TO PERFECT—DISMISSAL.

An appeal not perfected by the filing in the Supreme Court of a transcript within the time prescribed by Rev. St. 1909, § 5313, must on motion be dismissed, in the absence of a showing of good cause for the delay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2890-2892; Dec. Dig. § 1106.\*]

Appeal from Circuit Court, Boone County; David H. Harris, Judge.

Jabe Wade was convicted of murder in the second degree, and he appeals. Dismissed.

Don C. Carter, of Sturgeon, and Harris & Finley, of Columbia, for appellant.

FARIS, J. Defendant was convicted in the circuit court of Boone county of murder in the second degree, for that, as it was charged in the information, he had stabbed and killed one James Franklin White. The appeal of defendant herein was granted by the circuit court on the 27th day of October, 1911, but such appeal was not perfected by filing in this court a transcript of the record till April 1, 1913, as is clearly disclosed by the file mark of the clerk of this court. The state has filed a motion to dismiss the appeal of defendant, for the reason that it was not perfected within one year after the same was granted by the trial court. This

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

motion was taken with the case when the same was argued and submitted.

The facts are plain and undisputed. More than 17 months elapsed after the appeal was taken till it was perfected. The statute allows but 12 months in this behalf in such a case as this, absent a showing of good cause for the delay. Section 5313, R. S. 1909. No such showing has been made in the case, and under the authority of the statute above cited, as construed in the case of *State v. Pieski*, 248 Mo. 715, 154 S. W. 747, we are constrained to hold the motion to dismiss well taken. We may say, in passing, dehors the record, that, lest the rigid enforcement of a recent ruling, mayhap not yet fully understood (though soundly bottomed upon a fairly ancient statute), might seemingly work an undeserved hardship, we have gone over the record with care, and found naught of error therein which would cause reversal, were we required to pass upon the whole of it.

Let the appeal be dismissed.

BROWN, P. J., and WALKER, J., concur.

#### THOMPSON et al. v. STILLWELL

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. APPEAL AND ERROR (§ 1010\*)—REVIEW—QUESTIONS OF FACT.

Under Rev. St. 1909, § 2535, providing that any person claiming any title, estate, or interest in real property may institute an action against any persons having or claiming any title, estate, or interest therein to ascertain and determine the estate, title, and interest of the parties respectively, where there is nothing in the pleadings giving the action an equitable character, the rules applicable in ordinary actions at law apply, and the trial court's finding, if supported by substantial evidence, will be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

#### 2. ADVERSE POSSESSION (§ 85\*)—SUFFICIENCY OF EVIDENCE.

In an action to determine title to the west half of a quarter section of land, evidence held to support a finding that one claiming under a sheriff's deed to the whole quarter section entered in good faith and took and for 20 years held possession of part of the tract in the name and under claim of title to the whole.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 313, 498-503, 656, 657, 660, 668, 688-690; Dec. Dig. § 85.\*]

#### 3. ADVERSE POSSESSION (§ 100\*)—COLOR OF TITLE—SHERIFF'S DEED.

Under Rev. St. 1909, § 1882, providing that the possession under color of title of a part of a tract or lot of land in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract, shall be deemed a possession of the whole of such tract, a sheriff's deed issued to the purchaser at an execution sale was color of title to the whole of the land which it purported to cover.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 547-574; Dec. Dig. § 100.\*]

#### 4. ADVERSE POSSESSION (§ 16\*)—CHARACTER OF POSSESSION—EXERCISING ACTS OF OWNERSHIP.

Under such section, where part of a tract to which a party had color of title was fenced and cultivated, and another part unfenced and uncultivated, such person exercised the usual acts of ownership over the unfenced portion by cutting timber and selling standing timber thereon, and through his lessees keeping trespassers off and protecting the timber.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 82-89; Dec. Dig. § 16.\*]

#### 5. ADVERSE POSSESSION (§ 65\*)—HOSTILE CHARACTER OF POSSESSION.

That the fenced portion of a tract of land to which defendant's grantor had color of title was fenced by a third person by mistake did not render applicable the rule that one in mistaken possession of part of another's property claims only to the true line, and not adversely, where such third person subsequently occupied the tract as tenant of defendant's grantor, and did not set up title in himself.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 365-370; Dec. Dig. § 65.\*]

Appeal from Circuit Court, Morgan County; John M. Williams, Judge.

Action by Alonzo H. Thompson against R. R. Stillwell, in which Alonzo H. Thompson and another were substituted as plaintiffs. Judgment for defendant, and plaintiffs appeal. Affirmed.

Amos A. Knoop, of Kansas City, for appellants. A. L. Ross, of Versailles, for respondent.

BLAIR, C. This proceeding was commenced by Alonzo Thompson. Since the appeal was taken, he died, and Alonzo H. Thompson and Hattie I. Lindley, his sole heirs and devisees, have been substituted as appellants.

This is a suit to ascertain and determine title under section 2535, R. S. 1909. The land involved is the west half of the northeast quarter of section 2, township 41, range 19, Morgan county, Mo. The whole of the quarter section was patented to Henry Alcorn, who executed a deed therefor to John F. Baker, who, in turn, executed a deed for the same land to H. A. Swift, which deed was filed for record September 12, 1868, and on April 25, 1870, Swift executed a deed for the same land to Alonzo Thompson, and this deed was recorded April 30, 1870.

Respondent claims by mesne conveyances under Hugh Lynch, who purchased at a sheriff's sale on an execution on a transcript of a justice's judgment against John F. Baker in St. Louis county. This execution issued April 23, 1868. The execution was levied May 7, 1868, and the sale thereunder occurred September 22, 1868, and the deed from the sheriff to Lynch is dated September 23, 1868, and was filed for record January 6, 1871. Respondent also claims under the ten years' statute of limitation. Alonzo Thompson paid the taxes beginning with the year 1871, except for the years 1873, 1875, 1877,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1889, 1893, 1895, and 1896. Lynch, in December, 1873, executed a deed to Max Joachimi, and he paid the taxes for the years in which Thompson did not pay them. Each of the two claimants knew the other was paying taxes. At the close of the evidence plaintiff's counsel requested the court, sitting as a jury, to give an instruction to the effect that under the pleadings and the evidence the finding must be for plaintiff. This the court refused to do. No other instructions were asked or given, and the court found for defendant, and rendered judgment accordingly.

[1] This is a simple proceeding under section 2535, R. S. 1909, and there is nothing in the petition or answer which gives it an equitable character. The rules applicable in ordinary actions at law, therefore, govern the case in this court. *Lee v. Conran*, 213 Mo. 404, 111 S. W. 1151; *Cousins v. White*, 246 Mo. loc. cit. 309, 151 S. W. 737. This being true, if there is any legal theory, supported by substantial evidence, which justifies the trial court's finding, the judgment must be affirmed.

[2] There was evidence that Max Joachimi in 1873 paid Lynch \$400 in consideration of a deed for the quarter section including the land in suit; that in the summer or fall of 1874 he put up a cabin on the east half of the quarter section, and for seven or eight years, off and on, did some mining on the west half thereof, miners occupying the cabin mentioned; that in 1874 he leased five or six acres of the west half to one Moore, and had it cleared and fenced, and Moore cultivated it as Joachimi's tenant from 1874 until he died, about 1897; after his death Joachimi leased the same ground to Todd, who cultivated it until he died, about 1901 or 1902. During this period Joachimi had much of the timber cut off the unfenced portion of the tract, and sold standing timber to others. In his rental contract with both Moore and Todd it was agreed they should keep trespassers off of the unfenced portion and protect the timber, and there is evidence they did so, at least that Moore did.

The court questioned Joachimi as follows: "Q. Mr. Joachimi, now you say there was some four or five or six acres cleared? A. Yes, sir. Q. The main part of the cleared tract being on the west half? A. Yes, sir. Q. Some little of it being on the east half? A. Yes, sir. Q. Now, was that fenced? A. Yes, sir. Q. Well, was it cultivated every year for as much as ten years? A. Yes, sir; more than that. Q. And continuously fenced? A. Yes, sir."

Other witnesses corroborated Joachimi as to the fact that he leased the cleared portion of the land in suit to Moore in 1874; that Moore cultivated it continuously until his death, about 1897; and that Todd then rented the parcel from Joachimi, and cultivated it until he died, about 1901.

No one but Joachimi and his tenants, Moore and Todd, had ever been in posses-

sion of any part of the land. In 1877 Alonzo Thompson sent to the collector of Morgan county a check for \$3.10 in payment of the taxes on the land in suit and the east half of the same quarter section. The collector returned the check, and wrote Thompson that the taxes on this land for 1877 had been paid by Joachimi. March 24, 1890, the collector wrote Thompson that the taxes of 1889 had been paid by Joachimi, and in 1893 and 1897 similar letters were written by collectors to Thompson concerning the taxes of 1893, 1895, and 1897. In 1893 and 1897 Thompson's checks for taxes were returned to him.

[3, 4] The statute (section 1882, R. S. 1909) provides that: "The possession, under color of title, of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract."

It cannot be doubted that Joachimi had at least color of title to the whole of the land (*Dunnington v. Hudson*, 217 Mo. loc. cit. 100, 101, 116 S. W. 1083), and there is evidence sufficient to support the finding that he entered in good faith and took and for 20 years held possession of part of the tract in the name and under claim of title to the whole. The acts of ownership the evidence tends to show he exercised over the unfenced and uncleared portion of the land were of the usual character; the nature of this part of the tract being considered. *Hickman v. Link*, 97 Mo. loc. cit. 490, 10 S. W. 600; *Leeper v. Baker*, 68 Mo. 400. These things were sufficient to satisfy the requirements of the statute.

There having been substantial evidence to support a finding under the statute, this court cannot now substitute itself "for the trier of the facts, and retry it on the evidence." *Gaines v. Saunders*, 87 Mo. loc. cit. 563.

[5] It is suggested Moore fenced the cultivated parcel of the land through mistake, and that this fact introduces into the case the rule relating to a situation in which one in mistaken possession of part of another's property claims obly to the true line and not adversely. The question whether Moore fenced the land by mistake or fenced it at all; for himself, was, at most, one of fact, and a finding that he did not do so was clearly warranted by the evidence. Further, if he did so fence it, the evidence is all to the effect that from 1874 forward he occupied it as Joachimi's tenant. Neither Moore nor any one claiming under him sets up title or claim to any of the land.

In view of these considerations, it appears that the evidence warranted a finding for defendant on the theory of adverse possession, for the requisite period, under color of title. It therefore becomes unnecessary to go into the questions raised in the excellent brief of

plaintiff's counsel with respect to the soundness of Joachim's record title.

The judgment is affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur.

#### STATE v. DUFF.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

##### 1. BURGLARY (§ 41\*)—EVIDENCE OF BREAKING—SUFFICIENCY.

In a prosecution for burglarizing a corn-crib, evidence that at about 10 o'clock on a certain night the door of the crib was closed, and that at about 2 o'clock on the same night defendant was found in the crib with the door open, was sufficient to sustain a finding that defendant broke into the crib.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.\*]

##### 2. WITNESSES (§ 337\*)—CROSS-EXAMINING ACCUSED—OTHER OFFENSES.

In a prosecution for burglary, it was improper for the prosecuting attorney to ask defendant on cross-examination as to his having been arrested several years before on a similar charge; it being such attorney's duty to see that defendant has a fair and impartial trial, and is not convicted on incompetent evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337.\*]

##### 3. CRIMINAL LAW (§§ 369, 1036\*)—RECEPTION OF EVIDENCE—OTHER OFFENSES.

In a burglary case, it was error to permit witnesses to testify that, while acting as deputy sheriffs, they had arrested defendant and his daughter upon a similar charge, though not necessarily ground for reversal in the absence of objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824, 1631-1640, 2639-2641; Dec. Dig. §§ 369, 1036.\*]

##### 4. CRIMINAL LAW (§ 992\*)—APPEAL—JUDGMENT—VALIDITY.

Where the record shows that a defendant charged with larceny and burglary, though he pleaded not guilty, and was convicted of burglary alone, was sentenced for larceny because "he had pleaded not guilty," there is no valid judgment, and the case will be remanded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2519; Dec. Dig. § 992.\*]

##### 5. CRIMINAL LAW (§ 1086\*)—APPEAL—RECORD—SWEARING OF JURY.

Where the record entry states with reference to impaneling and swearing of the jury merely that, "the jury being by the clerk sworn, and after selection the following \* \* \* are chosen as jurors to try this cause," the verdict and sentence will be set aside; such record entry not showing that the trial jury was impaneled or sworn to try the cause.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2769, 2770, 2772, 2794; Dec. Dig. § 1086.\*]

Appeal from Circuit Court, Vernon County;  
B. G. Thurman, Judge.

L. M. Duff was convicted of burglary, and appeals. Reversed and remanded.

From the conviction of defendant in the circuit court of Vernon county of the crime of burglary, wherewith, as also with larceny, he stood charged by an information, he has appealed to this court. The jury found defendant guilty of burglary, but not guilty of the larceny charged, and fixed his punishment at imprisonment in the penitentiary for a term of two years.

Since the facts are, in the view which we take of this case, not pertinent and not necessary to be stated in order that a complete understanding of the points in judgment may be had, we will not take space in reciting them further than to say that the burglary complained of consisted in the burglarious breaking and entering by defendant on the night of January 18, 1913, of a barn and cornercrib belonging to or in the possession of one Claude T. Beedle, and situate in the county of Vernon.

The record entry, as made by the clerk, purporting to show the impaneling and swearing of the trial jury, is as follows: "Now, on this day, this cause coming on for hearing, comes the defendant in person and by attorney, and comes the state of Missouri, by J. B. Johnson, the duly elected and qualified prosecuting attorney of Vernon county, Missouri, the jury being by the clerk sworn, and after the selection the following good and lawful men of the body of the county are chosen to try this cause, as follows, to wit: John Blotti, J. F. Lang, J. M. Palmer, Frank Hereford, A. C. Ogier, Jim Dinnis, Claud Hereford, O. B. Wallace, H. V. Swearingen, L. L. Cummins, G. Lille, and H. C. Lyons are chosen as jurors to try this cause."

The sentence and judgment of the circuit court, as shown by the record proper, certified to us by the clerk, is as follows: "Now, at this day, comes the prosecuting attorney for the state, and also comes the defendant herein, in person, in the custody of the sheriff of this county, and in the presence of his attorney and counsel in open court, whereupon said defendant is informed by the court that he stands charged with larceny, and pleads not guilty as charged in the information, and, being now asked by the court if he had any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered, and adjudged by the court that the said defendant, L. M. Duff, having pleaded not guilty as aforesaid, be confined in the penitentiary of the state of Missouri for the period of two years from the 19th day of February, 1913, and that the sheriff of this county shall, without delay, remove and safely convey the said defendant to the said penitentiary, there to be kept, confined, and treated in the manner directed by law, and

the warden of said penitentiary is required to receive and safely keep him, the said defendant in the penitentiary aforesaid, until the judgment and sentence of the court herein be complied with, or until the said defendant shall be otherwise discharged by due course of law. It is further considered, ordered, and adjudged by the court that the state have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefor."

Immediately upon the conviction of defendant, that is to say, on or about February 19, 1913, he was incarcerated in the penitentiary, where he ever since has been, and now is.

The above statement we deem sufficient; regard being had to the points which we are compelled by the condition of the record before us to hold in judgment here. Should, however, other facts be necessary, they will be adverted to in the opinion.

Lee B. Ewing, of Nevada, Mo., for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen., for the State.

FARIS, J. (after stating the facts as above). [1] I. Learned counsel for appellant insists that there is not sufficient evidence of the breaking charged in the information to constitute the crime of burglary. While this point is not necessary to a decision of this case at this time in the view which we take of it, it is perhaps well for us to say that in our view counsel is in error. The testimony shows that the outer door of the crib in question, and in which defendant was found at about the hour of 2 o'clock on the night of January 18th, was closed at about the hour of 10 o'clock on the identical night; that said door was not again seen by any one until about the hour of 2 o'clock that night, at which time it was found to be open, and defendant was himself found to be in the crib. We think that this circumstance inevitably points to a breaking on the part of the defendant with such unerring certainty as to preclude any doubt thereof either in law or in common sense. If this were not so, it would, we think, become almost impossible to prove the crime of burglary. When a witness swears that a door is closed or locked or that a window is down or locked at a given hour, that subsequently and shortly thereafter a burglary occurs in the building or structure to which such door or window belongs, and that, following the burglary, or following the larcenious or felonious entry, such door is found to be open, or the fastening broken, or such window is found to be open, or the fastening thereon broken, the *prima facie* conclusion which necessarily follows is that the one who committed the larceny or the felony within the premises also did the breaking or opening, and that such breaking or opening was done within the purview of our statute de-

fining burglary, in order that ingress could be obtained. Any other view, it seems to us, would make it necessary for an eyewitness to be present at every burglary before a conviction would be possible. The point involves a well-known and well-settled phase of circumstantial evidence. This point is not involved in the case now, and we suggest and pass on it only that it may not get in the way hereafter.

[2, 3] II. Appellant also complains that upon the trial the court permitted the prosecuting attorney to cross-examine defendant as to his having been arrested some seven or eight years prior in Lawrence county upon the charge of burglary and theft. Complaint is also made that C. J. Cherry and Will T. Brown were permitted to testify that, while they lived in Lawrence county in the year 1904, and while acting as deputy sheriffs, they had occasion to arrest defendant and defendant's daughter, who, we may say in passing, was shot and killed while engaged as an accomplice of defendant in the alleged commission of the burglary here in issue. This arrest seems to have been, as somewhat obscurely and vaguely appears, upon the charge of burglary and larceny, arising in some way out of the theft of a load of wheat, whereof defendant, his deceased daughter, and his entire family were accused. While we are unable to see upon what theory this testimony was offered, except for the purpose of prejudicing defendant before the jury, and while we are unable to take any possible view upon the facts here which would make it competent (*State v. Hess*, 240 Mo. 147, 144 S. W. 489), yet in the one case no objection whatever was made to its reception, and in the other no proper objection (*State v. Colvin*, 226 Mo. 446, 126 S. W. 448; *State v. McKenzie*, 228 Mo. 385, 128 S. W. 948). It may well be that, had a proper objection been interposed, or even a half-way proper objection, the learned trial court would have sustained the same. We will not, therefore, in this case convict the trial court of error for either permitting the wrongful cross-examination of defendant or for permitting Cherry and Brown to testify, as they did, a *fortiori*, since it must be reversed for other reasons. Questions so clearly incompetent, so verging upon unfairness, and so hurtful withal ought not to be asked by any prosecuting attorney. It is the duty of this officer to see to it that the defendant shall have a fair and impartial trial, and that he shall not be convicted by incompetent evidence. *People v. Carr*, 64 Mich. 702, 31 N. W. 590; *People v. Derbert*, 138 Cal. 467, 71 Pac. 564. The attorney for the state owes a duty to the state to see that justice is meted out, and to the defendant that he be given a fair and impartial trial; he cannot square these duties with the act of presuming upon or taking an advantage of his opponent's lack of information touching the technical details of the criminal law. There is much of respecta-



ble authority holding that, while great allowance will be made by the courts for that zeal which is the natural growth from a hard-fought legal contest, yet, if such zeal shall so outrun discretion as to trench upon unfair, oppressive, and unjust methods, the court may on this ground alone reverse. 12 Cyc. 571, and cases cited.

[4] III. As we have stated in setting out the facts in this case, the defendant was by the verdict of the jury acquitted of the larceny charged, and found guilty of burglary in the second degree. The record shows that, when sentence was pronounced, defendant was sentenced to the penitentiary, not for the burglary of which he had been convicted, but for larceny, to which the record of the sentence and judgment before us says he pleaded not guilty. The inextricable confusion of this record renders it almost impossible to tell what was done by the court, and gives color to the view that careless clerks are costly luxuries. Fully a third of the cases which we are called upon to reverse are reversed on account of bald errors in making up the record, which might have been avoided by the exercise of even a small amount of care.

Clearly there is no judgment here. First, because it appears from the judgment before us, as the record shows it, that defendant was sentenced to the penitentiary for two years for larceny, a crime of which he was found not guilty; and, second, that this sentence was given him, not because he had been tried by a jury and found guilty of burglary, but because *he had pleaded not guilty* to the crime of grand larceny, for which he was sentenced, but of which he was found not guilty. Under the authority of the State v. Kile, 231 Mo. 59, 132 S. W. 230, as well as other cases decided by this court, it will become our duty, if no other error appears, to reverse this case, and remand it back to the Vernon county circuit court, in order that the defendant may be properly sentenced. This will be so even if no error meet for reversal and remanding for a new trial shall be found by us.

[5] IV. It is insisted, however, that the order found in the record, and which purports to show the impaneling and swearing of the trial jury, is not sufficient to show such impaneling and swearing of this jury, or to show that the jury was ever sworn at all to try the case. A reference to this order, as we have set it out in the statement, will disclose that it nowhere shows that the trial jury was ever impaneled, nor does it show that the jury was sworn to try the case. The manner of impaneling, examining upon their voir dire, of challenging and swearing a jury to try a criminal cause, is well known to the profession in this state. Part of the procedure is statutory; but some of it rests in practice, coming down to us, we take it, from the common law. Our statute as to the impaneling of jurors and the manner of ren-

dering their verdicts in criminal cases provides that the same procedure shall prevail as is prescribed by the procedure in civil cases. Section 5229, R. S. 1909. We find, however, a paucity of prescription in our statute touching all these things when we turn to the provisions prescribing the details of jury trials in civil cases. Our statute as to criminal procedure seems largely to take it for granted that the trial jury will be sworn to try the case, for we find it saying, "*The jury being impaneled and sworn, the trial may proceed in the following order.*" Section 5231, R. S. 1909. The oath at common law which was required to be administered to a trial jury of 12 was somewhat formal (24 Cyc. 370; 14 Encyc. Pl. & Prac. 523); from this formality we have drifted a long way, and have reached the very salutary view that, if it appears clearly and not ambiguously that the jury was sworn to try the case, the use of the word "sworn," of the words "duly sworn," or of the words "duly impaneled and sworn" will be held to impart *ex vi termini* a regular and legal oath, even though the oath at common law or that prescribed by statute, where such is prescribed, has not been used. But, on the other hand, it has been uniformly held that, where the transcript fails to show that the jury which tried the defendant had been sworn, the verdict and sentence will be set aside. Johnson v. State, 47 Ala. 9; Lacey v. State, 58 Ala. 385; Harper v. State, 25 Ark. 83; Chiles v. State, 45 Ark. 143; State v. Calvert, 32 La. Ann. 224; Baird v. State, 38 Tex. 599; McHenry v. State, 14 Tex. App. 209; State v. Mitchell, 199 Mo. 105, 97 S. W. 561, 8 Ann. Cas. 749; State v. McKinney, 221 Mo. 467, 120 S. W. 608; State v. Duncan, 237 Mo. 195, 140 S. W. 882. "In criminal cases," says 24 Cyc. 369, "it is absolutely essential to the validity of the proceedings that the jury should be sworn, and that this fact should affirmatively appear from the record."

In the case of State v. Mitchell, *supra*, Judge Gantt, delivering the opinion of this court, touching the identical point in question, said: "The sole error upon which a reversal is sought is that the record upon its face discloses that the jury which tried and convicted defendant was not sworn to try the cause and a true verdict render according to the law and the evidence. \* \* \* As it is everywhere held that the record proper in criminal appeal must show that the jury *was sworn to try the cause*, and this record fails to do so, the judgment must be reversed, and the cause remanded for a new trial."

In the case of State v. McKinney, *supra*, Judge Burgess held touching this point even stronger language, as note the following: "Among the first things required by the statute \* \* \* to be done in the trial of a criminal case before a jury is that the jury be impaneled and sworn. This same question

underwent full consideration, and the authorities were extensively reviewed by Gantt, J., in the recent case of *State v. Mitchell*, 199 Mo. 105 [97 S. W. 561, 8 Ann. Cas. 749], in which case it is held that, if the record proper in a criminal case fails to show that the jury was sworn to try the cause, the judgment will be reversed, and the cause remanded. That case is decisive of the case at bar, and leaves nothing further to be said upon the subject. The judgment is reversed, and the cause remanded."

It is true that the word "sworn" is used in this order as copied in the record by the clerk; but all lawyers know the facts to which we above advert as to the manner of impaneling a jury in a felony case, and that in selecting and impaneling such jury, and prior to an examination of them upon their voir dire, they are sworn to answer questions. The record entry before us avers that they were sworn; but this swearing, by the language used in the record, occurred prior to the selecting of the jury. If we say that the word "selection" as used by the clerk is equivalent to impaneling and examining upon their voir dire, then they were not sworn at all to try the cause. If we say that the clerk means that they were sworn after selection, then they were not impaneled, examined upon their voir dire, or an opportunity given for challenging them either for cause or peremptorily; in other words, they were not impaneled, nor any words from which we might presume a proper selection of them shown by this record. We simply say that this record does not show even haltingly that the trial jury was sworn to try the case, which resulted in the conviction of this defendant. We concede that it is difficult to tell what this record, taking it by and large, does actually mean; we have never seen one like it, and may be pardoned therefore for being entirely at sea as to either the genus or species of it.

It results, therefore, for the error noted, that this case should be reversed and remanded for a new trial in accordance with these views.

BROWN, P. J., and WALKER, J., concur.

# DAVIDSON et al. v. LACLEDE LAND & IMPROVEMENT CO.

(Supreme Court of Missouri. Division No. 1.  
Dec. 6, 1913.)

## 1. APPEAL AND ERROR (§ 361\*)—MOTION TO DISMISS—AFFIDAVIT.

Defendant gave notice of motion to dismiss appeal, and the record showed the filing of an affidavit and the granting of the appeal thereon, but the record showed that the jurat which purported to have been executed by the circuit clerk was unsigned. Depositions showed that the clerk personally entered the minutes of the filing of

the affidavit for appeal, its allowance, etc., and he testified that he did not know why the jurat was unsigned. Appellant's attorney testified positively that he signed and was sworn to the affidavit and filed the same with the clerk, and there was nothing except the absence of the clerk's signature tending to overthrow the testimony and the tendency of the record entries to corroborate it. *Held* that it sufficiently appeared that the affidavit was sworn to, and plaintiffs were not entitled to a dismissal of the appeal because the jurat did not contain the clerk's signature.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1941-1959; Dec. Dig. § 361.\*]

## 2. PLEADING (§ 403\*)—DEFECT—CURE BY ANSWER—CORPORATE CAPACITY.

Failure of plaintiffs' petition to allege defendant's incorporation was cured by an answer expressly admitting that defendant was a corporation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.\*]

## 3. QUIETING TITLE (§ 34\*)—PLEADING.

Where, in a suit to set aside a tax deed and to quiet plaintiffs' title, the petition did not disclose that defendant claimed alone through a fatally defective record, it did not appear that no cloud was cast on the title so that the petition was insufficient.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.\*]

## 4. JUDGMENT (§ 490\*)—COLLATERAL ATTACK—NOTICE BY PUBLICATION.

Where, in tax proceedings, the petition for the enforcement of a tax lien on real property alleged the nonresidence of the defendants, including the common source of title, and there was no claim that the clerk did not actually issue an order of publication in the proper manner and form or that there was any error or defect in the time or place of its publication, and the judgment itself recited that all the defendants save one, although served with legal process, came not, but made default, plaintiffs in a suit to quiet title as against a deed executed pursuant to such proceedings could not question the sufficiency of the notice by publication on the ground that the order of publication was not spread of record by the clerk.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 926-928; Dec. Dig. § 490.\*]

## 5. TAXATION (§ 776\*)—TAX DEED—CONSTRUCTION—PROPERTY CONVEYED.

A tax deed, after reciting the rendition of judgment finding that a specified sum was due for taxes on specified subdivisions of sections 33, 34, and 36 in township 32, etc., declared that an order had been made directing a sale "of said real estate or so much thereof as may be necessary to satisfy" the judgment, and that publication had been made, and the L. Land Company being the highest bidder for the following described real estate, to wit, the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 33, the W.  $\frac{1}{2}$  of section 34, and the E.  $\frac{1}{2}$  of section 36, township 32, range, etc., for \$37.62 "the said last above described tract" was stricken off and sold to the L. Land Company for the sum bid therefor by it as above set forth. *Held* that such deed should be construed as conveying only the east half of section 36, that being the "last above described tract," and did not convey the other land mentioned in the description.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1544, 1545; Dec. Dig. § 776.\*]

Appeal from Circuit Court, Reynolds County; Joseph J. Williams, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Action by M. J. Davidson and others against the Laclede Land & Improvement Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. B. Daniel, of Centerville, for appellant. R. I. January, of Centerville, and Arthur T. Brewster and Sam M. Brewster, both of Poplar Bluff, for respondents.

BLAIR, C. This is an appeal from a judgment of the Reynolds circuit court setting aside and canceling a tax deed and quieting in respondents the title to the west half of section 34, twp. 32, range 2, west, in Reynolds county. In 1859 the land in question was patented to Joshua F. Hancock. Respondents are his widow and heirs, who claim a one-half interest, having conveyed a like interest to the remaining respondent, January. Hancock died intestate in 1889, owning the land involved here unless his title was divested by the proceedings culminating in the tax deed assailed.

As grounds for canceling the tax deed the petition alleges, among other things: (1) That in the tax suit Joshua F. Hancock was neither served with summons nor notified by publication; (2) that the judgment rendered included the tract in question and two others and was rendered against the whole; and (3) that the land involved was never stricken off and sold to appellant.

Respondents tender a return of all proper sums found due appellant and pray the court to "try, ascertain and determine the estate, title and interest of plaintiffs and defendants, respectively," in the land in question, that the tax deed be set aside, the interests of the respective parties adjudged, and for general relief.

Appellant, by its answer, admitted its incorporation and claim of title, denied the other allegations of the petition and pleaded the bar of the ten years statute of limitation.

On the trial it was admitted that Joshua F. Hancock entered the land in question and is the common source of title; that respondents, other than R. I. January, are the sole heirs of Joshua F. Hancock and have executed deeds to January conveying to him one-half of whatever interest they took, as such heirs, in the lands involved. Respondents called a witness whose testimony tended to show no order of publication in the tax suit had ever been spread of record. Appellant, over objections, offered the tax deed. Respondents then offered the pleadings and judgment in the tax suit.

[1] 1. A motion to dismiss the appeal has been filed. The ground of the motion is that the affidavit for appeal was not sworn to. This rests upon the fact that the jurat is not signed by the clerk or other officer. Notice of the motion was given January 14, 1913, the case being set for argument here January 20, 1913. The record of the trial court shows the filing of an affidavit for appeal and the granting thereon of an appeal to this court

December 17, 1909. Depositions have been taken and are on file which disclose that the circuit clerk personally entered the minutes of the filing of the affidavit for appeal, the allowance of the appeal, etc., but he testifies he does not know why the jurat was unsigned. He has no direct recollection of the happenings at the time, but testifies the orders were taken in this and several other cases during the hurry of the closing hours of the term. By deposition appellant's attorney testifies positively he signed and was sworn to the affidavit in this case and in another at the same time and filed both affidavits with the clerk.

There is nothing, except the absence of the clerk's signature, tending to overthrow this testimony and the tendency of the record entries to corroborate it. The clerk personally made the minute showing the filing of an affidavit for appeal and the following minute of the court's order, based thereon, granting an appeal. He had served three years as clerk and it is presumed he knew an affidavit for appeal must be sworn to. He received and filed this paper as such an affidavit. This and the court's action in granting the appeal are to be considered in connection with the evidence mentioned.

Under the rule approved in *Clark v. Railroad*, 242 Mo. loc. cit. 589, 593, 148 S. W. 472, it sufficiently appears the affidavit was in fact sworn to and it will be treated as sworn to, there being no necessity of going through the now "bare and meaningless formality" of literally inserting the clerk's name above his official designation as it now appears in the affidavit. *Darrier v. Darrier*, 58 Mo. loc. cit. 234.

2. The sufficiency of the petition is challenged in this court.

[2] (a) Whatever the effect the failure of the petition to allege appellant's incorporation otherwise might have been, the answer expressly admits appellant is a corporation and eliminates the question.

[3] (b) The allegations of the petition do not disclose that appellant claims alone through a fatally defective record, and, consequently, the rule stated in *Turner v. Hunter*, 225 Mo. loc. cit. 82, 123 S. W. 1097, is inapplicable. In that case the petition alleged no judgment had ever been rendered in the tax suit, and Judges Woodson and Valliant were of the opinion this allegation rendered the petition fatally insufficient. There is no such allegation in the petition in this case.

In view of this the question whether the rule mentioned could, in any event, apply to a petition containing allegations that title is in plaintiff and that defendant claims some interest and praying the court to ascertain and determine the respective interests of the parties (section 2535, R. S. 1909; *Spore v. Land Co.*, 186 Mo. 656, 85 S. W. 556) need not be discussed.

[4] 3. It is contended the judgment in the tax suit was and is void because the order of

publication was not spread of record by the clerk. The petition in the case alleged the nonresidence of the defendants, including Joshua F. Hancock, and there is no pretense the clerk did not actually issue an order of publication in proper manner and form, and it is not contended there was any error or defect in the time or place of its publication. The record in the case shows that on November 27, 1886, "plaintiff, by attorney and leave of court, files proof of publication of notice to nonresident defendants," and the judgment itself recites all the defendants save the Ozark Land Company, "although served with legal process herein, come not, but make default." In these circumstances plaintiffs cannot be heard, in this proceeding, to question the sufficiency of the notice by publication on the ground mentioned. *Brawley v. Ranney*, 67 Mo. loc. cit. 283. The Missouri cases cited by respondents (*Cummings v. Brown*, 181 Mo. 711, 81 S. W. 158; *Kelly v. Murdagh*, 184 Mo. 377, 83 S. W. 437; *Otis v. Epperson*, 88 Mo. 131) do not decide the question presented here. In the last there was a failure to designate the paper in which the order was to be published, and the others discussed orders made by the court on a non est return. In cases like these last the order is made, if at all, by the court and must be based upon a finding by the court that the defendant cannot be served with process. The observation of the court in *Cummings v. Brown*, supra, that an order so made must be proved by the record falls far short of a holding that the failure to record an order of publication against nonresidents, made on an allegation or affidavit of nonresidence, renders the judgment absolutely void. The distinction between the statutes is pointed out in the cases cited.

The general statute (section 627, R. S. 1879; section 2685, Rev. St. 1909) requiring the clerk to make a record of all orders, decrees, and proceedings was in force at the time the case of *Brawley v. Ranney*, supra, was decided, and the clerk's failure to write up his records in accordance with his minutes could hardly be said to oust the court of jurisdiction in any case. Such must be the effect of such a failure if respondents' present contention is to be upheld. Cases upon statutes providing for the publication of copies of the record of orders of publication and statutes mandatorily requiring the recording of such orders prior to publication thereof are not applicable to the question here. The following decisions further support the conclusion reached: *Smith et al. v. Valentine*, 19 Minn. loc. cit. 460, 461 (Gil. 393); *Fink v. Wallach*, 109 App. Div. loc. cit. 720, 721, 96 N. Y. Supp. 543; *In re James*, 99 Cal. loc. cit. 377 et seq., 33 Pac. 1122, 37 Am. St. Rep. 60.

[5] 4. The tax deed recites that the circuit court of Reynolds county rendered its judgment to the use of the collector and against certain named persons for \$11 for

taxes and interest "found to be due and unpaid upon the following described real estate, viz.:

Tract No.	Pts. Secs. Lt. or Block Addition or Town.	Sec.	Twp.	R.
1	S- $\frac{1}{4}$ of NE- $\frac{1}{4}$	33	23	2W
	W- $\frac{1}{4}$	34		
	E- $\frac{1}{4}$	36		

and that the taxes and interest found due upon said real estate, and the years for which the same were assessed are upon each of the above described tracts, as follows, viz.:

Tract No.	Years for Which Taxes were Found Due.	Tax.	Int.	Tl.
1	1884	9.36	2.06	11.42

and also certain costs which have been taxed at the sum of sixteen dollars and 60 cents, which said, several sums of taxes, interest and costs were declared by said court to be a lien in favor of the state of Missouri upon the above described tracts of real estate." Then follows the recitation that by the judgment the total was made a lien, and sale "of said real estate or so much thereof as may be necessary to satisfy" the judgment was ordered and special execution issued; that publication was made and that the sheriff at the proper time and place, at public auction, exposed for sale "the above described real estate, and Laclede Land & Improvement Company being the highest bidder for the following described real estate, viz.: 'The south half of the northeast quarter of section thirty-three. The west half of section thirty-four and east half of section thirty-six, township thirty-two, range 2 west, for thirty-seven and 62/100 dollars; the said last above described tract was stricken off and sold to the said Laclede Land & Improvement Company for the sum bid therefor by it as above set forth.'"

The concluding paragraph of the deed corresponds in form to that set out and discussed in *De Paige v. Douglas*, 234 Mo. loc. cit. 83, 136 S. W. 345. In that case each parcel of land was, in the first instance, separately given a number in the deed, as a tract, while in this case the deed first describes the land as set forth above. It is insisted that "Tract No. 1" included all the land described and that subsequent reference to the "last above described tract" therefore was to the whole. The deed, however, recites that the judgment was declared a lien "upon the above described tracts," and it therefore may be said to appear, in view of this recital, that the sheriff had in mind that he was dealing with and offering for sale more than one tract. Having used the plural term in the deed, it is reasonable to conclude he used the singular and the corresponding verb advisedly when he stated in the deed that the "last above described tract was stricken off and sold," etc.

In the case of *Sanzenbacher v. Santhuff*, 220 Mo. 274, 119 S. W. 396, the deed discussed was exactly like that in this case in the

respects above mentioned save the words "Tract No. 1" did not appear in connection with either parcel therein described. The ruling in that case was approved and relied upon in the De Paige-Douglas Case. Nearly all that is said in this last mentioned case is applicable in this, and under the rule announced therein and in the Santhuff Case it follows that the tax deed in this case conveyed, if anything, only the land in section 36 and did not affect the land now in suit.

The certified copy of the record of the tax deed tendered by appellant cannot be considered, not being in the record and its consideration not being agreed to by respondents. This fact and the further fact that the record does not otherwise show what recitals in the tax deed are written and what are printed, as well as the fact that the tax bill in evidence shows that the parcels were separately assessed, renders inapplicable what was said by division 2 of this court in *Miller v. Keaton*, 238 Mo. loc. cit. 706, 707, 139 S. W. 158.

It is suggested that the decision in *Coombs v. Crabtree*, 105 Mo. 292, 18 S. W. 830, was overlooked by this court in the cases of *De Paige v. Douglas*, supra, and *Sanzenbacher v. Santhuff*, supra, is directly in point, and ought to result in the reversal of this judgment. In that case it was said: There is nothing in the objection "founded upon the fact that the letter s is omitted from the word tract in the recital of the sale of the several tracts described in the deed to Ford; it appearing plainly on the face of the deed that he was the highest bidder for all of the tracts described in the deed at the price therein stated, and that for that price all the described real estate was sold, and by the sheriff conveyed to him, in which description was included the land in controversy." There is nothing in this language which necessarily conflicts with the cases cited above, but counsel call to our attention the fact that the record in that case shows that the tax deed in judgment was, in the pertinent recitals, like that discussed in *De Paige v. Douglas*, supra. In one particular, however, there is a difference in the conclusions reached. In *Coombs v. Crabtree* the land was all in one section, and the description to which the court held the words "the last above described tract" referred to was "the east half of the northeast quarter and the east half of the southeast quarter and the east half of the southwest quarter and the east half of the northwest quarter and the southwest quarter of the northwest quarter of section six (6), township thirty-three (33) of range thirty-two (32)." The court had before it a previous decision (*Sparks v. Clark*, 57 Mo. 58) in which it had been announced that the statute then (and now) in force (section 11,372, R. S. 1909) required all tracts in the same section belonging to the same owner to be assessed

as one tract and that "the provision is specific and requires them all to be assessed as one tract, and they are declared by law to be but one tract, so far as any and all the acts of the revenue officers are concerned." It may be the court had in mind this decision in reaching the conclusion it did in the *Coombs-Crabtree* Case.

In this case and in the *Sanzenbacher-Santhuff* and *De Paige-Douglas* Cases the parcels described were in different sections. It might be argued that the question in the *Coombs-Crabtree* Case was not what the statute meant but what the sheriff meant in the language he employed in his deed and that the sheriff does not fall within the class designated in *Sparks v. Clark*, supra, as "revenue officers"; but whether these arguments are sound and whether the description in the *Coombs-Crabtree* Case and the fact the land there involved was in a single section are sufficient to dispel the doubt raised by the reference in the deed to the "last above described tract" are questions better postponed, at least, until a like record presents them for decision.

5. There is no evidence of possession, and the rule approved in *Brewster v. Laclede Land & Improvement Co.*, 247 Mo. 223, 152 S. W. 302, might be applied. In view, however, of the fact that there is neither allegation nor proof as to when defendant first set up a claim to the land in suit and the fact that the recording of the deed could not be considered as the assertion of title to land it did not include or convey, the question as to the applicability of the statute of limitation, on that account, is not in the case.

There are other questions discussed in the briefs but they become unimportant in view of the conclusion reached in the preceding paragraph.

The judgment is affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur.

#### TALLENT v. FITZPATRICK et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### WILLS (§ 693\*)—CONSTRUCTION OF POWERS—POWER OF DISPOSITION.

A will gave all the testator's property to his wife for life with remainder to his five children, and gave his wife power to sell and convey any of the real estate that she might think best and to her best interest. He left a city lot worth about \$5,000, which a few days after his death and after being advised that she could dispose of the property as she saw fit, the wife conveyed to two of the children by deeds, each reciting a consideration of \$1,000. No money was paid at the time. One of them claimed that she rendered care and assistance to her mother,

and surrendered a note for \$300 executed by her father. The other grantee claimed that he gave his mother \$200 after his father's death, and that he paid \$150 for medical attention and funeral expenses of the father, and that he rendered some other financial assistance. The wife received the rent for both lots during her lifetime amounting to \$16 per month, which apparently was her only means of subsistence aside from her own labor. *Held*, that the wife had no power to make such conveyances under the circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.\*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Theresa Tallent against Louisa Fitzpatrick and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

See, also, 132 S. W. 17.

John Kaiser died on the 24th of June 1899, having first made and published the following will:

"I, John Kaiser, of St. Joseph, Buchanan County, Missouri, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do hereby make and publish this my last will and testament, hereby revoking any and all former wills by me at any time heretofore made.

"First—I give, bequeath and devise to my beloved wife, Margaret Kaiser, all my estate and property, real, personal and mixed, with which I may be possessed or that I shall in any wise be entitled to at the time of my death, providing and it is my will that all my just debts be first paid, to have and to hold and enjoy the same during the full term of her natural life, according to her own free will and pleasure without let or hindrance from anyone, with full power to sell at any time any or all of my real estate and convey the same by good and lawful deeds of conveyance at any time that she may think best, and to her best interest.

"Second—It is my will and I direct that my estate remaining at the death of my wife shall be equally divided between my children as hereafter named, or to their children, to-wit: First, Anna Bertha, wife of Gustave Kaiser; second, Louisa, wife of John Fitzpatrick; third, Alice Josephine, wife of Fred Sturmer; fourth, Theresa, wife of August Angst, and fifth, John M. Kaiser, each of said children share and share alike.

"Third—It is further my will and I request that my wife, Margaret Kaiser, act as the first executrix of this will and further that she be not required to give any bond as such executrix and that she be required to give no other account of said estate than are necessary to secure the rights of creditors.

"In witness whereof, I have hereunto set my hand and seal this 10th day of June, 1899. "John Kaiser. [Seal.]"

At the time of his death, his children and wife mentioned in the will survived. He

left little personal estate, but was the owner of a city lot of ground in St. Joseph, Mo., whereon three houses were erected. Six days after his decease, his widow executed and delivered two warranty deeds, one in favor of Mrs. Louisa Fitzpatrick, and the other to John M. Kaiser, each conveying one-half of said lot and each alleging a consideration of \$1,000. Both of the grantees in said deed were the children of the testator and mentioned in said will. Mrs. Fitzpatrick had resided in the house on the portion of the lot granted to her before the death of her father, and continued to reside thereon until the death of her mother on the 5th day of March, 1909, and paid \$8 per month rent during her occupancy of said lot. This sum, and an equal amount received by the mother for rent of the lot deeded to John M. Kaiser, seems to have been the only means of subsistence, aside from her own labor, which the widow had until her death. After the death of the widow, Theresa Tallent Angst brought this suit to avoid said deeds, on the ground that they were gifts instead of sales, and therefore beyond the power of the widow under the terms of the above will. Mrs. Fitzpatrick did not otherwise pay any money for the deed to herself, except that she testified that she rendered care and assistance to her mother while she lived, and surrendered a note for \$300 executed to her husband by her father. Neither did John M. Kaiser pay anything in money for the deed to himself, but the evidence shows that after his father's death, he gave his mother \$200, and paid \$150 during his father's lifetime for medical attention and funeral expenses, and that he rendered him some other financial assistance.

Mrs. Fitzpatrick testified that she did not intend to present any claim against her father's estate, nor was any presented by her codefendant John M. Kaiser. The evidence shows that the lots in question were worth from \$4,250 to \$5,000; that when her husband died the widow received from fraternal orders about \$250. At the conclusion of the trial, the court rendered the judgment annulling the two deeds from which defendants have prosecuted this appeal.

Brewster, Ferrell & Mayer, of St. Joseph, for appellants. John S. Boyer, of St. Joseph, for respondent.

BOND, J. (after stating the facts as above). The decisive question in this case is the effect of the terms of the will in granting estates to the devisees therein, and giving power of disposal to the life tenant. In clear and positive terms the testator made two devises of his property: First, the estate to his widow during the full term of her natural life; second, remainders in fee to his five children by name; third, the testator gave the widow power to sell and make valid conveyances of his real estate "at any time she may think best and to her best interest."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index—

In the construction of such wills, the rule is fixed that the donee of the power can only exercise it in the precise form in which it is given. *Washburn on Real Property* (5th Ed.) vol. 2, p. 707; *Garland v. Smith*, 164 Mo. loc. cit. 15, 64 S. W. 188; *Dougherty v. Dougherty*, 204 Mo. loc. cit. 235, 102 S. W. 1099; *Burnet v. Burnet*, 244 Mo. loc. cit. 505, 148 S. W. 872. The reason of this is that the remainder devised shall not be defeated except by the terms of the will creating it; for when a remainder is expressly devised in fee, and the testator goes farther and specifically points out how it may be cut off, any other method of extinguishing it would annul the will of its creator, hence the necessity for confining the execution of such power to the particular mode and manner provided by the donor. In the case of *Burnet v. Burnet*, supra, this doctrine is reaffirmed after a full review of the rulings in this state, and in consonance with the guiding motive of the law to make the will speak only the mind of its maker whenever that can be lawfully carried out. Our conclusion is that by the language of the present will, giving her a power to dispose of the property, the life tenant was restricted to a sale and conveyance in pursuance thereof in the proper and legal sense of the term, and that she had no power to defeat the remainders by any other form of alienation.

II: It only remains to see whether the two transactions, whereby the defendants acquired deeds to the property of their father in exclusion of the right of their sisters to share in the remainder devised by the testator to all of his children, were within the legitimate exercise of the power given to their mother to sell the land. We think not. No part of the price recited in either deed was paid by either grantee when the instruments were executed and delivered. Before making them, the grantor took the will and consulted a Mr. Schnieder as to her authority, who seems to have told her that she could dispose of the property as she saw fit. Both of the defendants were present at this interview. When cross-examined then as to the deeds then made, the defendant Mrs. Fitzpatrick testified, to wit: "Q. These deeds recite that you are to pay \$1,000 for your half of the lot; you were to pay \$1,000 apiece for it? A. Yes, sir. Q. As a matter of fact you never paid any money? A. No, sir. Q. Never intended to pay any money? A. No, sir. Q. Did you ever present any claim in the probate court against your father's estate for anything that you claimed he owed you? A. No, sir; I would not have done it. Q. You lived with him in his house for 18 years? A. Not right with him; lived adjoining him. Q. Do you know whether or not John Kaiser ever paid any money for his deed? A. Not to my knowledge. Q. You know as a fact that he never did pay for his deed, don't you? A. He never paid anything that I know of.

\* \* \* Q. Was it discussed in your presence between your mother and Mr. Schnieder as to what she could do under this will with this property? A. Yes, she asked him while I was there if she could dispose of this property, and he said she could do as she saw fit. Q. Mr. Schnieder told her that? A. Yes, sir. Q. Was your brother with you at this time? A. Well, he went with us there, but I think he left to go to Mr. Sidenfadens. Q. You and your brother accompanied your mother to Mr. Schnieder's office? A. Yes, sir. Q. Did anybody else go with your brother and mother? A. No, sir." This witness also added that the only payment made by her was the surrender to her mother of a note given to her husband by her father for \$300, and which had been many years overdue previous to her father's death.

The defendant John Kaiser, on cross-examination as to the making of the deed to him and the visit to the office of Mr. Schnieder, stated: "Q. Your mother and Mrs. Fitzpatrick went to Mr. Schnieder's office? A. Yes; and he read it to us. Q. You read in the will—heard read that it was your father's wish that the remainder of this property, after his death, was to be equally divided among his children? A. She could dispose of it as she saw fit for her maintenance and support. Q. Is that so? A. Yes, sir; that is the way I understood it anyway. Q. Was there anything to the effect that she could give it away? A. She could give it away if she wanted to; that is the way I understood it. \* \* \* Q. You say these deeds were executed on the 30th? A. Yes, sir. Q. Three days after the will was filed she gave you and your sister the entire property? A. I think it was the 30th; I think it was that date. Q. You or your sister—neither one paid a dollar to your mother for those deeds, at this time? A. No, sir. Q. You say you don't know what the value of the property was at the time? A. I don't know what it was then or now. Q. Haven't any idea? A. No, sir. Q. Why was \$1,000 written in the deed as a consideration? A. Well, I don't know; possibly Mr. Schnieder told her to put that in; I don't know." He then added that he paid some expenses charged to the property for city improvements against it since his father's death, and that he gave his mother \$200 after his death which he supposed she used to pay bills, and that he paid his father's funeral expenses and medical bills, amounting to \$150. It is evident that these transactions did not in any fair and just sense meet the requirements of a sale of the property which the widow was authorized to make under the will. Her authority was to sell, which implies that she should do so in fact and truth, not by fiction and pretense.

The common-law definition of a sale of personal property is, "a transfer of the absolute or general property in a thing for a price in

money paid or promised." Ben. on Sales (5th Ed.) p. 2; Stout v. Hdw. Co., 131 Mo. App. loc. cit. 525, 110 S. W. 619. "But if any other consideration than money be given, it is not a sale," though it may be an exchange or barter. "Where no consideration be given for the transfer it is a gift, not a sale." Id. p. 3; Black's Law Dictionary. A sale possesses the same elements whether its subject matter be goods or lands. By the use of the words "to sell," the testator gave his wife only the power implied in performing an act of sale or the transfer of title for a *moneyed* price. He did not thereby clothe her with authority to convey for a different consideration or for no consideration; for neither of these acts would have been a sale, according to the fixed meaning of that term. Now the transactions under review in this case, if not mere gifts from the widow to the defendants, certainly rested on no present or promised payment of money, but only upon an alleged satisfaction of some vague and uncertain claims of the grantees against the estate of their deceased father. This was not sufficient to bring the deeds based on such consideration within the scope of the power given the grantor under the will; for that instrument only empowered her to make a real, not a colorable, sale. Not having done this during her life, the remainders to the five children of the testator took effect at her death, and the present suit by one of them to avoid the deeds to defendants was well brought and correctly decided by the trial court.

The judgment is affirmed.

GRAVES, J., concurs. LAMM and WOODSON, JJ., concur in result for the reason stated in dissenting opinion by LAMM, J., in Griffin v. Nicholas, 224 Mo. loc. cit. 312, 123 S. W. 1063.

#### STATE v. SYDNOR et al.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

#### 1. CRIMINAL LAW (§ 1064\*)—APPEAL—MOTION FOR NEW TRIAL.

Alleged error in not instructing on all of the law of the case will not be considered on appeal, where appellant's motion for new trial does not state any point upon which the court failed to instruct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.\*]

#### 2. WITNESSES (§ 268\*)—IMPEACHMENT.

A question to the prosecuting witness in a robbery case, asked on cross-examination, after he had testified that he did not go into the alley where he was robbed with some negro girls, whether he would not deny that he went into an alley with negro girls, even if it were true, was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

#### 3. ROBBERY (§ 24\*)—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction for robbery, and negative alibi.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. § 24.\*]

Appeal from St. Louis Circuit Court; Kent K. Koerner, Judge.

Richard H. Sydnor and another were convicted of robbery, and appeal. Affirmed.

Convicted of the crime of robbery in the first degree, the defendants appeal from a judgment of the circuit court of St. Louis city fixing their punishment at five years each in the penitentiary.

John Herbert, the prosecuting witness, testifying on behalf of the state, says that on the morning of January 1, 1913, about the hour of 1:30 a. m., he was robbed by defendants near the corner of Fairfax and Sarah streets, in St. Louis city, a locality inhabited mostly by negroes. About two or three blocks from the scene of the alleged robbery is located a Chinese restaurant, and about the same distance, though in a different direction, is located the residence of a colored man by the name of Lang, who gave a New Year's party on the evening of December 31, 1912. These places figure extensively in the evidence of the witnesses.

The prosecuting witness, a railroad brakeman, testified that he spent most of the evening of December 31, 1912, and until 1 a. m., January 1, 1913, sitting with another railroad man by the name of Fitzgerald in a saloon on Whittier street, where they smoked several cigars and drank a few glasses of beer. When the saloon closed at 1 a. m. the prosecuting witness walked to the corner of Fairfax and Sarah streets, intending to take a car and go home; that while he was at this corner, under a very bright street lamp, the defendants came along, and, after asking him if he "had been to the white folks' party," seized him by the arms, dragged him about a half block or more and into an opening between two buildings, and there the defendant Foster held him and defendant Sydnor took from him a \$10 bill, some small change, and an Ingersoll watch; that while they were thus pulling him along by the arms they told him that if he holloed they would kill him.

After he was robbed Mr. Herbert hunted up a policeman, and the two went to the Chinese restaurant before mentioned. There the policeman started to write down a description of the parties who committed the robbery, and while he was doing so the defendants entered the restaurant. The prosecuting witness recognized them at once, but the policeman took the prosecuting witness out in front of the restaurant and questioned him closely as to the identity of the parties before making the arrest. When arrested defendant Sydnor had in one of his pockets a \$10 bill "crumpled up" in a card

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



case; also a \$2 bill and some small change in another pocket. No money was found on defendant Foster.

George Ernest was in the restaurant when defendants were arrested. He testifies that on the night after the arrest he was again in the restaurant and found a watch where it had been hidden among some chop suey crates. The watch thus found was still running, and corresponded in make and date of purchase to the one taken from Herbert by the parties who committed the robbery. The Chinaman who operated the restaurant would not claim the watch; apparently it had been placed where it was found by some one not connected with the restaurant.

The evidence does not show that the defendants placed this watch where it was found, but only that it was possible for them to have done so just before they were arrested.

On the part of defendants there was testimony of two witnesses that defendants attended a "watch party" at a negro church located on Elliott and Wash streets until after the hour of midnight of December 31, 1912, and that they subsequently attended the New Year's party at Lang's residence. Two witnesses swore that defendants came to Lang's party at 1:20 a. m. and remained there until after 3 a. m., of January 1, 1913, when they went to the Chinese restaurant, where they were arrested.

The father of Sydnor testified that his son (one of the defendants) had been working for him regularly as a paper hanger, and that on the day prior to the alleged robbery he paid his son \$12.50 in cash and gave him an order on which the son received \$8 additional.

Defendant Sydnor was not sworn, but defendant Foster testified, denying all connection with the robbery. He stated that he never saw the prosecuting witness until defendants entered the restaurant, where they were arrested.

The evidence of the prosecuting witness and the policeman was to the effect that there were very few people on the streets near the corner of Fairfax and Sarah at the hour of 1:30 a. m., on January 1, 1913, while the evidence of defendants' witnesses tended to prove that there were numerous people on said streets at that hour.

Such other points in the evidence as are necessary to a proper understanding of the case will be found in our opinion.

William E. Fish, of St. Louis, and Wm. P. Hill, of McAlester, Okl., for appellants. John T. Barker, Atty. Gen. (Paul P. Prosser, of La Plata, of counsel), for the State.

BROWN, P. J. (after stating the facts as above). The defendants have filed no brief in this court, but their motion for new trial below assigns the following alleged errors: (1) Failure of the trial court to instruct the jury on all the law of the case; (2) exclu-

sion of legal evidence; (3) admission of improper evidence; and, (4) that the verdict is against the evidence.

[1] I. *Instructions*. Defendants' first assignment must be disregarded, because their motion for new trial does not designate any point upon which the court failed to instruct the jury. *State v. Conway*, 241 Mo. loc. cit. 283, 145 S. W. 441; *State v. Dockery*, 243 Mo. loc. cit. 599, 147 S. W. 976; and *State v. Horton*, 247 Mo. loc. cit. 663, 153 S. W. 1051.

[2] II. *Exclusion of Evidence*. The only evidence offered by defendants which was excluded by the court was a part of the cross-examination of the prosecuting witness. Said witness, upon being asked by defendants' counsel if he went into the alley where he was robbed with some negro girls, replied that he did not. He was then asked if he would not deny that he went into an alley with negro girls, even if it were true. Upon objection by the state, he was not required to answer the last question. We do not think the witness should have been required to pass judgment on his own veracity, or lack of it, under a state of facts which, so far as the evidence indicates, had not yet arisen. The court did not err in refusing to require the prosecuting witness to answer the question. No effort was made to impeach the witness by evidence of his general bad reputation for truth or morality.

III. A careful reading of the entire record does not disclose the admission of any improper evidence; consequently there is nothing to support defendants' third assignment.

[3] IV. *Sufficiency of Evidence*. The fourth assignment challenges the sufficiency of the evidence. The prosecuting witness says that when seized by the defendants he was standing, or walking slowly, under a very bright street lamp, so that he must have obtained a good view of their faces, which were not masked. He also heard their voices. This gave him a very good opportunity to identify them. We think the evidence of the prosecuting witness made out a prima facie case for the state, and that other evidence in the case tends to corroborate him.

The evidence of defendants' own witnesses indicates that the defendants were together on the streets not more than a block from the place where the prosecuting witness claims he was robbed within 10 minutes of the time of the robbery. The alibi which the defendants attempted to establish is not very convincing. It is seldom that any witness can remember the exact minute when a transaction took place. This is illustrated by the testimony in this case. One of defendants' witnesses swore that the defendants did not leave Lang's New Year's party until about 3:30 a. m., while defendant Foster swears that they left Lang's between 2 and 3 a. m.

It was the special province of the jury to

weigh the evidence, and there is nothing in this case which would warrant us in disturbing their verdict. *State v. Alexander*, 184 Mo. 266, 83 S. W. 753; *State v. Newman*, 245 Mo. 495, 150 S. W. 1050.

The judgment is affirmed.

WALKER and FARIS, JJ., concur.

# GARRETT et al. v. WILTSE.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

## 1. DEEDS (§ 124\*)—ESTATE CONVEYED—FREE-SIMPLE ESTATE.

A deed recited that it was between grantor and "G. and heirs," of the second part, and that grantor in consideration of a certain sum paid by said "parties" of the second part did grant and convey "unto said parties of the second part and to their heirs and assigns forever" the tract described, to have and hold with all the privileges and appurtenances "unto her," the said "party" of the second part, and to "her" heirs and assigns forever, and warranted title unto "her," the said "party" of the second part, "her" heirs and assigns. G., who was grantor's daughter, at the time had three children. *Held*, that the deed conveyed the fee-simple estate to G., the grantee, and not to her as tenant in common with her children.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. § 124.\*]

## 2. DEEDS (§ 93\*)—CONSTRUCTION—INTENTION OF PARTIES.

The intention of the parties to a deed must be effectuated, if not in contravention of some positive rule of law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.\*]

## 3. DEEDS (§ 93\*)—CONSTRUCTION.

The intention of the parties to a deed must be gathered from its four corners.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.\*]

## 4. DEEDS (§ 124\*)—CONSTRUCTION—ESTATES PASSING.

At common law the word "heirs" was necessary to pass an estate of inheritance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. § 124.\*]

## 5. DEEDS (§ 124\*)—OPERATIVE WORDS—"WORDS OF LIMITATION."

The word "heirs," in a conveyance at common law, was a word of limitation and not of purchase; "words of limitation," in this connection, meaning words which do not give the estate imported by them originally to the heirs described but only extend the ancestor's estate to an estate of inheritance descendible to the heirs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. § 124.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7517.]

## 6. DEEDS (§ 124\*)—CONSTRUCTION—OPERATIVE WORDS.

To construe the word "heirs," when used in a deed, as a word of purchase and not of limitation, the intent not to use the word in its usual legal meaning must be unequivocally shown.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. § 124.\*]

## 7. STATUTES (§ 188\*)—CONSTRUCTION.

Even in construing statutes, the plural is generally included in the singular number, and the masculine gender is construed to include the feminine.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. § 188.\*]

## 8. DEEDS (§ 97\*)—HABENDUM CLAUSE.

The habendum clause of a deed may be referred to for the removal of ambiguities, and even to control and modify the granting clause when that is necessary to effectuate grantor's plain intent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.\*]

## 9. VENDOR AND PURCHASER (§ 243\*)—ESTATE PASSING—EVIDENCE.

As against a subsequent bona fide purchaser without notice of such declarations, evidence as to a prior grantor's declarations as to the estate intended to be conveyed was not admissible if not actually brought to such subsequent purchaser's notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606-608; Dec. Dig. § 243.\*]

## 10. VENDOR AND PURCHASER (§ 231\*)—BONA FIDE PURCHASERS—NOTICE—RECORDS.

Under Rev. St. 1909, § 2810, providing that every conveyance certified and recorded as prescribed shall impart notice of its contents to subsequent purchasers, a purchaser is charged with constructive notice of everything, in prior recorded deeds, which go to make up the chain of title under which he holds.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. § 231.\*]

## 11. EVIDENCE (§ 65\*)—PRESUMPTION—KNOWLEDGE OF LAW.

Every person is presumed to know the law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 85; Dec. Dig. § 65.\*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Ashton W. Garrett and others against R. N. Wiltse. From a judgment for plaintiffs, defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

Eugene Silverman and Charles F. Strop, both of St. Joseph, for appellant. Brown, Cell & Myers, of Kansas City, for respondents.

LAMM, J. This is a suit under section 850, R. S. 1899, to try and determine title to the W. ½ N. E. ¼ section 2, township 56, range 34, containing 83 acres, situate in Buchanan county.

The case is this: All parties claim under William M. Whitson, deceased, the common source of title. In 1893 William conveyed by warranty deed, duly recorded, to his married daughter, Laura Alice Garrett, "and heirs," for a consideration of \$5. (This deed is the bone of contention and its terms will hereafter appear.) At the date of that conveyance Laura Alice had three children. Eight years afterwards, in March, 1901, Laura Alice and her spouse, Richard M., by warranty deed put of record, conveyed to defendant for a consideration of \$3,500 and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

put him in possession. At the date of this latter deed another child, Dixie, had been born to her and Richard. This child died prior to suit. Both deeds purport to convey the whole title. In 1908, Laura Alice being yet alive, her said spouse and two of her said children in being when Whitson conveyed to her, and the husband of one now dead, brought this suit to establish an interest in the land. The court decreed that Laura Alice took title under the Whitson deed as tenant in common with her three children then in being, one-fourth to each. Further, one of said children, a married daughter, having since died and left no children, it was adjudged that defendant stood seised as grantee of Laura Alice of an undivided one-fourth, plus an undivided one thirty-second, the latter coming to Laura Alice as heir of her deceased daughter and passing to defendant under her said warranty deed, and, on the theory indicated, adjudged to plaintiffs each a specified undivided interest as tenants in common. Other terms of this decree may become material later on, if we hold against defendant's principal contention presently stated.

The case runs on the theory that defendant bought in good faith for full value and took and held possession under his deed claiming the fee, so that, unless the deed from Whitson, *ex vi termini*, is to be construed as notice of an interest in the "heirs" of Laura Alice, he had no notice of any such interest; this notwithstanding there was testimony showing declarations of Whitson made before and at the time of the execution of his said deed to the effect that he intended to tie the land up so Laura Alice and her spouse could not convey the fee, and later declarations to the effect that he had done so. But none of these verbal acts or declarations were brought home to defendant. His counsel in due time objected to them, and, the trial court reserving its ruling, the record shows that at the close of the case the objections were neither ruled on nor was the decree founded on the testimony objected to. It was founded on the face of the deed itself.

The main question is: (1) Did the deed from Whitson to Laura Alice, *on its face*, and by virtue of its terms, convey the whole title to her? Defendant contends it did. Plaintiffs contend contra. The court held with plaintiffs, and defendant appeals.

A subsidiary question is: (2) If we refuse to follow the court's construction of the deed but hold contra and with defendant, then (this not being a suit in equity to reform the Whitson deed and the intentions and declarations of the grantor aliunde the deed not having been brought home to defendant before his purchase so as to charge him with notice) is the testimony of grantor's said intentions and declarations admissible against defendant?

There are other nice questions arising on

other hypotheses (for instance, whether Richard M. is bound on the covenants of warranty in his deed to defendant, whether Laura Alice did not take a life estate under the Whitson deed, and whether the "heirs" did not take as a *class* which opened and let in the child born after such deed and dying before suit), but none of them are important if we hold with defendant on the two first formulated. To those we address ourselves.

[1] The Whitson deed, omitting acknowledgment not questioned, best speaks for itself (we italicize the words on which the court's construction must stand or fall), viz: "Warranty Deed. This deed, made and entered into this twenty-fifth day of March, in the year of our Lord, eighteen hundred and ninety-three, by and between William M. Whitson (a widower) of the county of Buchanan and state of Missouri, of the first part, and Mrs. Laura Alice Garrett *and heirs* of the county of Buchanan and state of Missouri of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of five (\$5.00/100) dollars, to him in hand paid by the said *parties* of the second part, the receipt whereof is hereby confessed and acknowledged, has given, granted, bargained and sold, and by these presents does give, grant, bargain, sell, convey and confirm unto the said *parties* of the second part, and to *their* heirs and assigns forever, the certain tract, piece or parcel of land, lying and being in the county of Buchanan and state of Missouri, to wit: The west half of the northeast quarter of section No. two (2) in township fifty-six (56) of range thirty-four (34) containing eighty-three acres of land. To have and to hold the said tract, piece or parcel of land with all the privileges and appurtenances thereunto belonging, or in any wise appertaining unto *her the said party of the second part*, and to *her* heirs and assigns forever; and the said party of the first part for himself, his heirs, executors and administrators, does covenant and agree that he will warrant and forever defend the title to the said tract, piece or parcel of land, and every part thereof, unto *her the said party of the second part*, *her* heirs and assigns, against the lawful claim or claims of all persons, whomsoever. In testimony whereof, the said party of the first part has hereunto set his hand and seal the day and year first herein written. W. M. Whitson. [Seal.]"

Assuming that the "premises" of a deed are those parts preceding the habendum clauses (Utter v. Sidman, 170 Mo. loc. cit. 294, 70 S. W. 702) it will be observed that the words "and heirs" are used in that part of the premises reciting the parties. When we come to the granting clause the plural form is used for nouns and pronouns in connection with the second party (thus, "*parties*" and "*their heirs*"), and when we come to the habendum and warranting clauses the singular form is used (thus, "*her the said party of the*

second part, and to her heirs," and "unto her the said party of the second part, her heirs and assigns"). On such record we are of opinion the court erred in construing the deed, and that, under accepted rules of construction, the fee-simple estate passed to Laura Alice Garrett. This because:

[2, 3] I. (a) Not only is the general maxim applicable, viz., that the intention of the man is the soul of the instrument (*animus hominis*, etc.), but the guiding rules of construction for both deeds and wills are that the intent must be got at and given effect (if not in contravention of some positive rule of law), and that words used are to be understood in the sense indicated by the whole instrument; i. e., that the intent must be gathered, not from one clause or another, but from the four corners of the instrument. *Chew v. Keller*, 100 Mo. loc. cit. 369, 13 S. W. 395; *Utter v. Sidman*, supra. Applying those cardinal rules, we must take the words of grantor in all the clauses of his deed as indicating his intention. Much of the old learning concerning the stress to be put on one clause of a deed over another and concerning the weight and significance to be given words because they appear in one clause and not in another is exploded. Commenting on the modern, as distinguished from the old, doctrine in that regard, it was well said by Marshall, J., in *Utter v. Sidman*, supra: "The modern rule which prevails in this state is much simpler and much more calculated to carry out the wishes of the grantor. The intention of the grantor, as gathered from the four corners of the instrument, is now the pole star of construction. That intention may be expressed anywhere in the instrument, and in any words, the simpler and plainer the better, that will impart it, and the court will enforce it no matter in what part of the instrument it is found."

(b) The words "and heirs," used in the premises of the deed, following Laura Alice's name, are stressed as of significance by respondent; but those words have no office to cut down her estate to less than a fee. They point the other way. The word "heirs" connects itself logically with the concept of *inheritance* with the idea of an ancestor and descent cast, for no man is heir to the living man. *Nemo est hæres viventis*.

[4] Accordingly, at common law the word "heirs" was necessary to pass to a grantee an estate of inheritance. Without it the estate conveyed was for life. True it is no longer necessary to use the word "heirs" to pass a fee simple. The common law in that regard is exploded by section 2870, R. S. 1909, reading: "The term 'heirs,' or other words of inheritance, shall not be necessary to create or convey an estate in fee simple, and every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly ap-

pear, or be necessarily implied in the terms of the grant."

[5] But whilst the use of the word "heirs" is not now essential in passing a fee to the named grantee, yet its use or that of the words "and heirs" or "heirs and assigns" is not to be allowed, under accepted rules of law, as in any wise making doubtful the intent of a grantor to pass a fee-simple title to the named grantee. *Gannon v. Albright*, 183 Mo. loc. cit. 248 et seq., 81 S. W. 1162, 67 L. R. A. 97, 105 Am. St. Rep. 471. Such words, unless controlled or modified by the context, but hark back to and connect themselves with the usages, the learning, and the rules of common-law conveyancing. They are highly technical and have a fixed meaning and when used in conveyancing, unless manifestly controlled by the context, as said, are held to be words of limitation and not words of purchase. 21 Cyc. 418. Words of limitation, in this technical sense, mean words "which do not give the estate imported by them originally to the heirs \* \* \* described, or to whom they are expressly directed, but only extend the ancestor's estate \* \* \* to an estate of inheritance descendible to the heirs described. \* \* \*" *Fearne on Rem.* 77. And on page 78: "When the word 'heirs' \* \* \* operates only to expand an estate in the ancestor, so as to let the heirs described into its extent and entitle them to take derivatively through or from him, as the root of succession, or person in whom the estate is considered as commencing, they are properly words of limitation; but when they operate only to give the estate imported by them, to the heirs described, originally and as the persons in whom that estate is considered as commencing, and not derivatively from or through the ancestor, they are properly words of purchase. \* \* \* In general, words of purchase are those by which, taken absolutely without reference to or connection with any other words, the estate first attaches or is considered as commencing in the person described by them, whilst words of limitation operate by reference to or connection with other words and extend or modify the estate given by those other words."

[6] Undoubtedly the words "and heirs" may be used in deeds and wills in the sense of sons, daughters, and children, etc. (that is, as words of purchase), when the context demands such construction, but the burden is thrown upon him who contends they are words of purchase to rebut the presumption that they are used as words of limitation (i. e., as intended to mean not individuals but quantity of estate and descent), which in a fixed legal sense they import, and the intent not to use the words in their legal and fixed sense must be unequivocal and not to be misunderstood. *Guthrie's Appeal*, 37 Pa. 13 et seq.

We conclude, then, that respondent's case

does not prosper on the theory of a controlling significance in his favor in the use of the words "and heirs" in the premises of the deed. Look at it from another viewpoint. As said, there were three children in being, born of Laura Alice by Richard, her husband, at the time of the Whitson deed. Now, in construing a deed, it is sometimes worth while to take into account what the grantor should say but does not say as well as what he does say in getting at his intent. This grantor in making a conveyance on which, when spread of record, the world might act named none of those children. If he desired them to take a present interest as tenants in common with their mother, why did he not say so and name them? Is that not the usual way? Why, in dealing with grandchildren, did he ambush and screen his intent by use of a term importing to the contrary? In speaking to that phase of the matter, the words of Valliant, J., in *Tygart v. Hartwell*, 204 Mo. loc. cit. 203, 102 S. W. 990, are apposite, thus: "It would be a very strained construction to say that it was the intention of the parties to this deed to convey the land to James F. White and his children as tenants in common. If such had been the intention, the natural course would have been to have inserted the names of the two children then living in the granting clause of the deed as grantees. If it was the intention to include not only those then in being but those thereafter to be born, then the idea of a tenancy in common must be excluded because the unborn children could not be made tenants in common in an estate presently created. *Kinney v. Mathews*, 69 Mo. 520; *Rines v. Mansfield* [96 Mo. 394, 9 S. W. 798] *supra*."

(c) When we come to further consider the granting cause of the deed, we find plural forms are used, viz., "parties of the second part," "parties of the second part, and to their heirs and assigns forever." Much is made of that feature. But we think it loose and unsound construction to give to those awkward and inartificial grammatical forms the labored significance insisted upon by learned counsel for respondent. Their argument runs after this fashion: That the phrase "parties of the second part" should be held to import more than one grantee, to wit, the heirs of Laura Alice then in being.

[7] Now, even in construing public statutes, the rule is to include the plural in the singular number and vice versa. Likewise with gender, when the form is masculine it includes the feminine. But it would be unprofitable to pursue the matter from a philosophical standpoint and point out why in so grave a matter as title the plural form is of little value. The slips of the pen are too many in slipshod conveyancing to hinge a decree alone on "parties" and "their heirs." In this case, however, let the grantor tell his own meaning. To do so is allowable exposition, for does not every man know what he

wants to say better than the other fellow? It will be perceived that presently he recurs to the same subject-matter in the habendum clause and therein he makes all plain by speaking of "her the said party of the second part," and "to her heirs and assigns forever," not once, but twice; and it must be held that whatever ambiguity arises by the prior use of the plural number in the granting clause is dissipated by the use of the singular number in the habendum clause. Moreover, why should Whitson not *warrant* to his grandchildren as well as to their mother, if he intended to *grant* to them? If his bounty took them in, why did he exclude them in his covenants of assurance? Why caress with one hand and smite with the other? To hold otherwise than as indicated would contravene a settled rule of construction and put a harsh and strained construction on the deed taken as a whole. It would magnify a pinprick of mere possible inadvertence into pivotal and controlling substance and build this deed up around a shadowy speculation.

[8] We think we are on safe ground to say that, whatever was the technical function of the habendum clause of a deed in olden times, its present office may be allowed to be to clear up the conveyance by clarifying and removing ambiguities and smoothing away inconsistencies. It will even control or modify the granting clause when by such control or modification the intent of the grantor, as expressed in his words, is made plain and effectuated. *Utter v. Sidman*, 170 Mo. 284, 70 S. W. 702, and cases therein cited and analyzed; *Linville v. Greer*, 165 Mo. loc. cit. 397, 65 S. W. 579; *Grooms v. Morrison*, 249 Mo. loc. cit. 554, 155 S. W. 430; *Rines v. Mansfield*, 96 Mo. 394, 9 S. W. 798; *Williamson v. Brown*, 195 Mo. loc. cit. 337, 93 S. W. 791; *McCulloch v. Holmes*, 111 Mo. 445, 19 S. W. 1096; *Meacham v. Blaess*, 141 Mich. 258, 104 S. W. 579; *Green v. Sutton*, 50 Mo. loc. cit. 192.

[9] II. The conclusions already reached and announced bring us to the final question: What probative force is to be given to the declarations (hereinbefore mentioned) of Whitson, made before, at, and after his conveyance to Laura Alice? Mark, we are not dealing with a case wherein Whitson is suing his daughter in equity to correct his deed, or wherein the children of Laura Alice are suing their mother to correct such deed on some equitable ground like mistake, or wherein the children are suing the mother in equity (before her conveyance) to adjudge title as between themselves. The case up is one against an innocent purchaser of the land, who dealt with it and the mother on the strength of the title the deed imported to convey to her by its own words, and not otherwise; dealt on the full faith and credit due the record of the deed, and not otherwise. Under such circumstances, for the trial court to get at the intent of grantor (not from the words he set

down in the instrument at the time to be presently blazoned forth on the records in the office of the recorder of deeds, but) from the admissions of Whitson of which defendant had no notice, will not do.

[10] Defendant was bound to take notice of the terms of the Whitson deed when recorded. R. S. 1909, § 2810; Sellert v. McAnally, 223 Mo. loc. cit. 518, 122 S. W. 1064, 135 Am. St. Rep. 522. Whitson contemplated that form of notice when he executed his deed. The law held the same end in view in the registry acts. He is charged, too, with constructive notice of everything contained in recorded deeds that lie in and make up the chain of title under which he holds. Case v. Goodman, 250 Mo. loc. cit. 115, 156 S. W. 698, and cases cited. So, if he had had actual notice that his grantor held a base fee or one subject to outstanding equities or rights not disclosed by the deed records or that there was a mistake in the deed, that would be another matter. But, as said, no such case is here; and we know of no principle of real estate law that would permit the title of a bona fide purchaser to be affected or impaired in the way proposed. As to defendant, presumably Whitson wrote into that deed all he intended to. Since the written word remains and the spoken word flies, when parties sit down to write a contract they are presumed to set forth the whole of it.

[11] Defendant could rest on that presumption of law, for no man is held to be, or need to be, wiser than the law. He is presumed to know it, but not to be wiser than it. If, then, the deed, when taken as a whole, bore on its face notice of a base fee or lesser estate than a fee in his grantor or words putting defendant on inquiry, he must abide the fact or pursue the inquiry. But we have held the contrary to be the fact in the first paragraph and must rule the offered testimony of no probative force. The disposition made of questions discussed makes other questions dealt with in briefs unimportant.

Let the judgment be reversed, and the cause remanded, with directions to find against plaintiffs and decree title in defendant. It is so ordered. All concur.

#### CLARK v. McATEE et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### BOUNDARIES (§ 37\*) — SUFFICIENCY OF EVIDENCE.

Evidence in ejectment, in which the boundary line between lots was in dispute, held not to show that defendant's fence was 12 feet too far north, or that the boundary was as claimed by plaintiff.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Knox County; Chas. D. Stewart, Judge.

Action by Rosa Clark against Margaret

McAtee and husband. From a judgment for plaintiff, defendants appeal. Reversed.

Frisby H. McCullough, of Edina, for appellants. O. D. Jones and James C. Dorian, both of Edina, for respondent.

BLAIR, C. This is an action in ejectment. The dispute concerns the boundary line between certain lots in the city of Edina. The case has been here before. 227 Mo. 152. As on the former trial, the judgment was for plaintiff, and defendants appeal.

The only plat of a survey in the record is called the "Robinson Survey," was offered by plaintiff, and shows the southwest corner of the original town of Edina is also the southwest corner of section 18, township 62, range 11. The Robinson survey shows 16 blocks. Block 1 is the southwest block in the plat. Blocks 2, 3, and 4 lie, in order, north of block 1 and between 1 and 2; 2 and 3 and 3 and 4 are streets platted as 66 feet wide. The length of the west line of each of blocks 1, 3, and 4 is platted as 4 chains. That of block 2 is platted as 4.02 chains. Clay street runs between blocks 1 and 2; Jackson, between blocks 2 and 3; Smallwood, between blocks 3 and 4; and Marion street runs north of block 4 and has a platted width, at the northwest corner of that block, of 55 feet. Survey No. 77, which played such an important part in the former trial and the former hearing in this court, was again relied upon by respondent, though not offered in evidence as an official survey. The surveyor who made it testified he was following the Robinson survey; that he began at the southwest corner of section 18-62-11 at the "niggerhead rock" which has been immortalized by this litigation. As on the former trial, it appears there is no plat or field notes calling for this rock, but the surveyor above mentioned had previously used it in other surveys. He testified he verified its location at the southwest corner of section 18-62-11 by running south 111 links to a limestone rock; there being a call in "the field notes," supposedly those of the survey of section 18, for a limestone rock 111 links south of the southwest corner of that section. To this part of his testimony and that concerning other marks, corners, buildings, etc., further reference will be made in the course of the opinion. The surveyor also testified that the actual, measured distance from the southwest corner of the section and original town to the northwest corner of the inclosure on block 3, as shown by survey No. 77, is 925.58 feet, and that this distance corresponds exactly with that called for by the Robinson survey; that the actual distance from the northwest corner of block 3 north across Smallwood street to the southwest corner of block 4, as inclosed, is 74½ feet; and that the actual length of the west line of block 4, as inclosed, is 251½ feet. As plat-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ted, block 4 is divided into two equal parts by an alley running north and south through its center. Both the east and west halves of the block, as thus divided, are divided into five lots—lots 1 to 5, inclusive, lying in the west half and fronting west on First street, and lots 6 to 10, inclusive, lying in the east half and fronting east on Second street. Lot 1 is the southern lot in the west half, and 2, 3, 4, and 5 lie north of it, in order. Lot 6 is the southern lot in the east half, and 7, 8, 9, and 10 lie north of it, in order. Each of these lots has a platted frontage of  $52\frac{1}{2}$  feet, and of these respondent owns lots 4, 5, 8, 9, and 10, and appellants own lots 1, 2, 3, 6, and 7. The lines in controversy are those between lots 3 and 4 and lots 7 and 8. The surveyor mentioned testified that his measurements disclosed that the true line between lots 3 and 4 was "about eight feet" south of appellants' fence, and the line between lots 7 and 8 was "about 10 or 12 feet" south of appellants' fence. It may be noted here that the platted distance from the southeast corner of block 1 to the northeast corner of block 4 is 3.3 feet greater than the platted distance from the southwest corner of block 1 to the northwest corner of block 4. This surveyor also testified that respondent's north fence was some 12 feet north of what he fixed as the true north line of block 4 and of lot 5 of that block. He did not measure to the north boundary of the original town, as shown by the plat, nor did he make any measurements of the actual occupancies of respondent and appellants. For appellants there was in evidence actual measurements of the inclosures of respondent and appellants. One witness who made measurements testified, and the plat made by him disclosed, that the west line of block 4, as inclosed, is  $253\frac{1}{2}$  feet, and the east line 259 feet; that appellants' frontage on the west side of the block is 149 feet and respondent's frontage on the west side is  $104\frac{1}{2}$  feet. Appellants' frontage on the east side is 105 feet and respondent's frontage on the east 154 feet.

Respondent's case depends absolutely upon the testimony of the witness who surveyed the property for her and made survey No. 77. In making this survey this witness testified that his purpose was to follow the calls in the Robinson survey, accepting it as accurate. The questions are whether he used the correct beginning point as called for by that survey; and, if so, whether he accurately followed the calls of that survey for courses and distances. Let it be conceded that the beginning point he selected was the right one, yet the record demonstrates the inaccuracy of his subsequent proceedings. His testimony and measurements show that the distance from the beginning point to the northwest corner of the inclosure in block 3 is 925.58 feet. This, he testified, is the distance between the beginning point and the northwest corner of block 3, as platted. The slight error apparent in this measurement

is negligible. His survey shows the distance from the northwest corner of block 3, as inclosed, across the street to the southwest corner of block 4, as inclosed by appellants' fence, to be  $74\frac{1}{2}$  feet. It also shows that the length of the west line of the inclosures of respondent and appellants in block 4 is  $251\frac{1}{2}$  feet. He testified appellants' north fence, which should have been placed along the true north line of lot 5, block 4, is 12 feet north of the true line. He also testified that the fence which divides the occupancies of respondent and appellants in the west half of block 4 is about 8 feet north of the true line between lot 3, owned by appellants, and lot 4, owned by respondent.

The northwest corner of block 3, as platted in the Robinson survey, and as marked by the inclosures now on block 3 being identical, according to the surveyor upon whose testimony respondent's case depends, the distance between the beginning point and the northwest corner of block 3 must be accepted as the basis of measurements to the north. The northwest corner of the inclosure in block 3, the error of 4.32 inches being negligible for the purpose of the argument, may be accepted as fixed, and will be designated as "A." From this point to the southwest corner of appellants' inclosure on block 4 is  $74\frac{1}{2}$  feet. From this last-mentioned point to the northwest corner of respondent's inclosure is, according to respondent's evidence,  $251\frac{1}{2}$  feet. The sum of these distances is  $325\frac{1}{2}$  feet. The platted distance from A to the northwest corner of block 4, as platted, is 330 feet. This distance is made up of the distance across the street, as platted, north from A 66 feet and the length of the west side of block 4, which is platted as 264 feet. The fence on the north side of the appellants' inclosure in the west half of block 4 is therefore  $4\frac{1}{2}$  feet south of the true line, as platted. How the witness arrived at the conclusion that appellants' fence is 12 feet too far north is inexplicable when the measurements upon which the entire probative force of his testimony depends demonstrate it is  $4\frac{1}{2}$  feet too far south.

There is another method of arriving at the same result. Each lot is  $52\frac{1}{2}$  feet wide according to the plat. Commencing at A and adding to the platted width of the street (66 feet), immediately north, the platted width of lots 1, 2, and 3 owned by appellants, the result is the distance from A to the true north line of lot 3, and is 224.4 feet. If appellants' fence is on their true line, respondent would have left, actually inclosed, but  $101\frac{1}{2}$  feet front, and would have lacked  $4\frac{1}{2}$  feet of having inclosed, on the north, all to which she is entitled.

If the measurements given by the witness are correct, it is not possible to accept as possessing any probative force his mere conclusion that respondent's lines are "about 8 feet," and "about 10 or 12 feet" too far north. If his measurements are incorrect,

or if he started from the wrong beginning point, of course his survey and his testimony fall, and respondent's case falls with it.

It may be added that it clearly appears that respondent has in possession a larger proportion of the block than have appellants; that the niggerhead rock is conclusively shown to have reached its present position by reason of the fact that it was ploughed up in the street and placed there solely to get it out of the way of those working in the street. The limestone rock called for by the field notes as being 111 links south of the southwest corner of section 18 was undoubtedly under "Fisher's sidewalk," while the limestone rock found by respondent's surveyor when he measured south 111 links from the niggerhead rock was in a ditch, and under no sidewalk. To accept the conclusion upon which respondent's case depends would, according to the surveyor, change every street in Edina save one. The Winterbottom building, a three-story building erected in the 50's, is relied upon as evidence of the correspondence between the present location of the niggerhead rock and the southwest corner of section 18. There is no satisfactory evidence that this building was erected on any lot line, though the surveyor who testified for respondent said he had used its location on the theory it had been erected on the south boundary of one of the south lots of the original town. The fact that the same witness testified that he had run a line north from the niggerhead rock and struck the corner stone in the west line of the section is of no value, since he gave no distance for the line thus measured, and without the distance between the two the corner stone mentioned is valueless as an indication whether, in commencing at the niggerhead rock, the witness commenced too far north or too far south. In view, however, of the fact that the measurements given by the witness demonstrate that he was wrong, and that appellants are not in possession of any of respondent's ground, and in view of the fact that it is upon this witness respondent's whole case depends, the evidence concerning the position of the niggerhead rock becomes of little importance.

The judgment is reversed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur.

#### RYAN v. STROP et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. HUSBAND AND WIFE (§ 171\*)—VALIDITY—DURESS—EVIDENCE.

Proof that a wife signed a note and deed of trust on her home to secure it because of

threats that her husband would be prosecuted for crime if she did not was proof that the instruments were procured by duress authorizing the wife to sue to cancel the same.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 671-683, 721, 950, 951; Dec. Dig. § 171.\*]

#### 2. APPEAL AND ERROR (§ 1012\*)—FINDINGS—CONCLUSIVENESS.

Where the facts in evidence are about evenly balanced, the findings of the trial court hearing the witnesses will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.\*]

Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Action by Rose F. Ryan against Charles F. Strop and others. From a judgment for plaintiff against defendant Adam Schaaf, a corporation, it appeals. Affirmed.

Plaintiff brings suit to cancel certain notes and a deed of trust securing the same on the ground that her signatures thereto were obtained by duress. The petition perhaps goes a little further than the question of duress. Among other matters, it charges: "Plaintiff states that said notes and the deed of trust pretending to secure the payment of same was signed by her, solely by reason of her fear caused by the threats made by the agents, servants, and employes of Adam Schaaf, and solely on account of the fear, coercion, and intimidation caused thereby, although said notes were signed without any consideration moving from said Adam Schaaf to this plaintiff, or to her husband, as said notes were given for an existing indebtedness and obligation, without any consideration whatever moving to either plaintiff or her husband." The suit was originally brought against residents of Missouri (individuals and corporations), but later, Adam Schaaf, a corporation of Illinois engaged in the manufacture of pianos, filed an answer alleging that since the filing of plaintiff's suit it had become the sole owner and possessor of said notes and deed of trust, and admitting that plaintiff was the owner of the real estate described in the deed of trust, and further alleging that the deed of trust was a lien thereon. The answer after these admissions and allegations then denied the other matter averred in plaintiff's petition. By reply the plaintiff charged that the notes and deed of trust grew out of business transacted by Adam Schaaf, a foreign corporation, whilst it was doing business in Missouri, and whilst it had no license or other authority to do business in Missouri, and that by reason of this fact such corporation had no standing in the courts of this state. The resident defendants were dismissed from the case, and the cause proceeded in battle royal between plaintiff and Adam Schaaf. Plaintiff had judgment as in her petition prayed, and the defendant, alleging itself to be aggrieved by



such judgment, has sought a review of the same by an appeal to this court. The evidence can best be detailed in connection with the points made.

W. B. Norris, of St. Joseph, for appellant. John S. Boyer, of St. Joseph, and Broadus & Crow, of Kansas City, for respondent.

GRAVES, J. (after stating the facts as above). I. The respondent in her reply charges that Adam Schaaf, a foreign corporation doing business in this state without license, at the time of the transaction here in question, has no standing in the courts of our state. In the view we have upon other matters in this record, the intricate question of fact and law pertaining to this proposition will be left to a case wherein such matter is the sole turning point.

II. Under the facts in evidence, J. A. Ryan, husband of plaintiff, Rose F. Ryan, was the manager or agent of the defendant Adam Schaaf for the sale of pianos, manufactured by Adam Schaaf, in the states of Missouri, Kansas, and Nebraska, with a business office in the city of St. Joseph, Mo. For the purpose of the point now in hand it is immaterial whether J. A. Ryan was the manager of Schaaf in Schaaf's office in St. Joseph, or in an office or place of business of his own. Whatever the relation was, it began in September, 1903. Ryan sold pianos and was to account for the proceeds of the sales. After several years' work, it was discovered that Ryan was short in his accounts in sums aggregating nearly \$2,500. An agent for Adam Schaaf called upon him, and he finally admitted his shortage, but had no money with which to pay. This was in September, 1906, or about three years after Ryan began the sale of pianos for Schaaf. The matter was closed on September 12, 1906, by Ryan and his wife signing up notes aggregating such sum, and securing the payment thereof by a deed of trust on the home, which home was the property of the wife.

[1] Plaintiff and her husband testified that Rucker, the agent of Adam Schaaf, with Mr. Mytton, the attorney for Adam Schaaf, came to the office of J. A. Ryan, with the notes and deed of trust already prepared, and that Ryan then phoned his wife to come down that he wanted to see her on some business; that when she came Mr. Mytton told her that there were some papers for her to sign; that, after she read them over and found that they included a deed of trust on her home, she refused to sign them; that at this juncture Rucker, the agent of Adam Schaaf, told her that her husband would be prosecuted if she did not; and that, after crying awhile and being in fear of such a prosecution, she finally signed the notes and deed of trust. The evidence of Ryan was further to the effect that Rucker told him that the matter would have to be fixed up or he would be

prosecuted. The evidence for the plaintiff made a clear case of duress. *Lacks v. Butler County Bank*, 204 Mo. loc. cit. 478, 102 S. W. 1007. If threats were made to Mrs. Ryan, as by the testimony of her and her husband shown, then such threats were sufficient to deprive her of her own free will in the matter, and the instruments executed under such circumstances would be void. There are not many wives whose will power would not be destroyed by open threats to send the husband to the penitentiary.

[2] If this were the only side to the case, it would be one of easy disposition. For the defendants Mr. Mytton, Mr. Parkinson, and the agent Rucker testified that the notes and deed of trust were executed in Mr. Mytton's office, and not at the Ryan store, and that there were no threats made by either of the parties as against Ryan. It should be stated that Mr. Parkinson did not claim to have been present all the time. Mrs. Ryan says that she never would have put a deed of trust upon her home, but for these threats, and the chancellor nisi has found her version of the transaction to be the proper one. Women, who own property in their own right, are not prone to use it in the payment of the husband's debts; but this is but a circumstance corroborating the views of the lower court. In this court we are empowered to review the whole case and write anew the judgment, and in many cases we go that far, notwithstanding the usual difference had for the judgment of the chancellor below. In this case the evidence and facts and circumstances in evidence are pretty evenly balanced, and the trial court had the advantage of facing the witnesses and hearing their respective stories. In such case we have often said that we would give heed to the views of the trial chancellor. We feel that we should so do in this case.

Let the judgment be affirmed. All concur.

#### MAHAFFEY v. LEBANON CEMETERY ASS'N.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. APPEAL AND ERROR (§§ 516, 518, 529\*) — BILL OF EXCEPTIONS—RECORD PROPER.

The date of the institution of the action, together with the pleadings and judgment, constitute the record proper and need not be incorporated in the record by a bill of exceptions to be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2332-2340, 2342-2355, 2374, 2389-2393; Dec. Dig. §§ 516, 518, 529.\*]

#### 2. APPEAL AND ERROR (§ 584\*)—ABSTRACT OF RECORD—FORM OF STATEMENT.

Those matters presented in open court should be abstracted separately in the abstract from the things which become matters of record only because incorporated in the bill of exceptions, and the abstract of record properly grouped under "entries of the court" copies of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pleadings and other matters going to make up the record proper after which, under the heading "end of record proper," the bill of exceptions was incorporated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2584, 2585; Dec. Dig. § 584.\*]

### 3. APPEAL AND ERROR (§ 586\*)—ABSTRACT OF RECORD—AFFIDAVIT FOR APPEAL.

A statement in the abstract that defendant filed in due form its affidavit for appeal to the Supreme Court, and the trial court finding the same sufficient, after approving the appeal bond, granted the appeal, sufficiently showed that a sufficient affidavit for appeal was filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2595-2597, 2600-2605; Dec. Dig. § 586.\*]

### 4. APPEAL AND ERROR (§ 586\*)—ABSTRACT OF RECORD—ORDER GRANTING APPEAL.

A statement in the abstract of record that defendant filed in due form its affidavit for appeal, and the trial court finding the same sufficient after approving the appeal bond did grant said appeal, when taken with the presumption that the affidavit complied with the statute, sufficiently showed that the order for appeal was granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2595-2597, 2600-2605; Dec. Dig. § 586.\*]

### 5. APPEAL AND ERROR (§ 586\*)—ABSTRACT OF RECORD.

The Supreme Court will read into the abstract of the record the certified copy of the judgment and order granting the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2595-2597, 2600-2605; Dec. Dig. § 586.\*]

### 6. APPEAL AND ERROR (§ 653\*)—AMENDMENT OF ABSTRACT.

The Supreme Court may in its discretion in a proper case permit the amendment of an abstract of record after lapse of the time prescribed in the statutes and court rules for filing the abstract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2816-2818; Dec. Dig. § 653.\*]

### 7. APPEAL AND ERROR (§ 653\*)—ABSTRACT OF RECORD—AMENDMENT.

Where respondent filed no briefs and promptly objected that the record entries in the abstract showing extension of leave to file the bill of exceptions so as to cover the time when it was filed, and the order showing that it was signed and filed, were untrue because the record did not contain such entries and verified his claim by filing a certified copy of the whole record, appellant will not be permitted to amend the abstract; there being no excuse for his negligence in its preparation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2816-2818; Dec. Dig. § 653.\*]

### 8. QUIETING TITLE (§ 43\*)—ISSUES.

Where, in an action to quiet title, the petition alleged title generally in plaintiff and asked that the title of the parties be defined and adjudicated, and the answer was a general denial and special plea asserting title and prayed that title be adjudged in defendant, the whole title was in issue.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84-87; Dec. Dig. § 43.\*]

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Action by J. M. Mahaffey against the Lebanon Cemetery Association. From a

judgment for plaintiff, defendant appeals. Affirmed.

Suit instituted in the Laclede county circuit court at the August term, 1908, under the provisions of section 650, Revised Statutes of Missouri 1899, to ascertain and determine the estate, title, and interest of the parties to the N. ½ of lot 17, block 10, of the cemetery of the appellant. The petition states that plaintiff is the owner of the land with the right to possess and use it for burial purposes against all other persons whomsoever; that he purchased it from the appellant in 1901 for \$10, which he fully paid and took possession of the half lot, buried one of his children on it, and held it until May, 1908; that he is informed and believes that the defendant is making some claim to the lot. The answer consists of a general denial, with a special plea, amounting, in substance, to a denial that the lot had been paid for and asserting that it had been forfeited under the rules of the association subject to which whatever right the plaintiff had was acquired. The answer asked the court, in substance, to adjudge the title in the appellant and that the plaintiff has no title or right of possession to the land. The cause was tried on August 13, 1908, during the same term at which it was instituted, and resulted in a judgment for the plaintiff, the substantial part of which is as follows: "It is by the court ordered and adjudged and decreed that the plaintiff purchased of the Lebanon Cemetery Association the following lot, viz., N. ½ of lot 17, block 10, in the Lebanon Cemetery Association, and took possession of the same and buried his child thereon, and that his right of burial remain in full force and effect. It is therefore ordered and decreed that the plaintiff has full burial privileges in the N. ½ of said lot and the exclusive right of interment on said N. ½ of said lot 17." From this judgment the defendant has appealed and brought the record here by the short transcript provided in section 2053, Revised Statutes 1909, and in due time filed his abstract of the record. The cause was docketed and set for hearing at the October term, 1912, in division No. 1, on October 17, the ninth day of the term, and was heard and submitted on that day.

The respondent in due time filed an additional abstract, and on October 8, 1912, filed his motion "to dismiss appeal or affirm judgment," a copy of which, with notice of his intention to file it, was served on appellant on October 2, 1912. It has been submitted and taken under advisement with the case. It states as grounds for such action: (1) That the printed abstract of the record proper fails to show that there was an affidavit for an appeal which complied with the law; (2) that it fails to show that there was an appeal granted by the court, or that such an order was ever spread upon the records of the court; (3) that it fails to show

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the bill of exceptions was presented to and filed in the circuit court while in session, or that leave was given to file the bill of exceptions, or that it was ever signed or filed.

As a matter of fact, the abstract was constructed on the following plan: (1) A copy of the petition; (2) a copy of the answer; (3) a statement that the cause came on for trial on August 13, 1908, during the August term of the trial court, and a copy of the judgment. Preceding this copy are the following words: "The entries of the court are as follows." After the judgment comes a narrative statement of the filing of the motion for a new trial and its overruling on August 13, 1908; the same reference to the motion in arrest of judgment on the same date; then the following: "Appeal. Thereafter on said 13th day of August, 1908, and at said August term, 1908, the defendant, the Lebanon Cemetery Association, filed in due form its affidavit for appeal to the Supreme Court of Missouri, and the trial court finding the same sufficient (after approving the appeal bond) did on the same day last aforesaid grant said appeal to said Supreme Court." "Bill of Exceptions—Leave to File Same. Thereafter, on said August 13, 1908, and at the same term of the trial court last aforesaid, the trial court by its order duly entered of record proper, did grant to the defendant, the Lebanon Cemetery Association, to file its bill of exceptions in this cause 'within one hundred and twenty days from the 13th day of September, 1908,' which leave to file said bill of exceptions was thereafter, on November 4, 1908, extended by the court, with the consent of the parties to this cause to February 10, 1909. And the defendant, the Lebanon Cemetery Association, on February 6, 1909, and within the time so allowed by the court, did present to the court its bill of exceptions and the same was signed by the Hon. L. B. Woodside, judge thereof, and was duly filed on said February 6, 1909, as shown by the record entry of the court." Then the following words: "End of record proper." Then follows the bill of exceptions, preceded by the statement, "filed by entry of record proper February 6, 1909." The bill of exceptions contains everything generally incorporated in such a paper, including the evidence, the court's finding of facts, the instructions given and refused, the motion for a new trial and in arrest of judgment, the exceptions, and closes without signature, and with the following words: "And thereafter and at the same term of the trial court, at which said motion in arrest of judgment was filed, court overruled said motion and to its action in so doing defendant thereupon objected and excepted. Said bill of exceptions was duly signed on the 6th day of February, 1909, by L. B. Woodside, circuit judge, and was duly filed on the same day as part of the record in this cause."

Respondent's additional abstract consisted of a certified copy of the entire record,

showing that the only order of the court referring in any manner to the bill of exceptions is, omitting caption, as follows: "Now on this day comes the defendant herein, by attorney, and files motion in arrest of judgment, in this cause, which is by the court overruled, and 120 days allowed defendant to file their bill of exceptions in this cause."

On October 15th the appellant filed an application to amend his abstract so as to show that the time for filing the bill of exceptions was extended by order of Judge Woodside of the Laclede circuit court, and not by the court. This was supported by affidavit of Mr. Edwin Silver, saying that the error had been made by him through a misapprehension of the facts and not with any intention of deceiving or misleading the court. Two days after the submission of the case in this court, and on October 19, 1912, the appellant gave to one of the judges a certificate of the clerk of the trial court to the effect that the bill of exceptions had been filed with the clerk of that court on February 6, 1909, and at the same time filed with the clerk of this court an application to amend his abstract so as to show that fact.

W. I. Wallace, of Lebanon, and Silver & Dumm, of Jefferson City, for appellant. L. C. Mayfield, of Lebanon, for respondent.

BROWN, C. (after stating the facts as above). [1, 2] I. The appellant's abstract was prepared, in so far as form is an element, with care and attention to such suggestions as have been made from time to time by this court. The date of the institution of the suit, together with the pleadings in *hæc verba*, and the judgment, complete the necessary elements of the record proper. They do not have to be incorporated in it by exception, and it is our duty to examine them whenever properly brought before us for review. Mindful of the requirement of this court, often repeated, that the abstract should separately show the record entries with respect to those matters which are done in open court and about which its permanent records must speak, should be abstracted separately from the things that become matters of record only because they are excepted to during the progress of the proceedings and written down in the bill of exceptions, the appellant grouped them under the heading "The Entries of the Court," and wrote at their end, "End of record proper." We can imagine no reason why we should refuse to understand this plain language and definite arrangement. In abstracting these entries, the appellant dropped into the style recommended by this court in *State v. Broadus*, 216 Mo. 336, 115 S. W. 1018, where we said with reference to the abstract then under consideration, invoking the support of a liberal citation of authorities, "it sets out those record facts, not by literal copy, which would be unnecessary, but in abbreviated narrative form,

which is sufficient and preferable." He then states, in the form so recommended, various proceedings succeeding the judgment, including the foregoing order approving the appeal bond and granting the appeal. It would be a perversion of language to say that this does not carry on its face the assertion that it is the substance of an entry appearing on the "record proper," through which only the court can speak with reference to the matters involved. To require more would be like requiring the statement that a man said so and so to be supplemented with the explanation that he said it with his mouth.

[3] That the statement above quoted shows that a sufficient affidavit for the appeal had been filed is also decided in *State v. Broadus*, supra. See, also, *Elliott v. Delaney*, 217 Mo. 14, 26, 116 S. W. 494; *Hutchinson v. Patterson*, 226 Mo. 174, 181, 126 S. W. 403.

[4] Assuming, then, that it is required by the statute and the rules of this court, made in accordance therewith, that the abstract of the record should show the order of the circuit court granting the appeal, we hold that the order, together with the presumption that the affidavit upon which it was made complied with the statute, is sufficiently shown in this abstract. While we assume, for this purpose alone, that this burden rests upon the appellant, we do not so decide.

[5] While we may not always have been absolutely consistent on this question, we have frequently said in substance, as we said in words in *Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47, "that we would read into the abstract the certified copy of the judgment and order granting the appeal," and in the later case of *Nickey v. Leader*, 235 Mo. 30, 37, 138 S. W. 18, Judge Graves, who wrote the opinion, collected our cases to the same effect, and we then indorsed them. It follows that the appeal is sufficiently shown in the record before us.

[6, 7] II. A more difficult question is whether the bill of exceptions is presented for our consideration. The filing by respondent of his additional abstract, consisting of a certified copy of the entire record proper, demonstrated that the record entries abstracted by the appellant showing the extension of the leave to file the bill of exceptions so as to cover the time of its actual filing, and the order showing that it was signed and filed, were myths existing in the imagination of the attorney who prepared the bill, and not in the record books of the court. Before the case was heard in this court, the appellant presented to us a copy of a written order of Judge Woodside, made in vacation, extending the leave theretofore granted by the court; but this leaves us still without any evidence that the bill of exceptions was ei-

ther signed or filed. After the case was submitted, the appellant attempted to supply the last of these two omissions by a certificate of the clerk that it had been filed in vacation, but we are still in ignorance as to whether or not it was signed by the judge who tried the case. The respondent, during all this time, has stood and still stands on his objections to the abstract as originally presented and has filed no brief upon the merits. While this court may, in its discretion, at a proper time, under proper circumstances and upon proper terms, for good cause shown, permit the amendment of an abstract of the record, after the lapse of the time prescribed in the statutes and rules of the court for its filing, there is nothing in this case to call for the exercise of such discretion. This abstract presents a purely imaginary condition of the record, which the attorney who prepared it had evidently never seen; and the amendments asked, some of the most important of which were not suggested until after the final submission of the case, present an entirely new state of facts. The respondent promptly availed himself of his right to object to the condition as it existed at the time he prepared his case, and to now inject new elements for which he was not called upon to prepare, and has not prepared, would be to punish the diligent for the benefit of those who offer no excuse for their negligence other than that they did not intend to deceive or mislead the court. It follows that the amendments to the abstract must be disallowed. *Everett v. Butler*, 192 Mo. 564, 569, 91 S. W. 890; *Harding v. Bedoll*, 202 Mo. 625, 634, et seq., 100 S. W. 638; *Nickey v. Leader*, 235 Mo. 30, 36, 138 S. W. 18; *Tipton v. Davidson*, 40 Mo. App. loc. cit. 423; *Realty Co. v. Brewing Co.*, 247 Mo. 29, 32, 152 S. W. 31.

[8] We still have the record proper before us, which raises the single question whether or not the judgment rendered is supported by the pleadings. The petition, by which we must judge it, states, in broadest terms, the title of the respondent and asks the court to define and adjudge the title, interest, and estate of the parties in the land. The answer asserts the title of appellant in terms as broad, and asks that it be defined and adjudged. The issue was well framed under the statute. So far as the pleadings are concerned, the whole title was at stake, and the judgment determines it as to both parties. There being no error apparent in the record proper, the judgment will have to be and is affirmed.

PER CURIAM. The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All concur.

## STATE v. RUCKMAN.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

1. ARSON (§ 25\*)—BURNING INSURED PROPERTY—PROSECUTION—CORPORATE CAPACITY OF INSURER.

In a prosecution for arson in the third degree, consisting of burning insured property in violation of Rev. St. 1909, § 4509, it is not necessary to prove that the insurer was a corporation.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 52-54; Dec. Dig. § 25.\*]

2. ARSON (§ 37\*)—BURNING INSURED PROPERTY—EVIDENCE.

In a prosecution for arson in the third degree, evidence held insufficient to sustain a conviction.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71-78; Dec. Dig. § 37.\*]

3. ARSON (§ 37\*)—EVIDENCE—MOTIVE.

In a prosecution for arson in the third degree in burning insured property, evidence of motive is admissible as furnishing a link in the chain of circumstances tending to establish guilt, but mere proof of motive, uncorroborated by other facts and circumstances inconsistent with innocence, is insufficient to establish a prima facie case of guilt.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71-73; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Jefferson County; E. M. Dearing, Judge.

Clarence A. Ruckman was convicted of arson in the third degree, and he appeals. Reversed.

The count of the information upon which defendant was tried charged arson in the third degree, as defined by section 4509, R. S. Missouri 1909. Trial was had in the circuit court of Jefferson county, Mo. Defendant was convicted and his punishment assessed at two years in the penitentiary.

The evidence upon the part of the state tends to show the following facts: On the 25th day of January, 1912, and for some months prior thereto, defendant was engaged in running a pool and billiard hall at De Soto, Mo. About 3 o'clock a. m. on said day, fire was discovered in said pool room.

B. J. Peasley testified that, as he got off a train at the depot in the town of De Soto, he saw the fire break out the front windows of the pool room, and that the blaze shot nearly across the street and looked like oil was burning.

Mr. Herman Hamel, the owner of the building, testified: That defendant occupied the first floor for a pool room and that the second floor was occupied by different offices. The front of the building opened on Main street, and just back of the building was a small warehouse, and in the rear of the warehouse was a back yard, and back of that was the alley. On the north side of the pool room was a building, the lower floor of which was occupied by a clothing store and the upper portion as a family residence. The building on the south side of the pool hall

was used as a dwelling. The pool room had three doors, a front door, one back door into the warehouse, and a side door which entered the pool hall from an outside hallway. Witness first went down to the scene of the fire about 7 o'clock a. m., and, at that time, found that the pool tables and billiard tables were nearly destroyed by fire; that there was some kindling around the legs of the pool tables; and that behind the last pool table was an empty whisky barrel containing some coal oil and a pan. Witness further stated that the scent of coal oil was strong in the building, and that he noticed some oil out in the outside hall, and that the pool room floor was burned out.

A. J. Blair, justice of the peace and fire insurance agent, testified: That on May 1, 1911, he insured defendant's pool tables and fixtures and delivered to defendant an insurance policy in the Providence-Washington Insurance Company, for a term of one year. The total insurance was \$1,300, divided as follows: \$1,150 on four tables, balls, cues, cue racks, cuspidors, and chairs; \$50 on showcases and stock of cigars; \$100 on lighting plant. The policy provided that, in the event of loss, no table was to be valued at more than \$210. Loss, if any, under the policy, was made payable to the Kansas City Billiard Table Manufacturing Company, mortgagee, as their interest might appear. Before issuing the policy of insurance, the witness looked at the property and ascertained the value of the same for the purpose of insurance. That he was at the building for a short time, about 8 o'clock on the morning of the fire, and found the four pool tables badly damaged by the fire and the pool room floor was badly burned and saw the whisky barrel in the pool room. On being asked if he noticed any coal oil around there, he said: I don't know exactly, there was something in a tin can there, and there was something in the barrel with some kindling in there. I suppose there was some water among the coal oil." He further testified that he noticed some coal oil on the wall in the hallway, to the left of the steps leading upstairs; that he saw some kindling under one of the pool tables; that the defendant lived at the Commercial Hotel, which was 80 or 90 feet south of the pool hall; that in the rear of the hotel was an incline runway, leading from the alley to the second floor of the hotel, up which trunks were moved to the sample room on the second floor; that, at the time of the issuing of the insurance, defendant told him that the tables were mortgaged for \$600; that, shortly before the fire, defendant asked witness to find him a buyer for the property; the witness thought defendant made one price of \$400. (This was evidently for the defendant's equity in the property, but the evidence does not so show.)

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
161 S.W.—45

W. A. Welch, chief of the De Soto Fire Department, testified: That he went to the fire and found the front of the room all ablaze and that the flames from the fire shot out about halfway across the street. The fire department put the fire out and found that the floor was burned out and the ceiling broken through in several places; some kindling wood was found in the pool room, stacked up around the pool tables and in rows under the tables. That he smelled coal oil in the building, and that "it seemed to be everywhere." He also found a whisky barrel in the back part of the pool room, and said that the door going from the pool room into the outside hallway was open. That the defendant came to the fire shortly after the fire department arrived, and that witness directed defendant to take hold of one of the nozzles and turn it upon the fire.

James Couch, liveryman, and member of the fire department, attended the fire; had charge of the hose in the rear of the building; saw some pine kindling, split up so as to go into a stove, under the pool tables and around the legs. He did not see any oil, in any part of the building, but testified that the building was so badly burned that there was no oil there, except what was in the barrel.

John Anderson, a driver of a transfer wagon, testified that some time during the last part of December, 1911, he hauled one-half load of kindling for defendant and delivered it at the rear of defendant's place of business; that it was the same kind of kindling that he hauled for many other citizens of the town at that time of year.

A. Rush testified that he was the son of the lady who conducted the Commercial Hotel at De Soto; that defendant lived at the hotel in room 24 on the third floor; that a few days before the fire he cut up some kindling for the defendant and stacked the kindling in the warehouse; that he had never seen a coal oil lamp in the pool room; that he saw some of this kindling under the pool tables after the fire; that the door to the sample room on the second floor of the hotel is supposed to be kept closed; that on the night of the fire he occupied room 23 at the hotel, which room is separated from the room that defendant occupied by the stairway leading down to the second floor; that he heard nothing during the night, until he heard the porter call the defendant and give the fire alarm, and that after he got to the fire he saw the defendant there; that he did not know when defendant went to bed; that the pool room was heated with a coal stove and lighted with gas lights, the gas being supplied by an individual gas plant, the tank of which was in the corner of the pool hall; that the kindling he cut for defendant was for use in the stove, and that there was no attempt to conceal the splitting of the kindling; that defendant had nothing to do with the sample room, but that the sample

room was used for storing canned goods and bedclothes at this time; that there were only two ways to go from the third floor of the hotel to the yard in the rear of the hotel: One way was to go down the front stairs and through the office, the other way was to go down the back steps and through a door leading into the kitchen, and then through a door leading from the kitchen into the back yard, and that the kitchen door was generally locked.

William Spiker, night clerk at the Commercial Hotel, testified: That he was on duty as night clerk on the night of the fire. That about 1 o'clock a. m. defendant came to the hotel and went upstairs to bed. That about 3 o'clock witness went up to defendant's room and knocked on the door. That defendant answered him, and that he told defendant that his pool room was on fire. Witness then went downstairs to the hotel office, and after remaining there about five minutes went back up to defendant's room and kicked on the door. That defendant got up and came to the door, and witness told him that his pool room was on fire, and that defendant said: "How in the deuce did it get on fire this time of night?" That thereupon defendant put on his shoes and trousers and then his overcoat and hat and went to the fire. Witness further testified that he was awake and on watch, at the hotel, from the time that defendant went to bed until the fire broke out, and was positive in his statement that defendant did not leave the hotel, after he came in at 1 o'clock, until he called him at 3 o'clock; that if defendant had gone out of the building by going through the sample room he thought he could have heard him.

D. L. Rouggy, a fire insurance agent, testified that he was in the building and found the head of the above-mentioned whisky barrel in the cellar, under the pool room.

C. K. Perdue, manager of the Commercial Hotel, testified that a person could go through the old sample room and down the incline at the rear of the hotel into the alley; that the door leading from the back stairs into the kitchen was fastened with a common door lock; that the door leading from the kitchen into the back yard was fastened with a bolt on the inside; that there was nothing to indicate that the door leading from the sample room out to the incline had been opened that night.

F. M. Polk, saloon keeper, identified the empty whisky barrel, which was found in the pool room, as one which he had missed from his place of business about a month before.

Pat Ennis testified: That he was in defendant's pool room the night of the fire, about 11:30, when defendant "closed up," and that defendant, together with witness and two or three other persons, went to a nearby saloon, and from there to a restaurant across from the depot, and that the crowd then went over to the depot, and that they

separated about 1 o'clock a. m.; the respective members of the party going in the directions of their homes, the defendant going toward the hotel. That he did not see the empty whisky barrel in the pool room when defendant closed up.

Jake Englehart testified that he was conducting a pool room in Crystal City, and that some time before the fire defendant came to Crystal City, upon the invitation of witness, and witness offered defendant \$800 for the pool room, but defendant refused to take it, saying that he wanted more.

Charley Burrus testified that he was engaged in running a pool hall at De Soto, and that about two months before the fire defendant offered to sell him his equity in the place for \$700, saying that there was a mortgage against it for \$500 and that would make the total selling price \$1,200.

Robert Filkins testified that he was in defendant's pool room when it was closed for the night, about 11:30, and that he did not see the whisky barrel in the pool room at that time.

Ralph Carson testified that the whisky barrel was not in the pool room on the evening before the fire.

George Mahn, a real estate dealer, testified that in June, 1911, defendant wanted to borrow some money from him to make some monthly payment on the pool tables, saying that business was dull at that time and that he had not made enough to make his monthly payment, but witness would not make the loan.

Ed. Alderson, city marshal of De Soto, testified that he arrested defendant at 2 p. m., on the day of the fire, and that upon being arrested defendant said: "That is H——. I guess I am in for it now." And that a little later defendant passed Charley Perdue, and said, "Charley, by G——, they've got me." This was all the evidence introduced by the state.

The defendant then introduced the following testimony: Frank Moon, night marshal of the city of De Soto, said that he saw the defendant, with several other fellows, at the restaurant and depot, on the night of the fire, and that about five minutes before 1 o'clock he met the defendant about one-half block from, and going toward, the Commercial Hotel; that he saw the fire about the time that it broke out, at 3 a. m., and ran across the street to the restaurant and called the fire department, and then ran up to the pool hall and looked to see if there was any one around the building, and then went to the hotel and saw the night clerk sitting behind the cigar case, which was about the center of the office in the hotel and just beneath the sample room on the second floor. Witness told the night clerk to go up and call the defendant; that the night clerk first tried to get central, but, being unable to do so, immediately ran upstairs to arouse defendant.

Harry Maupin testified that he was one of the fellows in defendant's place of business at closing time, and that the defendant and the others went from the pool hall to the saloon, then to the depot and restaurant. Defendant took the stand in his own behalf and testified that since April, 1912, he had been traveling for the Kansas City Billiard Table Manufacturing Company; denied setting fire to the pool tables; and denied having any connection with the cause of the fire; and said that he had no knowledge of the fire until the night clerk knocked on his door; that he went to bed at 1 o'clock and never left his room until the night clerk called him at 3 o'clock. Defendant was not cross-examined.

That was all the evidence in the case and defendant renewed his request for a peremptory instruction, which the court overruled, and to which ruling defendant saved an exception.

H. B. Irwin, of De Soto, and S. G. Nipper, of Potosi, for appellant. John T. Barker, Atty. Gen., and Wm. M. Fitch, Asst. Atty. Gen., for the State.

WILLIAMS, C. (after stating the facts as above). [1] I. It is contended that the evidence fails to prove that the Providence-Washington Insurance Company was a corporation and that it was necessary for the state to prove that fact. In prosecutions for arson in the third degree as defined by section 4509, R. S. 1909, it is not necessary to prove that the insurer is a corporation. *State v. Steinkraus*, 244 Mo. 152, 148 S. W. 877, and cases therein cited.

[2] II. It is next contended that the evidence is not sufficient to sustain the conviction. Because of the fact that this is the important question involved in this appeal, we have, in the foregoing statement of facts, set forth the evidence more in detail than would be necessary were the insufficiency of the evidence not involved.

The testimony, as to the odor of coal oil in the burning premises and the arrangement of the kindling about the pool tables, would tend to show that the fire was caused by a criminal agency rather than by natural or accidental causes.

The evidence also tends to show that, at the time of the fire, the insurance upon the pool tables was in excess of the price at which defendant had recently offered to sell. This was some evidence of a motive upon the part of the defendant to do the criminal act. There was also some evidence that, "if" defendant had gone with his shoes off, he might have been able to go from his room on the third floor of the hotel down the stairway to the second floor and out through the sample room thereon located, and from there down the incline to the alley, in the rear of the hotel, without being detected by the night clerk of the hotel. This, at most,

would only show a possible opportunity the defendant had to commit the crime without being detected. But is the mere fact that defendant had a motive for causing the fire, and a possible opportunity to have carried out such a motive, a sufficient showing to warrant the jury in finding that, in fact, he did carry out such motive and cause said fire?

[3] We think that such a showing is not sufficient. Evidence of motive is admissible, as furnishing one link in the chain of circumstances tending to establish guilt; but mere showing of motive, uncorroborated by other facts and circumstances inconsistent with innocence, is not sufficient *prima facie* showing to authorize the submission of defendant's guilt to the jury. It would be a rather unjust and dangerous rule that held that the mere showing of motive and opportunity would overcome the presumption of defendant's innocence and establish, beyond a reasonable doubt, his participation in the criminal act. Aside from the showing of a possible motive, there is no other fact or circumstance which, in any way, points towards defendant's guilt. On the other hand, the state's own evidence tends to show that the defendant did not cause the fire. The evidence shows that at about 3 o'clock a. m. the flames burst out, suddenly, indicating the presence of oil and therefore a quick fire; that defendant left the pool hall at closing time, in company with some of the state's witnesses, and, after an hour or two of time, all of which is fully accounted for, the defendant entered the hotel at 1 o'clock a. m., and did not again leave the hotel until he was awakened by the night clerk at 3 a. m. and informed that his pool room was on fire.

It may be admitted that the finger of suspicion might point to the defendant, but, as was well said, in the case of *State v. Jones*, 106 Mo. 302, 17 S. W. 366: "Mere suspicion, however strong, will not supply the place of evidence, when life or liberty is at stake." Furthermore: "The rule in criminal cases unqualifiedly is that the burden of proof never rests on the accused to show his innocence or to disprove the facts necessary to establish crime with which he is charged. The defendant's presence at and his participation in the corpus delicti are affirmative material facts that the prosecution must show to sustain a conviction." *Wharton's Criminal Evidence* (10th Ed.) § 160a. In discussing the weight to be given evidence showing a motive, the same learned author says: "The presence or absence of motive in cases depending wholly on circumstantial evidence is not a factor that determines either the guilt or the innocence of the accused. Proof of motive does not establish guilt, nor want of it establish innocence." *Id.*, § 878.

In the case of *State v. Morney*, 196 Mo. 43,

93 S. W. 1117, in discussing the sufficiency of circumstantial evidence to sustain a conviction of arson, the court, speaking through Burgess, P. J., said: "It matters not that there was no evidence to show that some other person than defendant committed the crime. That there was opportunity for some other to do so cannot be gainsaid. Taking all the facts in evidence, they do not even make out a *prima facie* case against the defendant. He was not shown to have been guilty of any incriminating act, and it requires stronger and more cogent circumstantial evidence of his guilt than was adduced upon the trial in order to maintain the judgment. \* \* \* Where a chain of circumstances leads up to and establishes a state of facts inconsistent with any theory other than the guilt of the accused, such evidence is entitled to as much weight as any other kind of evidence, but the chain, as it were, must be unbroken, and the facts and circumstances disclosed and relied upon must be irreconcilable with the innocence of the accused in order to justify his conviction. In this case there was an entire absence of one important link in the chain of evidence; that is, there was no evidence that the defendant was present at the building at the time it was fired. At most, the evidence adduced only raised a suspicion against the defendant, and under such circumstances no conviction for crime should be allowed to stand."

All the facts and circumstances shown by the state's evidence could exist and yet the defendant be innocent of any crime. The evidence as a whole leaves too much room for doubt and mistake and does not possess sufficient proof of guilt to authorize the state to deprive defendant of his liberty.

If upon another trial the state is not able to produce additional evidence of defendant's guilt, the trial court should direct an acquittal.

The judgment is reversed, and the cause remanded.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the Judges concur.

#### GRIFFITH v. WITTEN et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. WILLS (§ 104\*)—VALIDITY—INDEFINITE WILL.

A will which is so vague that the court cannot, by reasonable rules of construction, determine testator's intent is void.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 242; Dec. Dig. § 104.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. WILLS (§ 104\*)—CONSTRUCTION—VOID FOR UNCERTAINTY.**

A will recited: "Knowing and Bieve to Be in my Rite mind knowing the codition I am in to save trubel and Expence I S. make my first and Last Will and Tesament. \* \* \* I Will or Bequeth to my sun D. \$1000 And I \* \* \* Will to or Bequeth to my Daughter O. \* \* \* \$1000.00 And I \* \* \* Will or Bequeth to my sun Z. \* \* \* \$1000.00 to Have at my Death after all Debts is paid and funeral Expenses is paid and Toom Stone is Put to My grave My household goods to Be sold and Personal Propty to Be sold at Public sale horses wagon Bugy harness and some farm Impliments Plows and tools and all grain on hand and hay And the farm In D. County Missouri to Be Rented For the term or 2 years to give time to Be sold and the G. County Land to Be Rented for 2 years to give Time to Be Sold After the 3 children gets their shers and All Expences is Paid I \* \* \* want or Will or Bequeth an Equal Shar to Each Grand Child Living who Names is," as stated, "these all to have an Equal Shear of the Remaining Sum I apoint G. to Excuit this Will this is my Last Will and Testament of S. Z. to have all my cloths these children is to have their Shear as they Becom of Age Zach to have the pictures," etc. followed by provisions giving the Bible and other small items. *Held*, that the will was not void for uncertainty, but was susceptible of construction, and contemplated the disposition of all of testator's property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 242; Dec. Dig. § 104.\*]

**3. CONVERSION (§ 15\*)—DIRECTION IN WILL.**

Testator intended that all of his property be sold except the small individual bequests, and reduced to cash, and that the remainder, after paying the specified legacies of \$1,000 to each of his three children, should be equally divided between the grandchildren named, though the word "children" was once used instead of "grandchildren."

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.\*]

**4. WILLS (§ 440\*)—CONSTRUCTION—TESTATOR'S INTENT.**

The principal rule in construing wills is to ascertain testator's intent from the whole instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.\*]

**5. WILLS (§ 470\*)—CONSTRUCTION—CONSTRUING AS WHOLE.**

Testator's intention must be ascertained from the four corners of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 988; Dec. Dig. § 470.\*]

**6. WILLS (§ 488\*)—CONSTRUCTION—EXPLAINING AMBIGUITIES.**

If a will is so ambiguous as to make it difficult to ascertain testator's intent from its language, evidence aliunde may be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.\*]

**7. WILLS (§ 449\*)—CONSTRUCTION—PRESUMPTIONS.**

It is presumed that testator intended to dispose of his entire estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.\*]

**8. CONVERSION (§ 22\*)—CONSTRUCTION OF WILL—RECONVERSION.**

If testator clearly intended that all of his estate be converted into cash and distributed under the will, equity will consider the real

estate as money, but it may be reconverted into land at the election of beneficiaries.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66-72; Dec. Dig. § 22.\*]

**9. CONVERSION (§§ 15, 19\*)—TIME OF CONVERSION.**

The equitable conversion of testator's realty into money continues until, by the beneficiary's election, there has been a reconversion, which may take place at any time before the actual conversion; the constructive or equitable conversion taking place as of the date of the will or testator's death, and the actual conversion taking place as of the date of the sale of the realty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28-37, 45-52, 55; Dec. Dig. §§ 15, 19.\*]

**10. CONVERSION (§ 22\*)—RECONVERSION—NECESSITY OF ELECTION.**

While in case of adult beneficiaries there must be an election to reconvert the proceeds of land, directed to be sold and distributed under the will, into realty, a court of equity may make such election for infant beneficiaries if the infant's best interest requires it.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66-72; Dec. Dig. § 22.\*]

Appeal from Circuit Court, Davless County; Arch. B. Davis, Judge.

Action by Richard Griffith, Executor, against Orpha Witten, Laura L. Shuler, and others for the construction of a will. From a judgment as stated, Laura L. Shuler appeals. Affirmed.

Richard G. Griffith the duly qualified executor of the last will and testament of Jackson Shuler, deceased, brought this action in the circuit court of Davless county, to have construed the will of the said Jackson Shuler. The will was drawn by the deceased and is not elegant either in diction or spelling. It reads:

**"Will of Jackson Shuler His Will.**

"February the 20 1908 knowing and Bieve to Be in my Rite mind knowing the codition I am in to save trubel and Expence I Jackson Shuler make by first and Last Will and Tesament knowing myself to Be sound Mind I Will or Bequeth to my sun David Shuler One Thousand Dollars \$1000.00 And I Jackson Shuler Will to or Bequeth to my Daughter Orpha Witten One thousand Dollars \$1000.00 And I Jackson Shuler Will or Bequeth to my sun Zachariah Shuler One thousand Dollars \$1000.00 to Have at my Death after all Debts- is paid and funeral Expenses is paid and Toom Stone is Put to My grave My household goods to Be sold and Personal Propty to Be sold at Public sale horses wagon Bugy harness and some farm Impliments Plows and tools and all grain on hand and hay And the farm In Daviss County Missouri to Be Rented For the term or 2 years to give time to Be sold and the Grundy County Land to Be Rented for 2 years to give Time to Be Sold After the 3 children gets their shers and All Expences is Paid I Jackson Shuler want or Will

or Bequeth an Equal Shar to Each Grand Child Living who Names is Letha Witten and Heral J. Witten and Alford Witten and Hobert Shuler and William J. Shuler and Thelma Shuler and Irean Shuler and Doris Shuler these all to have an Equal Shear of the Remaining Sum I Apoint R. G. Griffith to Exicut this Will this is my Last Will and Testament of Jackson Shuler Zack to have all my cloths these children is to have their Shear as they Becom of Age Zack to have the Pictures and all the Books and Bible and the Little Bible Dave a Bed and Zack a Bed and Orpha a Bed and the Rest of things to be sold at Public sale This I sign knowing What I Sine and Am in my Rite Mind and Last Will and Testament. Jackson Shuler.

"This Will Directs that the Exicuter gives a Bond in which case he mus comply with the Pervisions of the Will and Give the Bond Before he is qualified to act as Exicutor Also the Timber land to Be sold.

"Jackson Shuler.  
"Nathan Davisson.  
"Eugene Ham."

The petition of the plaintiff sought light from the trial court upon the following alleged uncertain and indefinite parts of the will: "That said will is vague, uncertain and indefinite in this: (1) As to whether or not the will requires the land belonging to said Jackson Shuler at the time of his death to be sold by the executor after two years, or at any other time, and the proceeds distributed. (2) As to whether or not the grandchildren mentioned in the will are to receive all of the personal property after the payment of the legacies of \$1,000 each to his three children named in the will. (3) As to whether or not it is the intent of said will to give to said grandchildren, each the sum of \$1,000 out of the personal property. (4) As to whether or not, the will requires the sale of all the land by the executor after two years, and the distribution of the proceeds of sale among the children and grandchildren of said deceased, in any ratio or proportion. (5) As to whether or not the grandchildren mentioned in the will participate to any extent in the real estate or proceeds thereof, owned by the deceased at the time of his death. (6) As to whether or not said grandchildren participated in any part of the estate of said deceased, except personal property, and that only after the payment of the legacies of \$1,000 each to Orpha Witten, David Shuler, and Zachariah Shuler, and after payment, out of said personal property, for expenses of last sickness, tombstone, debts, and costs of administration. This plaintiff further says that a dispute has arisen between the heirs and legatees under said will as to the construction thereof in the particulars above set forth, and that a further question has been raised as to the right of this executor to distribute and pay to the defendant Laura L. Shuler, the widow of

Davis Shuler, deceased, the share, if any, or any part thereof, of said David Shuler in said estate; that the defendants are legatees and beneficiaries under said will, and are the sole persons named therein as such; that they constitute all of the children and grandchildren, heirs, devisees, and legatees of said Jackson Shuler, deceased; that by reason of the vague, indefinite, and uncertain provisions of said will, and of the difference and disputes that have arisen concerning the consideration thereon, this plaintiff cannot proceed with the administration of said estate, and the distribution of the assets thereof, without the construction of said will and the guidance and direction of this court."

Under the evidence it appears that this will was duly probated, and the inventory of the estate shows personal property to the amount of \$8,000. Outside of this formal proof the case was submitted upon the will and the following admissions: "It is admitted that Jackson Shuler died on April 5, 1908. It is admitted that Richard C. Griffith is the duly named, appointed, qualified, and acting executor of the will of Jackson Shuler, deceased. It is agreed that at the time of his death Jackson Shuler was the owner of 167 acres, more or less, in Daviess county, Mo., described as follows: The E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 11, township 61, range 26, and the W.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 11, township 61, range 26; in Daviess county, Mo., also a strip 10 rods wide, commencing in the southwest corner of the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 11, township 61, range 26, and running north far enough to make 7 acres; in all 167 acres, more or less, in Daviess county; and the following described land in Grundy county, Mo.: twenty-four acres situated in the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 15, township 61, range 25. Timber land in Grundy county, in section 8, township 61, range 25, containing 14.51 acres, more or less. It is admitted that at the time of his death, Jackson Shuler was possessed of personal property of the value of between \$7,000 and \$8,000. It is admitted that the wife of Jackson Shuler was dead at the time of his death; that he left surviving him three children, Orpha Witten, a daughter, David Shuler and Zachariah Shuler, his two sons. It is admitted that David Shuler died after the death of his father, and that David Shuler had no children. It is admitted that Orpha Witten was the wife of Harry Witten, and had three children only; that is to say, Letha Witten, Harold J. Witten, and Alfred Witten. It is admitted that Zachariah Shuler had five children only; that is to say, Hobart Shuler, William J. Shuler, Thelma Shuler, Irene Shuler, and Doris M. Shuler; and it is further admitted that the name appearing to be Olean or Irean in the will is identical with Irene Shuler, and that thereby the testator intended to name his grandchild, Irene Shuler. It is admitted that Jackson Shuler left surviving him no other children or de-

scendants of a deceased child; that the children of Orpha Witten and Zachariah Shuler, aforesaid, were and are his only grandchildren. It is admitted that Letha Witten, Harold J. Witten, Alfred Witten, Hobart Shuler, William J. Shuler, Thelma Shuler, Irene Shuler, and Doris A. Shuler are all minors, under legal age; that all parties, plaintiff and defendants, in this case live in Daviess, Harrison, and Grundy counties, Mo. It is admitted that David Shuler died without issue, leaving a will, by the terms of which all of his property passes to his wife, Laura L. Shuler. It is admitted that a controversy has arisen between the legatees and executor and between the legatees, as between themselves, as to the construction of this will. It is admitted that the Heral J. Witten, as written in the will of Jackson Shuler, means and was intended for Harold J. Witten; and it is admitted that the name Alford Witten, written in the will, was intended for and ought to be Alfred Witten, and that the name Hobert Shuler was intended to be and should be Hobart Shuler. It is admitted that where the name Doris M. Shuler appears in the will, it was intended to be and ought to be Doris A. Shuler. It is admitted that at the time of making the will in evidence Jackson Shuler was on equally friendly terms with all his children and grandchildren named as beneficiaries in said will."

By its judgment the circuit court thus construed said will:

"The court finds that said Jackson Shuler intended by his last will and testament to and that he did bequeath to David Shuler, his son, \$1,000 and one bed; that he intended to and did bequeath to Orpha L. Witten, his daughter, \$1,000 and one bed; that he intended to and did bequeath to Zachariah Shuler \$1,000 and all the clothing of said Jackson Shuler and his pictures and his books and two Bibles and one bed; that all the rest, residue, and remainder of his personal property after payments of debts, funeral expenses, and a monument or tombstone for his grave and the cost of administration and the legacies aforesaid was by said Jackson Shuler intended to be bequeathed, and he did by said will bequeath such rest, residue, and remainder to his grandchildren, Letha Witten, Harold J. Witten, Alfred Witten, Hobert Shuler, William J. Shuler, share and share alike, that is to say, one-eighth to each.

"The court further finds that the said last will and testament of said Jackson Shuler, deceased, does not authorize the real estate belonging to him at the time of his death to be sold by the executor; that said executor has no power under said will to sell the same; that said Jackson Shuler intended by his said will and testament and did thereby devise all the real estate of which he died seised to his said grandchildren, to wit, Letha

Witten, Harold J. Witten, Alfred Witten, Hobert Shuler, William J. Shuler, Thelma Shuler, Irene Shuler, and Doris M. Shuler, share and share alike, that is to say, one-eighth to each of them.

"It is therefore ordered, adjudged, and decreed by the court that said last will and testament of said Jackson Shuler, deceased, be and the same is hereby construed, defined, and adjudged to be in accordance with the filings aforesaid; that David Shuler, son of said Jackson Shuler, take under said will the legacy therein provided of \$1,000 and one bed; that his daughter Orpha L. Witten take under said will the legacy therein provided for her of \$1,000 and one bed; that his son Zachariah Shuler take under said will the legacy therein provided of \$1,000 and all the clothing of said Jackson Shuler and his pictures and books and two Bibles and one bed; that Richard G. Griffith, executor of the last will and testament, is ordered and directed by the court to pay to said David Shuler, Orpha L. Witten, and Zachariah Shuler or their legal heirs or legal representatives the legacies aforesaid.

"It is further ordered by the court that the debts of said Jackson Shuler, if any, his funeral expenses, and a monument or tombstone for his grave, and the costs of administration of his estate, shall, in addition to the legacies aforesaid, be paid and defrayed out of the personal property belonging to said estate, if sufficient, thereto, by said executor, and that the rest, residue, and remainder of said personal property after having paid the debts, funeral expenses, for a monument or tombstone for the grave of said Jackson Shuler, and the cost of administration of his estate and the legacies aforesaid, shall by said executor be paid to and distributed among the grandchildren of said Jackson Shuler, deceased, to wit, Hobart Shuler, William J. Shuler, Thelma Shuler, Irene Shuler, Doris M. Shuler, Harold J. Witten, Alfred Witten, and Letha Witten, share and share alike; that is to say, one-eighth to each. And it is further ordered by the court that upon the expiration of two years from the date of the death of said Jackson Shuler he shall turn over all of the real estate of which said Jackson Shuler died seised to the grandchildren of said Jackson Shuler, deceased, to wit, Letha Witten, Harold J. Witten, Alfred Witten, Hobert Shuler, William J. Shuler, Thelma Shuler, Irene Shuler, and Doris M. Shuler, who shall take said real estate share and share alike, that is to say, one-eighth to each, and it is further ordered by the court that the cost of this proceeding be taxed against and paid by the estate of said Jackson Shuler, deceased."

All of the defendants seem satisfied with the judgment nisi except Laura L. Shuler, the widow of David Shuler, who has appealed. She filed a separate answer, but its terms need not be set out further than to

say that it sufficiently raises the questions urged by her in this court. This states the case.

John C. Leopard and Alexander & Alexander, all of Gallatin, for appellant. A. G. Knight, of Trenton, for respondents Shuler and others.

GRAVES, J. (after stating the facts as above). I. Laura L. Shuler, the appealing defendant, is the wife and devisee by last will of the son David Shuler, who died after the father, Jackson Shuler. She contends (1) that the purported will is so dense, dark, and vague as not to be susceptible of construction, and that by reason of this fact it is void, and (2) that if susceptible of construction, it should be so construed as to leave Jackson Shuler die intestate as to his real estate. These are the two principal contentions raised by her answer, and upon that pleading and the admitted facts she seeks our judgment.

[1,2] If, as a fact, a paper writing purporting to be the last will and testament of a person is so vague, indefinite, and uncertain that a court cannot, by reasonable rules of construction, determine the real intent and purpose of the deceased, then such paper writing should be declared void. The legal proposition urged by appellant this court has and will recognize, but a sufficient answer here is that we think this will susceptible of construction. It reveals the illiteracy of the writer, but in it all we think there is a well-defined purpose expressed, and, more, that such purpose contemplated the disposition of all his property. We, therefore, decline to follow the lead of appealing defendant to declare the paper writing void.

[3-6] II. Now going to the instrument itself, what was the intent of the testator? The cardinal principle of will construction is to get the real intent and purposes of the testator. These must be gathered from the instrument itself, if such be possible, but in so gathering the intent and purpose of the testator the whole instrument must be considered. It must, in other words, be considered from its four corners. Of course, ambiguity appearing, if there is trouble in getting at the intent from the instrument itself, then pertinent matters aliunde may be considered in determining the intent. These fixed rules of construction cannot be again raised, and citation of cases would be but to incumber, rather than to elucidate, an opinion.

[7] Reverting to the instrument itself. It is true there is not a punctuation mark throughout, yet there is a rather mixed use of capital letters, which gives us some idea of the beginning and ending of sentences. From the instrument it is clear to our minds that the purpose of the testator was to dispose of all his property, both real and personal. We are further impressed with the idea that the testator had in mind the sale of

his real estate, although there are no express words directing the executor to sell. The instrument says: "And the farm in Daviss County Missouri to be Rented For the term of 2 years to give time to be sold and the Grundy County Land to Be Rented for 2 years to give Time to Be Sold." Again at the close of the will are the words "the Timber land to Be sold." The admitted facts show that there were farm lands in both Grundy and Daviess counties, and that there was also a small tract of timber land. Taking these expressions in the will as indicative of a purpose, it appears to us that the idea of the testator was to reduce all his belongings, except the small individual bequests, to cash, and then, after paying the specified legacies of \$1,000 to each of his three children, and the expenses of the administration, debts, and tombstone cost, the residue should be equally divided between the eight grandchildren named, such grandchildren to have their respective shares as they reached their maturity. It is true that he used the word "children" in one place, where he should have said grandchildren, but the entire context shows that he was speaking of grandchildren. Not only does the context so speak, but aliunde it appears that there were none of his own children under age, and he must have used the word "children" for grandchildren, having reference by the use of such words solely to the ages of the beneficiaries, rather than the exact relationship to him. If, as we think, the purpose of the testator was to dispose of his entire estate, then does the judgment nisi sufficiently effectuate that purpose, and along the lines of distribution above indicated? We think so. That testator had in view the disposition of his whole estate is evident from his expressed idea that there should be a sale of it at the end of the two years of rental period. If he contemplated the sale of his lands and personal property, and thus the reduction of his entire estate to cash, it then becomes evident that he only desired his own children to have the sum of \$1,000 each out of his estate, leaving the residue of the entire estate to be divided among his eight grandchildren. We cannot agree with counsel for appellant when they say that there is nothing upon the face of this will to indicate the intent of the testator to dispose of his entire estate. Why talk about selling the land at all, if there was no purpose to dispose of the land by the will? We are not even driven to the principle which usually accompanies wills; i. e., that it is presumed in the construction of wills that the testator intended to dispose of his entire estate. *Tebrow v. Dougherty*, 205 Mo. loc. cit. 321, 103 S. W. 985, and cases cited therein. In the instrument before us, awkwardly drawn as it is, we have clearly expressed ideas of disposing of the entire estate, and for the purpose of the entire estate, and for the purpose, as expressed in the will, "to save trubel and

Expende." The spelling and capitalization may be bad, but the ideas are good.

[8] III. The trial court held that there was no power in the executor to sell real estate. There is no express power given, although the intent of the testator is clear. In such case was the trial court right in decreeing the real estate to belong to the grandchildren? We are inclined to the view that this part of the decree can be upheld upon the doctrine of equitable conversion. In other words, if it is clear that the testator intended that all his estate be converted into cash and then distributed under the will, then in equity the real estate will be considered as cash for the purpose of the will, and reconverted into land at the option or election of the beneficiaries. *Nall v. Nall*, 243 Mo. loc. cit. 256, 257, 147 S. W. 1006.

In *Harris v. Ingalls*, 74 N. H. 342, 68 Atl. loc. cit. 36, it is said: "If he understood his order to the executors impliedly imposed upon them the duty of converting his real estate into money as a step necessarily to be taken in dividing the property into four equal parts, the order with the implied power of sale operated in equity to convert the property from realty to personalty (*Perkins v. Coughlan*, 148 Mass. 30, 18 N. E. 600; *Salisbury v. Slade*, 160 N. Y. 278, 288, 54 N. E. 741, and authorities cited; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. 413), and the use of the word 'bequeath' was technically correct." And in the same case, at page 343 of 74 N. H., at page 37 of 68 Atl., it is further said: "Upon all the facts now presented, it appears reasonably clear that the testator intended, by the provisions of the will, to impose upon the executors the duty of converting the residue of the property, real, personal, and mixed, into money as a necessary incident of its division into four equal parts, and the duty of distributing the parts among the legatees as set forth in the residuary clause of the will; and the plaintiffs are so advised. As was said in the former opinion, if the legatees all prefer to take the real estate and hold it in common, and so elect, the executors will not violate their duty by allowing the legatees to so take the property. Indeed, if the legatees are all sui juris, it would seem that they have the right to elect to reconvert the property to real estate. *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320; *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925; *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495; *Lash v. Lash*, 209 Ill. 595, 70 N. E. 1049; *Boland v. Tiernay*, 118 Iowa, 59, 91 N. W. 836; *Bank of Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *Pom. Eq. Jur. par. 1175*; 1 Sto. Eq. Jur. par. 798." This *Harris Case* in some respects is very much like the case at bar. In the case at bar there is a direction to pay each of the children \$1,000, but these bequests are not restricted

to the sale of the personal property. Under this will, had the personal property proven insufficient, there can be no question that such legacies could have been paid out of the real estate, and this is an additional circumstance tending to show an intent on the part of the testator to have his real estate sold, but only a slight circumstance when we go to the proof aliunde as to the value of the personal estate. But, going back to the doctrine of "equitable conversion" and "reconversion by election" it is sufficient to say that the facts of this case bring the decree of the chancellor below well within the limits of the rule as to "equitable conversion" and "reconversion by election" as discussed and held in *Nall v. Nall*, supra. If, as we hold, the will contemplated the sale of the real estate, then there was a conversion in equity of the land into money at the death of the testator.

In the case of *Chick v. Ives*, 2 Neb. (Unof.) 888, 90 N. W. loc. cit. 754, it is said: "It seems clear that the will, by a fair construction of its terms, and every implication, worked an equitable conversion of the real estate of the testator into money. *Clark v. Clark* [46 S. C. 230] 24 S. E. 202, 57 Am. St. Rep. 675; *Farmer v. Spell*, 11 Rich. Eq. [S. C.] 541; *Moore v. Davidson*, 22 S. C. 94; *Jaudon v. Ducker*, 27 S. C. 295, 3 S. E. 465; *Penfield v. Tower* [1 N. D. 216] 46 N. W. 413; *Dodge v. Williams*, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Chandler's Appeal*, 34 Wis. 505; *Dodge v. Pond*, 23 N. Y. 69; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303; 1 *Pom. Eq. Jur. p. 413*. The learned judge of the district court was therefore mistaken in his construction of the will, and his view of the law to be applied to its provisions. We, therefore, hold that under the will in question there was an equitable conversion of the testator's real estate into money at the time of his death." The will under construction in this case, like the case at bar, contained no express power or direction to sell, but left the intent to be gathered from the context. It will be observed the court held the equitable conversion to have been of the date of the testator's death.

In *Becker v. Chester*, 115 Wis. 116, 91 N. W. loc. cit. 96, the Wisconsin court thus puts it: "The general principles to be satisfied in determining whether equitable conversion of personal property into realty or realty into personalty was wrong in any given case are too well understood to call for any extensive discussion of them. Equity deems that done which ought to be done. Therefore, if a testator, in a valid testamentary way, unmistakably directs, expressly or by unmistakable implication that his real estate shall be treated in the administration of his estate as personalty, equity will deem that purpose impressed upon the property immediately upon the taking effect of the will, and rules regarding personal property will govern." To

like effect are *Lash v. Lash*, 209 Ill. 595, 70 N. E. 1049, and *Starr v. Willoughby*, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623.

[9] The "equitable conversion" of the real estate into money continues until such time as there is an actual conversion, or until by election there has been a "reconversion." This reconversion may take place at any time prior to the actual conversion. The constructive conversion or "equitable conversion" is as of date of the will or death of testator; the actual conversion is as of the date of the sale of the real estate. *Nall v. Nall*, supra, and cases therein reviewed.

[10] As stated in the *Nall* Case the reconversion may take place at any time during the period of constructive conversion, and prior to actual conversion. In the case of adults there must be an election, but this election may come at any time before actual conversion. In the case of infants, as here, the court of equity may make the election for them, if the necessities of the case so require it, and the interest of the minors would thereby be best subserved. In the instant case the real beneficiaries are the eight minors. Under the will and the showing made in this case, they would be entitled to all the proceeds of this land, if it were sold. Under such facts the trial court had the power to elect for them to reconvert the property into land and decree that they so hold it. Upon this theory of the law the judgment nisi is correct.

Let the judgment be affirmed. All concur.

#### FITZPATRICK v. GARVER et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. EJECTMENT (§§ 16, 18\*)—RIGHT OF ACTION—PRIOR POSSESSION AND OUSTER.

Under Rev. St. 1909, § 2382, providing that ejectment may be maintained by a plaintiff legally entitled to possession, and section 2385, providing that such action shall be brought against the person in possession of the premises claimed, prior possession by plaintiff and ouster by defendant are not prerequisites to the right to maintain ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41, 65-73; Dec. Dig. §§ 16, 18.\*]

#### 2. EJECTMENT (§§ 65, 66\*)—PETITION—SUFFICIENCY—"WITHHOLD."

In view of Rev. St. 1909, § 2388, requiring that ejectment shall be conducted as other civil actions, except as otherwise provided, and section 1794, requiring the petition in civil actions to contain a plain and concise statement of the facts relied on, and under section 2387, providing that it shall be sufficient for the petition in ejectment to aver that on a stated day plaintiff was entitled to possession and that defendant afterwards on a stated day entered into such premises and unlawfully withholds possession of same from plaintiff, a petition, stating that plaintiff on a certain day was the owner of the premises and entitled to possession of the same, and, being so entitled, defendant afterwards on a stated day unlawfully withholds from plaintiff the possession, was not in-

sufficient as against an objection that it failed to state that on the very day the suit was filed plaintiff was entitled to possession, and defendants were then unlawfully withholding said possession from plaintiff; the word "withholds," as used in the petition implying that defendant is retaining in his own possession that which plaintiff claims.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 165-174, 175-179; Dec. Dig. §§ 65, 66.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7497.]

#### 3. APPEAL AND ERROR (§ 193\*)—OBJECTION TO DEFECTIVE PLEADING—WAIVER.

Under Rev. St. 1909, § 2119, cls. 8, 9, 14, providing that a judgment shall not be reversed on account of want of any allegations in the petition for omission of which a demurrer could have been sustained, or for want of any allegation without proving which the triers ought not to have been given the verdict, or for any other default of the parties by which neither party is prejudiced, where an objection that the petition in ejectment defectively alleged that defendant was retaining possession, was not called to the court's attention by demurrer or by objection to the entry of judgment, so that the defect could be remedied by amendment, defendants could not present such objection on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.\*]

Appeal from Circuit Court, Livingston County; Arch. B. Davis, Judge.

Action by William A. Fitzpatrick against William L. Garver and another. From judgment for plaintiff, defendant Catherine H. Garver appeals. Affirmed.

This suit was begun in the circuit court for Livingston county by the filing, on March 13, 1909, of the petition, which, omitting the signature, is as follows: "Plaintiff states that on the 26th day of January, 1909, he was the owner of and entitled to the possession of that part of block 8 of the original (Orin Garvin's) survey of the city of Chillicothe, Mo., beginning 52 feet west of the southeast corner of said block, thence west 53 feet to the property of Carrie Shirley; thence north 141 feet; thence east 52 feet; thence south 141 feet to the place of beginning, being the north side of Cooper street—and being so entitled to the possession thereof, the defendants afterwards, on the 27th day of January, 1909, unlawfully withholds from plaintiff the possession of said premises to his damage, in the sum of \$50. Plaintiff states that the monthly rents of said premises is \$16.66% per month. Wherefore, he prays judgment for the possession of said premises above described, and for \$50 damage, and for the monthly rents from the 27th day of January, 1909, to the date that possession is given to him, and for his costs in this behalf expended." The defendant Catherine H. Garver alone filed answer, which was a general denial. The case went to trial, and upon the pleadings and evidence judgment for plaintiff and against both defendants was entered, from which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this appeal is taken by Catherine H. Garver. The record proper alone is brought here for review upon the sufficiency of the petition to sustain the judgment. It will be noted that in the description of the land in the petition the second call for distance is 53 feet, which makes a patent discrepancy. This is corrected to 52 feet in the judgment. This is not mentioned in the briefs, but seems to have been a printer's error, and will be disregarded.

Lewis A. Chapman, of Chillicothe, for appellant. Karl Hirsh and Scott J. Miller, both of Chillicothe, for respondent.

BROWN, C. (after stating the facts as above). [1, 2] The appellant insists that the petition is fatally defective, and wholly insufficient to support the judgment because it fails to state facts sufficient to constitute a cause of action. She bases this contention on the fact that it does not state that upon the very day it was filed in the office of the clerk of the circuit court plaintiff was entitled to the possession of the land sued for, and that the defendants were then unlawfully withholding its possession from him; and that it fails to lay any ouster. Her brief gives us so little light upon the process of reasoning by which she arrives at this conclusion that it will, perhaps, be the most satisfactory way of dealing with the question to inquire generally what the statutes prescribe in a pleading of this character. Our action of ejectment being a statutory one, we should expect the act that created it to be the repository of all that is special and peculiar in its procedure. It (R. S. 1909, § 2382) declares that the action may be maintained in all cases in which the plaintiff is legally entitled to the possession of the premises. Section 2385 provides that it shall be prosecuted in the real names of the parties thereto, and shall be brought against the person in possession of the premises claimed. These two sections abolish the fiction by which an ouster or ejectment was an absolute prerequisite of the action. It is no longer necessary to allege that the mythical Mr. Doe entered upon the premises, where he was met by the ubiquitous Mr. Roe and politely ejected. The plaintiff became the living party entitled to possess the land, and the defendant the person who was there at the time and withheld the possession from him. The pleadings and proceedings were required (section 2388) to be conducted as in other civil actions, except where in that article otherwise prescribed. In other civil actions the Code requires of the petition "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." Section 1794. The statute does not require that the plaintiff, in order to maintain this action, should ever have been in possession of the premises, any more than it requires that he should have been ousted by the defendant.

It is enough that the plaintiff have the right to the possession at the time of bringing his action, and enough that the right of possession of the defendant, if he ever had one, has expired. As for the evidence, it is sufficient for the plaintiff to show the same two facts; that is to say, that the defendant is in possession when the suit is brought, and that the right, as against him, to the possession is in the plaintiff. Section 2389.

The only statutory provision specially applicable to such pleading is section 2387. It provides that "it shall be sufficient for the plaintiff to aver in the petition that on some day therein to be specified, he was entitled to the possession of the premises, describing them, and being so entitled to the possession thereof, that the defendant afterward, on some day to be stated, entered into such premises and unlawfully withholds from the plaintiff the possession thereof." This section purports to give no hard and fast rule. It simply states the averments required to meet every case that can arise under the statute, as section 2389 states the proof which will, in every case, authorize a recovery. There is nothing in its language that implies that an entry upon plaintiff's possession shall be alleged where there has been no such entry, as in cases where the defendant is holding over after the expiration of his possessory right and the accrual of that of the plaintiff. Judging this petition by that rule, we find that it states plainly that the plaintiff was, upon a day specified, entitled to the possession of the premises, and that, being so entitled, the defendant afterward unlawfully withholds from plaintiff the possession. While it might possibly have been more elegantly framed, it seems to be a careful attempt to state that the defendant was withholding the possession of the premises from plaintiff, and it speaks as of the very date of its filing in the present tense. The word "withholds" implies, in the connection in which it is used, that the defendant is retaining in his own possession that which the plaintiff claims.

[3] The same question was before this court in *Alexander v. Campbell*, 74 Mo. 142. The petition there questioned was, so far as we can see, framed on the same plan as the one now under consideration, except that the words "being in possession of said premises" preceded the charge of unlawful withholding. The present possession of the defendant is, in our opinion, as certainly expressed in this case by the use of the word "withholds," as by the words we have quoted from the *Alexander* petition. This pleading does not need the aid of any of our statutes relating to joinders and amendments to sustain the judgment; but, should it lack that certainty of statement which might be reasonably required to sustain it against a timely demurrer, it implies all the statutory requisites, and such uncertainty would be rendered harmless by the provisions of the

eight, ninth, and fourteenth clauses of section 2119, Revised Statutes 1909; for so shadowy an objection ought to be called to the attention of the court in time to prevent the labor and expense of a fruitless trial. If this was not done by demurrer and the evidence authorized a judgment, there was again an opportunity to interpose the same objection against its entry, when the defective statement could still be remedied by amendment. Should this opportunity be passed, and the judgment be entered, neither party to the oversight could complain of prejudice because a matter so clearly implied had not been emphasized by amendment so as to conform to his highly specialized views.

The judgment is affirmed.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All concur.

#### SCHROEDER v. TURPIN.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

##### 1. DEEDS (§ 38\*)—VALIDITY—DESCRIPTION.

Where a deed did not describe the land so that it was possible to identify it, it was absolutely void.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.\*]

##### 2. EXCHANGE OF PROPERTY (§ 5\*)—RESCISSION—FAILURE TO PERFORM.

Where, in the delivery of conveyances to complete an agreement for an exchange of property, defendant's deed to plaintiff was absolutely void and conveyed nothing, so that defendant actually received all plaintiff agreed to convey to him, to wit, 160 acres of land and eight city lots, and all plaintiff received was \$100 in cash, plaintiff was entitled to rescind.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 5, 6, 8-10; Dec. Dig. § 5.\*]

##### 3. EXCHANGE OF PROPERTY (§ 3\*)—RESCISSION—INADEQUACY OF CONSIDERATION.

Where, by reason of a failure of title to land which defendant agreed to convey to plaintiff in exchange, and by the failure of defendant's deed to convey any property to plaintiff, defendant received 160 acres of land and eight city lots for \$100 in cash, the inadequacy of the consideration was so shocking as to entitle plaintiff to rescind.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 7; Dec. Dig. § 3.\*]

##### 4. EXCHANGE OF PROPERTY (§ 3\*)—RESCISSION—ATTEMPT TO CONVEY.

Where defendant's deed to plaintiff, purporting to convey certain land pursuant to an exchange of property, in fact conveyed nothing, plaintiff's attempt to convey the land to a third person did not estop him to assert his right to rescind.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 7; Dec. Dig. § 3.\*]

##### 5. EXCHANGE OF PROPERTY (§ 8\*)—RESCISSION.

Plaintiff contracted to exchange 160 acres of land and some city lots with defendant for

a tract of land in Kentucky, certain oil stock, and \$100. Defendant's deed did not convey any land in Kentucky or elsewhere, and the oil stock was worthless. It appeared that the real property conveyed by plaintiff was worth \$2,000, and the city lots \$240. Held that, where, in a suit for rescission, defendant was permitted to retain the lots, plaintiff was not barred from relief as to the other land because he failed to tender the cash received and the oil stock.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. § 8.\*]

##### 6. ACKNOWLEDGMENT (§ 4\*)—NECESSITY—DEEDS.

An unacknowledged deed is valid and sufficient to convey the title as between the parties.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 7-21; Dec. Dig. § 4.\*]

##### 7. PLEADING (§ 369\*)—PETITION—COUNTS—DUTY TO ELECT.

Where the same cause of action was set out in separate counts to meet possible variations in the proof, plaintiff was not required to elect on which he would proceed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

##### 8. EQUITY (§ 65\*)—MAXIMS—UNCLEAN HANDS.

Where, in negotiations leading up to an exchange of real property, plaintiff placed large values on the property he was to exchange, but defendant was not misled thereby, and defendant acquired nearly \$2,500 worth of land for \$100, plaintiff was not chargeable with unclean hands so as to preclude relief in equity because of his valuation of his property.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.\*]

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Action by William G. Schroeder, revived after his death in the name of Anna Kendall, against Aurelius C. Turpin. Judgment for plaintiff, and defendant appeals. Affirmed.

J. N. Burroughs, of Westplains, for appellant. O. L. Haydon, of Westplains, and W. P. Campbell, of Wichita, Kan., for respondent.

BLAIR, C. Since the appeal was taken the original plaintiff has died and the cause has been revived in the name of Anna Kendall, his sole heir at law.

This is a suit to cancel deeds whereby plaintiff had conveyed to defendant 140 acres of land in Howell county.

The negotiations which resulted in the execution of the deeds sought to be canceled began with the acquaintance of the parties hereto, and both had their origin upon the occasion of plaintiff's first visit to a place in Chicago frequented by persons known as "traders," the vocation of most, if not all, of whom seems to have been the dealing in stocks, bonds, mortgages, deeds, etc., mainly in what defendant terms "unsight unseen trades." It is fairly inferable from the record that this phrase possessed, among these traders, a meaning not greatly different from that which it has among schoolboys, i. e., each high contracting party seeks to offer something so valuable that he cannot lose, however worthless the thing he receives may be. There was this

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



difference, however; among schoolboys the rule "whole blade or no trade" sometimes prevails; among the "traders," above mentioned, however, we find no evidence of any corresponding restriction upon their freedom of contract.

There is no evidence plaintiff was advised of the custom prevailing in this busy mart of trade in which he was, at the age of 79 years, introduced to defendant by one, Low, who was a "trader," and whose assets consisted of a valise filled with mining stock, ancient railroad bonds, etc., and a willingness to trade for anything any one might offer. That plaintiff did not know the rules and customs under which his new acquaintances operated is evidenced by the fact that he offered actual property, to which he had good title, and by the further fact that he tried to get defendant to "put some money into the trade." On this last proposition he was at first rather sternly rebuked, though defendant did "put in" \$25 after confirming, by visits to Indiana and Missouri, the astonishing suspicion that plaintiff really owned the land he claimed in these states. Plaintiff owned the land involved in this suit, 20 acres (subject to mortgage) in or near South Bend, Ind., and eight lots in Denver, Colo.

To plaintiff defendant represented that he owned a one-half interest in 10,000 acres of land in Kentucky, and exhibited an abstract of title and a letter from an abstractor of the county in which the land was said to be located, which letter glowingly pictured the wealth of timber above and coal beneath the tract described. This land defendant agreed to convey to plaintiff in exchange for the 20 acres at South Bend (subject to mortgage), eight lots in Denver and the 140 acres involved in this suit. Plaintiff's properties were, in the trade, valued at \$500 more than defendant's land, and the parties differ as to whether this sum was to be paid in cash, or secured by mortgage on the Howell county (Mo.) tract. The pretended consummation of this exchange resulted in the conveyance to defendant of all he bargained for and all plaintiff had, while plaintiff received \$25 in money, some oil stock, and a deed in which the description is as follows: "A one-half interest in the following described real estate: Beginning at a point on the Big Sandy river below the southern line of James H. Mallory; running thence north 42 degrees E. 1,900 poles to a stake; thence south 48 degrees E. 900 poles to a pine; thence south 48 W. 1,900 poles to a point in the Big Sandy river marked by a double stump; thence along the Big Sandy river to the point or place of beginning, containing ten thousand acres, more or less," in Johnson county, Ky. There is evidence no James H. Mallory then lived or ever had lived in Johnson county, and also *direct evidence*, received without objection, that there was no possibility of locating any land by the description in the deed.

Plaintiff subsequently demanded \$500, rep-

resenting the difference in trading valuations, as stated, but defendant contended plaintiff had agreed to accept a mortgage on 80 acres of the Howell county land, securing a note for \$500 to be executed by a "straw man" of plaintiff's selection. Defendant claimed also to have discovered that the mortgage on the South Bend property was \$500 greater than had been represented, and insisted in offsetting this excess against plaintiff's demand. Low, "a trader" par excellence, as the term is above defined, then began to take an active interest, and for plaintiff's "interest" in the Kentucky land "traded" him some railroad bonds, secured by a fourth mortgage on the property of the "South Carolina Railway Company," which bonds showed no transfer to Low, though by their terms they were unassignable except by transfer on the company's books, certified on the bond itself by the company's transfer agent. The last transfer had been made about 20 years prior to the transaction between Low and plaintiff. Defendant knew of this "trade" at the time, but testified he had no interest in it, though immediately thereafter he and Low and plaintiff engaged in another "trade" whereby plaintiff received \$75 and another railroad bond, and acknowledged satisfaction of the \$500 mortgage defendant had agreed to execute to him, and agreed to pay the \$500 mortgage on the South Bend property, which was overlooked in the original agreement.

The judgment was for plaintiff, canceling the deeds to defendant.

[1] 1. It is averred in the answer that the abstract of title to the Kentucky land, exhibited to plaintiff, showed title in defendant, and defendant testified he had had the "title" thereto for 10 years, having acquired it from the persons named in the abstract as his grantors. Plaintiff testified defendant told him he owned the one-half interest in the 10,000 acres in Johnson county, Ky., and agreed to convey that interest to him, and the finding of the truth of that testimony is fully justified.

The deed executed by defendant is absolutely void by reason of the fact that it describes no land at all, no point of beginning having been fixed (2 Devlin on Deeds [3d Ed] § 1011a), and it also appearing from both the deed and testimony offered that it is impossible to identify any land in Johnson county, Ky., as falling within the description given. The description in the deed was not taken from the abstract. In fact, therefore, defendant has not complied with the agreement to execute to plaintiff a deed for a one-half interest in the Kentucky land. Whether his title thereto was good or bad plaintiff had a right to contract for a conveyance thereof and a right to insist upon the fulfillment of that contract. Whatever interest defendant had (and the answer avers the abstract shows title in him, and he testifies he had the title) plaintiff contracted for it. The fact that defendant refused

to execute a warranty deed does not excuse him from executing the deed he agreed to execute.

[2] The instrument in evidence is no deed at all, and defendant has failed to perform the agreement on his part. He actually received all plaintiff agreed to convey to him, 160 acres of land and eight city lots, and now seeks to retain it despite his own failure to perform the contract. His failure to comply entitles plaintiff to rescind. 2 Warvelle on Vendors, § 828. Also, the principle which entitles a vendee, on failure of title or failure of the deed as a conveyance, to resist the payment of the purchase money or recover payments already made (*Owens v. Rector*, 44 Mo. loc. cit. 392; *Wheeler v. Standley*, 50 Mo. 509) entitles plaintiff to rescind and recover his land.

[3] Further, the shocking inadequacy of the consideration (taking into account the absolute nullity of defendant's deed), together with the circumstances of imposition and fraud disclosed by the record, affords additional support of plaintiff's right to rescind. *Obst v. Unnerstall*, 184 Mo. loc. cit. 392, 83 S. W. 450. The cases cited, affirming the adequacy of considerations of agreements when the "least benefit or advantage" accrues to the one party or injury or disadvantage to the other, are not applicable. In this case plaintiff has not received the consideration defendant contracted should pass to him, while the cases cited belong to a class involving no such situation.

[4] 2. So far as concerns the contention that plaintiff is estopped to rescind because he attempted to convey the Kentucky land to Low, it will suffice to say that plaintiff had no interest he could convey, and defendant cannot complain because of the ineffectual attempt to do so. It would not have been necessary for plaintiff to have offered to reconvey to defendant before bringing this suit. In the circumstances, such reconveyance would have been "a nugatory act and unavailing for any purpose." *Lawless v. Collier's Ex'rs*, 19 Mo. loc. cit. 485. Plaintiff acquired no interest under the deed to him and there was, consequently, nothing he could convey to Low or reconvey to defendant. The attempted conveyance was a nullity and, with respect to the Kentucky land, left both plaintiff and defendant exactly as they were before. Whatever Low's rights may be by reason of the ineffectual character of plaintiff's deed to him, defendant was in no way affected thereby.

[5] 3. It is contended plaintiff's suit must fail because the petition does not tender to defendant the \$100 in cash and some oil stock received from him in the transaction. As to the latter item, the weight of the evidence is that it was worthless. The trial court must have so found to render the judgment it did, and we do not feel disposed, on this record, to overturn that finding. Plaintiff, however, received \$100 in cash. For

this alone, in truth, he conveyed to defendant the South Bend property, the Howell county land, worth about \$2,000, and eight lots in Denver, concededly worth \$240. These last-mentioned lots defendant still retains, and this decree, of course, does not disturb his title to them. Defendant testified the South Bend property was sold under the mortgage upon it.

The cases cited by defendant's counsel apply the rule that, in actions at law, a tender is a condition precedent to the rescission of a release of the cause of action upon which recovery is sought. In this case the question of tender was not raised in the trial court in any manner, and it clearly appears from the facts in evidence that defendant had and retained the lots in Denver, worth at least \$240. This is a suit in equity, and, on the grounds that the question was not raised below and that the court could not, on this record, have justly decreed any return to defendant, the point must be ruled against him. *Peak v. Peak*, 228 Mo. loc. cit. 556, 557, 128 S. W. 981, 137 Am. St. Rep. 638.

[6] 4. After the trade with defendant, plaintiff, acting on bad advice, attempted to execute a deed to one McWeeney for the land in suit. It is contended plaintiff did not own the land and could not sue. McWeeney reconveyed to plaintiff, omitting to acknowledge the deed, but signing and delivering it prior to the institution of this proceeding. This was sufficient as between the parties (*Vincent v. Means*, 207 Mo. loc. cit. 715, 106 S. W. 8; *Genoway v. Maize*, 163 Mo. loc. cit. 231, 232, 63 S. W. 698), and defendant is in no position to complain. The subsequent acknowledgment by McWeeney does not affect the question. Whether the deed to McWeeney was void under the rule that a mere right to sue for fraud upon the assignor is not assignable (*Ryan v. Miller*, 236 Mo. loc. cit. 514, 515, 139 S. W. 128, Ann. Cas. 1912D, 540) it is not necessary to decide.

[7] 5. The trial court's refusal to require plaintiff to elect between the counts of his petition did not constitute error. Counsel does not argue the question or attempt to point out any inconsistency between the counts. The petition presents the ordinary case of separate counts drawn to meet possible variations in the proof. There is no repugnancy within the rule (*Rinard v. Railway*, 164 Mo. loc. cit. 284, 64 S. W. 124), and but one cause of action is stated and the same relief is sought in both counts.

6. In view of what has been said, it becomes unnecessary to discuss the competency of the testimony concerning defendant's title to the Kentucky lands, the justice of the decree being fully established without recourse to that testimony.

[8] The suggestion that plaintiff's hands are unclean because he placed large values on his properties is without merit. The rec-

ord shows defendant was not deceived, and demonstrates he was not injured thereby. Defendant cannot very consistently harmonize this contention with his resistance to rescission. The rule invoked has no such application as suggested. The net result of the "puffing" on both sides was the acquisition by defendant of nearly \$2,500 worth of land for \$100.

It may be added that it is unnecessary in view of what has been said, to discuss in detail the question whether the allegations of fraud were proved. The judgment is affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur.

### FERRELL v. FERRELL et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1918.)

#### 1. SPECIFIC PERFORMANCE (§ 80\*)—NATURE OF CONTRACT—PARTITION.

A contract between the distributees of real property provided that the estate should be divided into six equal parts, one to be given to each of the parties, that they should all meet at the family homestead in six months, and divide and partition the real property according to the value of each acre thereof, and if they failed to agree they should select three disinterested men, who should act as arbitrators and appraise the value of each acre, and that the decision should be binding on the parties. *Held*, that the contract was not one to partition the lands, but to arrive at such an agreement in the future, and in case of their failure to agree, not to submit the partition to arbitration, but only to submit to arbitrators the value of each particular acre, and that such contract could be made the basis of a suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 214; Dec. Dig. § 80.\*]

#### 2. SPECIFIC PERFORMANCE (§ 80\*)—NATURE OF CONTRACT—AGREEMENT TO NAME ARBITRATORS.

An agreement to name arbitrators cannot be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 214; Dec. Dig. § 80.\*]

#### 3. PARTITION (§ 22\*)—DEFENSES—AGREEMENTS.

An unperformed agreement to submit the partition of certain real property to arbitration was no defense to a suit for partition, where no suit was pending at the time the agreement was made, and no tribunal was constituted for the settlement of the controversy by the arbitration agreement, that part being left open for future action, and defendants, instead of pleading the agreement as a ground for dismissal, prayed for affirmative relief.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 73, 74; Dec. Dig. § 22.\*]

#### 4. ARBITRATION AND AWARD (§ 16\*)—STATUTORY SUBMISSION—REVOCAION.

A statutory submission to arbitration of the rights of distributees to lands acquired from their ancestor was revoked by the bring-

ing of suit by one of the parties for partition, before actual submission to the arbitrators.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 64-76; Dec. Dig. § 16.\*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Suit by William Homer Ferrell against Jennie Ferrell and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Suit was brought to the September term, 1909, of said circuit court. The plaintiff is the only son of A. J. Ferrell, deceased. The defendants are Jennie Ferrell, his widow, and Ettie Finney, Effie Finney, Lora Brownell, and Nola Ferrell, his only daughters, the plaintiff and defendants being his only heirs. The suit is to partition about 500 acres of land in Buchanan county of which he died seised.

The defendants Ettie and Effie Finney filed a joint answer in which was pleaded, as the only defense, a contract signed by all the parties to this suit, which, omitting signatures, is of the following tenor: "This agreement made and entered into by and between Mrs. Jennie Ferrell, Mrs. Ettie Finney, Mrs. Effie Finney, Mrs. Lora Brownell, Homer Ferrell, and Nola Ferrell, the heirs of A. J. Ferrell, deceased, witnesseth: Whereas, the said A. J. Ferrell died January 12, 1909, leaving certain valuable real estate and personal property. And whereas, each of the undersigned are one of the heirs of said A. J. Ferrell, being entitled each to one-sixth ( $\frac{1}{6}$ ) of said estate of A. J. Ferrell. And whereas, each of said heirs are desirous of settling and dividing said estate without probating the same and without a partition suit or litigation. Now, then, it is hereby agreed by and between each of the parties hereto. First. All of the personal property is to be given to Mrs. Jennie Ferrell absolutely, except the money in the bank; Mrs. Jennie Ferrell is then directed by each of us to purchase a suitable monument and cause the same to be erected at the grave of said A. J. Ferrell, and pay for the same out of the money now in the bank; and balance of money left in bank is to be divided into six (6) equal parts and one-sixth ( $\frac{1}{6}$ ) is to be given to each of the undersigned. Second. Mrs. Jennie Ferrell is by us directed to collect all the rents, profits, or emoluments due said estate, or that may become due and to promptly divide the same into six (6) equal parts, and give to each of the undersigned one-sixth ( $\frac{1}{6}$ ) less all expenses incurred by her in collecting the same. Third. Each of the undersigned agrees to meet at the home of the A. J. Ferrell homestead on the first Monday in August, 1909, and divide and partition said real estate into six equitable parts, according to the value of each acre thereof, each of the undersigned to receive a quitclaim deed to one-sixth of said real es-

tate from the other five. In case of the failure of the undersigned to agree on an equitable partition and division of the real estate, then they are to select three disinterested men who shall act as arbitrators and appraise the value of each acre, and we then agree to abide by the decision of the arbitrators. Fourth. In the partition or division of said real estate as hereinbefore agreed on, the share to be allotted to Mrs. Jennie Ferrell and Homer Ferrell is to be selected out of the A. J. Ferrell homestead. Fifth. The windmill now up opposite the A. J. Ferrell homestead is to be the property of Mrs. Jennie Ferrell, and the water right, and privilege of maintaining said windmill at the same place where it now stands, and pumping water from the A. J. Ferrell homestead is to remain inviolate to Mrs. Ferrell. Witness our hands this 26th day of January, 1909, at the Buchanan county, Missouri." It states that, while the answering defendants were at all times ready and willing to carry out the terms of the agreement, all the other parties failed and refused to do so, and prays a decree of specific performance of the contract, or that defendants be held harmless from the payment of costs, and for a receiver. The court found the facts as stated in the answer, and concluded, as a matter of law, as follows: "The court finds that if said agreement is properly admissible in evidence it is no defense to this action. The court further rules that said agreement was not competent evidence in this cause, and sustains the objection made to it when offered in evidence." It also found that the six parties were each entitled to an undivided one-sixth interest in all the land, and decreed that partition be made accordingly, appointing commissioners for that purpose. The appeal is taken from this interlocutory decree.

C. C. Crow, of Kansas City, for appellants.  
C. C. Ferrell and Chas. H. Mayer, both of St. Joseph, for respondent.

BROWN, C. (after stating the facts as above). [1] The record presents no other question than such as relate to the effect of the contract we have quoted, as a defense to the cause of action stated in the petition, and as a ground for affirmative equitable relief. The respondent, to be sure, questions whether the contract is preserved in the bill of exceptions, but it is unnecessary to discuss the point, for it is copied in the answer, and, in the state of the pleadings shown by the record before us, stands admitted. In short, the points upon which the parties rely are fully presented upon the face of the pleadings. It is not contended that the suit should abate by reason of the contract. No plea in the nature of a plea in abatement is interposed. On the contrary, the answer is framed upon the theory that the suit be continued for the purpose of enforcing, against

the respondent and the defendants who stand with him, its specific performance according to its terms; so that the first question which thrusts itself upon us is whether this is such a contract that its performance will be specifically enforced by the court. It provides, in substance, that the estate shall be divided into six equal parts, one to be given to each of the parties; that they are all to meet at the family homestead, occupied by the mother, on the first Monday in August, 1909, "and divide and partition said real estate into six equitable parts, according to the value of each acre thereof, each of the undersigned to receive a quitclaim deed to one-sixth of said real estate from the other five." If they failed to agree, they were to select three disinterested men, "who shall act as arbitrators and appraise the value of each acre"; and the parties agreed to abide their decision. It will be observed that they did not agree on any division of the real estate; they only agreed that they would meet at a time more than six months distant for that purpose, and if they should fail, they would then select three arbitrators, not for the purpose or with power to divide the land between them, nor to indicate what part of it each or any one of them should have, but to "appraise the value of each acre." While the knowledge of this value might be of great advantage to the parties or others charged with the division of the land, its ascertainment would fall short of being a partition. The contract, then, is not a contract to partition the lands, but to try to arrive at such an agreement in the future, and pointing out an alternative course should they fail. This alternative is not a contract to submit the partition of the land to arbitration, but to submit to arbitrators to be chosen the value of each particular acre. This information might be of great assistance to the parties in a future amicable partition of the land, but this particular manner of obtaining it is not so indispensable and exclusive that equity will compel its manufacture and production. It enforces the specific performance of contracts already made, but will neither compel the parties to make them or any part of them; nor will it make them for the parties.

[2] Should we add all the requisites necessary to make the writing in question a full-fledged contract to submit the partition of the land to arbitration, and to appoint arbitrators for that purpose, we would be no nearer to a happy solution. Nothing is better settled than that an agreement to name arbitrators cannot be specifically enforced, and this is the particular remedy the appellants have elected to invoke. The authorities on this subject are collected and examined by this court in *City of St. Louis v. St. Louis Gaslight Company*, 70 Mo. 69, 102, et seq. See, also, *Bales v. Gilbert*, 84 Mo. App. 675, 679. In *Bowen v. Lazalere*, 44 Mo. 383, it was said that the submission to arbitration of the subject-matter of a pending suit "may

be made to work a dismissal of the suit," and this has been held in other jurisdictions, although against the great weight of authorities. *Thompson v. Turney*, 114 Mo. App. 697, 89 S. W. 897. It is placed upon the ground that by the submission the parties have selected another tribunal in which to try their difference, and thereby agreed that the suit be discontinued; but, as is held in the case cited, the dismissal can only be enforced by a plea in the nature of a plea in abatement exhibited *puls darrein continuance*, and cannot be pleaded in bar until after a binding award.

[3] It can have no application to such a case as this because (1) there was no suit pending at the time the agreement was made; (2) no "tribunal" was constituted for the settlement of the controversy, that part of arrangement being left open for future action; (3) the appellants, instead of exercising their right to have the suit dismissed, asked by their plea that it proceed, so that they might be granted affirmative relief. Each of these constitutes a complete answer to the suggestion that the case should have been dismissed.

[4] On the other hand, if this contract is a submission to arbitration, it is a statutory one under section 4822, R. S. 1899, which prescribes the time and terms upon which it might be revoked, and it was revoked by the bringing of this suit. *Id.* § 4845.

The judgment of the circuit court is affirmed.

BLAIR, C., concurs.

PER CURIAM. The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All concur.

#### STATE v. GORDON.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1918.)

#### 1. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for larceny from the person, alleged to have been committed by accused in picking prosecutor's pocket in a crowd on a street car, evidence that, while on the back platform of another street car near the place where the theft was supposed to have occurred, and shortly prior to committing it, defendant pushed himself in between witness and his father was admissible as tending to establish defendant's presence in the vicinity of the crime, and was not objectionable as showing defendant's guilt of another offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

#### 2. CRIMINAL LAW (§ 724\*)—TRIAL—ARGUMENT OF COUNSEL.

Where, in a prosecution of defendant for larceny from the person, there was evidence that defendant was guilty of larceny, that he was not a resident of St. Louis where the crime was committed, but at the time of its commission

had just arrived in that city from Chicago, it was not error for the prosecuting attorney in his argument to refer to defendant as a "foreign thief."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1679; Dec. Dig. § 724.\*]

#### 3. CRIMINAL LAW (§ 721\*)—TRIAL—ARGUMENT OF ATTORNEY—ABSENCE OF WITNESS.

Where, in a prosecution for larceny from the person, a witness who had testified on a prior trial was absent and the record of his testimony had been introduced in evidence, a statement by the prosecuting attorney in argument that such witness was not able to be present, and the state introduced his testimony which was conclusive and not contradicted by any evidence, was not objectionable as a direct reference to the failure of accused to testify in his own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Sidney Gordon was convicted of grand larceny by stealing from the person, and he appeals. Affirmed.

Defendant was charged with the crime of grand larceny, by stealing from the person, as defined by section 4538, R. S. 1909, amended by Laws of Missouri, 1911, p. 193.

Upon a trial had in the circuit court of the city of St. Louis, defendant was found guilty, and his punishment assessed at three and one-half years in the penitentiary. The state's evidence tends to show the following facts: The alleged crime occurred on October 7, 1912, near the corner of Eighteenth and Market streets, in the city of St. Louis. One, Charles H. Robnett, came into the Union Depot on an early morning train, and, just before getting off the train, examined his pocket book and counted his money, which amounted to \$63. He then placed his pocket book, which he says was a black one, crosswise in his left hip pocket, and came through the Union Depot and up to the corner of the above-named streets for the purpose of taking a north-bound Eighteenth street car to his home. While waiting for the car, he felt the pocket book in his pocket, and noticed the time from the depot clock to be 7:35 a. m. In a minute or two, he got upon an Eighteenth street car going north. He boarded the car on the east side of Eighteenth street and just south of Market street and at a point very near a fruit stand conducted by one Bischoff. Just as Robnett attempted to board the car, one Robert Webster "swung in ahead" of him and boarded the car. Robnett followed, and just back of Robnett came the defendant Gordon. Robnett noticed some pushing and jostling on the back platform, and felt the defendant pushing against him, apparently trying to get upon the back platform which was crowded. When the car reached Eighteenth and Olive streets, defendant and said Webster got off of said car, without paying their fare, and they, in company with a third person named

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
161 S.W.—46

Albers, turned east on Olive street. After the car passed Olive street, Mr. Robnett entered the car and took a seat, riding to a point near his house. When Robnett reached his home, it was discovered that his left hip pocket was turned wrong side out and his pocket book and money gone. He reported this fact to the police department, giving them descriptions of the persons on the platform of the car, and about 2 p. m. of that day defendant and Webster and two others were arrested. Defendant was identified by Robnett as being the man who got on the car behind him and pushed against him. Louis Schmidt and son, William, testified that they saw the defendant and a man by the name of Webster board a Market street car, going east, at the corner of Market and Eighteenth streets, about 7:30 on the same morning, and that defendant crowded his way in between the father and son, and then left the car before it had crossed Eighteenth street, and that Webster rode to Seventeenth street before leaving the car. These two witnesses testified that their attention was called to defendant by reason of his shoving and pushing. Jacob C. Bischoff testified that he was in charge of the fruit stand at 18 South Eighteenth street, within a few feet of where prosecuting witness boarded the north-bound Eighteenth street car, and that about 15 minutes after 7 o'clock that morning he noticed defendant standing in front of his fruit stand; and witness asked defendant to stand out of the way so that people could see his fruit; that he noticed defendant get on a street car and, after riding a short distance, get off and come back to the corner and get on a second time and repeat the same action; that his attention was attracted to defendant; that about 7:30 a. m. he noticed defendant get on a north-bound Eighteenth street car, and saw him stand on the first step, holding onto the handrail with his right hand, and taking a black pocket book from the left hip pocket of the man in front of him with his left hand; and that defendant remained on the car as the car passed up the street, and went out of witness' sight. Witness did not know the man whose pocket book was stolen, and said that he was not able to identify him. The witness said that the man whose pocket book was stolen was wearing black clothes, and the man who took the pocket book was wearing brown clothes. About noon on the same day, the witness told two police officers that he had seen the pocket picked and described the man. Detective McKenna testified that he arrested defendant, on the day of the theft, at the Princess Hotel, which was about one hundred and fifty feet from the corner of Eighteenth and Market streets in the city of St. Louis. When arrested, defendant said that he and Webster had been in St. Louis three or four days, and had come to St. Louis from Chicago. The evidence on the part of the defendant

was to the following effect: The street car conductor in charge of the north-bound Eighteenth street car upon which prosecuting witness rode to his home testified that he saw prosecuting witness on the car that morning, but did not notice defendant on the car. The conductor was not acquainted with defendant. A bell boy at the Princess Hotel testified that defendant and another man came to the hotel about 2 o'clock a. m., on October 7, 1912, and left a call for 9 o'clock that morning; that about 9:30 a. m. he took some coffee to defendant in his room, and that he did not see the defendant between 2 a. m. and 9:30 a. m. that morning. The night clerk at the Princess Hotel testified that he was on duty from midnight until noon on that day; that defendant came in and went to bed about 2 a. m. on that day, and that he did not see him again until about 10:30 a. m., on the same day, at which time defendant returned the key to the desk, and that it was the day before the Veiled Prophet's parade, and that a great many people were stopping at the hotel.

W. Blodgett Priest, of St. Louis (Matt. Holland, of St. Louis, Chauncey H. Clarke, and Otto Karbe, of St. Louis, of counsel), for appellant. John T. Barker, Atty. Gen. (S. P. Howell, of Jefferson City, of counsel), for the State.

WILLIAMS, C. (after stating the facts as above). [1] I. It is urged that error was committed in permitting witness William O. Schmidt, over defendant's objection and exception, to testify that a few minutes before the alleged theft, defendant, while on the back platform of another car near the place where the theft is supposed to have occurred, pushed or shoved himself in between the witness and his father. The objection urged against said testimony is that it tends to "indicate and insinuate" that defendant was attempting to commit another crime, and therefore should have been excluded.

The question as to whether defendant was near the place of the alleged theft, at the time of its occurrence, was one of the important issues in the case. Defendant's evidence tended to establish an alibi. The above evidence tended to establish defendant's presence in the vicinity of the crime a short time prior thereto. The evidence as to the pushing tended to explain how the attention of the witness was called to defendant's presence, and made more plausible and convincing the witness' statement that he was able to remember and identify defendant, whom he had never seen prior to the incident on the car platform. The evidence was properly admitted for the purpose of showing defendant's presence at or near the scene of the crime a short time prior thereto, and was therefore, when considered with the other facts and circumstances in the case, some evidence tending to establish the identity of

defendant as the person who committed the alleged theft. It is not a sufficient objection to evidence otherwise admissible to say that it might prove the commission or attempted commission of another crime. *State v. Spangh*, 200 Mo. 571, loc. cit. 594, 98 S. W. 55; *State v. Bell*, 212 Mo. 111, 111 S. W. 24; *State v. Lewis*, 181 Mo. 235, loc. cit. 260, 79 S. W. 671. The court, by instruction, properly told the jury that they could consider the testimony for no other purpose than that of determining whether or not defendant was in that locality at about the time the offense charged in the information was alleged to have taken place.

[2] II. During the closing argument the prosecuting attorney referred to defendant as a "foreign thief." To this remark defendant objected, and saved an exception to the failure of the court to rebuke counsel and to admonish the jury not to regard the statement.

The evidence tended to show that defendant was guilty of larceny, and that he was not a resident of St. Louis, but had just arrived at St. Louis, coming from Chicago. When the remarks of the prosecutor refer to matters shown by the proof, his conduct in that regard does not constitute reversible error. *State v. Griffen*, 87 Mo. 608; *State v. Allen*, 174 Mo. 689, 74 S. W. 839; *State v. Rasco*, 239 Mo. 535, 144 S. W. 449. In this connection however, it should be stated that conduct of this kind upon the part of the prosecuting attorney is not to be commended or encouraged. Many cases are reversed because prosecutors overstep the bounds of legitimate argument. And in many cases it is difficult to weigh the effect that such remarks may or may not have had in influencing the jury in arriving at their verdict. In all cases, the wiser and much the safer course for the prosecutor to pursue is to confine his remarks to a fair discussion of the evidence, and not indulge in the use of epithets or personal abuse.

[3] Exception was also saved to the court's failure to rebuke counsel and instruct the jury to disregard the further statement made by the prosecutor in the course of his argument, viz.: "Mr. Bischoff was not able to be here and we had to introduce his testimony, and that testimony is conclusive and not contradicted by any evidence." The "Mr. Bischoff" to whom reference is here made is the man who conducted the fruit stand near the corner of Eighteenth and Market streets, in the city of St. Louis. The witness was not present at the trial, but his testimony, given at a former trial, was, by consent of the parties, read to the jury by the official stenographer. Appellant insists that this remark was a direct reference to defendant's failure to testify in his own behalf. We cannot agree with appellant's contention. This was in the nature of a general comment

as to the weight and effect of the evidence of the witness Bischoff, and it would be a forced construction that would interpret it as a reference to defendant's failure to testify. The statement is quite different from the one made in *State v. Snyder*, 182 Mo. 523, 82 S. W. 12, which was held to be error. In the case of *State v. Ruck*, 194 Mo. 416, 92 S. W. 706, 5 Ann. Cas. 976, the prosecutor, in his argument to the jury, said: "Here we have testimony uncontroverted, undisputed by no living or unliving witness." In that case, it was held that the statement did not violate the inhibition of the statute against referring to the failure of the defendant to testify. To the same effect is *State v. Fields*, 234 Mo. 615, 138 S. W. 518.

The judgment is affirmed.

ROY, C., concurs.

PER CURIAM. The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

#### STATE v. SONNER.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1918.)

##### 1. INDICTMENT AND INFORMATION (§ 191\*)— MANSLAUGHTER — OFFENSES INCLUDED — ABORTION.

Rev. St. 1909, § 4458, providing that any person who, with intent to produce an abortion, uses any device shall, in the event of the woman's death occasioned thereby, be adjudged guilty of manslaughter in the second degree, and, in case death shall not ensue, he shall be guilty of the felony of abortion, creates the offense of manslaughter, which is separate and distinct from the offense of felony of abortion, and, under an indictment charging manslaughter in the second degree, accused may not be convicted of abortion.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 265, 604-621; Dec. Dig. § 191.\*]

##### 2. ABORTION (§ 6\*)—INFORMATION—EVIDENCE.

Under an information charging that accused, intending to produce an abortion, caused a woman to take drugs not necessary to preserve her life or the life of her child, resulting in the death of the child, the state must prove that the death of the child was occasioned by the use of some drug.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 15; Dec. Dig. § 6.\*]

##### 3. ABORTION (§ 6\*)—INFORMATION—EVIDENCE.

Under the information, the state had the burden of proving that the use of the drug was not necessary to preserve the life of the woman or that of the unborn child, and, where the evidence showed that the woman had been unwell for about a month preceding the alleged occurrence, the state, to support a conviction, must show facts from which the jury may infer that the taking of the drug was not necessary for the purposes specified.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. § 15; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Lincoln County;  
James D. Barnett, Judge.

Marion Sonner was convicted of crime, and he appeals. Reversed and remanded.

The information in this case originally consisted of four counts; but, before proceeding to trial, the prosecuting attorney dismissed the first, third, and fourth counts, and defendant was tried upon the second count in the information. That count charges defendant with manslaughter in the second degree under section 4458, R. S. Missouri 1909. The information charges, in substance, that the defendant, intending to produce a miscarriage or abortion, caused to be taken by one Emma Russell, a married woman, pregnant with a quick child, certain drugs and medicines; it being alleged that the same was not necessary to preserve the life of said Emma Russell or said quick child, and that same had not been advised by a duly licensed physician to be necessary for such purpose, and that same produced the miscarriage and abortion of said Emma Russell, resulting in the death of said quick child. Trial was had in the circuit court of Lincoln county, Mo., in the March term, 1910, resulting in a verdict by the jury, as follows: "We, the jury, find the defendant guilty of the felony of abortion and we assess his punishment at one year in the county jail and to pay a fine of one thousand dollars. Josiah Whiteside, Foreman." Motions for new trial and in arrest of judgment were duly filed and overruled, and sentence duly entered upon the verdict. The appeal was erroneously allowed to the St. Louis Court of Appeals, and said Court of Appeals properly certified the case here.

The evidence tends to substantiate the following facts: The alleged crime occurred in July, 1909, at the town of Hawk Point, in Lincoln county, Mo. Defendant was engaged in operating a meat market and also a livery stable at said place. Mrs. Emma Russell, a married woman, also resided in said town, and up to February 1, 1909, she and her husband, William Russell, conducted a boarding house. On February 1, 1909, Mrs. Russell and her husband separated and never lived together again as husband and wife; but Mrs. Russell continued to live in the town of Hawk Point. Viola Gordon, the 16 year old daughter of Mrs. Russell by her first husband, testified: That from February 1, 1909, until after the occurrence of the alleged abortion the defendant was a frequent caller at Mrs. Russell's home, calling there almost every evening about 8 o'clock, and remaining, generally, until 11 o'clock, and sometimes until 2 or 3 o'clock in the morning, and on a few occasions all night. That upon these calls defendant would kiss Mrs. Russell, and she would sit upon his lap, and they would act as lovers. That she had seen them in bed together two or three different times and on one occasion when they were undressed. About the middle of June Mrs. Russell began complaining of being unwell, and after July 1st grew worse until she mis-

carried on July 23, 1909. Between four and eight days prior to the miscarriage, defendant gave Mrs. Russell 25 cents worth of calomel tablets and told her to take three tablets every hour for two days and two nights. Mrs. Russell took two tablets each hour during the first day, and then missed taking the same for two days, and on the fourth day continued taking the calomel tablets until bedtime. That defendant made visits to the house during the time that Mrs. Russell was taking the calomel, and was there every evening just preceding the miscarriage. On the fourth day Mrs. Russell became sick at her stomach and vomited, and became so sick that she went to bed. On the following Saturday (the evidence does not show how much time elapsed between the time when she last took calomel and when she sent for the doctor) Mrs. Russell sent the witness to call Dr. Diggs to attend her. Dr. Diggs came and remained two hours, attending Mrs. Russell through the miscarriage. The next morning, before daylight, witness buried the fetus in the woodshed, and says that the fetus was a male child. The next night defendant brought Mrs. Russell a breast pump. Witness also testified that defendant gave Mrs. Russell \$6 with which to pay the doctor's bill. On the advice of Mrs. Russell's father and mother, the witness left home in November, 1909, and had not seen her mother since. Dr. Diggs testified that when he arrived at Mrs. Russell's home he found her in the act of aborting, and he proceeded to deliver her of a child; that, in his opinion, the fetus was about five months old, and that it was what is known as a quick child; that during the operation Mrs. Russell told the doctor that it was a "legitimate" child; that when he arrived the child was dead, and upon delivering the same found that its head had been previously severed from its body, and that the child had not been dead very long; that, in his opinion, it would have taken a scientific manipulation to have severed the head from the body of the fetus in the position which the fetus occupied in the womb (the feet projecting foremost), and that the head could not have been severed by pulling upon the feet of the unborn child. The doctor stated that he did not know what was the cause of the abortion, and named several things that might have caused it, and stated that, while calomel would not necessarily cause an abortion, yet it might produce such a result, if taken in excessive amounts. The doctor further testified that on July 19, 1909, Mrs. Russell called at his office and stated that she was troubled with discharge of the womb, and the doctor refused to prescribe for her unless she would allow him to make an examination as to her ailment. Five other physicians testified, in effect, that, while the taking of calomel would not necessarily produce an abortion, yet it would be dangerous for a pregnant wo-



man to take an excessive amount of the same, and that an excessive amount might in some instances produce an abortion. A number of other witnesses testified to seeing defendant at the home of Mrs. Russell, on different occasions, both in the daytime and at night, and that defendant boarded at Mrs. Russell's a short time. Dr. Shepard testified, on behalf of defendant, that on April 23, 1909, he treated Mrs. Russell and prescribed a drug to stop the hemorrhage of the womb, with which she was then suffering. Allie Monroe testified that he was at the preliminary hearing when Viola Gordon testified, and that he did not hear her testify to many things that she testified to at this trial. John Ernest testified that a short time after the preliminary examination Mrs. Russell's father, the prosecuting witness in this case, said that "he had worked mighty hard to get to catch him [Sonner], and that he thought he had caught him where he could get him, that they had the evidence all fixed." William Weeks testified that he was in the employ of defendant during the month of July, 1909, and that from the 20th to the 25th of July defendant remained at his home, taking care of his wife, who was then sick. Defendant's wife testified that defendant spent most of his evenings at home, and was a home the entire evenings of July 22, 23, and 24, 1909. Defendant did not take the stand.

Wm. A. Dudley, of Troy, for appellant. Stuart L. Penn, Pros. Atty., of Troy (Brevator J. Creech, of Troy, of counsel), for the State.

**WILLIAMS, C.** (after stating the facts as above). [1] I. The information charges defendant with manslaughter in the second degree under section 4458, R. S. 1909. The court instructed on manslaughter in the second degree, and also, by its instruction No. 2, instructed as to the "felony of abortion," and the jury found the defendant guilty of the "felony of abortion." The giving of instruction No. 2 constituted reversible error. In the recent case of *State v. Dargatz*, 244 Mo. 218, 148 S. W. 889, this court fully considered the identical point here involved, and, speaking through Brown, P. J., announced the following conclusion: "After a careful consideration of section 4458, R. S. 1909, we are of opinion that the crime of the felony of abortion is not included within the charge of manslaughter in the second degree as defined by that section. That statute expressly recites that, where the death of the female [or quick child] does not result from the unlawful acts of defendant, he may be convicted of the felony of abortion. In this case the charge is that Mrs. Hawkins died as the result of defendant's criminal operation, and he should therefore have been convicted of the crime of manslaughter in the second degree or acquitted. \* \* \* The two offenses denounced by said section

4458 are so inconsistent with each other that they cannot both be charged in the same indictment."

[2, 3] II. Appellant contends that the evidence is insufficient to sustain a conviction. While it is impossible to foresee what the evidence might be upon another trial of this case, yet, since the case must be remanded, it is perhaps advisable that we make some observations concerning the sufficiency, or rather the insufficiency, of the present evidence to sustain a conviction of manslaughter in the second degree as defined by said section 4458.

It will be noted that, under the present information, it becomes necessary to prove that the death of the quick child was occasioned by the use of some drug. The present evidence fails to show that the death of the quick child was so caused. On the other hand, the evidence tends to show that the severing of the head of the fetus, prior to its delivery, by the use of some instrument, by some unknown person, was perhaps the probable cause of its death.

The burden was also upon the state to prove that the use of the drug was not necessary to preserve the life of Mrs. Russell or that of the unborn child. *State v. Meek*, 70 Mo. 355, 35 Am. Rep. 427; *State v. Schuerman*, 70 Mo. App. 518; *State v. Aiken*, 109 Iowa, 643, 80 N. W. 1078; *State v. Clements*, 15 Or. 237, 14 Pac. 410; *Moody v. State*, 17 Ohio St. 110. It is true that, in the cases of *State v. Castro*, 231 Mo. 398, 132 S. W. 1115, and *State v. Dargatz*, 244 Mo. 218, 148 S. W. 889, it was held that a showing upon the part of the state to the effect that the pregnant woman was in a healthy condition just prior to the alleged criminal act would be sufficient prima facie proof that the taking of the drug was not necessary to preserve the life of the woman or that of the quick child. However, in the present case, there was no such showing; but, on the other hand, the evidence tends to show that Mrs. Russell had been unwell for the period of a month next preceding the alleged occurrence. The evidence, therefore, fails to show such facts or circumstances from which the jury could infer or find that the taking of the drug was not necessary for the purpose above mentioned.

If, therefore, the evidence produced upon another trial upon the same information should fail to supply the above-required additional proof, the trial court should direct an acquittal.

The judgment is reversed, and the cause remanded.

**ROY, C.**, concurs.

**PER CURIAM.** The foregoing opinion of **WILLIAMS, C.**, is adopted as the opinion of the court. All the Judges concur.

**LYONS v. METROPOLITAN ST. RY. CO.**  
(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

**1. EVIDENCE (§ 80\*)—PRESUMPTIONS—LAW OF OTHER STATE.**

In an action for personal injuries sustained in Kansas, where neither party proved the law of Kansas, the law of Missouri applied, and plaintiff would not be denied a recovery because of his failure to prove the law of Kansas.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.\*]

**2. EVIDENCE (§ 80\*)—PRESUMPTIONS—LAWS OF OTHER STATES.**

In the absence of a showing to the contrary, the laws of a sister state will be presumed to be the same as that of the former.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.\*]

**3. STREET RAILROADS (§ 117\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.**

In an action for injuries in a collision between a street car and a buggy, where the motorman admitted that he saw plaintiff's horse before plaintiff could see the car, and realized that a collision was imminent, and there was evidence that by ordinary care he could or ought to have seen the horse before he actually did, and that with the appliances at hand he could have stopped the car after reaching the point from which he first saw the horse, and before reaching the point of collision, the court did not err in submitting the case upon the humanitarian theory; since the motorman's duty to stop or slacken the speed of his car did not commence merely when the horse was actually on the track, but commenced when he, as a prudent motorman, could see that plaintiff was intending to cross the track, oblivious to danger.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**4. STREET RAILROADS (§ 90\*)—LIABILITY FOR INJURIES—INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.**

The motorman in charge of a street car, after discovering a vehicle in danger, was bound to use all reasonable effort consistent with the safety of persons on board the car to avoid a collision.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-193; Dec. Dig. § 90.\*]

**5. APPEAL AND ERROR (§ 882\*)—REVIEW—INVITED ERROR.**

In an action for injuries sustained in a collision with a street car, defendant could not complain that instructions correctly stating and applying the humanitarian doctrine conflicted with instructions given, at its request, on the subject of contributory negligence, which ignored the humanitarian doctrine.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**6. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPETENCY OF EXPERTS.**

In an action for injuries sustained in a collision between a street car and a buggy, where the driver of the buggy testified that he had frequently ridden in street cars, noticed their speed, and had occasion to estimate it at times, and, though given an opportunity, defendant's counsel declined to examine him further as to his qualifications, he was properly permitted to testify as to the speed of the car.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

**7. EVIDENCE (§ 539½\*)—OPINION EVIDENCE—COMPETENCY OF EXPERTS.**

In an action for injuries sustained in a collision with a street car, a witness who for more than a year had been in defendant's employ as a motorman and conductor, was familiar with its cars of the class to which the one which injured plaintiff belonged, had operated such cars, knew their equipment and the methods of stopping them, had seen the tracks where the accident occurred, had been over the curve there several times and knew there was a grade at that point, was properly permitted to testify respecting the distance within which the car could have been stopped.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539½.\*]

**8. EVIDENCE (§ 548\*)—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.**

In an action for personal injuries, questions asked the physician who treated the injuries and the surgeon who operated therefor, as to whether the conditions discovered by them could have been the result of the accident, which questions hypothesized the facts of the accident as detailed by plaintiff's witnesses, were properly admitted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2346, 2365; Dec. Dig. § 548.\*]

**9. DAMAGES (§ 158\*)—ACTIONS FOR INJURIES—EVIDENCE ADMISSIBLE UNDER PLEADINGS.**

In an action for personal injuries, where the petition alleged that plaintiff's kidney was crushed and that he was otherwise injured internally, and there was evidence that the condition of his kidney disclosed by an operation was due to traumatism, resulting in a fracturing of the urinary or secreting parts of the kidney followed by a leakage of the urine into the fatty tissue surrounding the kidney, and that the kidney was fractured or cracked, evidence that the urine on examination after the injury and before the operation was found to contain blood cells, indicating that blood was getting into the urine was not outside the issues, the examination being simply one of the methods which disclosed the condition of the kidney and led to the operation.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-444; Dec. Dig. § 158.\*]

**10. DAMAGES (§ 185\*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.**

In an action for personal injuries sustained in a collision with a street car, where physicians who treated plaintiff and the surgeon who operated upon him testified that the condition of his kidney was due to traumatism, and that the injury received in the collision could have caused such condition, there was no evidence that he had received any other injury which could have produced such condition, and the surgeon testified that he never found it to be present in a case of disease, the evidence showed sufficiently that such condition resulted from the collision.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 508-508; Dec. Dig. § 185.\*]

**11. NEW TRIAL (§ 124\*)—MOTIONS—SUFFICIENCY.**

A motion for a new trial on the ground of newly discovered evidence, which neither stated the evidence, gave the names of any witnesses, nor stated the diligence used before the trial, was insufficient and properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 250-253; Dec. Dig. § 124.\*]

**12. NEW TRIAL (§ 108\*)—NEWLY DISCOVERED EVIDENCE—SUFFICIENCY.**

Alleged newly discovered evidence produced on a motion for a new trial *held* to be of such slight probative force and the counter affidavits of such great probative force that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the motion might properly have been denied on the ground that there was no reasonable probability that a different result would be produced on a new trial by such evidence.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.\*]

**13. DAMAGES (§ 132\*)—EXCESSIVENESS—PERSONAL INJURIES.**

Plaintiff, 37 years old, strong and active, and in the real estate business, was injured in a collision with a street car. He was not immediately disabled, but suffered much pain, and a few hours afterward took to his bed where he remained for six days. There were no external wounds or bruises. On June 29, 1908, 18 days after the injury, he was again confined to his bed and a physician called. On August 3d, a serious operation was performed. The kidney was exposed, the lymphatic capsule dissected loose and found to be hard and compressed. It was then stripped, the kidney opened and a drainage tube put in place in the kidney, through which the urine was discharged for four months. The operation necessitated the handling of nerves causing pain requiring two weeks or more to disappear. He was in the hospital for six weeks, and, though his condition was considerably improved by the operation, the kidney hung lower than it should, interfering with its function and causing pain. This condition was permanent unless corrected by another operation. He suffered from nervousness and insomnia, prior to the operation suffered agonizing pain, and thereafter suffered considerable pain down to the time of the trial in February, 1909, at which time walking was painful. *Held*, that a verdict for \$17,500 was excessive and required a new trial unless plaintiff would remit all in excess of \$10,000.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Bond, J., dissenting in part.

**Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.**

Action by Claude H. Lyons against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed conditionally.

John H. Lucas and Chas. N. Sadler, both of Kansas City, for appellant. John T. Barker, of Jefferson City, and Sparrow, Page & Rea, of Kansas City, for respondent.

**BLAIR, C.** This is an action for damages for injuries plaintiff alleges he received when one of defendant's cars collided, at the crossing of Fifth street and Haskell avenue, Kansas City, Kan., with a buggy in which plaintiff and his brother-in-law were riding. The negligence charged in the petition is (1) negligent, careless, and reckless speed; (2) a negligent, careless, and reckless failure to give warning of the car's approach to the crossing; and (3) that defendant's servants in charge of the car did not employ proper care to either slacken speed or stop the car after they saw, or by the exercise of reasonable care could have seen, plaintiff on said crossing. Then follow allegations as to the injuries suffered. The answer was a general denial. There was a judgment for plaintiff for \$17,500, and defendant appealed.

[1, 2] I. It is contended that since Kansas

was the scene of the injury there was no cause of action unless the laws of Kansas gave it, and that, as a consequence, pleading and proof of the law of Kansas giving a cause of action in the circumstances was an indispensable prerequisite to a recovery. No law of Kansas was pleaded or proved by either party.

In *Thompson v. Railroad*, 243 Mo. loc. cit. 349, 148 S. W. 484, plaintiff sought damages for personal injuries received in Arkansas, and this court unhesitatingly held that, since "no statute or other law of Arkansas" was pleaded, the applicatory law was that of the forum; and in *Biggie v. Railroad*, 159 Mo. App. loc. cit. 351, 140 S. W. 602, the rule was stated to be that in a case of this kind, "in the absence of a showing to the contrary, it will be presumed the laws of a sister state are the same as our own." There is a difference between these two principles (*Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33 and note, 105 Am. St. Rep. 38), but it is not of a character such as materially to affect the question raised in this case, and need not be discussed. Under both views the trial court was right in trying the case under our law.

The cases cited by defendant's counsel (*Mathieson v. Railroad*, 219 Mo. loc. cit. 542, 118 S. W. 9, and *Newlin v. Railroad*, 222 Mo. loc. cit. 391, 392, 121 S. W. 125) were both actions founded on Kansas statutes, pleaded and proved, and must be read in the light of that fact. So read they furnish no support for the present contention. In the former, the court, after saying the action was on the statute and a change of front would not be permitted, further held that the common law would not be presumed to be in force in Kansas. In doing so, however, it approvingly cited and quoted from cases in this state which lay down the rule adopted and applied in *Thompson v. Railroad*, supra. Properly understood that decision is no authority for saying that a plaintiff, injured in Kansas, who brings in the courts of this state an action for damages for injuries actionable under our general law of negligence will, at the close of the trial, be turned out of court because he does not plead and prove the laws of Kansas applicable to the facts. In such case, unless defendant properly invokes the laws of the sister state, the law of Missouri is to be applied. This conclusion renders unnecessary discussion of those assignments of error which proceed upon the assumption that the law of Kansas applies, and leaves for consideration only those rulings which are asserted to be erroneous when judged by the law of this state. These will be considered in the subsequent paragraphs.

[3] II. It is insisted that there was no evidence which justified the trial court in submitting the case to the jury on the humanitarian theory. On this phase of the case there

was substantial evidence of the following pertinent facts: Defendant's double tracks are laid east and west along Haskell avenue; Fifth street runs north and south, and at the intersection of the street and avenue the latter "jogs" south to such an extent that east of Fifth street its south line is quite or almost on a line with its north line west of Fifth street; in passing eastward across Fifth street defendant's tracks curve to the south, the curve beginning a little west of the west line of that street, to such an extent that the south or eastbound track approaches very near the curb on the south side of Haskell avenue, the sidewalk at that point being quite narrow; there is a two-story building on the southwest corner of the intersection of the street and avenue, and it and the awnings thereon as placed at the time of the accident so obstructed the vision of one coming from the south on Fifth street that he could not see defendant's tracks for any considerable distance west of the west line of that street until he had reached a point about 15 or 16 feet south of the south track; west of Fifth street the tracks are laid on a very perceptible upgrade, estimated as 3 or 4 per cent; the accident occurred at about 11:30 a. m.; a mist or drizzle of rain was falling but there is no evidence this was of a character to obscure the vision.

Plaintiff and his brother-in-law, the latter driving, were in a one-horse buggy, traveling north along the center of Fifth street which, at this point, is 60 or 65 feet wide between the property lines; as the vehicle approached the tracks its speed was slackened and its occupants listened for cars and looked both east and west, but neither saw nor heard a car nor heard any warning of one's approach. Their view of the track west of Fifth street was obstructed by the building above referred to until the horse reached a point very near the track. Plaintiff testifies that, when the vehicle reached a point where he could see to the west down Haskell avenue 30 or 40 feet, he looked in that direction, but saw no car. At this time the horse was in 5 or 6 feet of the track and moving steadily toward it in a trot, and his speed is variously estimated by the witnesses at from  $2\frac{1}{2}$  to 10 miles per hour. At the moment the horse reached the south rail of the track or just after his front feet passed over it plaintiff and his brother-in-law, for the first time they say, saw the car, then 10 or 12 feet west of the west property line of Fifth street, and 35 or 40 feet from the horse. The car was moving at the rate of 12 or 15 miles per hour. Plaintiff testified that at this juncture the motorman's face was turned toward the rear of the car, in the center of which the conductor, who was the only other occupant, was standing. Hedrick, who was driving the horse, saw the car at the same moment plaintiff did, and immediately attempted to turn the horse to the right so as to get him off the track, but this effort was unsuccessful,

and the fender of the car "picked up" the horse, and the car struck the left front wheel of the buggy and broke it, so that the axle fell, and plaintiff, who was riding upon the left side of the buggy, was brought down against the car, and the horse, buggy, and occupants were dragged or carried in this position 30 or 40 feet before the car was stopped.

The motorman testified that he "had on a full head of power up to about the property line" on the west side of Fifth street, and that the car was moving 12 or 13 miles per hour; that, when he first saw the horse and buggy approaching the track, the car was 10 or 12 feet west of the west property line of Fifth street, and the horse's head was 8 or 10 feet south of the track, and the horse was approaching the track at the rate of 8 or 10 miles per hour. On cross-examination, the motorman further testified as follows: "Q. What is a blind crossing? A. Where you can't see only to a certain extent. Q. To that extent then it's more dangerous than the open crossing? A. Certainly, I just said that. Q. And you, as a motorman running on that line, appreciated that fact that morning? A. Yes, sir. Q. And when you approached that crossing it was your duty as a motorman to have your car under control, expecting to see people crossing? A. Yes, sir. Q. You knew that was your duty that morning? A. Certainly. Q. A person approaching from the south and driving north over this railroad track, on account of the conditions which you have detailed, could only see a very little distance up the track, you think Mr. Trembley? A. I wouldn't know what you would call a little distance. Q. Well, just a short distance then. The building is an obstruction, isn't it, Mr. Trembley? A. Yes, sir. Q. Now then, you are very familiar with that crossing? A. I am. Q. Now then, when the horse's head was about 8 feet south of the track, as you told Mr. White you first saw it, the men in the buggy couldn't see the car at all, could they Mr. Trembley? A. Not in the position they were in. Q. Naturally you, on the car, could see the horse's head first? A. Yes, sir. Q. Now, when you saw the horse's head, going at that speed, you knew he was going to try to cross the track didn't you? A. No, I did not. Q. What did you think the horse was going to do? A. Well, I didn't know. Q. He was going pretty fast? A. Yes, sir. Q. Within 8 feet of the track, going at the rate of speed he was going, you knew it would be very difficult to stop him after he got on the track? A. Certainly. Q. So you knew he would likely be at the crossing when you got there? A. Yes. Q. And you knew if he was on the crossing when you got there, there would be a collision? A. Yes, sir. Q. When you were 10 or 12 feet west of the property line you first discovered the horse's head? A. Yes, sir. Q. You say 10 or 12 feet west, that's just an estimate? A. Yes, sir. Q.

You are not pretending to give me the exact feet now? A. No." He further testified that the horse traveled to the track from the point where he first saw him in about the same time the car traveled to the point of collision from the point about 35 feet west thereof, from which point he first saw the horse's head; that the occupants of the buggy could not see the car as soon as witness could see the horse; and that the horse was nearly on the track before the occupants of the buggy could see the car. He said he had given the usual warnings of the car's approach to the crossing, and again sounded the gong as soon as he saw the horse, denied turning his face from the front after reaching the point 12 or 15 feet west of the west line of Fifth street, and declared he used every effort to stop the car after he discovered plaintiff's peril. There was evidence that the car could have been stopped safely in 25 or 30 feet, and that at the moment the car struck the buggy the motorman was setting the brake.

There was evidence which conflicted in several respects with that set out, but it is to be disregarded in determining the question presented by the contention now being considered.

It was said in *Ellis v. Metropolitan Street Railway*, 234 Mo. loc. cit. 680, 681, 138 S. W. 30, in which there was evidence that plaintiff, apparently oblivious to danger, drove upon the track, and the vehicle he was in was struck and he was killed, that the "duty of the motorman did not commence merely when the horse's feet were actually at the south track. It commenced at such a time as a prudent motorman could see that he (plaintiff) was intent on pursuing his journey across the track, oblivious to danger from the car. Then was when he came within the danger zone, and at and after that time the motorman, whose duty it was to see him, was not entitled to supinely await the event to see if the boy would save himself. He was obliged to act on reasonable appearances, put his car under control (if not already so), slack it, if he could, and stop it, if necessary and if it could be done. \* \* \* If the conduct and action of a party approaching a street railway track would lead a motorman of ordinary prudence to conclude that such party was going upon the track in front of the car, the right of the motorman to act on the presumption that the person would stop before going on the track ceases."

In the case of *Holden v. Railway Co.*, 177 Mo. loc. cit. 463, 464, 76 S. W. 973, the facts were that the injury occurred at a busy street crossing; that plaintiff was driving east on Pine street in a one-horse stake-wagon and was moving downgrade in a trot, at the rate of 5 to 7 miles per hour, and when the horse was 4 or 5 feet from the track he looked and saw a car coming rapidly about 25 feet away; the driver turned the horse diagonally across the street towards the

north, and after reaching the north crossing of Pine street, while one wheel of the wagon was on the car track, the car struck the wagon and plaintiff was injured. In discussing the duty of the motorman in that case, this court (177 Mo. loc. cit. 470, 76 S. W. 976) said: "We take it, that if the motorman discovered that the vehicle was approaching this crossing at a negligent rate of speed, and that he further observed that they were negligent in not looking out for the approach of the car, then, notwithstanding the negligence of the plaintiff, it was the duty of the motorman to so regulate the speed of the car, if in his power, as to avoid the infliction of any injury. In other words, the mere negligence of the plaintiff, in approaching and crossing the track, would not justify the infliction of an injury, if, by the exercise of reasonable care and caution, it could be avoided. The servant will not be permitted to assume that a person is aware of the approach of the car and will stop, in due time to avoid injury, and at the same time admit that he knows that the person was not performing his duty in that respect, in ignoring the violent ringing of the bell, giving no attention or notice to the approach of the car."

The same principle was approved in *Eckhard v. Transit Co.*, 190 Mo. loc. cit. 618, 619, 89 S. W. 602; *Moore v. Transit Co.*, 194 Mo. loc. cit. 12, 13, 92 S. W. 390; *Powers v. Transit Co.*, 202 Mo. loc. cit. 281, 100 S. W. 655, and many other cases.

In view of the fact that in this case the motorman testified, in substance, that he saw the horse before the plaintiff could see the car, and that he realized, from the horse's speed, that a collision was imminent, and that there is evidence he could have seen and, in the exercise of ordinary care, ought to have seen the horse before he actually did see him, but that he was not keeping his eye upon the track, having turned to look into the car, and also evidence that with the appliances at hand he could safely have stopped the car after reaching the point from which he says he first saw the horse and before reaching the point of collision, there was no error in submitting the case to the jury upon the humanitarian theory.

Numerous cases are cited as supporting a contrary conclusion. An examination of them discloses that some are cases in which pedestrians stepped suddenly upon the track in front of street cars or railroad trains; in others the facts were that persons and vehicles were negligently on the tracks, and there was no evidence they could have been seen in time for the injury to have been avoided; in others there was nothing in the manner in which the injured person approached the track to indicate he would not or could not stop before going in front of the car or train; in others the person was injured while walking on the railroad track, nothing indicating an obliviousness to danger; others turn upon the absence of any substantial evi-

dence to show that the injury could have been avoided after the injured person's peril was or ought to have been discovered. A detailed discussion of the cases cited is deemed unnecessary. A careful examination of them discloses that they are not opposed to the rule as above quoted and applied.

[4, 5] III. The first instruction for plaintiff is said to be erroneous (1) in that, in connection with the submission of the humanitarian theory, the court, among other things, told the jury that it was the duty of the motorman, after discovering a vehicle in danger "to use all reasonable effort consistent with the safety of persons on board to avoid colliding with them," and (2) in that it does not permit the jury to consider plaintiff's contributory negligence. The first objection is answered by the authorities quoted in the preceding paragraph. The clause objected to correctly stated the motorman's duty in the circumstances premised. The second objection is argued on the theory that the instruction conflicted with certain instructions given for defendant on the subject of contributory negligence.

It is not contended (except in the feature already mentioned) plaintiff's first and second instructions do not correctly formulate and apply the humanitarian doctrine. In fact they contain a correct announcement of it. Defendant is in no position to complain because of their conflict, if any, with instructions, given at its instance, on the subject of contributory negligence, which ignored the humanitarian doctrine. *Ellis v. Metropolitan St. Railway*, 234 Mo. loc. cit. 679, 138 S. W. 23. It is suggested the jury disregarded these last-mentioned instructions. There is nothing to indicate they were ignored, except in so far as they conflicted with correct instructions given for plaintiff. To that extent they should have been ignored.

[6] IV. (1) Another contention is that the witness Hedrick, who was driving the buggy, was erroneously permitted to testify as to the speed of the car. He testified he had frequently ridden in street cars and noticed their speed and had had occasion to estimate it at times. Defendant's trial counsel was tendered an opportunity to examine witness further as to his qualification, and declined to do so, but objected that the witness had not "qualified as a speed expert." There was no error in overruling this objection and permitting Hedrick to testify. *Moon v. Transit Co.*, 237 Mo. loc. cit. 431, 432, 141 S. W. 870, Ann. Cas. 1913A, 183.

[7] (2) There was no error in permitting the witness Lentz to testify respecting the distance within which the car could have been stopped. This witness at one time had been in defendant's employ as a motorman and conductor for more than a year, and was familiar with defendant's cars of the class to which the one which injured plaintiff belonged, had operated cars of that class, knew

their equipment and the methods of stopping them. He also had seen the tracks at the place where the accident occurred, had been over the curve there several times, and knew there was a grade at that point. Contrary to counsel's contention in his brief, the hypothetical question included the fact that the car was approaching the curve at Fifth and Haskell, the fact that it was moving upgrade, and the fact that rain had been falling and it was drizzling at the time. There was no error in connection with the admission of this testimony.

[8] (3) Exception was saved to the ruling permitting hypothetical questions to be propounded to physicians offered as witnesses. No authorities are cited, and objections of a rather general character are made in the brief. The physicians who had treated plaintiff's injuries and the surgeon who operated on him were the witnesses to whom the hypothetical questions were propounded. The object of these questions was to elicit testimony as to whether the condition of plaintiff's left kidney could have been due to the collision with the car. The question hypothesized the facts of the accident, as detailed by the plaintiff and his brother-in-law, and in each instance the inquiry, in effect, was whether the conditions the witness actually discovered could have been the result of the accident. There was no error.

[9] (4) It is urged it was error to permit Dr. De Lamater to testify as to the results of an examination of plaintiff's urine six weeks after the injury and one week before the operation occurred. The testimony was that the examination of the urine disclosed an excess of blood cells in the urine, which, the witness said, meant that blood was getting into the urine. It is insisted this testimony was not within the allegations of the petition. It was alleged that plaintiff's left kidney was crushed, and that he was "otherwise injured internally." There was evidence that the condition of the kidney which the operation disclosed was probably due to traumatism, resulting in a "fracturing in to the urinary or secreting parts of the kidney" followed by a leakage of the urine into the fatty tissue surrounding the kidney, and that the kidney seemed to have been "fractured" or "cracked" within the capsule or covering which incloses it. The examination of the urine was simply one of the methods adopted which disclosed the condition of the kidney and led to the operation plaintiff underwent. The evidence was relevant to the issue whether plaintiff's kidney was crushed as alleged.

[10] (5) It is also insisted that there was no evidence that the condition of plaintiff's kidney was the result of the collision. The record shows that the physicians who treated plaintiff and the surgeon who operated upon him testified that the condition they discovered was due to traumatism (an in-

jured or wounded condition), and that the injury received in the collision of the car and buggy, in their opinion, could have caused the condition discovered. There was no evidence plaintiff had received any other injury which could have produced the condition the surgeon found. The surgeon testified he had never known the condition he found to be present in a "spontaneous case," i. e., a case of disease. The contention is not well founded.

[11, 12] V. Error is assigned on the trial court's refusal to grant a new trial on the ground of newly discovered evidence. The motion for new trial neither stated the evidence discovered nor gave the names of any witnesses nor stated the diligence used before the trial. The affidavit of counsel filed with the motion was to the effect that counsel had heard, prior to the day the motion for new trial was filed, that plaintiff had been engaged in a fight in Denver, Colo., after he was injured, and four months before the trial, but when this information first came to counsel his affidavit did not disclose. It is stated, however, that he first learned on the day the motion was filed that one Tudor was an important witness and would state that plaintiff and his brother had a fight in which plaintiff claimed his injury was aggravated. Tudor's affidavit was filed. In this it was stated affiant was told that plaintiff and his brother were fighting, and when affiant went to the room plaintiff looked pale, excited, and nervous; and plaintiff and one Waddell, who was present, told affiant plaintiff's brother was intoxicated and had attacked him, whereby plaintiff's injuries were aggravated. Affidavits of plaintiff, his brother, and Waddell were filed by plaintiff, and in all it was stated that no altercation between plaintiff and his brother had occurred, and the physician whom Tudor swears he called to attend plaintiff made affidavit that he found plaintiff suffering from a cold and "found no marks or bruises on plaintiff or anything that would indicate he had had a fight." Subsequently and at the succeeding term of court, and several weeks after the trial, affidavits as to plaintiff's condition prior to the date of his injury were filed. In none of these is there anything to indicate that plaintiff's kidney was previously affected. A motion to strike out these affidavits was immediately filed, and plaintiff filed counter affidavits of numerous persons tending to show plaintiff, prior to his injury, was a strong, active, healthy man. The court struck out the affidavits at which the motion mentioned was aimed. The facts in this connection have been fully set out because of the earnestness of the insistence of counsel for defendant that this ground of the motion should have been sustained.

The applicable rule has been recently discussed and applied (*King v. Gilson*, 206 Mo. loc. cit. 278, 104 S. W. 52 et seq.; *Winn v.*

*Grier*, 217 Mo. loc. cit. 461, 117 S. W. 48) and it is clear the ruling in this case is justifiable on the simple ground that the motion was insufficient in so far as the ground relating to newly discovered evidence is concerned.

In addition, the court would have been fully justified in putting its ruling on the ground that the probative force of the affidavits defendant filed was so slight and that of the counter affidavits so great that there was no reasonable probability that a different result would have been produced by any evidence the affidavits disclosed defendant could have obtained. *Devoey v. Transit Co.*, 192 Mo. 218, 91 S. W. 140.

VI. Finally, it is urged that the verdict is excessive. In so far as the argument is directed to the question whether the injury to the kidney was the result of the collision with defendant's car, it need not be considered further than to say there is full and ample evidence justifying a finding against defendant on that issue, and the jury found that way.

There is evidence tending to show that prior to his injury plaintiff was a strong, active man. He was 37 years old and engaged in the real estate business in Kansas City. His injury did not immediately disable him, but caused much pain. A few hours afterward plaintiff took to his bed where he remained for six days and nights, suffering great pain. Thereafter, for a week, he was able to go to his office for an hour or two each day though suffering considerably during this time. During this week he was examined by Dr. McDonald. There was no external wound or bruise. On June 29th, 13 days after he was injured, plaintiff again was confined to his bed and Dr. McDonald was called. Subsequently, July 27th, Dr. De Lamater was also called into the case. He testified he found plaintiff suffering agonizing pain over the left kidney and extending down the ureter to the abdomen. On August 3d, other treatment having failed, plaintiff was operated on by Dr. Hill. The operation was a serious one. An incision was made in the left side and the kidney exposed, "the lymphatic capsule was dissected loose" and found to be hard and compressed, and the capsule was then stripped and the interior (of the kidney) was opened and a drainage tube put in place in the kidney, through which the urine was discharged out of the back for about four months. The operation necessitated the handling of two spinal nerves which of itself caused pain which would require two weeks or more to disappear. Plaintiff was in the hospital for six weeks. The operation relieved the prior particularly painful symptoms, and plaintiff's condition was considerably improved when he left the hospital. The result of removing the fatty tissue or capsule around the kidney was to deprive the kidney of

support, so that it hangs lower than it should, and this interferes with the kidney's function and produces pain. This condition is permanent unless corrected by another operation. From the time he left the hospital until the following January (1909), plaintiff was confined to his bed most of the time, and suffered considerably. In August, 1909, a year after the operation on plaintiff, Dr. Willetts examined him and found him "exceedingly nervous, bordering on a state of melancholia almost, a nervous exhaustion; very much depressed, very weak, a good deal of pain in the left side, radiating forward over the abdomen." In October, 1909, plaintiff went to Denver and returned suffering much pain and was nervous and troubled with insomnia. Dr. Willetts visited plaintiff frequently during the winter, every day for a time, and says he suffered a great deal of pain, was nervous, and much depressed, and for only a few weeks before the trial (February, 1910) was able to be out much. Plaintiff's left leg still swells and pains him, and walking is painful. His condition was still painful at the time of the trial. Physicians testified his injury was of a permanent character.

The trial court heard the evidence and saw the plaintiff at the trial and approved this verdict. That court was then in a better position to judge of the fairness of the verdict than this court can be now. *Gordon v. Railroad*, 222 Mo. loc. cit. 539, 121 S. W. 80. This is particularly true because of the nature of plaintiff's injury and the character of its effect upon him. There was ample evidence plaintiff had suffered a great deal of physical pain and mental anguish and that he was doomed to further suffering. One of his vital organs has been permanently and painfully injured, and, after a serious operation by a skilled and experienced surgeon, that organ yet fails to perform properly its natural function, with the result that plaintiff suffers considerable pain which he must endure in the future also, unless he submits to a second operation, and his kidney is restored to its proper position. This alternative itself is a trying one and one which is to be considered in determining the question as to the excessiveness of the verdict. Plaintiff's left leg is also in such a condition that it pains him when he walks. He has been weakened, generally, by his injuries and sufferings, and there is testimony (his own and that of his physician) that opiates and bromides are frequently, if not usually, necessary to induce sleep. His nervous system has been affected until he has been upon the verge of melancholia. It is difficult for this court to say that such injuries and suffering in the past and the pain the future threatens are more than compensated by this verdict, particularly in view of the character of plaintiff's injuries and

the fact that the verdict was returned by a jury and approved by a trial judge who saw the plaintiff in court and heard the witnesses. In some cases the injuries are of a character that does not give trial courts much advantage in determining the justness of the amount the jury allows. In such cases this court has, more freely than in others, reduced judgments in its opinion too large. In this case the plaintiff's appearance at the trial is an element of much greater importance than it could well be in case of the loss of a limb and like injuries. In this case plaintiff's disability resulting from his injury, while not complete, is very considerable and his suffering has been great, and, it seems, will continue at least until another serious operation is performed, which may effect his recovery and might, it is reasonably inferable, result in his death. With a dilemma of this kind before him, and injury and suffering of the kind described behind him, it would, on this record, be venturing a good deal to hold that the jury and trial court with the plaintiff before them went materially astray in the sum they allowed plaintiff.

The judgment is affirmed.

BROWN, C., concurs.

PER CURIAM. [13] In the foregoing opinion of BLAIR, C., BOND, J., concurs; WOODSON, P. J., and LAMM and GRAVES, JJ., are of the opinion that the judgment is excessive in the sum of \$7,500, and that it should be reduced to the sum of \$10,000. A majority of the court being of the opinion that the judgment should be reduced to \$10,000, to bear date of the original judgment, it is therefore ordered that if the plaintiff will, within ten days from this date, remit the sum of \$7,500 as of the date of the original judgment, then the judgment after such remittance will be affirmed in the sum of \$10,000 as and of the date of the original judgment; otherwise the judgment is reversed and cause remanded.

BOND, J., dissents to this disposition of the case.

WING et al. v. HAVELIK.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

1. DEEDS (§ 211\*)—SUFFICIENCY OF EVIDENCE—CAPACITY.

Evidence, in an action to set aside a deed, held sufficient to show that at the time of its execution the grantor was of sound mind.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

2. DEEDS (§ 211\*)—SUFFICIENCY OF EVIDENCE—UNDUE INFLUENCE.

Evidence, in an action to set aside a deed on the ground of undue influence, held not to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



show any undue influence on the part of the grantee or his wife.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

### 3. DEEDS (§ 17\*)—REQUISITES—CONSIDERATION.

Where a son, on receiving a deed of his parents' farm and homestead, orally agreed that when they could not care for themselves he would assist them, and after the death of his father cared for his mother until her death according to his agreement, there was a sufficient consideration for the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 26-37; Dec. Dig. § 17.\*]

### 4. DEEDS (§ 72\*)—VALIDITY—"UNDUE INFLUENCE."

A deed will be set aside when obtained by the undue influence of a person other than the grantee; "undue influence" meaning any influence, however exercised, which destroys free agency, and substitutes the will of another for that of the person in whose name the act brought in judgment is done.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190-199; Dec. Dig. § 72.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172, 7823, 7824.]

### 5. DEEDS (§ 211\*)—SUFFICIENCY OF EVIDENCE—UNDUE INFLUENCE.

Evidence, in an action to set aside a deed from parents to a son on the ground that the will of the father was overcome by that of the mother, who was of unsound mind, held not to establish undue influence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

Appeal from Circuit Court, Lincoln County; James D. Barnett, Judge.

Action by Mrs. Annie Wing and others against Frank Havelik, Jr. Decree for defendant, and plaintiffs appeal. Affirmed.

This is a proceeding to nullify a conveyance on the ground of unsoundness of mind and undue influence.

Frank Havelik and wife, Kate, were Bohemians, not understanding English. They had four children, Frank, Jr., Mrs. Krieger, Mrs. Annie Wing, and Mrs. Schromek; the latter being dead, leaving one child, Mrs. Anderson. All were made parties to this proceeding. In January, 1883, the parents were living on a farm of about 140 acres, worth not exceeding \$1,200. They lived in a two-room log house. Frank, Jr., was young, and had been hired out. He married at that time, and went to live with his parents on the farm, and received a deed from them for the land, which provided that all parties thereto should live in the dwelling on the land during the life of the grantors, who should be paid one-third of all the grain raised on the place. Disagreements arose, and in the following September the parents built and moved into another house on the farm. Disagreements continued, and after some time Frank moved away. After several years he moved back and remained until 1889. The troubles continuing, he made a conveyance of the land to his father and Mike Vocum, a brother of his mother, who lived on the farm. The deed expressed a consideration of \$400. Frank then

bought a place 12 miles distant, to which he moved his family.

Mrs. Wing testified as follows: "I reckon my uncle had money in the place, over half of it, wasn't more. He got it in the place, in St. Louis, in lots and buildings. When that was sold my pa kept the money and never give him any of it; they would borrow money and never give it back. It went into the farm; that's how come it to be his home as long as he was living. They bought the place from Frank; paid him \$400 for it. A long time ago Father and Mother made Frank a deed to it, about 1882. He got the farm for the support of my parents as long as they were living—they did it the same month he got married, in January; don't remember what year. Lived there mighty little before he was married; he was hired out. Frank, my brother, deeded it back to Father and Mike Vocum in 1889. Frank got it from them and deeded it back to Father and Uncle. They didn't get along well, and Frank deeded it back. He had one child when they left. Frank had the place—they couldn't get along. Joe Shelker married one daughter, and he moved there, and Frank moved on his place. Joe stayed until he got tired of waiting on my parents, and went to his own farm, and Frank moved back. I don't know how many years they lived there. They couldn't get along, and Pa bought the place back. I lived with Father first year I was married. Frank was a little boy then. They wanted to deed us the farm. We was young folks and wouldn't take it. Frank said he was going to sell it back, and he did so, and went off where he is now. Don't remember the year Frank made the deed back to Father and Uncle. Father paid \$100, and Uncle paid \$300. Heard that from my Father and Uncle."

In 1897 the parents and Vocum reconveyed to Frank for the expressed consideration of \$230. No money was paid. That deed contained a provision that the grantors should occupy the dwelling during their natural lives.

Mike Domackly testified that three times prior to the making of that deed the father came to him to get him to induce Frank to take a deed to the land, saying that he knew his son Frank was swindled, and that he wanted to fix it; that they had done Frank what was not right, and they wanted to correct it; that Frank had done lots of work on the land, and they wanted to give him a deed back to the property. He further testified that the deed was made upon an agreement talked over at the time, that the old folks should take care of themselves as long as they could, and then Frank would assist them. He testified that the father was of sound mind.

Frank Martinek was present at the making of the deed at the request of the elder Havelik, and testified that Havelik was of sound mind.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Joe Martinek and his wife, and Mrs. Annie Martinek, and Mrs. Wing and daughter, Mrs. Chaney, all testified that Mrs. Kate Havelik was subject to short spells, during which she imagined that she was bewitched by her son Frank and his wife, and was very wild and irrational, imitating cries of various animals, and cursing and abusing her husband; that she often importuned her husband to make a deed to the land to Frank, so that Frank and his wife would relieve her of her troubles.

Mrs. Joe Martinek testified that Mr. Havelik said that his wife was hard to do anything with; that she wanted him to deed the property to his son, so she would get rid of that trouble and that sickness; that she was mean to him, hard on him, and he could not get along with her.

Mrs. Chaney testified that her grandmother had those spells five or six years before the deed was made, and that she frequently sent her husband to induce Frank to take a deed for the place; that he did not want to go, and that he believed his wife was bewitched.

Mrs. Wing testified that her father believed that her mother was bewitched by Frank and his wife, and that on two occasions she prevented him from drowning himself because of his troubles with her.

Frank Knzel, in regard to the senior Havelik's mind, testified as follows: "Well, the fact is I couldn't decide on that matter. I said once I thought there was certain delusions the old lady had that was working on his mind; they worked on his mind, and he had no thought of anything else. Other times I thought he was as bright a man as any at his age."

Joseph Martinek testified that Mrs. Havelik said that Frank's wife was the cause of her trouble, and that she kept after the old gentleman to give the land back to Frank, so that would cure her; that Mr. Havelik would sometimes think she was bewitched, and sometimes would talk like he thought she wasn't; that he was a sensible, smart man, but could not write.

Frank Havelik, Sr., died in 1900. Mr. Vocum died the following year. After the death of Mr. Vocum, Frank took his mother and cared for her until her death in 1906.

The petition alleges that the minds of the elder Haveliks were unsound, and that Mrs. Havelik imagined she was bewitched by Frank and his wife, and that they could relieve her of such trouble, and that they would do so provided the land was conveyed to Frank. The petition then continues as follows: "And she thereupon so importuned and persuaded Frank Havelik, Sr., to so convey said land and give the same to her said son, the defendant, that he, by reason of his old age and feeble mind, also became possessed of the belief so entertained by said Katherine; that said Frank Havelik, Jr., knowing all of the aforesaid facts, fraudulently intending to procure said land for himself without consideration, and to cheat and deprive

said Frank Havelik, Sr., and Katherine Havelik of their interest in said land, and to cheat and defraud these plaintiffs of their apparent interest, as heirs of said Frank Havelik, Sr., fraudulently encouraged and promoted the delusion and belief aforesaid of his parents, and by means thereof and of undue influence, duress, and force exerted by him and his wife fraudulently induced them to make and execute a deed conveying to him the lands aforesaid."

The evidence conclusively shows that the mind of Frank Havelik, Sr., was sound, and there is no evidence tending to show that the defendant or his wife exerted influence of any kind to procure the deed.

The original petition alleged that the deed of 1897 was executed by Havelik and wife. During the trial the petition was amended by inserting the allegation that Vocum was one of the grantors. The pleadings make no showing as to who were the heirs of Vocum. We shall treat the case as one to set aside a conveyance of an undivided half of the property. At the close of the plaintiff's evidence the court found for the defendant, and dismissed plaintiff's bill, and they have appealed.

Frank Howell and Wm. A. Dudley, both of Troy, for appellants. R. H. Norton and Avery, Young & Woolfolk, all of Troy, for respondent.

ROY, C. [1] The evidence is almost all in favor of the soundness of the mind of Frank Havelik, Sr., and we agree with the trial court that he was of sound mind. The question as to whether Mrs. Kate Havelik was competent to make a deed need not be considered, as her interest in the land died with her.

[2] The plaintiffs utterly failed to make a case of undue influence on the part of the defendant or his wife as charged in the petition. However, they have chosen to brief the case in this court on the theory that the petition charged undue influence exerted by Mrs. Kate Havelik over the mind of her husband, and we shall so consider it.

[3] I. Appellants say that, even though the defendant had no knowledge of the influence that operated on the parties to induce the conveyance to him, there being no consideration, the conveyance is void, and should be set aside.

It appears in this case from the evidence introduced by the plaintiffs that there was a consideration for the deed. Frank orally agreed at the time that when the old people could not care for themselves he would assist them. After the death of his father and uncle, in accordance with his agreement, he took his mother and cared for her until her death.

[4] II. It may be conceded that a deed will be set aside when obtained by the undue influence of a person other than the grantee.

Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087.

In this case it is contended that undue influence was exerted by Mrs. Havelik, one of the grantors.

39 Cyc. p. 681, defines undue influence as: "A coercion produced by importunity, or by a silent resistless power, which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear; whatever destroys free agency, and constrains the person whose act is brought in judgment to do what is against his will, and what he would not have done if left to himself; that which overpowers the will without convincing the judgment; an influence which acts to the injury of the person who is swayed by it, or of those whom he would, if left to himself, have benefited."

In Dingman v. Romine, supra, 141 Mo. loc. cit. 474, 42 S. W. 1088, it was said: "Any influence, however exercised, which destroys free agency, and substitutes the will of another for that of the person in whose name the act brought in judgment is done, is undue or wrongful."

The contention of the plaintiffs herein is unusual and peculiar in this: They contend that the will of the husband was overcome by that of his wife, who is conceded to have been of unsound mind. They claim that the strong was overcome by the weak, that his will was overcome by one who had no rational will.

[5] We do not hold that in no case can the instrument be set aside because of undue influence by the weaker upon the stronger. We are of the opinion that the trial court was right in finding for the defendant on the merits.

Mrs. Wing's testimony shows that as early as 1883 her parents offered her a deed to the property. Their purpose in making such offer was doubtless the same as that entertained by them when they made the first deed to Frank. Neither of them was then of impaired intellect. It seemed to be a continuous desire on the part of the parents to convey the farm to one of their children for the support of the grantors in old age. Frank conveyed the farm back to his parents in 1889, and reluctantly accepted the deed of 1897. The testimony of Mike Domackly showing that the father insisted upon repaireing the wrong done to his son by making the last deed, and that such deed was made upon Frank's agreement to care for the grantors, cannot be ignored. It was introduced by the plaintiff. It is consistent with the father's conduct for 14 years prior thereto. We are impressed with the fact that the uncle also joined in making that deed. No undue influence is alleged or proved as to him. It is not charged that he was of unsound mind.

This is a case where much deference should

be shown to the finding of the trial court. The witnesses were present and testified, and their demeanor was observed by the chancellor. We are satisfied that his finding and decree are right, and affirm the judgment.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

#### STATE v. HUMFELD.

(Supreme Court of Missouri. Division No. 2. Dec. 9, 1913.)

#### 1. CRIMINAL LAW (§§ 1088, 1091\*)—APPEAL—BILL OF EXCEPTIONS—MOTION TO QUASH.

A motion to quash an indictment or information is no part of the record proper, and error of the court in overruling it must be preserved in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2746-2751, 2757, 2766, 2782-2803, 2815, 2816, 2818, 2819, 2823-2833, 2843, 2899, 2927, 2928, 2931-2933, 2943, 2948, 3204; Dec. Dig. §§ 1088, 1091.\*]

#### 2. COURTS (§ 231\*)—SUPREME COURT—JURISDICTION—CONSTITUTIONAL QUESTION.

Where the record on appeal from conviction for a misdemeanor shows that no constitutional question was raised save by a motion to quash the indictment, and defendant in his motion for a new trial does not call the attention of the trial court to the alleged error in overruling the motion to quash, no constitutional question is presented, and the Supreme Court has no jurisdiction on appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

Appeal from Circuit Court, Franklin County; R. A. Brenner, Judge.

William C. Humfeld was convicted of a misdemeanor, and he appeals. Case ordered transferred to the St. Louis Court of Appeals for determination.

Jesse H. Schaper, of Washington, Mo., and Morris & Hartwell, of La Crosse, Wis., for appellant. John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for the State.

WALKER, J. Appellant was convicted of a misdemeanor, in the circuit court of Franklin county, on an information charging him with a violation of section 8315, R. S. 1909, regulating the practice of medicine and surgery. The case is brought here on appeal on the ground that a constitutional question is involved, the manner in which this question was raised was by a motion to quash the information, and no effort was made thereafter to preserve the question in the record.

[1] It has been held in a number of cases that a motion to quash an indictment or information is no part of the record proper, and the error of the court in overruling same must be preserved in the bill of exceptions. State v. Coleman, 199 Mo. 112, 97 S. W. 574; State v. Finley, 193 Mo. 202, 91 S. W. 942; State v. Tooker, 188 Mo. 438, 87 S. W. 487.

[2] A later case directly in point holds that where the record on appeal from a conviction for a misdemeanor shows that no constitutional question was raised save by a motion to quash the indictment, and defendant in his motion for a new trial does not call the attention of the trial court to the alleged error in overruling the motion to quash, no constitutional question is presented, and the Supreme Court has no jurisdiction on appeal. *State v. Finley*, 234 Mo. 603, 137 S. W. 879.

In view of the foregoing authorities and the facts in this case, it is evident that there is no constitutional question before the court on this appeal, and the case should therefore be transferred to the St. Louis Court of Appeals for determination.

It is so ordered.

BROWN, P. J., and FARIS, J., concur.

### STATE v. CHRISTIAN.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

#### 1. INDICTMENT AND INFORMATION (§ 130\*)—CHARGING TWO OFFENSES.

An information, charging that accused and another "jointly" committed the crime of grand larceny of a horse, improperly joined therewith a charge that accused alone aided the other to escape with knowledge that the other had alone stolen the same horse; the joinder of such offenses not being authorized by Rev. St. 1909, §§ 4523, 5103, 5104, permitting larceny and embezzlement counts to be joined and the joinder of particular offenses in other cases.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 419-423; Dec. Dig. § 130.\*]

#### 2. INDICTMENT AND INFORMATION (§ 130\*)—JOINDER OF OFFENSES.

Only such offenses may be joined in the same information as arise out of the same transaction and are so far related that an acquittal or conviction for one would bar a prosecution for the other.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 419-423; Dec. Dig. § 130.\*]

#### 3. INDICTMENT AND INFORMATION (§ 124\*)—PARTIES DEFENDANT.

There was an improper joinder of parties defendant in an information charging that accused and another jointly stole a horse and also charging that accused alone assisted in the escape of such other after such other had alone stolen the same horse.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 327-333; Dec. Dig. § 124.\*]

#### 4. LARCENY (§ 64\*)—POSSESSION OF STOLEN PROPERTY—PRESUMPTIONS.

Where the manner of obtaining actual possession of recently stolen property is fully explained by the evidence, and the only issue is the capacity in which accused holds such possession, whether feloniously or innocently, no presumption of guilt arises from the mere fact of possession, so as to authorize an instruction thereon.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170-178; Dec. Dig. § 64.\*]

#### 5. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—REASONABLE DOUBT.

Instructions should in effect require that the reasonable doubt justifying an acquittal shall "arise from a consideration of all the evidence in the case."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

#### 6. ESCAPE (§ 10\*)—PROSECUTIONS—INSUFFICIENCY OF EVIDENCE.

Evidence, in a prosecution for assisting one to escape with knowledge that he had stolen a horse, held not to sustain a conviction.

[Ed. Note.—For other cases, see Escape, Cent. Dig. §§ 17, 18; Dec. Dig. § 10.\*]

#### 7. ESCAPE (§ 10\*)—BURDEN OF PROOF.

In a prosecution for knowingly assisting one who had stolen a horse to escape, the burden was on the state to show that the person who had stolen the horse was in fact trying to escape.

[Ed. Note.—For other cases, see Escape, Cent. Dig. §§ 17, 18; Dec. Dig. § 10.\*]

Appeal from Circuit Court, Moniteau County; J. G. Slate, Judge.

Theodore Christian was convicted of assisting in the escape of one who had stolen a horse, and appeals. Reversed and remanded for new trial.

This is a prosecution commenced against the defendant in the circuit court of Moniteau county upon an information which was filed therein on April 26, 1913. Since this information has been attacked by the defendant both by a motion to quash, directed toward the entire information, and by a demurrer to the second count thereof, we deem it necessary, for a full understanding of the points involved, to set the information out in full. Omitting formal parts, it is as follows: "J. B. Gallagher, prosecuting attorney within and for Moniteau county, Mo., upon his information and belief, for an amended information, informs the court that Eddie Scott and Theo. Christian on or about the 4th day of February, 1913, at Moniteau county, Mo., did then and there unlawfully and feloniously steal, take, and carry away one bay mare, then and there being, the personal property of Cornelius Coleman, of the value of \$100, against the peace and dignity of the state. J. B. Gallagher, prosecuting attorney aforesaid, upon his information and belief aforesaid, further informs the court that Eddie Scott, on or about the 4th day of February, 1913, at Moniteau county, Mo., did then and there unlawfully and feloniously steal, take, and carry away one bay mare, then and there being, the personal property of Cornelius Coleman, of the value of \$100; and the prosecuting attorney aforesaid, upon his information and belief aforesaid, informs the court that Theo. Christian, well knowing the said Eddie Scott to have done and committed the felony and larceny of the bay mare in the manner and form aforesaid, afterwards, to wit, on or about the 5th day of February, 1913, at Moniteau county, Mo.,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

him (the said Eddie Scott) did unlawfully and feloniously receive, harbor, aid, and assist with the felonious intent and in order that he (the said Eddie Scott) might then and there make his escape and avoid arrest, trial, conviction, and punishment, he (the said Theo. Christian) then and there not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, to the said Eddie Scott, against the peace and dignity of the state."

The motion to quash, caption omitted, is as follows: "Comes now the defendant, Theo. Christian, by his attorneys, and moves the court to quash the amended information filed in this cause, for the following reasons: Because there is a misjoinder of parties defendant. Because there is a misjoinder of counts in the information. Because the first and second counts in the information are inconsistent with each other. Because the first count in the information charges both defendants jointly with grand larceny, and the second count charges the defendant, Theo. Christian, alone of the crime of aiding the escape of Eddie Scott. Because two and distinct crimes created by different and distinct statutes are united in the same information. Because the information does not charge any crime."

The above motion to quash being considered by the court and overruled, exceptions were duly and properly saved. Thereafter a demurrer to the second count of the information was filed. This demurrer was in the usual form and substantially charged that the second count of the information was not sufficient to make out or charge against the defendant any offense against the law of the state. This demurrer was overruled by the court and exceptions thereto also properly preserved. The case coming on for trial on May 17, 1913, the trial jury by its verdict found defendant guilty as charged in the second count of the information and assessed his punishment at imprisonment for a term of three years in the penitentiary. No finding whatever was made by the jury upon the charge contained in the first count; the jury passing it over in silence.

The court instructed, among other things, that, although both counts were submitted to them for their finding, they must not convict on both; that they might convict him on the first count and acquit him on the second, or vice versa, or they might acquit him on both counts. The court also gave an instruction upon the recent possession of stolen property, predicated, without doubt, upon the charge contained in the first count of the information. This instruction is in the usual form, and the contents thereof are not attacked. The point made is that no such instruction upon the facts should have been given.

Upon the burden of proof, the presumption

of innocence, and reasonable doubt, the court gave the following instruction: "The law presumes the defendant innocent until the state has proven his guilt beyond a reasonable doubt; unless the state has so proven his guilt, you should acquit him; but such a doubt, to authorize an acquittal on that ground alone, should be a substantial doubt of guilt and not a mere possibility of his innocence." The court was asked by defendant to instruct upon circumstantial evidence, but this request was refused.

The facts as to the larceny of the mare, since defendant was not convicted of such larceny, need not be set out here at length. Suffice it to say the proof shows that appellant's codefendant, Eddie Scott, stole the mare from one Cornelius Coleman, who resided some 20 miles from the town of California, in Montiteau county. This theft by Scott was committed on February 4, 1913. Scott appeared riding the mare into California on February 5, 1913. His story as to the connection of defendant Christian (hereinafter called defendant simply) with the stealing of the mare is that defendant appeared at the farm of said Coleman on February 3, 1913, during the absence of the latter, and hired said Scott, for the promise of the sum of \$15, to ride the mare into California; that on the 4th day of February defendant returned and assisted Scott to catch and bridle the stolen mare, and that Scott and defendant thereupon alternately rode said mare until they arrived in the vicinity of the town of California, when, pursuant to instructions from defendant, Scott stopped and stayed all night with one Kennedy, but defendant continued on back to his home in California. According to Scott, all that the latter did in connection with the theft of the mare was done pursuant to defendant's instructions. Upon reaching California on the morning of the 5th of February, Scott rode the mare up to a livery stable belonging to one Orr and tied her first in the barn and latterly upon the street; he himself going into the barn to warm.

At this point many other witnesses come into the story. Their testimony is that Scott was introduced to defendant and that he became active in assisting Scott to make a sale of the stolen mare, which was very late in the day consummated, by selling her to one Messerli for the sum of \$45. This sum was paid to Scott by Messerli by a check, which check was made out in the name of Scott. Defendant, who admits that he was to get \$10 for helping Scott sell the mare, says that the sole connection with or knowledge of either Scott or the mare arose when he was made acquainted with Scott at Orr's livery stable; that he there saw Scott for the first time in life. Scott, on the other hand, swears that all that he said and did about the theft of the mare and the sale of her was done under the instructions of de-

fendant; that he (Scott) was and is wholly innocent; and that he was doing what he did in bringing the mare to California and in selling her in order to earn the sum of \$15 promised him by defendant for that service. After the cashing of the check at a saloon in California, a number of drinks were taken by both Scott and defendant, and it was finally agreed (at whose suggestion it is impossible to say from the record) that Scott and defendant and defendant's brother should come to Jefferson City to "have a good time." When the check was cashed, Scott avers that he gave defendant \$15 of the money, retaining himself \$30; that he purchased the first round of drinks with another \$5 bill and divided the resulting change with defendant; that it was the suggestion of defendant that the party come to Jefferson City; that the railroad fares of all were paid by defendant; and that defendant during the whole of this trip paid all expenses of whatever kind. On the other hand, defendant avers that he got only the sum of \$10 out of the purchase price of the mare; that this was according to agreement with Scott to pay defendant this sum for his services in assisting Scott to make the sale; that in addition he received only the sum of ten cents from Scott, which sum was to be paid to the livery stable man for some small service rendered to Scott, as the latter claimed; that Scott paid all railroad fares and for all refreshments of whatever kind consumed while at California or during the presence of the party at Jefferson City. Where the truth lies it is utterly impossible to say, since there is as much corroboration in favor of defendant's assertions as there is for those of Scott.

The defendant, whose attitude and statements we have woven into the statement already, proves for himself a very good alibi, so far as the theft is concerned.

Some very strong circumstances eking out an alibi were furnished by some of the witnesses for the state. It was further shown by the state that, when the defendant boarded the train at California to come to Jefferson City, he publicly in a loud voice requested a friend to advise his (defendant's) wife that he was going to Jefferson City. The proof shows that defendant, Scott, and defendant's brother did come to Jefferson City, where they were arrested on the night of February 5, 1913, and placed in jail. When Scott was searched he had on his person but \$5.45 in money, while there was found upon the defendant the sum of \$20 in bills and a small amount of silver.

Prior to the trial of defendant, Scott seems to have entered a plea of guilty to grand larceny and was thereafter used by the state as its chief witness against defendant. It may be said in passing, and this fact will be hereafter more at length referred to, that Scott, in the testimony which he gave for

the state, denied that he intended to escape, or that he came to Jefferson City for the purpose of escaping, but that, being wholly innocent of any intended wrongdoing, he was, when arrested, on the way back to the neighborhood in which he had stolen the mare. If any other facts shall become necessary to a full understanding of the points involved, they will be found in the opinion.

John M. Williams, of Dudley, and L. F. Wood, of California, Mo., for appellant John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for the State.

FARIS, J. (after stating the facts as above)  
I. It is urged upon us as grounds for reversal: (a) That the court erred in refusing to quash the information for that (1) there was a misjoinder of offenses which may not be joined in the same information, and (2) that there was a misjoinder of parties defendant; (b) that the court erred in giving instruction 4 on the recent possession of stolen property; (c) that the court erred in refusing to give the instruction asked by defendant, or any instruction, on circumstantial evidence; and (d) that the evidence adduced by the state was not sufficient to make out a case against the defendant upon the charge of being an accessory after the fact, for which he was convicted. These in their order.

Turning our attention to the first contention urged by defendant, we note that the information is against both Eddie Scott and Theodore Christian; that in the first count thereof both Scott and this defendant are jointly charged with having together and jointly committed the crime of grand larceny in that, as it was averred, they stole a horse from one Cornelius Coleman. In the second count of this same information the defendant alone is charged with an offense, that of being an accessory after the fact, for that defendant, knowing that said Scott had (alone and unaided) stolen the selfsame horse averred in the first count to have been stolen jointly by both Scott and defendant acting in concert, did "receive, harbor, aid, and assist \* \* \* said Scott to make his escape and avoid arrest, trial, conviction, and punishment." Upon this latter count defendant was convicted. The jury made no finding upon the first count, passing it sub silentio. Scott, it appears from the record, had, before defendant was put upon his trial, pleaded guilty to the larceny charged against him in the first count.

This court has comparatively often had occasion to discuss one of the bilateral questions arising here (that is, how far may the pleader, in one or more counts of an indictment, join charges of different crimes against the same defendant), but never before has there arisen, so far as we can find, the unique question here involved of not only charging different offenses in different counts of the

same information but of charging in one count two persons as acting jointly in the commission of a crime and in the other count charging one of the defendants only with committing a crime with which his co-indictee had nothing to do, or at least in which he incurred no criminal liability and took no active part. No finesse of language can relieve the case from the ultimate truth of this bald statement.

[1] Were the two offenses charged such as are permitted to be joined in the same information? We think not. The statute permits a count for larceny to be joined with a count for embezzlement or with a count for obtaining property by any false pretense or false token. Section 5103, R. S. 1909. If an offense by law comprises different degrees, the information may contain counts for the several degrees of the same offense, or for one or more of them. Section 5104, R. S. 1909. In cases of burglary, where in the act of committing the burglary a larceny is also committed, defendant by statute may be charged with both offenses in the same count or in separate counts of the same information and, if found guilty, may be punished by a separate term of imprisonment for each offense. Section 4528, R. S. 1909. In passing we may say that this is the only exception in our state to the rule that but one punishment can by law be meted out for the commission of a single criminal act. So far the statute prescribes the practice.

We have held, however, that a count for forgery may be joined with a count for uttering the instrument forged (*State v. Carragin*, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. [N. S.] 561), and that a count for larceny may be joined with a count for receiving stolen goods (*State v. Richmond*, 186 Mo. 71, 84 S. W. 880). In none of such cases, except that of burglary and larceny above adverted to, will more than one conviction be allowed to stand, and at the close of the case either an election must be made by the state or the jury must be instructed by the court that they can convict on but one count. *State v. Carragin*, *supra*. It goes without saying that, in order to meet the exigencies of the proof, it is well settled that the pleader may charge an offense like murder or an assault with intent to kill in as many counts as may be reasonably necessary. *State v. Hargraves*, 188 Mo. 348, 87 S. W. 491; *State v. Jackson*, 17 Mo. 544, 59 Am. Dec. 281. So also a count for an assault with intent to kill may be joined with an assault with intent to rape or to do great bodily harm, or with an assault to commit any felony. This from the very nature of these offenses, and more often from the necessities of the case, and by inference, from the very letter of the statute. Section 4481, R. S. 1909.

[2] We have not been able to find any other permissible joinders of counts for different offenses in the same information, allowed by

the decisions or by the statutes of this state. Clearly, then, by the method of exclusion and inclusion we may deduce the rule (statutory exception excepted) that only such offenses may be joined as arise out of the same transaction and which are so far cognate as that an acquittal or conviction for one would be a bar to a trial for the other. Judge Wagner in the case of *State v. Daubert*, 42 Mo. 242, expressed his view of the facts which will allow a joinder thus: "Where the offense charged in the second count is of the nature of a corollary to the original felony, as in larceny and the receiving of stolen goods, a joinder is good; and, whenever there is a legal joinder, the court may exercise its discretion as to an election."

It is evident that the instant case does not fall within the rule. The offenses charged in the two counts of the information here are not cognate, and they do not necessarily arise from the same transaction. One may be an accessory after the fact to murder, arson, burglary, or to any other crime known to the calendar or written in the books. It was not a necessary incident to the theft of the horse here that defendant became, as it is charged, guilty of being an accessory after the fact. It may better be said to have been a coincidence merely, since there is no crime to which it might not attach. Nor would a conviction for the theft here charged necessarily negative guilt as to the crime of being an accessory after the fact.

[3] Upon the remaining branch of this question as to whether an information may charge in its one count a felony as having been done by two defendants, and in another count thereof charge one of the defendants with having alone committed another and different crime, defendant also makes strenuous contention. In the instant case upon the facts of the second count as shown in evidence, as well as under the law applicable thereto, Scott was guilty of no crime for permitting himself to be harbored or aided or assisted to escape so as to avoid arrest, trial, conviction, and punishment for the theft of the horse charged against him in the first count. Scott had never been in custody on this charge, so at law he had the right to escape if he could, whatever view casuists might take of the moral phase. He was in the case but the mere passive agent through whom defendant, as was charged, committed, and without whom defendant could not have committed the offense laid in the second count. Scott in a sense bore in law the same relation to the subject-matter of the second count as the party assaulted bears to the subject-matter of an assault with intent to kill.

Clearly the joinder of parties defendant here was improper. It would be improper even in a civil action and be demurrable. Section 1800, R. S. 1909. Scott and the de-

fendant could not be sued in one count of a petition in a civil action upon a note (say) made by both, and defendant alone sued in another count of the identical petition upon an obligation with which Scott had nothing to do, and to which he was not a party against whom a judgment would lie.

The case of *State v. Lehman*, 182 Mo. 424, 81 S. W. 1118, 66 L. R. A. 490, 103 Am. St. Rep. 670, discusses fully the question of joinder of different defendants in the same count of an indictment. Under the facts in that case a joinder was held proper. That case was correctly held under the facts there in judgment, and no other view was possible. Had any other holding been made, such holding would have been so vulnerable for other objections as that no conviction of the defendants or any of them would ever have been possible in law. As the learned judge who wrote the opinion of the court in that case said: "The general rule must be conceded that, where the offenses of several defendants are separate and distinct, arise out of separate and distinct agreements or transactions, they should not be joined in the same indictment, but that is not this case."

It follows that the motion to quash was well taken for both, or either, of the misjoinders charged therein as occurring in the information.

II. It is contended by defendant that the court erred in giving instruction 4 on the presumptions arising from the recent possession of stolen property. In this, in the light of the evidence here, we think the defendant's contentions are well founded, in point of fact, but that, in the light of the conditions by which we are confronted in the record, the question raised by the objection is wholly academic. The instruction objected to has reference wholly to the offense of stealing the horse. On this charge defendant was not convicted, so it is a little difficult to see wherein he was injured. We are not passing upon the contents of the instruction complained of here; we are merely considering whether, upon the admitted facts, any presumption of guilt accrued from the fact of the possession of the horse by the defendant on the day following the theft thereof.

[4] Where the manner of getting the actual possession of property which has been recently stolen is admitted and fully explained by the evidence in the case, as was done in the instant case, and where the only question in issue is the capacity in which defendant holds such possession, whether feloniously or innocently, no presumption can arise against defendant from the mere admitted or known fact of possession. This instruction ought not to have been given. *State v. Warden*, 94 Mo. 651, 8 S. W. 233. It had no place in the record under the admitted facts, but for the reasons suggested, since defend-

ant was not convicted of the offense with which the instruction had to do, he may not, we opine, successfully complain. If it be urged that the instruction was competent because the fact of possession tended to prove the scienter here necessary in law, then the same reasoning applies. It was as impotent for the one reason as for the other.

III. Touching defendant's complaint that the court nisi ought to have instructed on circumstantial evidence, we may say there is no evidence in the record to justify the giving of an instruction upon circumstantial evidence. Why we take this view we need not discuss, since this case must be reversed for other reasons.

[5] A general attack is made also upon the instructions given in the case, and upon all of them. Without taking the time or space to pass upon them all, we may say in passing that the instruction given on presumption of innocence, burden of proof, and reasonable doubt is not in the best form. To say no more it does not require the reasonable doubt which will justify acquittal to "arise from a consideration of all of the evidence in the case," or words of similar import. *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *State v. Temple*, 194 Mo. 232, 92 S. W. 494; *State v. Harper*, 149 Mo. 514, 51 S. W. 89; *State v. Maupin*, 196 Mo. 174, 93 S. W. 379. We do not say that the instruction as given is so defective as to constitute reversible error, for it follows closely in substance that given in *State v. Nueslein*, 25 Mo. loc. cit. 124, which has been declared to be commendable. *State v. Bond*, 191 Mo. 564, 90 S. W. 830. But the better form of this instruction, as we show from the cases which we cite, refers in apt words, as a basis for the doubt, to a consideration of all of the evidence in the case.

[6] IV. It is also most seriously contended that there is not enough evidence in the record to sustain the charge of being an accessory after the fact upon which defendant was convicted. We think this contention must also be sustained. Granting, for the sake of the argument, that there was proof sufficient to take the case to the jury on all of the other required elements in the case (*State v. Miller*, 182 Mo. loc. cit. 382, 81 S. W. 867), is there any substantial proof that defendant was in fact aiding and assisting Scott to escape in order that the latter might avoid arrest, trial, and conviction? Upon this phase of the case Scott says that defendant suggested coming to Jefferson City, and that the defendant paid the fare of Scott to Jefferson City. The record further shows from the testimony offered by the state that, when defendant left California in company with Scott, he requested an acquaintance to inform his (defendant's) wife that he had gone to Jefferson City, and that he did come to Jefferson City is not denied but on the contrary proven by the state. Here was no secrecy but a publicity which



negatives the position of the state. When arrested, as he says, and as the state does not deny, he was on his way back to California. But that is not all nor the most serious failure of proof.

[7] It was incumbent on the state to show that Scott was in fact trying to escape, before the defendant could be convicted for aiding him to escape. The testimony of Scott, upon whom alone the state relied for proof on this point, so far from showing that he was trying to escape, shows conclusively that he was not doing any such thing. Scott says apropos of this very point: "I was not trying to get away at all. I had no intention of getting away. I was aiming to go right back out there to Coleman's." The story of Scott is throughout utterly incredible and filled with numerous and palpable contradictions. It is not capable of reconciliation with much of the other testimony adduced by the state. At this distance, relying, as we must, upon the cold record, it would seem that the conviction of defendant was largely brought about by his own bad reputation; that, having by an ill-spent life earned the punishment meted out to him, he was convicted on what is called in the vernacular "general principles" rather than upon the evidence in the case. However much we might personally sympathize with the doctrine of a conviction on "general principles" when rightly applied in a case of crying need, we can give no effect to it here but must look to the record, which we do, and hold there is not evidence enough to sustain this conviction.

For this and other reasons set out we reverse and remand the case, with the suggestion that, if the state is not able materially to strengthen the case made, another trial will be a useless formality.

BROWN, P. J., and WALKER, J., concur.

## HAVLIN v. CONTINENTAL NAT. BANK OF ST. LOUIS.

(Supreme Court of Missouri. Division No. 2. Dec. 9, 1913.)

### 1. BILLS AND NOTES (§ 237\*)—ACCOMMODATION INDORSEMENT.

An accommodation indorser is, in law, a surety, and, as such, equally bound with the maker to pay the notes when they become due.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 563, 564, 567-569; Dec. Dig. § 237.\*]

### 2. BILLS AND NOTES (§ 434\*)—ACCOMMODATION INDORSER—PAYMENT.

Payment of a note by an accommodation indorser, after it had become due and had been dishonored by the maker, was not a voluntary payment, since such payment was in discharge of a legal obligation which he had incurred as such indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1268-1274; Dec. Dig. § 434.\*]

### 3. BILLS AND NOTES (§ 237\*)—ACCOMMODATION INDORSER—NATURE OF LIABILITY.

An accommodation indorser of a note warrants inter alia that, if the note is dishonored, he will, upon notice thereof duly given to him, pay the same.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 563, 564, 567-569; Dec. Dig. § 237.\*]

### 4. BILLS AND NOTES (§ 397\*)—PRESENTMENT AND DEMAND—NECESSITY.

Where a note, payable to a bank and made payable at the bank, was owned by the bank at maturity, presentment and demand were not necessary.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1029-1044; Dec. Dig. § 397.\*]

### 5. SUBROGATION (§ 4\*)—ACCOMMODATION INDORSER—SUBROGATION TO RIGHTS OF PRINCIPAL.

Where an accommodation indorser, after a note became due and was dishonored, paid it, and subsequently the note was again paid by the maker, the indorser was entitled to be subrogated to the rights of the maker, and could recover from the payee the amount so paid by the maker.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 12-15; Dec. Dig. § 4.\*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Suit by John H. Havlin against the Continental National Bank of St. Louis. Decree for complainant, defendant appeals. Affirmed.

John H. Havlin, the respondent, brought suit in equity against the Continental National Bank, hereinafter designated as "the Bank," appellant, in the circuit court of the city of St. Louis, to recover \$7,200 paid by him to the Bank, as an indorser on two notes of one O. L. Hagan, which, subsequent to Havlin's payment, were again paid in full by Hagan in a settlement with the Bank, which thereafter refused to repay Havlin. Upon a trial, a judgment was rendered in favor of Havlin, from which the Bank appeals.

The material facts are as follows: O. L. Hagan was indebted to the Bank in the sum of \$23,203.15. This debt was represented by three promissory notes executed by Hagan to the Bank, one for \$5,000, another for \$1,500, and the balance by a third note. The respondent Havlin, who then resided and now resides in Cincinnati, Ohio, indorsed the two first notes for the accommodation of Hagan, the Bank having knowledge of the character of the indorsement. As further security for the payment of said debt, Hagan had deposited with the Bank, as collateral, 770 shares of the capital stock of the Hagan Opera House Company, under a contract in which said stock was valued at \$89,000, and the Bank was given power to sell same at public or private sale, in default of the payment of the indebtedness. On the 22d day of June, 1897, all of said debt was past due and unpaid, and the Bank, claiming to act under the power of sale conferred by the contract,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

sold said stock at a so-called public sale on the floor of the Merchants' Exchange, during a session of said body, in the city of St. Louis, when it was bought by one Finis E. Marshall, cashier of the Bank, for \$5,000, he being the only bidder. About a week after the sale, the Bank claiming to be the absolute owner of the stock, sold it at private sale to J. C. Jannopoulos, for \$30,000, receiving a part of the purchase price in cash, and taking Jannopoulos's notes for the balance. On the same day, or the day after the sale to Jannopoulos, said Marshall, representing the Bank, called upon Havlin, who happened to be in St. Louis for the payment of the two notes of \$5,000 and \$1,500 respectively. Havlin protested that he ought not to pay them, that the so-called public sale of the collateral, made by the Bank on the floor of the Merchants' Exchange, was invalid, and that the Bank should apply the proceeds of the sale of the stock to Jannopoulos to the payment of the notes. The Bank, through Marshall, insisted that the sale on the Merchants' Exchange floor for \$5,000 was valid; that it had applied this sum to the payment of the third note upon which Havlin was not an indorser; that, upon the purchase of the stock by Marshall, it became the property of the Bank, and that the proceeds of the sale of the stock to Jannopoulos were the Bank's individual property, and that the notes indorsed by Havlin were still wholly unpaid. After much discussion, Havlin, upon the repeated declarations made by Marshall that the Bank would look to him (Havlin) for payment, finally took up the two notes upon which he was indorser, and gave his individual notes for their full amount. The original notes were then indorsed over to him, without recourse, and the individual notes he subsequently paid in full to the Bank. A few weeks after the payment of the notes to the Bank by Havlin, who thereupon returned to Cincinnati, to wit, on August 9, 1897, Hagan brought suit against the Bank to redeem the 770 shares of the Hagan Opera House Company stock, pledged by him to the Bank as aforesaid, or for an accounting as to its value. In this suit, Hagan contended that the Bank had improperly exercised its power to sell the stock at public sale under the pledge made by him to it; that the so-called public sale was invalid; and that he was therefore entitled to redeem the stock, or, if it had been sold, to have an accounting for its value.

The trial court sustained this view, rendered a decree setting aside the sale made on the floor of the Merchants' Exchange as unfair, and found that the Bank had subsequently "effectually sold at private sale to J. C. Jannopoulos, for the sum of \$30,000, the 770 shares of the capital stock of the Hagan Opera House Company, but that said Jannopoulos was an innocent purchaser for value and without notice, and that the Bank must

account to plaintiff for that amount of money." This judgment was, upon appeal, affirmed by this court in *Hagan v. Continental, Nat'l Bank*, 182 Mo. 319, 81 S. W. 171. In this suit, Hagan alleged that he was indebted to the Bank in the sum of \$23,340, that being the full amount of his indebtedness, inclusive of the two notes for \$8,500, indorsed by Havlin as aforesaid, and which had been paid by the latter. There is no evidence that Hagan knew that Havlin, his indorser, had previously paid the two notes to the Bank. At the time of the trial Hagan was dead.

The Bank, in its answer, admitted that Hagan's indebtedness was \$23,340, together with interest thereon, which necessarily included the two notes indorsed, and which had been paid by Havlin, there being no other indebtedness of Hagan to the Bank. The answer did not mention the fact that Havlin had paid the notes indorsed by him, and that said notes, upon being paid, had been assigned to him. The decree rendered in favor of Hagan in that suit was upon the theory that he was still indebted to the Bank in the full amount of all notes held by it against him on June 22, 1897, or prior to Havlin's payment. The court, therefore, gave the Bank credit for the full amount of these notes, and rendered judgment over in Hagan's favor for the sum of \$8,796.85, being the difference between the sum of \$30,000 for which the court decreed that the Bank was accountable and the amount of all of the notes Hagan had given the Bank. In this decree, therefore, the Bank received and accepted credit for the amount of the notes which had been previously paid by Havlin, and, as a consequence, was twice paid the notes of Hagan on which Havlin was indorser.

Upon the presentation of the foregoing facts and submission of the cause, the St. Louis circuit court at the June term, 1909, rendered the following judgment in the case at bar: "Now, at this day, the court being fully advised of and concerning this cause heretofore submitted, doth find that the defendant (the Bank) is indebted to the plaintiff (Havlin) in the sum of \$7,200, with interest at the rate of 6 per cent. per annum from October 2d, 1906, to date. It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the sum aforesaid as found, together with interest thereon, and also his costs and charges herein expended, and that execution issue therefor." It is from this judgment that the Bank appeals.

Appellant's contentions are: First. That the money paid by respondent to the Bank was paid by him with knowledge of all the facts, and in settlement of a dispute as to his liability to the Bank; and that his mistake, if there was a mistake, in paying money to the Bank, was a mistake of law, which will prevent his recovery in this case.

Second. Even if respondent's mistake in paying the money can be regarded as a mistake of fact, in that he was ignorant of the manner in which the sale of the stock had been conducted on the floor of the Merchants' Exchange, he nevertheless cannot recover, because he was not induced to pay the money because of such alleged mistake of fact, but to avoid annoyance and expense of litigation with the Bank. Third. That there never was a sale to Jannopoulo of the Hagan Opera House stock bought in by Marshall at the Merchants' Exchange sale; that Jannopoulo was to pay for the stock out of the profits earned in conducting a theatre in the Hagan Opera House, which profits never materialized, and he never paid but \$12,500 of the \$30,000 contracted to be paid.

Geo. L. Edwards and Edward D'Arcy, both of St. Louis, for appellant. Robert L. McLaran and L. A. Steber, both of St. Louis, for respondent.

WALKER, J. (after stating the facts as above). [1-4] I. Respondent, an accommodation indorser for Hagan, the maker, on the notes to the Bank, was, in contemplation of law, a surety. *Welmer v. Shelton*, 7 Mo. 238; *Osborne v. Fridrich*, 134 Mo. App. 449, 114 S. W. 1045. As such, he was equally bound with the maker to pay the notes when they became due. In so doing, he simply met the obligation he made when he became surety, and the payment can in no sense be said to have been voluntary. In fact, it has been expressly decided in another jurisdiction that a payment made by an accommodation indorser, under a state of facts similar to those in the concrete case, was not voluntary (*Smith v. Folsom*, 80 Ohio St. 218, 88 N. E. 546), but was made under what may not inaptly be termed legal coercion. An indorser of a negotiable instrument warrants inter alia that, if the instrument is dishonored he will, upon notice thereof duly given to him, pay the same, with interest. *Kinsel v. Ballou*, 151 Cal. 754, 91 Pac. 620; *Mer. Natl. Bk. v. Bentel*, 15 Cal. App. 170, 113 Pac. 708. No question as to dishonor arose in the case at bar, but it may be said in passing, if it had, presentment and demand are not necessary where notes, as in this case, were, at maturity, owned by the Bank, and by their terms were made payable there. *Bank U. S. v. Smith*, 11 Wheat. 171, 6 L. Ed. 443; *Cent. Natl. Bank v. Stoddard*, 83 Conn. 332, 76 Atl. 472.

Respondent's interest as well as his legal duty, therefore, when the notes became due and remained unpaid, was to pay them, and thereby avoid the annoyance and expense of litigation. *Wilson v. Kieffer*, 141 Mo. App. 137,

122 S. W. 1149. A payment made under such circumstances does not involve the question of a mistake of law, as contended by appellant, but, on account of the legal relation of the respondent to the obligation as a surety, the payment may properly be held to have been made under duress, thus rendering the contention groundless. This disposal of appellant's first contention eliminates the second from consideration.

As to the third contention that there was no sale of the Hagan Opera House stock to Jannopoulo, it would be sufficient to say, if this fact were vital to the determination of the matter here at issue, that it was fully adjudicated, and the sale declared to have been made, in *Hagan v. Continental Bank*, 182 Mo. 319, 81 S. W. 171. However, leaving out of consideration the ruling of this court in the Hagan Case, the record here is ample to sustain the conclusion that the sale was made; it is admitted both by direct averment and by implication in appellant's answer; it is testified to by Jannopoulo himself and by Lewis, formerly cashier of the appellant Bank, and now cashier of the Bank of Commerce, which subsequently absorbed the appellant Bank. Other evidence, direct and circumstantial, point to proof of a sale. If the transaction constituted a sale, and we hold that it did, then it was none the less so when respondent brought this action, and contentions to the contrary, based on the ground that Jannopoulo did not pay for the stock or that he did not have manual possession of it, cannot change it. The matter, therefore, in our opinion, is no longer open to argument.

[5] II. Respondent's payment not having been voluntary but in discharge of his obligation as a surety, and the Bank having twice been paid the notes, the second time by the maker, Hagan, in his settlement with the Bank after the judgment against it in his favor (*Hagan v. Bank*, supra), the respondent is entitled to recover from appellant the amount paid by him, with interest, under the rule that one compelled to pay the debt of a principal is subrogated to the latter's rights. If the principal had himself twice paid the notes, he would unquestionably be entitled to recover of the Bank any sum paid in excess of the amount of the debt and interest actually due. A surety is in no worse position, and is entitled to a like right of action. This conclusion is too elemental to require the citation of authorities to sustain it, and is clearly consonant with equity and good conscience.

The judgment of the circuit court should therefore be affirmed, and it is so ordered.

BROWN, P. J., and FARIS, J., concur.

**HARDWICKE v. BARNES.**

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

**COURTS (§ 231\*)—SUPREME COURT—JURISDICTION—TITLE INVOLVED.**

Where, in a suit to have a deed of trust declared satisfied and the lien thereof removed as a cloud upon title, the only question involved was whether the deed of trust was satisfied by an alleged extension of time of payment without the consent of the sureties, the Supreme Court had no jurisdiction of an appeal transferred from the Kansas City Court of Appeals; title not being involved in the question to be determined.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 648-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

Appeal from Circuit Court, Platte County; Alonzo D. Burnes, Judge.

Suit by Claude Hardwicke against Richard S. Barnes. From judgment for plaintiff, defendant appealed to the Kansas City Court of Appeals, and the cause was transferred to the Supreme Court. Retransferred to the Kansas City Court of Appeals.

This suit was instituted by the plaintiff in the circuit court of Clay county against the defendant, to have a certain deed of trust declared satisfied and that the pretended lien thereof be removed as a cloud upon the title to a certain tract of land therein described. A change of venue was taken, and the cause was sent to the circuit court of Platte county, where a trial was had which resulted in a judgment in favor of the plaintiff, canceling the deed; and the defendant duly appealed the cause to the Kansas City Court of Appeals. The latter court, I take it, of its own motion, transferred the cause to this court for the reason assigned that title of real estate was involved therein, which deprived it of jurisdiction.

The facts of the case are few and undisputed. On and prior to December 17, 1889, Henry P. Lindenman was the owner of the tract of land mentioned; and on that date the Thornton Distilling & Milling Company, a corporation, of which Lindenman was the treasurer, was indebted to the defendant, Richard S. Barnes, in the sum of \$7,000, evidenced by a promissory note due 18 months after date, bearing 8 per cent. interest, which was signed by said distilling company, by Henry P. Lindenman, treasurer, and others. On said 17th day of December, in order to secure the payment of said note, Lindenman executed to defendant a deed conveying to him said real estate, which provided upon its face that upon the payment of said note the defendant was to reconvey said land to said Lindenman. The deed was duly filed for record on August 3, 1891. That also on said 17th day of December the distilling company, to further secure the payment of said note, executed to S. G. Sandusky, trustee, a deed of trust in which defendant was named as beneficiary, conveying to him certain other

lands which belonged to said company, but not involved in this suit. On January 28, 1891, Lindenman executed to Samuel Hardwicke, trustee, a deed of trust, wherein W. C. Lemon was named as the beneficiary conveying the first tract mentioned, and the one claimed to be here involved, to secure seven promissory notes therein described, aggregating \$1,400. Said deed was also duly filed for record a few days after its execution. At the date of the institution of this suit and for some six years prior thereto, the defendant was in the possession of said land, Samuel Hardwicke, the trustee in said deed of trust, died in the year 1895.

The petition charges that the notes mentioned in the second deed of trust were, for value received, assigned and transferred (but the date not given) by said Lemon, and were then and had been for a number of years, owned by the plaintiff. That there was a balance of \$2,250 then due thereon. The petition also charges that the defendant's said note for \$7,000 had been satisfied; that the latter's claim of right to the possession of said land was by virtue of said first deed of trust; that it constituted a cloud upon plaintiff's title to said land, which he asked to be removed; and prayed that the deed from Lindenman to defendant be declared a mortgage and that it had ceased to be of any force and effect, by reason of the said discharge of said Lindenman as security on said note, and by reason of the satisfaction of said note, and for such other relief as the court might deem meet and proper. It is not claimed by plaintiff that the defendant's note for \$7,000 had been fully paid; but his claim is that said note was not paid at maturity, and that the defendant extended the time of the payment thereof, in consequence of which the securities thereon, including Lindenman, were released from further liability thereon, and that therefore the deed or mortgage executed by Lindenman to defendant conveying said land was satisfied. There was evidence introduced pro and con upon those questions; but, from the view we take of the case, it will not be necessary to go into that.

Fyke & Snider, of Kansas City, for appellant. Guy B. Park, of Platte City, for respondent.

WOODSON, P. J. (after stating the facts as above). From reading the statement of the case, it is seen that there was no dispute as to Lindenman's title to the land mentioned, nor was there any question as to the validity of the mortgage given thereon by him, as security for the payment of the \$7,000 note. That being true, then the only question involved is whether or not the mortgage mentioned was satisfied by reason of the alleged extension of the time of payment without the consent of the securities.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The decision of that question one way or the other would in no manner involve the title to the real estate mentioned. The same principle was involved in the case of *Vandevanter v. Bank*, 232 Mo. 618, 135 S. W. 23. It was there held that where the plaintiff owned the land, and that the note for \$200 was secured thereon by a valid deed of trust, and that the only issues in the case were whether or not the note had been assigned to defendant and whether or not it had been paid before the assignment, did not involve title to the real estate conveyed by the deed of trust, and that therefore this court had no jurisdiction of the cause. So, in the case at bar, the only issue in the case is: Were the sureties on the \$7,000 note released therefrom by the said extension of the time of its payment without their consent? The decision of that question one way or the other does not involve the title to the land mentioned, and this court therefore has no jurisdiction of the case, since there is but a small sum due and unpaid on said note.

This court having no jurisdiction of the cause, the case is retransferred to the Kansas City Court of Appeals to be disposed of according to law. All concur.

#### TURNER et al. v. BUTLER et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. TRIAL (§ 267\*)—REQUEST FOR INSTRUCTION—MODIFICATION BY COURT.

Where the court modified an instruction requested by defendant, and gave it as modified, it was not a compliance with the request, and was error if the requested instruction was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.\*]

#### 2. WILLS (§ 52\*)—TESTAMENTARY CAPACITY—BURDEN OF PROOF.

The burden is upon the proponent of a will to establish testamentary capacity of the testator by a preponderance of all the evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.\*]

#### 3. WILLS (§ 329\*)—ACTIONS TO DETERMINE VALIDITY—MISLEADING INSTRUCTIONS.

While, in a will contest, the contestants were entitled to an instruction that the burden was upon the proponents to prove testamentary capacity, yet, where the proponents depended upon the witnesses offered by contestants to prove such capacity, it was not error to refuse contestants' request to charge that, unless proponents had shown testamentary capacity by a preponderance of the evidence, the verdict should be against the will; since such an instruction might mislead the jury into believing that it was incumbent on the proponents to show such facts by their own witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 774, 776-778, 786, 787; Dec. Dig. § 329.\*]

#### 4. WILLS (§ 163\*)—PROBATE AND ESTABLISHMENT—PRESUMPTION—VOLUNTARY ACT.

When the proponents have shown that a will was executed with all the prescribed formalities while the testator was of sound mind, it will then be presumed that it was his free

and voluntary act, and the burden is upon a contestant to show the contrary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

#### 5. WILLS (§§ 158, 166\*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

The law does not denounce the influence which a son-in-law may have over his father-in-law, but only the improper use of it, and that such influence is shown to exist, and, in addition, that testator gave a large part of his estate to the daughter, the wife of the son-in-law, is not sufficient to establish undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 385, 386, 421-437; Dec. Dig. §§ 158, 166.\*]

#### 6. WILLS (§§ 47, 156\*)—TESTAMENTARY CAPACITY.

That testator, at the time of executing his will, was old and greatly weakened in mind and body did not justify the court in confining him more closely to conventional methods in distribution, though it should make the court more careful in its scrutiny of the influences which surrounded him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 94, 382; Dec. Dig. §§ 47, 156.\*]

#### 7. WILLS (§ 324\*)—ESTABLISHMENT—SUFFICIENCY OF EVIDENCE—UNDUE INFLUENCE.

Evidence, in a will contest, held not sufficient to take to the jury the question whether testator's son-in-law exercised undue influence over testator as to the execution of the will, though the son-in-law was testator's confidential adviser, and testator devised a large part of his estate to his daughter, the wife of the son-in-law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767-770; Dec. Dig. § 324.\*]

#### 8. APPEAL AND ERROR (§ 260\*)—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—EXCEPTIONS—NECESSITY.

The appellate court will not review the rulings of the trial court upon the admissibility of evidence, where no exceptions were taken thereto in the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.\*]

#### 9. WILLS (§ 53\*)—ADMISSIBILITY OF EVIDENCE—CONDITION OF MIND.

Where the issue was as to the testamentary capacity of testator at the time he executed his will, the court did not err in sustaining objections to questions asked an attorney, with whom testator had advised shortly before executing his will, as to the attorney's reasons for refusing to write the will at that time, since it was the condition of testator's mind and not the attorney's which was in issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.\*]

Appeal from Circuit Court, Boone County: N. D. Thurmond, Judge.

Will contest by Eugenia Turner and husband, contestants, against Mary Butler and others, defendants and proponents. Judgment for defendants establishing the will, and proponents appeal. Affirmed.

This is a statutory contest of the will of John Butler, late of Boone County, Mo., by plaintiff, his granddaughter, against his widow, four children, Loutitia Phelan, Mary Woods, Martin Butler, and Lizzie Vantine, a grandson, John Butler, only heir of a deceased son, William Butler, and Butler and

Thornton Stewart, grandsons, who with plaintiff are the three heirs of a deceased daughter, Annie Butler Stewart. The executors are also made parties. The grounds of the contest are fraud, undue influence, alteration of the instrument after signature, and unsoundness of mind.

At the close of all the evidence, the court withdrew the issue of undue influence from the jury and refused all instructions offered by plaintiffs on this issue. The case was submitted on the sole issue of unsoundness of mind.

The will in question was made and signed December 8, 1905, when the testator was about 80 years of age. Although he had been a man of considerable vigor and business ability, he had for some time been suffering from a general breaking down incident to old age, and had been practically confined to his house for some months previous to the making of the will. The evidence tended substantially to show that at that time he was not of sound and disposing mind, although some of the numerous witnesses introduced by contestants testified that they considered him all right in that respect.

The undue influence relied on is particularly charged in the petition to have been exerted by defendant Loutitia Phelan and her husband, Vincent D. Phelan, over the diseased and weakened mind and will of Butler, while he was sick and under the influence of intoxicating liquors and drugs administered by them, as well as other artifices, without which he would not have signed and published the alleged will. As a matter of fact, the Phelans lived on Mr. Butler's land about two miles from his residence. Mrs. Phelan was the only child who lived in Boone county, and she and her husband were frequently at the Butler home; and, while Mr. Phelan did not wholly superintend the operations on the testator's farms, his advice was sought by the hands and his suggestions were followed in the absence of Mr. Butler. The latter does not seem to have known much about the technical description of lands. He seems to have been helpless in the presence of a map or survey, and depended entirely on Phelan, who seems to have been expert in such matters, and said that he could describe the entire real estate holdings of Mr. Butler without a map. Mr. Carter, Mr. Butler's attorney, when writing the will in question, had difficulty in describing the land, and availed himself of the services of Mr. Phelan who was at the Butler home at the time, as was Mrs. Butler, who is shown by the evidence to have taken an active part in Mr. Butler's affairs. Mr. Phelan had said to both his wife's sister-in-law and her son that he had been the business manager and legal adviser of Butler for two years before his death, although there is nothing in the evidence to indicate that he was a lawyer, or had any special training in that direction.

In the latter part of February or the first part of March, 1906, Mr. Stephen March received word from Mr. Butler through some neighbors to come to write a will. He found Mr. Butler in bed or in a reclining chair, and said that he wanted Mr. March to rewrite a will. Mrs. Butler got the old will, the one in controversy here, and handed it to Mr. March. Mr. Phelan was not there. He got his map for Mr. March to look over and pick out certain pieces of land in which he wanted to make a change. March told Mr. Butler that he was not accustomed to that kind of work, and would rather have some one to assist him because he might get it wrong. Mr. Butler proposed Mr. W. W. Brundage, who did not come, and March suggested Mr. Phelan. Butler said, "He is the very man," and they telephoned for him and he came. In the meantime, Mr. Butler asked Mr. March to read the will until he got to "Marty" and then stop. By that time Mr. Phelan was there. At Mr. Butler's direction, Mr. March copied the will as far as the beginning of the devise to Martin E. Butler, and had finished when Mr. Phelan came. He then told him the trouble, and Phelan said, "I can almost locate that land without looking over the map"; that it was more trouble than he thought it would be. Mr. March after relating these facts in his testimony proceeded: "Uncle Johnnie said, 'I want all in No. 17 west of the creek, Lick Fork creek,' I think he says, 'to go to Marty.'" "Q. Had you put that in the will you were writing? A. No, sir. Mr. Phelan just made the remark, 'Uncle Johnnie, don't you know, Uncle, that there is ten acres that does not lie due west of Lick Fork creek, there is ten acres that is west of Perche?' Q. He had said he wanted all west of Lick Fork Creek? A. Yes, sir, in the 17th. Q. And Mr. Phelan asked him if he didn't know — A. That there was ten acres — Q. Lying west of the Perche? A. That didn't lie west of the Perche. Q. What did Mr. Butler say to that? A. It just appeared to kind of unnerve him. He got all out of sorts about it. Q. What did he say? He just said, 'Squire, you just burn up what you have written there, and I will get Mr. Tom Carter back here and have him to fix this up.' Q. What else did he add when he told you to burn the papers? A. I put them in the stove. And, after reflecting a little while, he says: 'No, that wouldn't do. I may pass away before Tom Carter gets back here, and you just let me rest two or three days and I will call you again and we will fix it up.' Q. Did he send for you any more? A. Not after that."

The map admitted in evidence shows that Perche creek, for the most of the way, forms the west boundary of section 17, but is deflected eastwardly and comes back to the line in such a way as to leave about ten acres of the section west of the creek and

bounded on the west by the middle third of the section line. Lick Fork creek enters the northwest quarter of the section from the north, and runs in a southwesterly direction through that quarter, emptying into Perche creek, leaving a considerable tract of land in the northwest corner of 17 lying east of Perche creek and west of Lick Fork. One would judge from the map that there are 40 acres or more.

The will of John Butler begins as follows: "I, John Butler, of Boone County, State of Missouri, being of sound mind and memory and of disposing disposition, and realizing the uncertainty of life and the certainty of death, do hereby make and publish this my last will and testament, hereby revoking and annulling all former wills made by me. First. I desire that all my just debts, if any, be paid out of my personal estate, by my executors hereinafter named, as soon after my death as convenient. Second. It is my will, and I direct that my beloved wife, Mary Butler, have the use and control, and receive the rents and profits of all the real estate of which I may die seized, during the term of her natural life, or as long as she remains my widow, and at her death or remarriage, I direct that my real estate be divided among my children and their descendants in the way and manner hereinafter set forth. Third. At the death or remarriage of my wife, Mary Butler, I direct, and it is my will, that my real estate be divided as follows: Then comes a devise to Martin E. Butler of 420 acres of land; to Mrs. Phelan of 602 acres; to his daughter Mary Woods, wife of P. S. Woods, 520 acres; to the grandson, John Butler, son of William Butler, 240 acres; to the grandson Butler Stewart, 120 acres; to the grandson Thornton Stewart, 150 acres; to the granddaughter, Eugenia Turner, the plaintiff, 80 acres. The remainder of the real estate, consisting of about 700 acres, was then devised to be sold upon the death or remarriage of his wife, and the proceeds to be divided between the three children, Martin E. Butler, Louftia Phelan, and Mary Woods, in equal parts.

The contestants introduced, as a witness, C. B. Sebastian, a practicing lawyer, who testified that he had known John Butler for 20 years before his death, and saw him in July or August, 1905, when he came to his office to consult about writing his will, and said he had a will but was not satisfied with it. The following questions were asked, and answers given by him: "Q. Did you act as attorney for Mr. Butler and receive a fee for it? A. No, sir. Q. You didn't advise with him in the capacity of an attorney? A. I think I did. By Mr. Whitecotton (for defendants): We object to any conversation between attorney and client." The court made no ruling, but said: "You might examine him further." In answer to questions by Mr. Whitecotton the witness said: "Uncle Johnnie and I were particularly friendly and talked about

a great many matters, and he discussed the question with me about the will, but the will was not written. He was to come back at another time, and nothing was done that day except to have a conversation in regard to it. \* \* \* He didn't seem to have any very clear idea of what he wanted then. He was not satisfied with the will that was written and wanted another will, but was not clear about what he wanted done. He arranged with me to come back again, but never did so. By Mr. Conley (for contestants): I will get you to state whether he appeared to understand the nature and extent of his property? By the court: I have not passed on the other question. Objections sustained." Defendants excepted. Witness continued: "In my talk with Mr. Butler, I was not able to get clearly what he wanted done; he didn't seem to be clearly of any opinion as to what he wanted done, and I suggested to him to think the matter over carefully and come back. By Mr. Gillespy: Is that the only reason, Mr. Sebastian, why you didn't write the will that day? By Mr. Whitecotton: We object to that as immaterial." Which objection was by the court sustained, and plaintiffs excepted. "By Mr. Gillespy: I will ask you if the reason that you didn't write it was that Mr. Butler was— By Mr. Harris, for defendants (interrupting): We object." Which objection was by the court sustained, and plaintiffs excepted. "By Mr. Gillespy: I will ask you if Mr. Butler had the capacity, on that occasion, to make a will and make proper disposition of his property? A. Physically, he was very weak, and mentally, he was not very clear. I mean by that that his statements in regard to what he wanted to do were somewhat conflicting and confused. I thought it best not to write the will. By Mr. Whitecotton: We ask that the latter part of the answer be stricken out as not responsive to the question and improper. By the Court: Motion sustained as to 'I thought it best not to write the will.'" Plaintiffs excepted.

Questioned by the court, the witness stated that, before that time, he had not been attorney for Mr. Butler, who had only consulted him as a friend. That on this occasion he talked about his will, and gave him some ideas about it, but was not very clear about it. Had witness written the will, he would have charged for it. He said he would come back some other time. Mr. Butler did not employ him.

The foregoing includes all the exceptions taken by the plaintiffs to rulings of the court, relating to the examination of Mr. Sebastian upon the question of the testamentary capacity of Mr. Butler. He was afterwards recalled for further examination, when the court said: "The court reverses its ruling heretofore made as to excluding the testimony of Mr. Sebastian," and the following question and answer followed: "Q. I will ask you then, Mr. Sebastian, if, from all the

conversation which you had with John Butler in your office at that time, whether sociably or in regard to business, as to whether or not he was of sound mind or not? A. I will answer that in this way. I don't think his mental condition was such on that day that it would have been proper for him to have made a will." The witness was then asked as to the conversation between him and the testator at the time, and the court said: "If he was acting as attorney, he cannot state the communications made to him." No exception was taken to this statement or ruling, and the witness was excused.

In submitting the question of testamentary capacity to the jury the contestants asked the following instruction: "(2) In determining the issue of sufficient soundness of mind or testamentary capacity possessed by the testator to make a will, before you can find in favor of the proposed will you must believe from a *preponderance* of the evidence that, at the time of the signing and execution thereof, the said John Butler had sufficient understanding to fully comprehend the nature of the transaction that he was engaged in, the nature and extent of his property, and to whom he desired to give and was giving it, without the aid of any other person, and, unless the defendants have shown by such *preponderance* of evidence that he did possess all of these requisites, you should find this issue in the negative and against the will."

This was refused by the court in the form asked. The court then modified it by striking out the words italicized and inserting in lieu of the last group so stricken out the words "it has been so shown by the."

There was a verdict establishing the will. The appellant assigns the following errors: "(1) The court erred in giving instruction 2 for defendants, being a peremptory instruction on undue influence, and in refusing plaintiffs' instructions 8 to 10 inclusive all on undue influence. (2) The court erred in rejecting the evidence of Sebastian as to conversations with Butler at the time he consulted him about writing the will. (3) The court erred in modifying plaintiffs' instruction 2 and omitting the only specific declaration in the instructions that the burden of proof of the issue of unsoundness of mind lay with the defendants."

Gillespy & Conley, of Columbia, for appellants. Harris & Finley, of Columbia, and Whitcotton & Wight, of Moberly, for respondents.

BROWN, C. (after stating the facts as above). [1-2] 1. We will first consider the question whether the court committed error in refusing the second instruction requested by the appellants in the form in which it was asked; for it is not contended that it was erroneous as given. The appellants con-

tended that they had the right to the court's judgment on the instruction as they presented it, and that, when modified, it became the court's instruction, for which they were not responsible, and this is undoubtedly true. *Jordan v. Transit Co.*, 202 Mo. 418, 431, 101 S. W. 11; *Maxey v. Railway*, 95 Mo. App. 303, 311, 68 S. W. 1063; *Meyer v. Railway*, 40 Mo. 151. If the court ought to have given the instruction in the form in which it was presented, then the modification was error of which the contestants had the right to complain. If it ought not to have been given in that form, there was no error in refusing it, and whatever the court may have afterwards done in the way of patching it up could not have made such action erroneous. Should the court have refused the instruction in the form in which it was asked? The appellants, insisting on a negative answer to this question, point out the fact that it is substantially copied from an instruction which was well considered and approved by this court in *Mowry v. Norman*, 223 Mo. 463, 472, 122 S. W. 724. The question upon that instruction, as upon this, was whether the burden was upon the proponent of the will to establish the testamentary capacity of the testator by "a preponderance of all the evidence," and the court held that it was, and to the general principle so announced we still adhere. In the subsequent case of *Gibony v. Foster*, 230 Mo. 106, 131, 130 S. W. 314, 322, we said: "In *Sehr v. Lindemann*, 153 Mo. loc. cit. 288 [54 S. W. 537], it was expressly ruled that upon making out a prima facie case by the proponents of the will, it then devolved upon the contestants to establish incompetency or undue influence." The use of so strong a word as "establish," in that connection suggested that, in the opinion of the court, there might be some point at which the burden of proof would change from one side to the other, so that, when the proponent had lifted his "burden of proof" to the height of a "prima facie case," the contestant must come in and elevate it still higher before he could defeat the probate of the will. In *Bensberg v. Washington University*, 251 Mo. 644, 158 S. W. 330, our attention was again directed to the same subject, and we pointed out that the "prima facie case" arose upon the introduction of the evidence required by the statute to be introduced to probate the will. But, as we said in that case, when the testimony is all in for both proponent and contestant, it must be considered together, and the question remains for the jury whether the proponent has sustained the burden of proving the execution of the will, including the fact of testamentary capacity at the time it was signed and published. How this burden may be borne in the first instance is fixed by the statute, but when the statutory evidence is not forthcoming, or its effect has been weakened by the contestant until it no longer preponderates, the statute still suggests the only rule which



can meet the exigencies of the trial. It provides that the evidence must be sufficient to prove the will on a trial at common law. We have already had occasion to say (*Bensberg v. Washington University*, supra), and now take occasion to repeat that these evidential rules have their foundation laid deep in the policy of the common law as well as in the legislative policy of this state to permit, to the fullest extent consistent with the public welfare, the testamentary disposition of property, and in the corresponding obligation to protect the individual acting upon such permission, by the application of the cautious and safe methods of the common law to inquiries which may result from any attempt to use the counterfeit presentment of such action in furtherance of wrong.

[3] While we think that the appellants were entitled to an instruction telling the jury, in some form easily understood, that the burden rested upon the defendants to prove the testamentary capacity of the testator by a preponderance of the evidence, there is, in our opinion, a vice in the one we are considering, which fully justified the court in withholding it from the jury. It told them, with reference to those things which are generally considered the mental requisites of testamentary capacity, that "unless the defendants have shown by a preponderance of evidence that he did possess all of these requisites, you should find this issue in the negative, and against the will." The merit of this feature of the instruction consists in the fact that it was substantially copied from one that was expressly approved by this court in *Mowry v. Norman*, which we have already cited. The real difference is that, while in that case it was perfectly proper, in this case it is improper and misleading; for statements relating to these very matters tending strongly to prove the capacity of the testator, and which were no doubt highly satisfactory to the proponents of the will, and were presented by them to the jury with greater confidence for that reason, occurred in the testimony of the contestants' witness. Were this an ordinary suit, in which the burden of proof rested throughout upon the plaintiff, and the defendant had introduced no evidence, but had depended on that of the plaintiff, an instruction of this character would have been at least misleading; and the same construction is called for in this case. This court has recognized the difference in the effect of the same facts depending upon whether they are proven by the evidence of one party or the other (*White v. Railways Company*, 157 S. W. 593, and cases cited), and what is more natural than that a jury when told that the defendant, to recover, must have shown a fact by a preponderance of evidence, should take the court at its word, and not be satisfied when the same fact has been shown by the plaintiff. The trial court took this view, and we see no error in its refusal of the instruction as

asked, and no error is suggested in it as it was finally given.

[4] 2. The proponent having shown that the will was executed by the testator with all the formalities prescribed by law while the testator was of sound mind, it will then be presumed that it was his free and voluntary act; for the ability to consider and determine is a fundamental characteristic of mental soundness. If the contestant then claims that the instrument proposed does not represent the will of the testator, but the will of another, substituted by fraud or by force either physical or intellectual, the burden lies upon him to prove it. In this case the contestant has undertaken to sustain this burden principally upon a foundation consisting of a confidential relation of Mr. Phelan, the husband of one of the principal beneficiaries, toward the testator, and the fact that Mrs. Phelan received perhaps twice as much as either of his children.

[5-6] It is true that the law will not permit one to take advantage of those intimate relations of trust and confidence which it recognizes between the natural or lawful adviser and the advised, or the trustee and his beneficiary, to use the influence incident to his dominant position for the purpose of private gain. So jealous is it in this respect that, in such cases, undue influence will frequently be presumed unless the act can be fully accounted for by another and adequate motive. But the law does not look with disfavor on the loving performance of those filial offices which, while not exacted by it, are the real rewards of parental solicitude and sacrifice; nor does it discourage the substantial recognition of those affectionate services. These principles apply as well to relations having their origin in marriage as in consanguinity; and confidential relations of this character may often explain why the testator has desired to bestow generously upon the beneficiary of his will. *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887. In this case the testator was old, and greatly weakened in mind as well as in body. While this should make us more careful in our scrutiny of the influences that surrounded him and were operative in suggesting the disposition he should make of his property, there is nothing in it to justify the courts in confining him more closely to conventional methods in its distribution, than they would were he in the full vigor of his prime. Once given the testamentary capacity, and his weakness is only to be considered as an element calculated to contribute to the success of any improper influence shown to have been brought to bear upon him.

[7] In the light of these principles, we have carefully examined this record for evidence more consistent with the theory that the will of Mr. Butler was the product, to any extent, of improper or "undue" influence operating upon him at the time it was made, than with the theory that it was the product of his own

volition, unaffected by any influence from which the law should protect him. We have considered that he was in a condition to be readily susceptible to such influences; that his provision for the Phelans was very large in proportion to the amounts bestowed upon his other heirs; that they occupied a position with relation to him and his business as intimate and commanding as Mr. Phelan could have intended, under the circumstances, to express by the statement that he was his legal adviser and business manager; and that they had never, like his other children, left the neighborhood in which he resided, and were ready and willing to come at his call with advice and assistance. While some of these things would, under normal conditions, have a tendency to explain the disposition of Mr. Butler to deal generously by them, they might also give them vantage ground from which to work upon his weakness; but we have failed to find anything in the evidence tending to show that they used any such advantage, or solicited or advised, directly or indirectly, any disposition contained in the will. It is true that Mr. Phelan was present at its making, and, when requested, rendered valuable assistance in describing the land, for which service he was peculiarly equipped. But Mr. Butler had excellent independent legal advice and assistance in charge of the matter, and it was the province of his lawyer to direct and utilize the activities of Mr. Phelan, which he evidently did. The only instance in evidence in which the Phelans or either of them subjected themselves to criticism in connection with Mr. Butler's testamentary activities was at the time of the March incident, the latter part of February or first part of March, after the making of the will in controversy. He then evidently had a desire to change the will in favor of his son Martin, or "Marty," as he affectionately called him. He had, at the suggestion of Mr. March, procured the presence of Mr. Phelan to assist in describing the lands in the new will. Mr. March had copied the old will down to the place where it mentioned Martin, when the old gentleman said: "I want all west of the creek, Lick Fork creek, to go to Marty." The will in controversy had already devised all that part of the northwest quarter of section 17 lying east of Perche creek to Mrs. Phelan, and the change proposed would give a large portion of that quarter section to Martin. Mr. Phelan immediately took notice, and said: "Uncle Johnnie, don't you know that there is ten acres that does not lie due west of Lick Fork creek, there is ten acres that is west of Perche." It was apparently an innocent remark, but "it just appeared to kind of unnerve him. He got all out of sorts about it. He just said, Squire, you can burn up what you have written there, and I will get Mr. Tom Carter back here, and have him fix this up." Mr. March put the papers in

the stove, and, after reflecting a little while, Mr. Butler said: "No, that won't do. I may pass away before Tom Carter gets back here, and you just let me rest two or three days and I will call you again, and we will fix it up."

That Mr. Phelan, on this occasion, interfered in his own behalf, there can be no doubt; that Mr. Butler desired to give to the son who still lingered in his heart as the child "Marty," the particular parcel of land that lay in the triangle between Perche creek and Lick Fork is plain; and that, at the first intimation that Mr. Phelan was taking notice of his newly formed purpose, he should have become so disturbed as to be unable to proceed under the conditions that then surrounded him is so suggestive that, had it occurred at the time of or before the preparation of the will now before us, we would have no hesitation in coming to the conclusion that it should have been submitted to the jury upon the issue of undue influence. But as we have already seen, it is not the influence that the law denounces, for that may grow out of the very virtues which it most commends, but it is the improper use of that influence. The circumstance just related not only suggested the existence of such an influence, but also had a tendency to suggest that it was operative in preventing a change in the will. When we attempt, however, to apply it to the execution of this will some two or three months before, the circumstance, standing alone as it does, loses its evidential character, and sinks to the level of mere suspicion. We do not think the court could have done otherwise than it did, in withdrawing the issue of undue influence from the jury.

[8-9] 4. The only remaining question relates to the assignment that "the court erred in rejecting the evidence of Sebastian as to the conversation with Butler at the time he consulted him about writing the will."

As a matter of fact, Mr. Sebastian was permitted to testify with considerable freedom as to his conversation with Mr. Butler in July or August, 1905, in which, among other things, the writing of a will for Mr. Butler was mentioned. He said that Mr. Butler was not clear enough about what he wanted done so that he could understand it, and did not seem to be clearly of any opinion as to what he wanted; that physically, he was very weak, and mentally, was not very clear, so that his statements in regard to what he wanted to do were conflicting and confused; that from all the conversation that they had at that time, both of a social nature and in regard to business, he did not think Mr. Butler's mental condition was such at the time that it would have been proper for him to have a will made. At the time he made this last statement, the witness was asked what the conversations were upon which he based this statement, and the court said, without

any objection being made: "If he was acting as attorney, he cannot state the communications made to him." No exception was taken to this statement, and the witness was excused without answering. The circumstance impresses us that the contestants, having got what they wanted from the witness, deliberately refrained from pressing the matter further by exceptions or otherwise, and this impression is strengthened by the consideration that further pressure might weaken the favorable result already attained. Realizing, however, that the contestants and their attorneys may disagree with our conclusion upon that point, we will examine the exceptions taken by them in the examination of Mr. Sebastian, for the purpose of judging whether the action of the court was erroneous in the sense charged in the assignment of error we have just quoted.

The first exception of this character was to the remark of the court: "I have not passed on the other question. Objections sustained." With a little aid from an active imagination we may infer that this remark applied to the following statement which had been previously made by an attorney of the defendants: "We object to any conversation between attorney and client." It was not limited to any question that sought information about any statement made by Mr. Butler, connected with professional matters under discussion. It assumed the relationship of attorney and client, and covered, like a blanket, anything they might have said upon any subject. It reached no question in the case. Nor did the court, in sustaining the objections to questions asked Mr. Sebastian as to his reasons for not writing the will that day, indicate that it intended to exclude any statement made in the conversation between the witness and his alleged client. This objection was made and should have been sustained on the ground that the testimony was "immaterial." The processes of Mr. Sebastian's mind was not the matter at issue. The court was trying the condition of Mr. Butler's mind. The same suggestion applies to the action of the court in striking out the statement of the witness that he thought best not to write the will. None of these matters involved the admissibility of any statement made by Mr. Butler in the conversation with Mr. Sebastian, and the action of the court upon them was irrelevant to that question.

This view makes it unnecessary to express an opinion as to the confidential character of the talk between Mr. Butler and Mr. Sebastian about writing a will. If the plaintiffs had any intention to preserve this question for the consideration of the appellate court, they abandoned it at the time when an exception would have been effective for that purpose; thus retaining all the advantages accruing to them from the general statements of the witness, and avoiding

the danger of weakening them by a disclosure of the language used. There was no prejudicial error shown in the action of the court in this respect.

For the reasons stated, the judgment of the circuit court is affirmed.

PER CURIAM. The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All concur.

## STATE v. BRUTON.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

### 1. SEDUCTION (§ 46\*)—EVIDENCE—CORROBORATION.

Where, on a trial for seduction under promise of marriage, the prosecutrix testified that she and accused became engaged in May, 1910, a letter written by accused to her in July following, wherein he asked her if she would marry, did not alone corroborate the promise of marriage, essential under Rev. St. 1909, § 5235, to support a conviction.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

### 2. SEDUCTION (§ 46\*)—EVIDENCE—CORROBORATIVE EVIDENCE.

Evidence corroborative of promise of marriage, required by Rev. St. 1909, § 5235, to sustain a conviction for seduction under promise of marriage, need not be such as, standing by itself, will prove the fact, but any material circumstance shown by other witnesses, corroborating the testimony of the prosecutrix as to the promise of marriage, is sufficient.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.\*]

### 3. CRIMINAL LAW (§ 814\*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for seduction, prosecutrix testified that she was seduced August 3d while taking a buggy ride with accused, who testified that he was only in her company once in December following, and again in April following, and that on the latter occasion a third person accompanied them, the trial court properly charged on alibi.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

### 4. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse requested instructions covered by other instructions asked by defendant or given on the court's own motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

### 5. CRIMINAL LAW (§ 403\*)—EVIDENCE—PEDIGREE.

Where entries in a family Bible, showing the date of the birth of prosecutrix, were originally made by the deceased mother of prosecutrix, and, after the Bible becoming so worn as to make it advisable to copy the entries on a sheet of paper, which was done in the presence of the deceased mother and other members of the family, the copy was properly received in evidence on a trial of her seduction to establish her age.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 889; Dec. Dig. § 403.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**6. CRIMINAL LAW (§ 1169\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

The error, if any, in admitting evidence, which is merely cumulative of a necessary but uncontradicted fact established by competent proof, is harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

**7. SEDUCTION (§ 44\*)—EVIDENCE—ADMISSIBILITY.**

On a trial for seduction under promise of marriage, accused may show that, during the period fixed by prosecutrix as the period during which he kept company with her, he kept company with other girls when limited to the particular dates fixed by the prosecutrix as the dates accused was in her company.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. § 78; Dec. Dig. § 44.\*]

Appeal from Criminal Court, Greene County; Alfred Page, Judge.

Ben Bruton was convicted of crime, and he appeals. Reversed and remanded for new trial.

Defendant was tried in the criminal court of Greene county on July 23, 1912, upon an information charging him with seduction under promise of marriage, for that it was averred he had seduced and debauched one Susan Reynolds, an unmarried female of good repute, under the age of 21 years. He was found guilty by the jury, which assessed his punishment at a fine of \$300 and imprisonment in the county jail for a term of 180 days. From this verdict and the judgment following same, he has appealed to this court.

The testimony in the case tends to show that defendant and prosecutrix had known one another nearly all of their lives; that they had lived for years near one another in Webster county, where they were both reared, though prosecutrix had been, prior to the seduction charged, living for a number of years with her parents in Greene county. Apparently defendant himself was farming in Greene county at the time of the seduction, but, since the offense was committed in Greene county, neither of these facts is of much moment.

The testimony is somewhat voluminous, and in many respects contradictory. That of the prosecutrix tends to show that defendant began keeping company with her in the month of February, 1909, and continued to wait on her with much of assiduity until some time in April, 1911. She avers that in the month of May, 1910 (precise date or part of month not given), while walking home from church with defendant, that the latter asked her to marry him, and that she consented. It seems from prosecutrix's testimony that her father was opposed to her receiving the attentions of defendant, and would not permit him to visit her at her home. The details of this opposition or the reasons for it are not given, and the facts appear but obscurely and vaguely in the record. The prosecutrix states that the promise of

defendant to marry her was conditioned upon her leaving home, which she did on June 22, 1910, and went to Kansas City, Kan., where she remained about a month, living with her half-brother. While at Kansas City, Kan., defendant wrote prosecutrix a letter, which she received some time in the early days of July, and which letter we print in full in the opinion herein, as it indubitably is the only spark of corroboration in the entire record. Upon the return of prosecutrix to her home, the attentions to her of defendant, she says, were renewed, and on August 3, 1910, while ostensibly on the way to attend church at Rogersville, the defendant, protesting the while to use her own words, "that he loved her better than any girl he ever kept company with," accomplished her undoing. The intercourse thus began continued until some time in March of the following year, when she became pregnant, subsequently giving birth to a child on December 4, 1911. About the month of April, 1911, when she became aware of her condition, she confessed it to her sister-in-law, but, so far as the record shows, her confession was confined to her condition of pregnancy, and gave no hint of the making or of a reliance upon the alleged promise of marriage, which she now avers caused her fall. Prosecutrix, for a part of the time covered by the record, seems to have been employed at various places in the neighborhood as a domestic servant, and for some three weeks in the month of October, 1910, performed such service for one Henry Bruton, the brother of defendant, at whose home at the same time defendant seems to have been staying.

Many witnesses were called for the state, who testified as to the good repute in the community of the prosecutrix prior to her downfall. Six of these witnesses for the state, for the most part her neighbors and acquaintances, out of nine who testified as to the below fact, say that they never saw defendant in company with her. The other three say that they never saw defendant with her but once or twice.

Defendant, on his part, proved for himself, a good reputation generally, and for truth and veracity, and touching the precise failing involved in this inquiry. Testifying for himself, he denied the promise of marriage. Touching whether he had had sexual intercourse with prosecutrix, he refrained from committing himself, passing this question, like the Levite, "on the other side." He denied having paid court to prosecutrix, and averred that he had not accompanied her or "gone with her in his whole life" but upon two occasions; once to a dance in the vicinity, and on the other occasion he had driven with her in a buggy from the house of a neighbor where she was marooned by a rain-storm to the place at which she was then staying, and that, upon the latter trip, an-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other girl was in their company. In all of this his own witnesses corroborate him.

At the conclusion of all the evidence in the case, defendant offered an instruction in the nature of a demurrer to the evidence, and requested the court to give the same. This the court refused to do, proper exception was taken and saved, and this point is the contention which learned counsel have most strenuously urged upon us. Other alleged errors are said to have occurred upon the trial. These, together with such other facts as may be necessary to be stated in order that a full understanding of the contentions made and the points ruled may be obtained, will be set out in the opinion, if such setting forth shall become necessary.

J. J. Gideon, J. C. West, and Waldo G. Gideon, all of Springfield, for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen., for the State.

FARIS, J. (after stating the facts as above). [1] I. At the close of the case, when all of the testimony was in on both sides, defendant offered an instruction in the nature of a demurrer to the evidence. This instruction the court refused to give, which refusal, as we have stated, is the basis of defendant's most strenuous contention here, and presents a serious question in the case. Assuredly there is evidence enough of facts in the record, for the testimony of the prosecutrix furnishes that, but is there enough of corroboration of prosecutrix's testimony? Let up look fairly over the facts shown in evidence.

Prosecutrix says that defendant began keeping company with her in February, 1909, and continued to do so till a period long subsequent to the date at which she says she was seduced; that defendant went to dances with her; that he accompanied her home from church and drove about the country in a buggy with her, but that he never came to her father's house to visit her, because her father objected to defendant's paying attention to her. In this she is not corroborated by the witnesses for the state, for six of them, her neighbors and acquaintances for the most part, say they never saw the defendant with her or in her company anywhere. The defendant says he never went with her but twice, once he accompanied her from a dance to the place at which she was staying, and once, at the suggestion of a third person, because of a rainstorm in which prosecutrix was caught, drove with her and another girl in a buggy from the house of a friend to the place where prosecutrix was working. Three other witnesses for the state say that they never saw defendant with prosecutrix but once or twice. During the period embraced in this record, defendant is shown to have been paying attention to other girls in the neighborhood, and prosecutrix is shown to have been the recipient of much

more attention from other young men than from defendant. She avers that the promise of marriage was made to her and accepted by her on some indefinite day in May, 1910. In June following she went to Kansas City, Kan., and while there and on about the first days of July, 1910, she received from defendant the following letter: "Rogersville, Mo. Miss Susan R. Dear Sweetheart. I will try to ancer your letter this afternoon I was to here from you well sweetheart how ar yo by this, find and dandle I guess-well sweetheart I wish I was out thar with you, we wod have a time dont forgit it we wod. Say sweetheart cood I get any work to do that—say sweetheart do you want me to come out thar say sweetheart do you want mary if you let me no—well sweetheart I will ring off for this time—answer soon ancer soon from your sweethart Benie Bruton to dear sweethart Susie. X X X X X X X By By By."

This letter prosecutrix says she answered, and in her answer accepted the offer of defendant to marry her. We concede that, if she had not already unequivocally and, all through her testimony, unalterably fixed the promise of marriage as in May preceding, we would need to look for corroboration no farther than this letter, although she says defendant gave her no ring, made her no presents, and never fixed any day for the wedding. Prosecutrix made no preparations for marriage to defendant, and did not for more than a year (and long after she became pregnant) tell any one of the alleged promise of defendant. In fact, while the record shows that she told her brother's wife of her pregnancy in May, 1911, there is no evidence in the record that she complained of having yielded to him under a promise of marriage till she filed a sworn complaint against defendant in July, 1911, which complaint is the foundation of this prosecution.

Besides the letter, which we set out above, four other letters were written to prosecutrix by the defendant. No one of these, though all were written long subsequent to the alleged promise of marriage, gives any sign or hint of the existence of a promise of marriage. Since these letters contain all and the only extrajudicial utterances of defendant touching the subject-matter of this charge, we append below, as an example of all, one of these four epistles, which one was written in the fall or winter of 1910, following the alleged engagement in the month of May, and the debauchment in August, 1910, preceding. This letter is as follows: "Miss susie R hellow kid how ar yo I am fine and hope you the same Well kid I will com over sady night if you will go. Be wred to go when I get thar. I will tell the wrest I see yo so good By By. From Ben B to susie. If you cant go let me no."

As illustrating the slender thread of fact upon which the case hangs and turns, an excerpt from prosecutrix's testimony detailing

still other promises of marriage is pertinent. Upon her cross-examination, among other things, she said: "Q. What did he say, if you got into trouble he would marry you, the defendant here, Ben Bruton—did he say anything about if you got in trouble he would marry you? A. Yes, sir. Q. What did he say? A. He said if I got in any trouble he would marry me. Q. Was that before he had intercourse with you? A. Yes, sir. Q. How did he say that? A. I told you he said he would marry me if he got me into trouble. Q. That was before you had intercourse? A. No, sir. Q. Did he say if you got into trouble he would marry you? A. Yes, sir. Q. How many times did he say that? A. I don't know. Q. More than that? A. I never kept count. \* \* \* Q. Was it at Martin's he said he would marry you if you got in trouble, or at Bruton's, or your father's, or Ben Field's? A. Every place I was staying at. Q. Every one of them from start to finish? A. Yes, sir."

Since, by statute, the testimony of the prosecutrix in a prosecution for seduction must be corroborated as to the promise of marriage (section 5235, R. S. 1909), we are constrained to say that we cannot gather from this record sufficient corroboration as to warrant our permitting this verdict to stand, when we regard the statute and the adjudicated cases. *State v. Teeter*, 239 Mo. 475, 144 S. W. 445; *State v. Long*, 238 Mo. 383, 141 S. W. 1099; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *State v. Eisenhour*, 132 Mo. 140, 33 S. W. 785; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *State v. Reeves*, 97 Mo. 106, 106 S. W. 841, 10 Am. St. Rep. 349; *State v. Primm*, 98 Mo. 368, 11 S. W. 732; *State v. Davis*, 141 Mo. 522, 42 S. W. 1083; *State v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; *State v. Sublett*, 191 Mo. 172, 90 S. W. 374.

[2] For the quantum of corroborative evidence, the statute (section 5235, *supra*) refers us to the rule prevailing in a prosecution for perjury. The rule as to the sufficiency and weight of corroborative proof, in a prosecution for the latter offense, was discussed in the case of *State v. Heed*, 57 Mo. 252, where it was said: "The additional evidence need not be such as, standing by itself, would justify a conviction in a case, where the testimony of a single witness would suffice for that purpose; but it must be at least strongly corroborative of the testimony of the accusing witness."

In the case of *State v. Eisenhour*, *supra*, it was said: "Positive corroborating evidence is not required either in perjury or in a case of seduction under promise of marriage, but any material circumstance shown by other witnesses corroborative of the evidence of the prosecuting witness as to the perjury or promise of marriage is sufficient."

We have searched this record most painstakingly for some sufficient corroboration of the prosecutrix's testimony as to the prom-

ise of marriage, and can find none of sufficient weight for this purpose. The letter which prosecutrix received in July, in which defendant asked her if she wanted to marry and if so to let him know, if it means anything, means a present offer of marriage. It does not corroborate a then long-existing contract to marry. If prosecutrix had laid the promise of marriage as of the same date, or subsequent to the receipt of this letter, we would not then hesitate to say that the letter would then furnish strong and ample corroboration of a subsisting contract to marry at the date of the debauchment and seduction. We cannot see why, if such a contract had existed since May, 1910, defendant should ask prosecutrix in July, 1910, if she wanted to marry. It is true that she avers that she also accepted this offer, but, in a case such as this, the more promises and acceptances the less definiteness and certainty of guilt. Too many promises create suspicion, other facts being regarded. She is not able to even approximate the date in May at which the defendant proposed to her and she accepted him, though she testified herein but a little more than two years after she avers she became engaged to marry defendant, and there had transpired in the interim matters of pith and moment which it seems ought to have impressed the date upon her memory indelibly. If it be said that by the letter we set out the defendant merely intended to ask whether prosecutrix was ready to marry, and desired her "to set the day" under a then existing promise, the answer would seem to be that prosecutrix herself, while professing to know all the antecedent facts, did not so interpret the letter, for she says she did not know why defendant thus wrote to her, and that she (regarding evidently the offer as a fresh offer) accepted this offer, also, as another offer of marriage. Learned counsel for the state join us in this view, and construe the clause in the letter as another offer of marriage, as witness this excerpt from their brief: "The only proposals of marriage by the defendant are the one made in May, 1910, when coming from Rogersville, and the one contained in the above letter mailed in July, 1910."

If we may judge by the lightness of the punishment inflicted, the jury must have been influenced by the many contradictions and improbabilities disclosed by this record. The whole record is barren of any fact whatever, the letter above alone excepted, which lends any, the least color of corroboration even, to the testimony of the prosecuting witness, and we are not disposed alone upon the weight of so ambiguous an extrajudicial confession to let this verdict stand, and so we hold that the court should have given the instruction in the nature of a demurrer to the evidence offered by the defendant.

[3] II. It may be that other testimony, sufficient, in law, to furnish forth the quantum of corroboration required, may be obtained

upon another trial. In this contingency, it may be well to say that we find no error in the fact that the court gave instruction 8, touching an alibi. The defendant urges upon us that this was error because there was no proof that defendant was not present on August 3, 1910, when prosecutrix was seduced and debauched; that he did not in his testimony deny that he was with her on that date.

Learned counsel, in sticking to the letter of the testimony, have suffered the fate denounced by the maxim, "*Qui hæret in litera hæret in cortice.*" Prosecutrix says she was seduced and debauched August 3, 1910, while taking a buggy ride with defendant and ostensibly on the road to church. Defendant says he never was with her in a buggy alone; that he never took her buggy riding, except one trip in April, 1911, when he drove her home on account of a rainstorm, and then they were accompanied by the Hargus girl; that he was in her company as an escort twice only in life, once in December, 1910, when he went with her to a dance at Horton's, and again in April, 1911, on the occasion above set out. His testimony, fairly considered, embraces an emphatic denial of his presence with prosecutrix on August 3, 1910, and makes for defendant a strong alibi, so strong by large inference that we cannot say the learned trial judge erred in caution in giving the instruction objected to, and so we disallow the point.

[4] III. While certain instructions offered by defendant were refused by the court, we see no error in this, for the reason that the court had already fully covered the points toward which the refused instructions were directed, by giving full and correct instructions *sua sponte*, or by giving other instructions asked by and given for defendant. *State v. Hicks*, 178 Mo. 433, 77 S. W. 539; *State v. Laughlin*, 180 Mo. 342, 79 S. W. 401.

[5] Further complaint is made that it was error to allow the introduction of the copy of the family record, which copy was averred to have been taken from this record some 15 years before the trial. We do not think this was error, *a fortiori*, under the facts here. No contradiction on defendant's part as to prosecutrix's age was made. She testified to her age, her father did likewise, and, as cumulative proof of the fact of her age, which was not denied, a copy of the family record, originally set down in the family Bible, was offered. Concededly the record in the family Bible was the best evidence, other things being equal and present; but may not a copy of the entries from a family Bible death and birth register also become competent upon a proper foundation laid? We think so, and we think the foundation was

laid in this case. The proof showed that the entries were originally made in the Bible by the deceased mother of prosecutrix; that some 12 or 15 years before, this Bible having lost its covers and some of its leaves, became so worn and illegible as to the pages thereof containing the register of births, that it was deemed wise, these dozen years, *ante litem motam*, to copy the entries from the register upon another sheet of paper; that this copy was made at the request of and in the presence of the deceased mother, the original maker of the entries, and in the presence of the witness Frank Reynolds, by another brother of prosecutrix and of said witness; that this copy, being the same offered in evidence in the case and to which objection was lodged, was a correct one, and that the original Bible entries were at the time of the trial so worn as to be illegible. We hold that it was not error to offer the copy under the foundation laid and above stated.

[6] Besides, as the facts here are, it was proof that was not under the law and facts here hurtful, because it was merely cumulative evidence of a necessary but uncontradicted fact already abundantly shown by other competent proof. It follows that we must disallow this point to defendant.

[7] The further contention that defendant should have been permitted to show that he was, during the time embraced within this record, keeping company with other girls in the community, and that error meet for reversal may be predicated upon the court's refusal to allow such proof, or rather upon the action of the court in limiting this proof, as he did, to dates at which prosecutrix testified defendant was in her company, needs we take it but scant attention. The very statement of the proposition shows its fallacy. It is confounded in *limine* and in the utterance by the homely expression of having "two strings to one's bow." Would it not have been entirely feasible and practicable to defendant to have paid strenuous, devoted, and continuous court to many maidens of the vicinage, on Sundays, Mondays, Tuesdays, and Wednesdays, and at the same time have found ample leisure and opportunity to visit and woo and promise and seduce the prosecutrix on Thursdays and Saturdays? We think so, and think the trial court was correct in setting the limitations of the proof offered as he did, and beyond the bounds of which he did not permit defendant to go.

It follows that this case must be reversed and remanded for a new trial, if so be it that the state may by diligence strengthen its case in the behalf mentioned. It is so ordered.

BROWN, P. J., and WALKER, J., concur.

## STATE v. BUNYARD.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

## 1. MAYHEM (§ 4\*)—INFORMATION—REQUISITES.

An information which alleged that accused feloniously assaulted prosecutor with a knife, and on purpose and of his malice aforethought cut and slit the nose of prosecutor, with intent to maim and disfigure him, sufficiently charges the offense of mayhem, under Rev. St. 1909, § 4480.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. § 8; Dec. Dig. § 4.\*]

## 2. CRIMINAL LAW (§ 1172\*)—INSTRUCTIONS—INFORMATION—HARMLESS ERROR.

The error, in an instruction authorizing a conviction of accused if he assaulted prosecutor with a knife, with intent to kill, maim, or disfigure him, arising from the fact that it is broader than the information, charging only an assault with intent to maim, was not prejudicial to accused, where the jury found him guilty as charged in the information, since, in view of the verdict, the jury either interpreted the words "to kill," in the instruction, as placing an additional burden on the state, or the words were rejected as surplusage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

## 3. CRIMINAL LAW (§ 1163\*)—APPEAL—HARMLESS ERROR—PRESUMPTION OF PREJUDICE.

That injury resulted to accused from an error in the instructions, must be presumed, unless the record shows the contrary, in which case the conviction will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.\*]

## 4. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—ISSUES.

The rule that the instructions must not be broader than the information is limited to cases where it appears that the added charge in the instructions either misled or was calculated to mislead the jury, or where it was attempted by the added charge to cure a defective information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

## 5. MAYHEM (§§ 2, 6\*)—EVIDENCE—SELF-DEFENSE.

The defense of self-defense is available to accused charged with mayhem, and where the evidence raises the issue, the court must submit it, as required by Rev. St. 1909, § 5231, requiring written instructions on all questions of law arising in the case, necessary for the information of the jury.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. §§ 6, 10; Dec. Dig. §§ 2, 6.\*]

## 6. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTIONS.

Where the facts do not justify an instruction on self-defense, accused, not being injured by an erroneous instruction thereon, may not complain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

## 7. MAYHEM (§ 6\*)—INSTRUCTIONS—SELF-DEFENSE.

An instruction that, if accused sought or brought on the difficulty, or voluntarily entered into it, he could not justify himself under the law of self-defense is erroneous in not stating

the intention with which accused entered into the difficulty.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. § 10; Dec. Dig. § 6.\*]

## 8. MAYHEM (§ 6\*)—EVIDENCE—SELF-DEFENSE.

Where accused charged with mayhem on a school-teacher went to the schoolhouse under the influence of liquor, and there assumed an offensive attitude toward the orderly proceedings, by interrupting the exercises, and assaulted the teacher while he was attempting to preserve order, an instruction on self-defense was unauthorized.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. § 10; Dec. Dig. § 6.\*]

## 9. MAYHEM (§ 6\*)—TEACHERS—AUTHORITY.

Where a public school-teacher conducted an entertainment in a schoolhouse in the presence of a director, and there was nothing to show that Rev. St. 1909, § 10,784, regulating the use of schoolhouses had not been complied with, the court must presume that the entertainment was held as authorized by law, and that the teacher conducting it was clothed with sufficient power to eject one disturbing the meeting, and when he did so, the one ejected could not assault the teacher, who only used the force necessary to preserve order.

[Ed. Note.—For other cases, see Mayhem, Cent. Dig. § 10; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Douglas County; John T. Moore, Judge.

Linzey Bunyard was convicted of mayhem and he appeals. Affirmed.

On an information filed by the prosecuting attorney of Douglas county, charging the appellant with mayhem under the provisions of section 4480, R. S. 1909, appellant was convicted, and sentenced to five years' imprisonment in the penitentiary, from which he appeals. Upon the perfecting of his appeal, he entered into a recognizance, which was approved by the trial court.

The evidence on behalf of the state was substantially as follows: During the month of November, 1912, a young man named Emmet Yoeman was teaching school at Walnut Grove schoolhouse, a few miles from Ava, in Douglas county. On the night of the 2d of November, an entertainment was given at the schoolhouse, which was conducted by Yoeman, the appellant and a large number of others being present. The appellant was heard to say, at a livery barn in Ava the afternoon before the entertainment, that he was going there that night and "tear it up." After the entertainment had commenced, while two little girls were singing, accompanied by Yoeman on the violin, appellant went upon the stage in the rear of the singers and began to sing. Upon Yoeman's looking at him, he went off the stage, shaking his fist at the latter. Later, while the selling of boxes, a part of the entertainment, was in progress, a disturbance occurred in the rear of the schoolhouse, among some boys, and several of them were ejected from the room. As Yoeman went towards the rear door, appellant came up the steps cursing, and took hold of Yoeman, and the latter gave him a shove, shutting the door. After the door was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



closed, a brother of appellant, who had been guarding the door with Yoeman, said: "Let's open the door, we can keep them out with it open." Yoeman then opened the door and stepped back. The appellant came up the steps the second time, cursing as he came, saying, "Is that you, Yoeman?" or "G—d—n you, Yoeman," and as he said this, he cut Yoeman across the face. The cut extended across Yoeman's nose and one cheek, severing his nose from his face, with the exception of a little skin on one side, causing his nose to drop over on his cheek. Yoeman and the appellant then clinched and fell between some desks at the rear of the schoolroom, Yoeman being on top. As they clinched, Yoeman gripped the wrist of the hand in which appellant held the knife with which the latter had done the cutting, and did not release his hold thereon until they were separated. Yoeman was then taken to the front of the school room bleeding profusely. Appellant, who was being held, again sought to reach Yoeman, saying with an oath, "G—d—n Yoeman, I will finish him while I am at it." Appellant was restrained, however, from further assaulting Yoeman, by one Alt Turner and his brother. Turner testified that he saw the appellant have a knife in his hand at the time, which he took away from him. Turner kept the knife, and it was exhibited in evidence at the trial. A witness for the defense named Homer Martin saw appellant start into the schoolhouse with his knife open, when witness said to him, "Linzy, don't go in there with your knife open; I am a friend to you and you had better not do that." To which appellant replied, "I know you are my friend, but I am going in there—I am going in there to stop that thing." This witness says he saw appellant fall off of the steps on his back; that after falling appellant arose and again went up the steps and entered the schoolhouse.

Two doctors, who arrived several hours after the cutting, found Yoeman in the care of some young ladies. He was very weak from the loss of blood, and his wounds are described as one across the face and nose, another above the ear, and another on the back of the head. His nose lacked but little of being cut off, being held on by a quarter of an inch of skin on the right side. These doctors also testified that there were no large arteries severed by the cut across the face, and that blood would not flow therefrom immediately after the infliction of the wound; that probably 20 seconds or more might elapse before the wound would commence to bleed.

The evidence on the part of the defense is to the effect that, when Yoeman went to quiet the disturbance in the rear of the schoolhouse, appellant was pushed out of the door and fell; that it was Yoeman who pushed him out, saying, "Get out; we are going to have this stopped;" that immediately after appellant struck Yoeman across the face, that before they clinched, no blood was seen

on Yoeman's face, and no knife in the hand of the appellant; that after they clinched and fell, appellant yelled, "Pull him off, he is cutting me;" that, while certain witnesses were separating the two, one of them was struck over the eye by one of Yoeman's hands and he received a cut, whether it was by the hand that was holding appellant's wrist is not stated; this same witness, however, testified that he saw a knife in appellant's hand at the time, and that Yoeman was holding the wrist of that hand when they separated them; that after they were separated and Yoeman had been taken to the front part of the house, a woman testified that she took hold of the appellant, and he told her to get back, that he meant to cut him; that some one said about this time, "Emmet (Yoeman) is cut mighty bad," and another said, "He is cut all to hell;" whereupon appellant said, "I am the man that done it." There was testimony that appellant was under the influence of liquor. He denied making any statements at the livery barn in regard to going to the schoolhouse, and that he had had any words or difficulty with Yoeman before the latter pushed him out of the schoolhouse; that when he fell Yoeman said, "I am putting all the drunk men out of the house;" that Homer Martin told appellant not to go into the house with his knife open, and he put it in his pocket; that when he started into the house the second time he said to Yoeman, "Emmet, you are the man that pushed me out of the door"; to which the latter replied, "Yes, I am;" that it looked as though Yoeman was going to give him another shove, and appellant then struck him; that they clinched and went down, and immediately Yoeman began cutting the appellant, and the latter yelled to take him off; that appellant did get his knife out of his pocket while down, and opened the knife with his teeth and cut Yoeman in the face; that they then began to pull Yoeman off of him; that appellant's finger was marked up with four or five slashes; that he was cut on the ear, and there were four or five stabs on his head, and that these wounds were bleeding so he could hardly see. Appellant further testified that he was a man 35 years old; that he had been convicted of and pleaded guilty to gambling so many times that he could not remember them all; that he had procured a pint of whisky (by other witnesses stated to be a quart), and had been drinking in the barn at Ava, and when he left town he had a half pint, and was a little full. He admitted he did the cutting, and did not know any one who saw Yoeman have a knife before or during the difficulty.

In rebuttal, it was shown that Yoeman had no knife; that no one saw any wounds on the appellant that night; and that the only person wounded was Yoeman. It was also shown that a few days after the difficulty one of the witnesses saw appellant, and said, "Where are your wounds?" to which appel-

lant said, "I got a cut or two," but none were to be seen.

The jury has determined as to the weight of the evidence which, we have no hesitancy in saying, is ample to sustain the verdict. The foregoing somewhat prolix statement of the facts has therefore been made only that the color and current of the entire transaction may be fully set forth.

J. S. Clarke, of Ava, for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] I. The Information. The sufficiency of the information is questioned. Omitting the formal parts, it is as follows: "That Linzy Bunyard on the 2d day of November, 1912, in the county of Douglas and state of Missouri, in and upon one Emmet Yoeman, on purpose and of his malice aforethought, unlawfully and feloniously did make an assault, and the said Linzy Bunyard with a knife, the nose of the said Emmet Yoeman, on purpose and of his malice aforethought, then and there unlawfully and feloniously did cut and slit with intent him the said Emmet Yoeman, then and there thereby to maim and disfigure, against the peace and dignity of the state." The information is not subject to valid objection. It uses all the essential statutory words, with other allegations, necessary to clearly charge the offense of mayhem. This is all that is required. Sec. 4480, R. S. 1909; State v. Nerzinger, 220 Mo. 36, 47, 119 S. W. 379; State v. Kyle, 177 Mo. 659, 661, 76 S. W. 1014. The rulings of courts of last resort in other jurisdictions upon indictments framed under similar statutes are of like import. *Kitchens v. State*, 80 Ga. 810, 7 S. E. 209; *Guest v. State*, 19 Ark. 405; *State v. Absence*, 4 Port. (Ala.) 397.

II. Evidence. The court's rulings on the admission and exclusion of testimony disclose no error upon which can be based a substantial claim of prejudice; in fact, appellant does not so contend, his assignments being confined, aside from an objection to the sufficiency of the information, to alleged errors in the instructions.

[2-4] III. Instruction—Broader than Charge. Instruction numbered 1, given by the court, is complained of as being broader than the information. The instruction is as follows: "No. 1. If you find from the evidence that Linzy Bunyard, in the county of Douglas and state of Missouri, at the time and place mentioned in the information, did feloniously, on purpose and of his malice aforethought make an assault on one Emmet Yoeman with a knife, a dangerous and deadly weapon, and cut the nose of the said Emmet Yoeman with the felonious intent to kill, maim, or disfigure the said Emmet Yoeman, you will find the defendant guilty of mayhem and assess his punishment at a term in the state pen-

itentiary not less than 2 years nor more than 25 years."

Comparing this instruction with the information, it will be seen that the former is framed in the language of the statute, in charging the assault as having been committed with the intent to "kill, maim, or disfigure," while in the information the offense is limited in its terms to an assault with intent to "maim and disfigure." Appellant's contention is that the jury was misled by the instruction, and, as a consequence, the defendant was found guilty of an assault with intent to kill, instead of an assault with intent to maim and disfigure. It is apparent that the instruction is broader than the information; but, were the substantial rights of the appellant thereby affected? If this cannot be readily determined, then appellant has not been tried as the law directs, and injury must be presumed unless the record shows to the contrary. If, however, the record does so show, the judgment should not be disturbed; for the law gives no redress for a wrong not resulting in an injury. The best record test as to the manner in which this instruction was considered by the jury is the verdict. It is as follows: "We, the jury, find the defendant guilty as charged in the information and assess his punishment at five years' imprisonment in the state penitentiary." It will be noted that the verdict by its express terms finds the appellant guilty as "*charged in the information*," from which it is evident that the jury either interpreted the words "to kill," in the instruction as placing an additional burden on the state before the appellant could be found guilty of an assault to maim and disfigure, or that the words in question were rejected as surplusage. Upon either theory, the jury was not misled, and appellant has suffered no injury in this regard. The rule that instructions must not be broader than the indictment or information is limited to cases in which it appears that the added words either misled, or, by their terms, were calculated to mislead the jury; or, in which it was attempted, by the added words, to cure a defective indictment or information, as in *State v. Kyle*, 177 Mo. 659, 664, 76 S. W. 1014, and *State v. Smith*, 119 Mo. 439, 447, 24 S. W. 1000, and not as in the case at bar, and in *State v. Wakefield*, 73 Mo. 549, 552, and *State v. Chauvin*, 231 Mo. 31, 37, 132 S. W. 243, Ann. Cas. 1912A, 992, in which the instructions placed a greater burden on the state than the law required to sustain a conviction, and hence were not prejudicial.

Another class of cases, in which the instructions may be broader than the indictment or information, and yet not prove prejudicial, are those in which the added words may be rejected as surplusage because inapplicable under the charge, and therefore not tending to mislead the jury. To this class belong *State v. Faulkner*, 185 Mo. 673, 707,

84 S. W. 967, and *State v. Scullin*, 185 Mo. 709, 712, 84 S. W. 862.

[6, 8] IV. Instruction—Self-Defense. Preliminary to a consideration of instruction numbered 9 in regard to appellant's entering into the difficulty, and instruction numbered 10 in regard to self-defense, to the giving of which appellant complains, we are confronted with the inquiry as to whether an instruction on the theory of self-defense and its correlative instruction may properly be invoked by the defense in a case of this character. In the few cases in which the matter has been considered, the plea of self-defense has been held to be permissible in a prosecution for mayhem, as in cases of homicide, but, in order to be available in justification of the act, the resistance must be proportionate to the injury offered. *Green v. State*, 151 Ala. 14, 15, 44 South. 194, 125 Am. St. Rep. 17, 15 Ann. Cas. 81; *State v. Skidmore*, 87 N. C. 509; *Hayden v. State*, 4 Blackf. (Ind.) 546; *People v. Wright*, 93 Cal. 564, 29 Pac. 240.

This court has impliedly, at least, held in *State v. Bldstrup*, 237 Mo. 273, 140 S. W. 904, that, upon evidence having been introduced in regard to self-defense by either the state or the accused, instructions in regard thereto are proper in cases of maiming, upon the theory that self-defense is an affirmative defense, and the court is required under the statute (sec. 5231, R. S. 1909) to instruct the jury in writing upon all questions of law arising in the case necessary for the information of the jury in giving their verdict. If, therefore, it appears that there was any evidence in this case authorizing instructions in regard to self-defense, the same should have been given, and when given, if found to be prejudicial, they will justify a reversal; but if, on the contrary, the facts do not justify the giving of the instructions, although they may have been improperly framed, if the appellant did not suffer injury therefrom, he should not be heard to complain.

[7] Instruction numbered 9 is to the effect that, if the appellant sought or brought on the difficulty or voluntarily entered into same, he cannot justify himself under the law of self-defense. This instruction is erroneous in not stating the intention with which the appellant entered into the difficulty. *State v. Pennington*, 146 Mo. 277, 47 S. W. 799; *State v. Goddard*, 146 Mo. 177, 48 S. W. 82.

Instruction numbered 10, while inartificially drawn, correctly states the law in regard to self-defense, and is therefore not subject to valid criticism on this account. But the appellant should not be heard to complain on account of the giving of these instructions although improperly worded, because there was no substantial evidence to sustain the theory of self-defense.

[8] A brief review of the testimony will demonstrate the correctness of this conclusion. Appellant was, according to his own statement, under the influence of liquor when he went to the schoolhouse. Upon his ar-

rival there he assumed an offensive attitude towards the orderly proceeding of the entertainment, by going upon the stage and interrupting the exercises, and, when admonished to desist, by a look from Yoeman, he left the stage, shaking his fist at the latter. Subsequently, when Yoeman and others were attempting to quiet a disturbance in the schoolroom, caused by some boys, appellant, hearing the noise, started into the building with his knife open, and when Homer Martin, one of his witnesses, remonstrated with him, appellant replied: "I know you are my friend, but I am going in there; I am going in there to stop that thing." Yoeman, continuing in his endeavors to preserve order, pushed the appellant off of the schoolhouse steps, as he attempted to enter the room. The latter immediately again sought to enter, cursing Yoeman as he went up the steps, and, upon reaching him, cut him across the face, inflicting the wound charged in the information. Up to the point of the infliction of this injury there is no testimony for the state or the defense that Yoeman was attempting to do more, or, in fact, that he subsequently did more, than attempt to prevent appellant from entering the schoolroom. This being true, there was no authority for the giving of an instruction on self-defense or of a statement of the law in regard to the accused entering into the difficulty, the latter being permissible only when there is testimony to authorize the giving of an instruction on self-defense. Under this state of facts, it is difficult to see how the appellant could have been injured by the giving of the instructions complained of, conceding that they may have been defectively framed. We hold, therefore, that there is no substantial merit in appellant's contention in regard to these instructions.

[9] V. Instruction—Teacher may Preserve Order. Appellant contends that error was committed in the giving of the following instruction: "No. 11. If you find from the evidence that the prosecuting witness, Yoeman, was a teacher in the district where the alleged crime was committed, and as such teacher had charge of the entertainment in said schoolhouse in said district, then, in that case, the teacher had a right to keep order at said meeting, and use what force that was necessary to preserve order and keep peace within said meeting place."

The meeting at the schoolhouse the night the offense was committed, as shown by the record, was held for the commendable purpose of affording entertainment for the people of the neighborhood, and incidentally, no doubt, to increase their interest in the school. While not unmindful of the provisions of section 10784 as construed in *Dorton v. Hearn*, 67 Mo. 301, regulating the use of public school buildings, the meeting being in other respects authorized, we assume, nothing appearing to the contrary, that the statute referred to had been complied with. This being true, in the absence of any showing

that a director was present, the teacher then employed in the district, and who was conducting the entertainment, was clothed, from the very necessities of the case, with sufficient power to at least eject a ruffian who sought to enter the schoolroom for the avowed purpose of disturbing the meeting. This was all that the instruction declared the teacher was empowered to do, and it was all, as the evidence clearly shows, that he did. The instruction, therefore, although awkwardly expressed, correctly declares the law applicable to this case, and we overrule appellant's contention.

From all of the foregoing, the judgment of the trial court should be affirmed, and it is so ordered.

BROWN, P. J., and FARIS, J., concur.

#### WOLZ v. VENARD et al.

(Supreme Court of Missouri, Division No. 1  
Dec. 6, 1913.)

#### 1. REFORMATION OF INSTRUMENTS (§ 19\*)— GROUNDS—MISTAKE.

The mistake which is ground for the reformation of an instrument must be mutual, and, where the parties agree to accomplish a particular object by an instrument to be executed, and the instrument as executed does not effectuate their intention, a court of equity may, on the ground of mutual mistake, reform the instrument to effectuate the intention.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.\*]

#### 2. REFORMATION OF INSTRUMENTS (§ 36\*) — MUTUAL MISTAKE—PLEADINGS.

A petition for the reformation of an instrument on the ground of mutual mistake need only set forth the substantive facts necessarily showing mutuality of mistake, and the term "mutual mistake" is not indispensable where the mutuality is fairly inferable from the allegations made.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.\*]

#### 3. REFORMATION OF INSTRUMENTS (§ 36\*)— MUTUAL MISTAKE—PETITION—SUFFICIENCY.

A petition for the reformation of a deed of trust by correcting the misdescription of land, which alleges that the grantor, owning two tracts, agreed to convey them to secure a debt, and that pursuant to the agreement the deed was executed, but the land was misdescribed, and not conveyed as agreed, and that the draftsman of the deed erroneously inserted the wrong description, pleads, when liberally construed, as required by Rev. St. 1909, § 1831, a mutual mistake, notwithstanding the absence of an allegation that the draftsman was the agent of both parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.\*]

#### 4. PLEADING (§ 418\*)—QUESTIONS REVIEWABLE— WAIVER OF QUESTIONS.

Under Rev. St. 1909, §§ 1800, 1804, authorizing a demurrer for enumerated causes, and declaring that the objections are waived if not taken by demurrer or answer, a defendant who pleads over after the overruling of a

demurrer to the petition on the ground of multifariousness and misjoinder of parties thereby waives the objection.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.\*]

#### 5. REFORMATION OF INSTRUMENTS (§ 19\*) — MUTUAL MISTAKE—EVIDENCE.

Where the parties to a deed of trust admitted that by inadvertence there was a misdescription in the real estate intended to be conveyed by the grantors and received by the beneficiary, there was a mutual mistake of the parties justifying the reformation of the deed so as to correctly describe the property.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.\*]

#### 6. JUDGMENT (§ 251\*)—CONFORMITY TO PLEADINGS.

Where the beneficiary in a deed of trust sued to reform it so as to correctly describe the land intended to be conveyed and to quiet title, under Rev. St. 1909, § 2535, and made the grantors, and a subsequent grantee of the grantors, and an execution purchaser of the grantors, and one claiming title under him through a warranty deed parties, but there were no cross-actions filed as between the defendants or any averments in any answer which could fill the office of a cross-action, a decree which not only reformed the deed of trust, and established title in the beneficiary against all claims of any defendant, but also settled the rights of the subsequent purchaser as against the execution purchaser and his grantee, and destroyed the covenants in deed executed by the execution purchaser, was erroneous because going beyond the issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\*]

#### 7. JUDGMENT (§ 251\*)—PLEADINGS—CROSS-ACTIONS.

Cross-actions as between codefendants must be germane to plaintiff's bill and in the nature of a defense to give the court jurisdiction to found a decree thereon.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.\*]

#### 8. EXECUTION (§ 275\*)—WRIT—VALIDITY.

A sale under an execution not issued by the clerk of the circuit court of the county rendering the judgment, as required by Rev. St. 1909, § 2166, but issued from the office of the clerk of the circuit court of another county, conveys no title.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791-796; Dec. Dig. § 275.\*]

#### 9. EXECUTION (§ 272\*)—SALES—TITLE OF PURCHASER—NOTICE.

A purchaser at an execution sale, with notice of a pending suit by a beneficiary in a deed of trust, executed by the execution debtor to secure a debt for the reformation of the deed so as to correctly describe the land intended to be conveyed, takes with notice, and he cannot affect the beneficiary's right to reformation.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 771, 781-783; Dec. Dig. § 272.\*]

#### 10. APPEAL AND ERROR (§ 301\*)—QUESTIONS REVIEWABLE—COSTS—MOTIONS FOR NEW TRIAL OR IN ARREST.

Where no complaint of the assessment of costs is made in the motion for new trial or in arrest, the question will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**11. JUDGMENT (§ 866\*)—REVIVAL—ACTIONS.**

Under Rev. St. 1909, §§ 2125-2132, providing for the revival of judgments, a judgment can be revived only in the court rendering it, notwithstanding section 2535, authorizing suits to determine interest in real estate and quiet title thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603-1607; Dec. Dig. § 866.\*]

Appeal from Circuit Court, De Kalb County; A. D. Burnes, Judge.

Action by Kate A. Lowen, prosecuted after her death by Michael Wolz, her executor, against Franklin Venard and others. From a judgment for plaintiff and for certain of the defendants, defendants Venard and others appeal. Reversed and remanded, with directions.

Hewitt & Hewitt, of Maysville, and E. G. Robinson, of Union Star, for appellants. Wm. M. Fitch, of Jefferson City, for respondent Wolz. O. M. Shanklin, of St. Joseph, for respondent Neff.

LAMM, J. In March, 1908, Kate A. Lowen sued an aggregation of defendants in the De Kalb circuit court. From a decree in her favor, and in favor of one of their codefendants, two of the defendants appeal (Robison and Atkinson). Pending that appeal, plaintiff died, and the cause stands revived here in the name of Michael Wolz, her executor. For convenience we will continue to speak of her as plaintiff.

As a part of the relief granted to one of the defendants not appealing was against the appealing defendants, and as questions of practice and pleading are submitted, and the decree in one or another angle is assailed, it will be useful to state the situation on such phases with some particularity.

The petition is in two counts. By the first plaintiff sought to reform a deed of trust by correcting the misdescription of land, to declare it a first lien, and to foreclose. To that end she averred in said first count, in effect, that she loaned \$300 to Ransom and Sarah Neff, husband and wife, in July, 1899, evidenced by a note due in three years; that said Neffs, as husband and wife, owned two tracts of land in De Kalb county (we omit description because diffuse and technical, and call them tracts 1 and 2); that tract 1 comprised 24.75 acres, and tract 2, 8 acres; that by agreement between plaintiff and said Neffs said note was to be secured by a deed of trust in the nature of a mortgage, which was to be a first lien on both said tracts; that pursuant to such agreement a deed of trust was executed whereby said agreement to convey said described land was attempted, but that the land was misdescribed and not conveyed as agreed. The petition also says that the draftsman of the deed erroneously inserted the wrong description; that the note is due and unpaid; and that the said deed of trust was at once spread of record. In the second count all the allegations

of the first are reasserted, and a cause of action is stated under old section 650 to try, determine, adjudge, and quiet title. In that count it is alleged that, subject to the deed of trust mentioned in the first, Ransom and Sarah Neff owned the fee; that the several defendants make some claim of right, title, interest, and estate in said real estate adverse to the title and estate of plaintiff, the exact nature of which is unknown to her. The prayer of this count is that the title of defendants and plaintiffs be tried and determined, and that the court adjudge, settle, and define whatever interest the several parties plaintiff and defendants may have, etc.

There was a group of defendants who made default, suffered judgment, and stand mute here; another group demurred, their demurrers were overruled, and they refused to plead over. None of that group appeal, hence they fall out of the case. Two defendants, Ransom and Sarah Neff, answer by solemnly admitting the allegations in the first count of the petition. As to the second count they disaffirm any title in themselves, but aver that their codefendant, Elmer Neff, acquired their title in May, 1905, by deed from them. Sarah and Ransom abide the decree. Elmer Neff was made defendant. He answered, admitting the allegations of the first count. As to the second count his answer avers that, subject to the lien of plaintiff's deed of trust, he acquired the title of Ransom and Sarah by deed in May, 1905, and, subject to the claim of plaintiff, claims all the right, title, and interest in said land, and prays to be decreed owner. Elmer abides the decree.

There were, as said at the outset, two other defendants, Robison and Atkinson. Robison answered, denying every allegation except that whereby it is alleged that he (Robison) claimed some right, title, and interest in the land. He admits that, and then avers he "claims all the right, title, and interests in said lands," wherefore he prayed to be discharged. To his answer, plaintiff replied by a denial and the averment that any interest owned by him was subject to the lien of plaintiff's deed of trust. Atkinson answered, denying all the allegations in the first count. By way of further defense thereto, he alleges that the deed of trust as well as the note referred to in the petition were made at a time Ransom Neff was involved in debt and owing a large sum to divers persons, among them defendant Atkinson; that the note and deed of trust were executed with intent to hinder, delay, and defraud such creditors including Atkinson; that the same was voluntary and without consideration; that presently Atkinson reduced his claims to judgments that are now unsatisfied and valid subsisting demands. The answer then proceeds as follows: "That thereafter, to wit, ——— day of ———, 190—, under and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by virtue of an execution issued under one of said judgments, the lands now sought to be incorporated instead and lieu of the lands said to be misdescribed therein were duly levied upon and sold by the sheriff of De Kalb county, Missouri, at which said sale this defendant was the purchaser thereof; that thereafter, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 190—, this defendant in good faith, relying upon his title, and without knowledge or information whatever concerning the alleged mistake in said trust deed, did, by a general warranty deed, sell and convey said land to his codefendant, Joseph Robison, by which said warranty deed last aforesaid this defendant covenanted that he was seized of an indefeasible estate in said land, and covenanted that he would warrant and defend the title to the same against all persons whomsoever; that the attempt to reform said trust deed is in furtherance of the attempt to hinder, delay, and defraud this defendant. And for further answer and defense this defendant says that the plaintiff has been careless and negligent, and has delayed an unreasonable length of time since the execution of said trust deed, and the note secured thereby, to have the same reformed, and ought to be and is in equity and good conscience estopped as against this defendant from having said reformation made as prayed. Defendant, for answer to the second count of plaintiff's petition, denies each and every allegation and statement therein contained. And the defendant, further answering, states and says that the judgments held by him against the said Ransom S. Neff are unpaid, and said defendant prays the court to revive the lien of said judgment now held by him against the said Ransom S. Neff, and that the same may be so revived as to constitute a lien against the property of the said Ransom S. Neff from this date. Wherefore, the defendant prays the court for a revivor of his judgment due him from Ransom S. Neff; defendant says that, by reason of the premises aforesaid, plaintiff should not be permitted to have said trust deed reformed."

To that answer, plaintiff replied, denying all its allegations, and then averring that defendant did not acquire title by said judgment and pretended sale; that the sale is void; that the judgments referred to were not liens upon the land; that plaintiff's deed of trust is superior and prior to any such judgment liens, and should be declared a first lien. The replication then goes on to bring into the paper controversy for the first time a sale made on the "\_\_\_\_\_ day of May, 1909." (As there were several sales made on the Atkinson judgments, the significance of the allegation in the replication regarding the sale in May, 1909, will be seen when we come to the decree which set aside that sale with the others.) In relation to the sale of May, 1909, the replication states as follows: "This plaintiff, further answer-

ing (sic), says that on the \_\_\_\_\_ day of May, 1909, when said lands were pretended to be sold under execution on said defendant Atkinson's said pretended judgment, defendant Atkinson at the time, through his agents and attorneys, had notice of the claims of plaintiff in and to the said lands, and at the time of said sale and a long time prior thereto defendant Atkinson was and had been a defendant in this case, and knew all about the claims of plaintiff in the premises. And well knowing that plaintiff had and of a right ought to have a first lien upon said lands, and intending to divert the plaintiff out of her just lien and claims to said lands, the said Atkinson pretended to have said lands sold, and pretended to become the purchaser thereof, well knowing the claims of this plaintiff." It is next averred that, if Atkinson has any right, title, or interest in the real estate, it is subject to the lien of plaintiff's deed of trust; wherefore, plaintiff renews her prayer for judgment.

At a certain time defendant Atkinson withdrew his answer and demurred, for that (1) there was an improper joinder of parties, (2) the petition was multifarious, and (3) the first count thereof did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and his answer refiled.

At the trial there was evidence for plaintiff tending to prove that Ransom and Sarah Neff, being indebted to plaintiff, increased their loan under an agreement with her to at once secure the whole debt on tract 1 by a deed of trust; that, to carry out that agreement, they executed the deed of trust on the date alleged, thinking it conveyed tract 1, and plaintiff at once received it, thinking it conveyed tract 1, such deed being spread of record; that afterwards it was discovered that the land description was wrong; that at the same time they executed their note to plaintiff for \$300, due in three years, with 8 per cent. compound interest from date, to wit, July 15, 1899; that said note is due and wholly unpaid, principal and interest; that in May, 1905, Sarah and Ransom Neff conveyed the land (both tracts 1 and 2), subject to incumbrances, to their son and codefendant, Elmer Neff, by warranty deed, consideration expressed \$300; that such deed was at once spread of record; and that Ransom and Sarah held title as husband and wife at the date of the execution of the note and deed of trust to plaintiff.

On behalf of defendants there was evidence tending to show: That at the time last above and continuously thereafter Ransom Neff was indebted to others besides plaintiff, among them defendant Atkinson. That Atkinson's claims were merged in judgment, and remained unpaid; the Neffs presently leaving the state. That no cash consideration was paid by Elmer Neff for his conveyance in 1905 or since. That he gave his note in pay for \$300; but it was not to be paid

at all unless he secured title. That Atkinson recovered three judgments against Ransom Neff in Buchanan county—one before a justice in March, 1900, transcribed to the Buchanan circuit court and thence to the circuit court of De Kalb, and duly filed in the proper offices; another before a justice of Buchanan county, also dated in March, 1900, for \$267.15. A transcript of this judgment was presently filed in the offices of the clerks of the circuit courts of Buchanan and De Kalb counties, respectively. (Note: As we gather this latter is the judgment on which execution issued and sale was made, referred to in Atkinson's answer as made on the "\_\_\_\_\_ day of \_\_\_\_\_, 190—.") In July, 1902, Atkinson and another recovered judgment against Ransom Neff for \$928.41 and costs in the Buchanan circuit court, of which judgment Atkinson presently became sole owner by assignment. That in May, 1900, execution issued on the justice judgment last above from the office of the clerk of the circuit court of De Kalb; levy was made on tracts 1 and 2, but the levy on tract 1 was by the same misdescription in plaintiff's deed of trust. That at a sale under that levy Atkinson purchased in June, 1900, and received a sheriff's deed. That in October, 1900, defendant purchased at another execution sale under the same justice judgment, and received another sheriff's deed. (Note: The execution supporting this last sale and sheriff's deed was also issued from the office of the clerk of the circuit court of De Kalb, and the deed and levy correctly described both tracts 1 and 2.) That in October, 1900, Atkinson sold and conveyed to (and in March, 1902, took a reconveyance from) one Jackson to both tracts. That in February, 1903, Atkinson sold and conveyed both tracts to his co-defendant Robison by warranty deed, duly spread of record, consideration \$900. That after this suit was brought, to wit, in May, 1909, Atkinson bought both tracts 1 and 2 at another execution sale, and received a sheriff's deed; three executions directed to the sheriff of De Kalb issuing from the office of the clerk of the circuit court of Buchanan severally on the three judgments hereinbefore mentioned, and the levies being made upon both tracts as the property of Ransom Neff. (Note: This is the execution sale mentioned in plaintiff's replication to Atkinson's answer.) It appears, furthermore, that Robison took possession.

There was no evidence tending to show any fraud or collusion between plaintiff and the Neffs; she seems to have acted throughout in good faith.

At the close of the evidence a demurrer thereto was offered, overruled, and an exception saved.

The court, having taken time to consider, presently decreed, inter alia (so far as pertinent to any question here affecting the appealing defendants), as follows: That because of a "mutual mistake" plaintiff's deed

of trust be reformed so as to include tract 1 by its correct description (setting it forth); that it is a first lien; that, as reformed, it be foreclosed; that Elmer Neff took title in fee to both tracts under his conveyance from his parents in 1905, subject to the lien of the deed of trust on tract 1, and "free from all claims of the other defendants herein"; that the two sheriff's deeds to Atkinson bearing date in 1900 be annulled and for naught held, and that he take no interest or estate thereunder; that the sheriff's deed bearing date in May, 1909, be similarly annulled, and that Atkinson take nothing thereunder; that the warranty deed from Atkinson to Robison, describing it, "be [quoting] set aside, annulled, canceled, and for naught held, and that said Joseph Robison take nothing under or by said warranty deed." The costs were adjudged against defendants Atkinson and Robison.

The points raised by appellants' counsel are, to wit: (1) The first count of the petition did not state a cause of action. (2) The demurrer to the evidence laid. (3) Conceding, for argument's sake, that reformation of the deed of trust was well enough, yet the decree in favor of Elmer Neff cannot stand (and herein of the last sheriff's sale and the deed from Atkinson to Robison). (4) It was error to adjudge all the costs against appellants. (5) And in not reviving the lien of Atkinson's judgments.

I. *Of the sufficiency of the first count of the petition:* There is no direct allegation in such count that the mistake in land description was a "mutual" mistake. Moreover, the pleader laid some stress on the "error" of the draftsman of the deed, and did not aver the draftsman was the agent of grantors and grantee in writing the deed wherefrom mutuality in such error springs. Hence appellants' counsel say the first count of the petition is bad and the demurrer good.

[1] (a) That a mistake, cognizable in equity as subject to correction by a decree, must be a *mutual* mistake, is a doctrine resting on the soundest premises. Thus, at root, a contract involves the primary and essential concept of a meeting of the minds of the contracting parties—the aggregatio mentium of the books on contracts. Without such meeting the instrument is unilateral, and there is no bilateral contract. Now, in reforming contracts equity does not make new ones. It lets the parties make their own. Its function is to find out if the contracting parties' minds met on a given substantial proposition (that is, it searches out the mutuality), and if, by mistake of both, the contract asserts to the contrary, or is silent, it reconstructs its terms so as to speak the truth. When it has done that the resulting product is the real contract the parties themselves made, and not one the chancellor accommodately made for them. The philosophy of the matter is nowhere better expressed than by Gamble, J., in an early case (Lel-

tensdorfer v. Delphy, 15 Mo. loc. cit. 167, 55 Am. Dec. 137) thus: "It is not necessary, in order to establish a mistake in an instrument, that it shall be shown that particular words were agreed upon by the parties as words to be inserted in the instrument. It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention. The power of a court of equity to reform an instrument, which by reason of a mistake fails to execute the intention of the parties, is unquestionable. It is not material whether the instrument is an executory or an executed agreement; nor is it material whether the proceeding is directly by bill to correct the mistake or the mistake is set up in the answer by way of defense."

[2] (b) Applying the principles just announced, it could not well be held that a pleader must in set terms and *ipsis* verbis plead a mutual mistake. If he set forth substantive facts by way of averments which necessarily mean mutuality of mistake, that will be sufficient. The mere name "mutual mistake" (while commonly used in bills for reformation of mistake) is not indispensable in a bill if mutuality is fairly inferable from allegations made. *Meek v. Hurst*, 223 Mo. loc. cit. 696, 122 S. W. 1022, 135 Am. St. Rep. 531. Agreeably thereto is the statute making it our duty to construe pleadings liberally with a view to substantial justice between the parties. R. S. 1909, § 1831. The ultimate question is, What is a mutual mistake? Take an  $a=b=c$  case to illustrate. A pleader alleges that A. agreed to sell to B. and B. agreed to buy from A. a tract of land X; that in pursuance of that pact A. attempted to convey X to B., but by mistake inserted Y. in the deed, thinking it was X, and B. by mistake, thinking Y. was X, accepted the deed, and paid the purchase money. Is not that a mutual mistake? We think so, and are of opinion the first count by fair implication set forth an equivalent situation.

[3] (c) Appellants' counsel seize hold of the allegation that the draftsman by error misdescribed the land. They say that, absent an allegation that the draftsman was the agent of both parties, it results that on the very face of the petition his error was not the mutual error of both. That proposition may be allowed as sound. *Meek v. Hurst*, supra; *Brocking v. Straat*, 17 Mo. App. loc. cit. 305; *Williamson v. Brown*, 195 Mo. loc. cit. 330, 93 S. W. 791 et seq.; *Benn v. Pritchett*, 163 Mo. loc. cit. 571, 63 S. W. 1103 et seq. But that concession does not reach the whole case. Here the pleaded error of the draftsman may be viewed as merely supplementary to the mutual mistake, impliedly alleged, of grantors and grantee. Redundancy may clog or obscure, but without more does not vitiate a pleading, and

we think the allegation of the draftsman's error was in the nature of redundancy. We are glad to be able to take that view of it, for the plain justice of the case runs for plaintiff in a strong current. Appellant's pleaded case, from the angle of fraud on her part, has no foot to stand on.

[4] (d) In leaving the question of demurrer we make some further remarks. It will be observed that, besides being a demurrer to the first count on the general ground that it did not state facts sufficient to constitute a cause of action, the whole petition was struck at as multifarious and because of a misjoinder of parties. As to the last two features they seem to be abandoned, if we read briefs aright. But whether we do or not is of no consequence, for, when appellants demurred on those grounds, and refused to stand on their demurrer, but pleaded over, taking issue on the facts, they waived those grounds effectually. For an appellate court to tread back in a case in search of reversible errors, and spy out some abandoned ground, would be but to deal in mere mint, and anise, and cummin, and neglect the weightier matters of the law. We have constantly construed section 1800, R. S. 1909, in connection with its cognate section 1804 as forbidding us to do that.

The demurrer to the petition was well ruled.

[5] II. *Of the demurrer to the evidence:* Under this head counsel argue that the testimony did not show a mutual mistake; but we cannot follow that lead, because, as we read the record, it shows such mistake with emphasis. The court found the mistake was mutual. The grantors in the trust deed admit they made the mistake. The beneficiary in the deed, plaintiff, testifies she was to receive a deed to tract 1. All hands agree that by inadvertence there was a misdescription in that particular. We rule the point against appellants.

[6, 7] III. *Can the decree in favor of Elmer Neff stand (and herein of the last sheriff's deed and of the warranty deed from Atkinson to Robison)?* It will be observed the decree set aside the sheriff's deed made subsequent to the bringing of this suit, and annulled the warranty deed made by Atkinson to Robison in 1903 subsequent to the first two sheriff's sales. It also decreed that Elmer Neff, by his deed of May, 1905, from his parents, acquired the whole title subject to plaintiff's reformed deed of trust. If the decree had been simply directed to reforming plaintiff's deed of trust and clearing away all claims by any defendant standing in the way of her title under that deed of trust, no fault could be found with it; but it went much beyond and undertook to settle the rights of Elmer Neff as against his codefendants, Robison and Atkinson, and it cleared up his title as against them, and not only so but, as pointed out, it cut



up the warranty deed Atkinson made to his codefendant Robison, root and branch. If the court under the pleadings had the power to do this latter thing as between Robison and Atkinson, then Robison is bound by the decree, and, if he seeks recourse over against Atkinson on his covenants of warranty, he will be met by a decree dissolving those covenants and canceling his deed in a suit to which he was a party. We have come to the conclusion that the decree went too far in these particulars and must be modified, because:

(a) In the first place there was nothing in plaintiff's bill demanding a clearing up of Elmer Neff's title except in so far as it was necessary to or an incident of the reformation of the deed of trust. So there were no cross-actions or cross-bills filed as between the codefendants and no averments in any answer which by the most liberal intendment could fill the office of such cross-action as between the answering defendants. We heretofore set out the substance of all the answers for the purpose of demonstrating so much as that. A decree must respond to the issues. Here there were no issues made on the validity of Elmer Neff's title as between him and his codefendants. To decree outside of the issues is error. *Spindle v. Hyde*, 247 Mo. loc. cit. 51, 152 S. W. 19 et seq., and cases cited.

(b) In the next place, if there had been cross-actions or cross-bills as between codefendants, they must be germane to plaintiff's bill and in the nature of a defense in order to give jurisdiction to found a decree thereon. *Fulton v. Fisher*, 239 Mo. loc. cit. 130, 143 S. W. 438 et seq.

(c) If we turn to old section 650, now (as amended) section 2535, R. S. 1909, and try to work out a theory on which those parts of the decree directed to clearing up the title of Elmer Neff, as between him and his codefendants, may stand, the result is the same. Neither of those sections contemplated that the chancellor should go outside the issues in his decree. Both of them are to be administered in conformity to the Code of Civil Procedure, that is, within the lines of scientific pleading and practice. R. S. 1909, § 2536, formerly section 651. Any other view would make of that remedial act a fruitful womb of confusion and wrong.

(d) In so far as the decree out and out annulled the deed from Atkinson to Robison, as between them, it went too far. No issue demanded such decree. It would have been enough to have held that whatever rights, if any, Robison had under that deed (as between him and Elmer Neff, and as between him and Atkinson) were subject to plaintiff's reformed deed of trust.

[8] In saying so much as that we are not to be taken as holding that Atkinson's first two sheriff's deeds, on which Robison may in part rely to support his title under Atkin-

son's deed to him, were valid. All parties agree (one side by assertion, the other by concession) that they were afflicted with a fatal infirmity, in that the sales supporting them were not made on executions issued by the clerk of the circuit court of Buchanan county (R. S. 1909, § 2166), but on executions issued from the office of the clerk of the De Kalb circuit court. Obviously the sheriff held no legal authority to make those sales, and the deeds conveyed nothing. *Ex nihilo nihil fit*.

[9] (e) The holding just made brings us to the last sheriff's sale and deed, made on three executions issued by the right authority, on the judgments mentioned against Ransom Neff, and at which sale Atkinson bought under the hammer and received a deed. This sale and deed were subsequent to the institution of this suit, and got into the case only through plaintiff's replication. It had no place there, and no issue was tendered thereon. Evidently it could not affect plaintiff's right to reformation, for at that time the judgments were not liens on tract 1; there was no fraud in her deed of trust making it subject to a creditor's bill, and, when Atkinson bought and took his deed, he had notice of plaintiff's claim. So that, if the question was only between plaintiff and Atkinson, we would not meddle with the decree on that score, because that phase of the decree would not affect the merits an iota on such view of it. But the scope of the decree being so wide and deep-going as to adjudicate Elmer Neff's title as against Atkinson and Robison, another question springs. We are not prepared to say that so much of Elmer's title as was derived from his father as tenant by the entirety is good as against the creditors of his father. We say neither aye nor nay thereon. What we do say is that on the pleadings in this cause such fact was not at issue, and the decree in that particular is not responsive to the pleadings.

[10] IV. *Of costs*: It is argued the decree is erroneous in assessing the costs against appellants. No complaint of that sort was made in the motion for a new trial or in arrest. We put that assignment of error to one side.

[11] V. *Of the revival of Atkinson's judgments*: Finally it is assigned for error that the court did not revive Atkinson's judgments. The point is without any merit at all for more reasons than one. Judgments are "revived" in the court rendering them and on scire facias (R. S. 1909, §§ 2125 to 2132 inclusive), and not in other courts and on other process.

Appellants cite us to R. S. 1909, § 2535, formerly section 650. That section on quieting titles seems indeed an omnium gatherum, a catchall, a "shotgun" instrument. But it cannot be held to serve the purposes of reviving or continuing the liens of judgments when such liens have expired (as here) or are

about to expire by effluxion of time. Nothing in its language indicates the lawmaker by that statute intended to provide such remedy.

The decree is reversed, and the cause remanded, with directions to enter a decree in accordance with the views herein set forth. All concur.

WOODSON, P. J. I concur fully in the opinion in this case, except as to what is said in regard to the case of *Fulton v. Fisher*, 239 Mo. 116, 143 S. W. 438. While that case announces a correct principle of law, yet it was clearly misapplied in that case, but not in this.

#### STATE v. MILES.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

##### 1. CRIMINAL LAW (§ 1052\*)—QUESTIONS REVIEWABLE—EXCEPTIONS.

Where no exception was taken to the overruling of a motion for a continuance, the point is not reviewable on appeal, though the motion, with a recital that it was overruled, was set forth in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2659; Dec. Dig. § 1052.\*]

##### 2. CRIMINAL LAW (§ 676\*)—NUMBER OF WITNESSES—GENERAL REPUTATION—DISCRETION OF COURT.

The general reputation of a witness is a collateral issue, and the trial court has a wide discretion in limiting the number of witnesses who may testify on the issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.\*]

##### 3. CRIMINAL LAW (§ 676\*)—NUMBER OF WITNESSES—GENERAL REPUTATION—DISCRETION OF COURT.

Where accused produced six witnesses, who testified that the general reputation of a state's witness for truth and veracity was bad, and the state, in rebuttal, used three witnesses, who testified that his general reputation was good, the refusal to allow accused to present three additional witnesses to testify further on the question was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.\*]

##### 4. HOMICIDE (§ 300\*)—EVIDENCE—SELF-DEFENSE—INSTRUCTIONS.

Where accused and decedent quarreled over money matters, and decedent raised one of his hands, motioning toward accused, asking him to leave, whereupon accused drew his revolver, and decedent then said that accused could not scare him, and accused shot decedent three times, causing his death in about 15 minutes, and there was evidence that accused had threatened decedent, and the court charged in submitting self-defense that it was not necessary that the danger should have been actual, but that accused must have believed and have had reasonable cause to believe that decedent was about to take his life or do him some great bodily harm, and, in determining whether accused had reasonable cause to so believe, all the facts should be considered, the refusal to charge that, when a person has reasonable ground to apprehend that some one is about to do him great bodily harm, he may act on appearances, was

not erroneous, as the charge given sufficiently declared the law in view of the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

##### 5. HOMICIDE (§ 300\*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for murder, the evidence showed that accused shot decedent three times but there was no evidence that decedent was advancing toward accused after the first and before the last shot, an instruction that if accused shot to prevent decedent from killing him, he had a right to shoot and to keep on shooting until the danger or apparent danger had passed, was properly refused for want of evidence on which to base it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

##### 6. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge fully and fairly covered by the instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

##### 7. HOMICIDE (§ 300\*)—EVIDENCE—INSTRUCTIONS.

Where the evidence showed that decedent had been drinking heavily for some time, and had threatened accused, and had been convicted of disturbing the peace, an instruction that, in law, it was the same offense to kill a bad man as to kill a good one, and, though a jury might believe that decedent when intoxicated was a bad man, that fact alone did not justify accused, was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

##### 8. HOMICIDE (§ 254\*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. § 254.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

James E. Miles was convicted of murder in the second degree, and he appeals. Affirmed.

Upon an information charging murder in the first degree, defendant was tried in the circuit court of Christian county, Mo., resulting in his being convicted of murder in the second degree, and his punishment being assessed at 10 years in the penitentiary. The case originated in Taney county, Mo., but was removed by change of venue to the circuit court of Christian county, Mo. Defendant, by proper steps, appeals from the judgment of said circuit court.

The state's evidence tends to prove the following facts: Defendant shot and killed one Enos Rush, at about 5 o'clock p. m., January 4, 1912, at Branson, Taney county, Mo., where both the defendant and the deceased lived. The shooting occurred in the grocery store and meat market of M. L. Heflin. Up until about a week prior to the shooting, Rush, the deceased, had been working for said Heflin in the meat market, but had been

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

drinking for about a week, and had quit the employment. About an hour before the shooting, deceased went into Heflin's store and again applied for his old position, and, upon promising to cease his drinking, was again employed, his work to begin on the following morning. About 5 p. m., defendant came to the door of Heflin's grocery store and called to Rush, saying: "I want to speak to you." Thereupon deceased went out of the store; and in about 10 or 15 minutes deceased and defendant came back into the store. Deceased went behind the counter on the south side of the store and up to a drawer, behind the counter, where envelopes, stationery, and waybills were kept. He pulled out the drawer and closed it again, and walked back, in the direction that he had entered, to an opening between the ends of the two counters. Deceased had his hands in his pockets and leaned back against the shelving on the side of the store. Defendant then spoke to deceased about some money, which he claimed the deceased owed him, and deceased replied that he would never pay it. At this point, Mr. Heflin asked defendant to leave and not cause any trouble, and deceased raised one of his hands, motioning toward defendant, saying: "Go on off, we don't want no trouble in here. I will never pay it." Thereupon defendant drew his revolver, and deceased said: "You can't bluff me," or "You can't scare me." "I am not afraid of you or afraid of your gun. You can't bluff me." Defendant said: "I can't, Ha," and thereupon shot the deceased three times; one shot entering the body a short distance above the heart; another shot, a short distance below the heart; and then the defendant, taking one step toward the door, shot the third time, this last shot striking the deceased in the arm. Deceased died in about 15 minutes, as a result of the bullet wounds. Defendant was about five feet from the deceased at the time of shooting. Mr. Heflin and his wife and a Mr. Carey were eyewitnesses to the shooting. Mr. Heflin further testified that he was about two and one-half feet from deceased, and about six feet from defendant, at the time of the shooting, and that deceased made no attempt to use any weapon at the time he was shot, and that deceased was unarmed at that time; that deceased wore an overcoat and had one hand in his overcoat pocket and was leaning back against the shelving at the time he was shot; that a person in front of the counter could not see the drawer which deceased had manipulated just before the shooting; that there was no gun in the drawer at the time. About two days before the shooting, Mr. Heflin had taken a revolver, which was used about the meat market, for the purpose of killing cattle, and hidden the same, in a sack of nuts, about five feet from the place where deceased was shot; that, a few days before, the deceased had taken the revolver from the place where it was former-

ly kept, and was in the act of going across the street to get some cartridges when he was arrested for disturbing the peace; and, on the day of the shooting, deceased plead guilty, in the justice court, to the above charge, and paid a fine, a part of which fine Mr. Heflin had paid. Heflin testified that he hid the gun, in the sack of nuts so that deceased could not get it and Heflin be called upon to help pay another fine. The pistol was found in the sack of nuts after the shooting. Mrs. Heflin testified that, after deceased opened the drawer and came back to the opening between the counters, deceased and defendant began quarreling about some money that one owed the other, and that the deceased, in a loud tone, said to the defendant: "You get out of here, sir." That thereupon defendant drew his pistol, and deceased said, "I am not afraid of you; I am not afraid of your gun;" and thereupon defendant shot deceased, and she became frightened and ran out the back door of the store, and did not see what occurred after the first shot. J. W. Bennett testified that he was in Heflin's store about 40 minutes before the shooting, and heard a conversation between the defendant and Andy Eversole, in which Eversole told defendant that deceased was going to have defendant "pulled for bootlegging whisky," and that defendant started out the door and said: "I will whip that s— of a b— for that." John Humphries, a groceryman, testified that about a week before the killing, defendant told him he would "whip the s— of a b— when his hand got well," because Rush had had him indicted for selling whisky. George Berry testified that, about 30 minutes before the shooting, defendant, with a pistol in his hand, was in a nearby barber shop, and said that, if Rush fooled with him, he would whip him when his hand got well, if not before. O. T. Thurman testified that, a short time before the killing, defendant came into the barber shop, took a pistol out of a drawer and put it in his belt, and left the barber shop; that later he saw defendant call deceased out of Heflin's store and saw deceased and defendant go out of the store and in a few minutes return to the store, and, a short time thereafter, he heard a shot, and turned and walked up close to the store, and saw defendant fire the last two shots. William Stark testified that defendant said, on the afternoon of the shooting, "I will whip him (Rush) before the sun goes down." Henry Lewallen testified that, about an hour before the shooting, defendant, in referring to the deceased, said he was "going to shoot that s— of a b— so high, before the sun goes down, that he will never come down, and you see if I don't." E. S. Pelton testified that defendant, as he came out of Heflin's store just after the shooting, said: "He can't run no bluff on me."

Defendant testified, in his own behalf, as follows: "On the 4th day of January, 1912,

about 5 o'clock in the evening, or half past 5, I started to go home for supper, and I was going by Major Heflin's after some butter, and going by Mr. Patterson's to pay some of what I owed, and, when I got down to Mr. Troutman's store, Mr. Rush was standing talking to somebody on the porch, and I says, 'Mr. Rush, I want to see you when you get through;' and stopped between the two buildings, and he says, 'All right;' and they talked a second or two, and Mr. Rush came where I was, and this fellow walked down the street, and I says, 'How did you come out with the trial?' and he says, 'I plead guilty, and it cost me \$27;' and I says, 'Mr. Rush, I owe Mr. Patterson a little bill, and they are wanting their money, and I would like for you to pay me;' and he says, 'Yes, come into Major Heflin's and I will pay you;' and we went down and went in and he went behind the counter, and I thought was pulling out the drawer to get the money, and he put this hand upon the showcase, and put this hand (indicating to right hand) on the drawer and pulled it out, and he put his hand this way in his pocket and turned round and says, 'See that door,' and I says, 'Yes, sir;' and he says, 'Get out;' and I says, 'What do you mean? You said you would pay me that \$1.15 if I would come in here; now, why don't you?' and he says, 'I pay you nothing, you get out;' and he started to draw his gun, and I says, 'Don't do that, Rush, don't do that;' and drew my gun, and when he saw my gun he says, 'You can't bluff me; you can't scare me;' and I says, 'I know I can't, but don't pull your gun on me;' and then he stepped a step or two and started to pull his gun, and I fired twice and then I stepped east one step and fired once more and walked out."

Defendant further testified that he, at no time, made any threats to kill deceased; that he knew the deceased had made an attempt to file complaint against him for selling whisky; that he fired the first shots while holding the revolver down at his side, and that he shot because he thought the deceased was going to kill him. Defendant testified that he had heard of deceased's threats against him, but paid no attention to them, and thought deceased was too good a friend to make an attempt to carry out the threats.

Other testimony in behalf of the defendant was, in substance, as follows: Wash Carey testified that he was in Heflin's store at the time of the shooting, and, after the deceased had gone to the drawer and back to the opening between the two counters, defendant demanded an amount of money from the deceased; the deceased braced himself up in front of the defendant and told defendant that he wasn't afraid of him and that he didn't have him bluffed; that he did not see the deceased making any motion with the hand that he had in his pocket, but saw the deceased motioning defendant out of the store with the other hand, and, at about

this time, defendant drew his gun, and defendant said, "Don't do that, don't do that, Rush" (Mr. Heflin and wife testified that they did not hear deceased make the statement), and immediately afterwards fired the first shot at the deceased. Witness did not see the other shots, on account of being occupied in helping Mrs. Heflin out of the store. Ben Carson testified that, about a week before the killing, he saw Rush in Heflin's meat market, and Rush said that he did not think defendant was a law-abiding citizen, and he did not want that kind of a man to undertake to arrest him, and that, if he did undertake it, "one or the other would get his lights put out"; and that deceased pulled a revolver out of a drawer behind the counter and said: "That is my old stand-by," and made motions with his hands and arms and stated that Miles "couldn't face him with them things," and that "he was a little bit handy with his fists." Andy Eversole testified that, on the day of the killing, he had a talk with the deceased on Heflin's porch, and, in discussing the fine which the deceased had just paid, witness said to deceased, "This will be a little hard on the whisky men's business," and deceased replied, "You are d—— right, it is a starter." At about that time, defendant passed, and deceased said: "We will get that s—— of a b—— before night." About an hour before the shooting, witness told defendant, what deceased had said. Robert Maddox testified that, about an hour before the shooting occurred, he heard deceased say, concerning the defendant: "I am going to kill that s—— of a b—— before night;" 15 minutes later witness told defendant what Rush had said. Elizabeth Schneller testified that, several days before the killing, she was in Branson and passed Rush and his wife on the street and heard Rush say: "I am going to kill every d—— man in Branson; that d—— s—— of a b—— of Jim Miles the first one; if I had got the cartridges, I would have killed him this evening." Six witnesses testified that the general reputation of witness, Henry Lewallen, for truth and veracity, in the community in which he lived, was bad. Three witnesses testified that the reputation of the deceased for being overbearing, quarrelsome, and dangerous was bad; one of said witnesses saying that deceased was all right when he was sober. Cecil Snapp, the son of the justice of the peace before whom deceased plead guilty for peace disturbance on the morning of the day of the killing, testified that he was in his father's office when deceased was settling the disturbance case, and that deceased was drunk that day and had a revolver or something that looked like a revolver in his hip pocket; that it might have been a whisky bottle, and that deceased threatened to kill the defendant, and that witness communicated that fact to defendant, and told him to be on his guard.

The state offered the following testimony

in rebuttal: Mary Breeden testified that she saw the defendant and deceased come out of Heflin's store about 10 or 15 minutes before the shooting occurred. Mrs. Rush, wife of deceased, testified that she had never heard her husband make any threats against the defendant, and that they were friends, as far as she knew. She denied that she and deceased passed Mrs. Schneller in front of the postoffice, and denied that her husband made the threat mentioned by Mrs. Schneller. G. B. Wilson, prosecuting attorney, testified that he was in the justice's office, when the deceased was settling up the disturbance case, on the day of the killing, and that Rush made no threats there against the defendant, and that Rush was drinking some and was "in good fighting trim" when the witness left Branson, on the afternoon of the shooting. The state then introduced three witnesses testifying to the good reputation for truth and veracity of witness Henry Lewallen. The defendant then offered three other witnesses to testify to the bad reputation of the witness Henry Lewallen; but they were not permitted to testify, by the circuit court, on the ground that six witnesses had already been sworn and testified on that point, in behalf of the defendant.

G. A. Watson, of Springfield, G. W. Thornberry, of Galena, G. Purd Hays, of Ozark, and Robt. Thornberry, of Eva, for appellant. John T. Barker, Atty. Gen., and Thomas J. Higgs, Asst. Atty. Gen., for the State.

WILLIAMS, C. (after stating the facts as above). [1] I. Appellant contends that the circuit court erred in overruling his application for a continuance. The motion for a continuance, together with a recital that the court overruled the same, is properly set forth in the bill of exceptions; but nowhere in the bill of exceptions does it appear that an exception was saved to the action of the court thereon. The point is therefore not properly raised for appellate review. *State v. Prather*, 136 Mo. 20, 37 S. W. 805, and cases therein cited.

[2, 3] II. Witness Lewallen testified for the state, as to threats made by defendant upon the life of deceased. Defendant produced six witnesses, who testified that the general reputation of the witness for truth and veracity, was bad; three of said witnesses testified about his general reputation at Branson, and three about his general reputation while he resided at Springfield. Later the state, in rebuttal, used three witnesses, who testified that the general reputation of Lewallen, in that regard, was good. The defendant thereafter offered three additional witnesses to testify further concerning the general reputation of said witness, and the trial court refused to allow the three additional witnesses to testify, assigning, as reason therefor, that defendant had used six witnesses for that purpose. Appellant contends that this con-

stituted error. The general reputation of the witness Lewallen was a collateral issue in the case. The trial court is and should be allowed a rather wide discretion in limiting the number of witnesses that may testify on such issues. *Railroad v. Aubuchon*, 190 Mo. 352, loc. cit. 360, 97 S. W. 867, 9 L. R. A. (N. S.) 426, 116 Am. St. Rep. 499, 8 Ann. Cas. 822; *State v. Lamb*, 141 Mo. 298, 42 S. W. 827. It is not apparent that the trial court abused its discretion, in that regard, and the point is ruled against appellant.

[4] III. Appellant next contends that the court erred in refusing to give his instruction A, which in part declared that, when a person has reasonable ground to apprehend that some one is about to do him great bodily harm, etc., "he may act upon appearances," etc. Instruction XIII, given by the court, fully covered the law of self-defense and, as to the above point, told the jury that it was not necessary that the danger should have been actual, etc., but that the defendant must have believed and also had reasonable cause to believe that said Rush was about to take his life, or do him some great bodily harm; and that, in determining whether defendant had reasonable cause to so believe, they should take in consideration "all the facts and circumstances given in the case." This sufficiently declared the law of self-defense on that point, under the evidence of the case.

[5] Appellant's refused instruction D declared that, if "defendant shot to prevent the deceased from killing him or doing him some great bodily harm, then defendant had a right to shoot *and keep shooting* until such danger, or apparent danger, had passed, or ceased. Appellant insists that deceased was on his feet and advancing toward defendant, when the last shot was fired, and that this instruction should have been given. A careful examination of the evidence, however, fails to disclose any evidence tending to show that deceased was advancing toward defendant, after the first shot and before the last shot was fired; and there was therefore no evidence upon which to base such an instruction.

[6] Appellant's refused instruction B declared the law with reference to the presumption of defendant's innocence; but that matter was fully and fairly covered by instruction III, given on behalf of the state.

[7] Appellant next contends that instruction No. VI, given by the court, was erroneous. Said instruction is as follows: "The jury are instructed that in law it is the same offense to kill a bad man as it is to kill a good man, and although the jury may believe from the evidence that deceased, when intoxicated, was a bad or quarrelsome man, this fact alone will not justify or excuse the defendant for the killing of the deceased."

While it was not necessary that the above

instruction should have been given, yet it contains a correct declaration of law, and, under the evidence in the case, was not improper. The identical instruction was approved by this court in *State v. Hardy*, 95 Mo. 455, loc. cit. 457, 8 S. W. 416.

[8] We have carefully examined the entire record of the case. The evidence was amply sufficient to support and justify the verdict of the jury; the instructions fully and fairly declared the law applicable to the facts in the case, and it appears that the defendant has had the privilege of a fair and impartial trial.

The judgment is affirmed.

ROY, C., concurs.

PER CURIAM. The above opinion by WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

### STATE v. ROGERS.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

#### 1. CRIMINAL LAW (§ 1092\*)—BILL OF EXCEPTIONS—TIME TO FILE—STATUTES.

Rev. St. 1909, § 5245, provided that exceptions in criminal cases might be taken as provided by law in civil cases, and that bills of exception should be settled, signed, and filed as "now" allowed by law in civil actions. Section 2029, defining such procedure in civil cases, was repealed by Laws 1911, p. 139, providing new rules for the filing of bills of exceptions. Defendant was convicted December 9, 1912, granted an appeal the same day, and given until April, 1913, to file a bill of exceptions but did not file it until August 2, 1913, after the term during which the appeal was granted had expired, but which, however, was settled and signed by the trial judge and filed. Held that, while a reference statute specifically designating the provision which it makes a part of itself will not be changed or modified by any subsequent change in the statute referred to, yet, where it pertains only to a mode of procedure and refers generally to some practice statute, it is affected by any change or amendment in such statute, and that, as the bill was filed within the time allowed by the amendment, it was timely.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. § 1092.\*]

#### 2. CRIMINAL LAW (§ 364\*)—RES GESTÆ—DECLARATIONS OF ACCUSED AFTER CRIME.

In a prosecution for murder, evidence that after accused returned home and, within a few minutes after the shooting, he took down a shotgun, loaded it, and stated that he would go back and kill every d—d one of them was admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.\*]

#### 3. CRIMINAL LAW (§ 811\*)—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a trial for murder, where declarations of defendant shortly after the shooting that he would kill all the family were received, an instruction that anything deceased said after shooting deceased to the effect that he had a notion to go back and kill the whole d—d out-

fit was admissible only as showing the condition of his mind at that time, and that whether it had any weight on that point was for the jury to determine, was erroneous as singling out a part of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.\*]

#### 4. CRIMINAL LAW (§ 720\*)—TRIAL—REMARKS OF PROSECUTING ATTORNEY.

In a trial for murder, where the homicide was clearly proven, the prosecuting attorney's remark, "Men, it would be a disgrace for you to acquit the defendant under the testimony," was proper argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.\*]

Walker, J., dissenting. Farris, J., dissenting in part.

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

Floyd H. Rogers was convicted of manslaughter, and he appeals. Reversed and remanded for new trial.

Charged with murder and convicted of manslaughter, defendant appeals from a judgment of the circuit court of Dunklin county fixing his punishment at two years in the penitentiary.

Defendant shot and killed one A. J. Lovins at a farm occupied by Thomas Walls, in Dunklin county, on Sunday, June 23, 1912. The circumstances surrounding and leading up to this tragedy were as follows:

In the early part of the year 1912, the defendant was hired to Thomas Walls as a farm hand. The family of Walls consisted of his wife, stepdaughter, and three sons, Elmer, Jack, and Tommie, all grown, or nearly grown. Thomas Walls will hereafter be referred to as Walls, Sr.

A courtship sprang up between defendant and the stepdaughter of Walls, Sr., which resulted in their marriage about six weeks before the tragedy. Walls, Sr., was very much displeased at the marriage, and, on account of the fact that they were not welcome at the Walls home, defendant and his wife went to board with one T. A. Blankenship, who resided some 200 yards from the Walls home. After the departure of defendant from the home of Walls, Sr., one A. J. Lovins (sometimes referred to in this opinion as "Bub") was employed to take his place as a farm hand.

On the day of the tragedy one Dora Stevens paid a visit to the Walls family. She is a niece of Walls, Sr., and was at that time engaged to marry Lovins, the hired hand. In going to town to meet her, Walls, Sr., Elmer Walls, and Lovins each procured a quart of whisky, of which Lovins and Walls, Sr., partook quite freely. During the day defendant and his wife came along the road by the home of Walls, Sr., and he invited them into his house. This was the first time Walls, Sr., had shown a disposition to be friendly with

them since their marriage. They accepted the invitation and remained there until quite late in the afternoon.

Walls, Sr., Lovins, and defendant took several drinks of whisky together during the day, and, when night drew near, Walls, Sr., and Lovins were quite drunk, and defendant was partially drunk. At one time during the afternoon Walls, Sr., proposed to defendant and Lovins that they kiss all the women present. Walls, Sr., did kiss defendant's wife (his stepdaughter), and defendant kissed Dora Stevens; but if this incident caused any friction or ill will between the parties it does not appear in the evidence.

Defendant and his wife returned to Blankenship's (where they were boarding). After their departure Walls, Sr., and Lovins decided to attend a church service which was being conducted near by. Dora Stevens, believing that if they attended church in their then drunken condition they would get into trouble, tried to dissuade them from going, but failing in that effort she sent Jack Walls to request defendant to come back to the Walls home and help keep the drunken men away from church. She testified that she thought defendant could exert a greater influence over Walls, Sr., and Lovins than any one else. Pursuant to this request, defendant placed a revolver in his pocket and returned to the Walls home. On arriving there he found Walls, Sr., very angry over the alleged fact that somebody had stolen his whisky. Defendant asked Lovins and Elmer Walls who took the old man's whisky, whereupon Lovins replied: "You would not accuse me of stealing it, would you?" Defendant replied: "Some of you took it, and if you will give it to him, or give him a drink, he will get quiet." This remark seemed to anger Lovins very much, and he immediately began swearing and threatening to whip defendant unless he "took it back." Up to this point there was no conflict in the evidence. Some of the state's witnesses testified that Lovins struck defendant on the back with his hand and stated that defendant or he (Lovins) would get a whipping unless defendant took back what he had said. Defendant became angry and, drawing his revolver, threatened to shoot Lovins. Lovins continued to swear and make a disturbance, whereupon defendant proposed to one of the Walls boys that they procure clubs and beat Lovins to death. Lovins, according to the state's evidence, kept on quarreling, swearing, and challenging defendant to fight, until defendant shot him twice; the second shot producing almost instant death. The state's evidence further tends to prove that Lovins was entirely unarmed and was only seeking a fist fight or ordinary battery with defendant.

After the shooting defendant walked to the home of Blankenship, 200 yards away, put up the revolver, and took down a shotgun

and loaded it, and, on being asked by Blankenship what he was going to do, replied: "Go back and kill every d—d one of them." Blankenship took the gun away from defendant, and he then remained at Blankenship's until arrested some hours later. On the part of the defendant there was slight evidence of a secret plan between Walls, Sr., and Lovins to assault defendant.

Within a few minutes after Lovins was killed, Walls, Sr., was heard to say that defendant would be sent to the penitentiary for 15 or 20 years, and that he would "get shet" of him for that length of time at least.

Defendant, testifying in his own behalf, stated that it was, almost dark when Jack Walls came to Blankenship's and told him that Walls, Sr., and Lovins were angry, and that Dora Stevens and Mrs. Walls wanted him to come down to the Walls home; that they thought he (defendant) could do more with them than any one else. Defendant promised to go down there in about 15 minutes. Before starting down to Walls' a "curious feeling" came over him and he armed himself with a revolver. That Walls, Sr., had made threats against him, and that he "had no reason to know but what he meant it." That on his arrival at the Walls home he inquired of Mrs. Walls what she wanted with him. She replied that she did not want anything, and that if she had known that he was coming she would have told him not to come, but she did not inform him that there was any danger at hand. He further testified that he told Lovins and Elmer Walls to get Mr. Walls' whisky and give him some and he would be all right, whereupon Lovins pulled off his coat and started toward defendant but was stopped by Tommie Walls. Walls, Sr., hearing the loud talking, came out of the house and inquired about the trouble. Tommie Walls replied: "Nothing, only Bub (meaning Lovins) is out here cutting up." Walls, Sr., then remarked that he would see "that no one run over Bub." Defendant told Walls, Sr., that it was "all settled," whereupon he (Walls, Sr.) went off in the direction Lovins had gone. That Mrs. Walls again suggested that defendant go home, and he had walked to the edge of the porch when Walls, Sr., and Lovins again came on the scene. Walls, Sr., seized defendant and pushed him off the porch and pulled him around, facing Lovins, saying at the time, "That has to be settled." That Lovins cursed defendant and said, "You have got to take it back." That Walls, Sr., slapped Lovins on the back and said, "I will stay with you." Defendant stated that it was growing dark and he walked back 10 or 12 steps to keep out of the way of Lovins, Walls, Sr., and Elmer Walls, all three of whom pursued him; that he would have run but could not on account of a stove and wood pile which were behind him; that he then drew his revolver and warned them two or

three times to stop; that Walls, Sr., and his son, Elmer Walls, fell back, but Lovins kept coming on with what appeared to be a knife in his hand and grabbing at defendant's pistol. He (defendant) then fired the fatal shot, believing that it was necessary to do so to save his life. After the shooting defendant started home and some one called to him to stop. He looked back and saw Walls, Sr., come out on the porch of his house with a shotgun in his hands.

Fort & Zimmerman, of Kennett, for appellant. John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for the State.

#### L. Bill of Exceptions.

BROWN, P. J. (after stating the facts as above). [1] The Attorney General alleges that defendant's bill of exceptions is void and cannot be considered for the reason that it was filed out of time.

Defendant was convicted on December 9, 1912, and granted an appeal on the same day. The court gave him time until April, 1913, within which to file his bill of exceptions. The bill of exceptions was not filed during the time granted by the court, but on August 2, 1913, after the term during which the appeal was granted had lapsed, and after the time allowed and granted by the trial court had expired, the bill of exceptions was settled, signed by the trial judge, and filed. Under the foregoing facts, was it filed within the time allowed by law? Appellant contends that, under the laws of 1911, p. 139, this bill was filed in a timely manner and must be considered, while the Attorney General insists that this appeal, being in a *criminal case*, is not governed by the amendment of 1911, and that its legality must be determined by section 5245, R. S. 1909. His contention is that appeals in criminal cases are in no way affected by the amendment of section 2029, R. S. 1909, for the reason that said section 2029 applies only to appeals in civil cases.

Said section 5245, supra, regulating the procedure for appeals in criminal cases, reads as follows: "On the trial of any indictment or prosecution for a criminal offense, exceptions to any decisions of the court may be made in the same cases and manner provided by law in all civil cases; and bills of exceptions shall be settled, signed, sealed and filed as *now* allowed by law in civil actions, and the same proceedings may be had to compel or procure the signing and sealing of such bills, and the return thereof, as in civil cases." This section is what is generally termed a reference statute; that is, it does not itself designate or set out in detail the steps necessary to secure a bill of exceptions in a criminal case, but refers or points to the Code of Civil Procedure and ingrafts itself upon said Code as a part and parcel thereof.

When a reference statute specifically designates

the section or article of the statute of which it is made a part, such reference statute will not be changed or modified by any subsequent change in the statute to which it refers. It has even been held that the provisions of a repealed law may be referred to and thus become a part of a new statute. Lewis' Sutherland, Statutory Construction (2d Ed.) vol. 2, p. 789. But, where the reference statute pertains only to a method of procedure and refers generally to some statute which defines how certain things may be done, such reference statute will be expanded, modified, or changed every time the statute referred to is changed by the Legislature. *Gaston v. Lamkin*, 115 Mo. loc. cit. 33, 21 S. W. 1100.

The gist of the Honorable Attorney General's contention is that, because section 5245, supra, provides that bills of exceptions in criminal cases "shall be settled, signed, sealed and filed as *now* allowed by law in civil actions," the act of 1911, amending section 2029, supra, is inoperative as to appeals in criminal cases, and that no valid bill can be filed in a criminal case after the time allowed by the trial judge for filing same has expired. He even contended *ore tenus* that, as said section 5245 was originally enacted at a time when the law required bills of exceptions in civil cases to be filed during the same term at which such cases were tried, it is impossible to secure a valid bill of exceptions in a criminal case after the end of the term at which the judgment was rendered. The phraseology of section 5245, supra, furnishes some color for the Attorney General's insistence, but we find that the construction he contends for is entirely too narrow.

Section 5245, supra, does not refer to or become a part of any particular section of any statute but refers generally to those provisions of the Code of Civil Procedure regulating appeals, of which there are several sections; consequently, when the Civil Code was amended in 1911 so as to permit the filing of bills of exceptions after the time would expire within which the court might require such bills to be filed, section 5245, supra, underwent the same amendment, and bills of exceptions may be filed in criminal cases within the same time and under the same terms and conditions as in civil cases.

The bill of exceptions in this case was neither filed during the term at which defendant was convicted, nor within the time granted by the trial court, but was filed within the time permitted by Laws 1911, p. 139, as construed by this court in the case of *Craig v. St. Louis & San Francisco Railroad Co.*, 248 Mo. 270, 154 S. W. 77. The learned Attorney General's contention that said bill of exceptions was filed out of time must be disregarded.

#### II. Res Gestæ.

[2] For reversal defendant alleges that the trial court erred in admitting and refusing



to strike out the evidence of T. A. Blankenship and Nora Hardy to the effect that after defendant returned home, and within a few minutes after the shooting, he took down a shotgun, loaded it, and, on being asked what he was going to do, stated that he would "go back and kill every d——d one of them." It is contended that what defendant said to Blankenship and Nora Hardy was not part of the *res gestæ*.

Wharton, in the tenth edition of his work on Criminal Evidence, vol. 1, at pages 501, 502, announces the rule that when "there is an unexpected collision between two men, entire strangers to each other, then the *res gestæ* of the collision is confined to the few moments that it occupies. But in the case of feuds and riots and strikes or disturbances, where parties are arrayed against each other for weeks, and people are so absorbed in the collision as to be conscious of little else, then all that such parties say and do under such circumstances is as much a part of the *res gestæ* as the blows given in the homicides, for which particular prosecutions may be brought." The same author, at page 1747 of the second volume of said treatise, says that it is permissible for the prosecution to introduce evidence "to show that accused told deceased's sister immediately following the homicide that, if 'you do not hold your mouth, I will blow your brains out;' \* \* \* or to show that immediately after the homicide accused fired at two persons with whom deceased had been walking; or to show other circumstances that establish a knowledge of the crime; or show malice toward the deceased or indifference to the fact of the crime."

The doctrine announced by Wharton is strongly supported by the decision of this court in the case of *State v. Bailey*, 190 Mo. 257, 88 S. W. 733. After Bailey had assisted in murdering a nonunion hack driver, he was admonished that "the union hack drivers could never expect to win a strike by shooting people," and replied: "That was the only way to win; they ought all to be killed." It was held that this statement made by Bailey the next day after the killing was competent to establish his felonious intent and motive in assaulting the man who was killed. *Fitts v. State*, 102 Tenn. loc. cit. 146, 50 S. W. 756.

In the present case the defendant admits that he shot and killed deceased, so there is no issue as to the identity of the person who committed the crime (if one was committed). Testimony for the state strongly tends to prove that deceased was entirely unarmed; consequently the motives and mental condition of defendant when he fired the fatal shot are very important. If the acts of deceased frightened defendant and gave him reasonable cause to believe that his life was in danger, then he may be entitled to an acquittal on that ground. On the other hand, if defendant shot deceased through a spirit

of malice, or to obtain revenge, at a time when he was in no real or apparent danger from said deceased, then he is guilty.

The alleged remarks of defendant in the presence of witnesses Blankenship and Hardy indicated a feeling of intense malice against the whole Walls family, and, as they were the friends and immediate associates of deceased, the jury might properly infer that the shooting of Lovins was the product of malice or a desire for revenge upon the part of said defendant. If the testimony of Blankenship and Hardy is true, then defendant was only prevented from killing other members of the Walls family by the timely act of Blankenship in taking the shotgun from him. The cases of *State v. McKenzie*, 228 Mo. 385, 128 S. W. 948, and *State v. Porter*, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589, cited by appellant, are not in point, because they relate to self-serving statements made by accused persons after they had had time to formulate statements which would tend to exonerate them.

We hold that the remarks of defendant, testified to by witnesses Blankenship and Hardy, made so soon after the homicide and before anything had occurred which could be reasonably calculated to interrupt or change the condition of defendant's mind, are part of the *res gestæ*. Consequently the evidence of Blankenship and Hardy was properly admitted.

### III. Instruction—Comment on Evidence.

[3] The defendant also complains of instruction A, given by the court on its own motion, on the ground that said instruction is an unwarranted comment on certain evidence in the case. Said instruction reads as follows: "The court instructs the jury that anything defendant may have said after shooting deceased, A. J. Lovins, if anything, to the effect that defendant had a notion to take a shotgun and go back down there and kill the whole d——d outfit, or words to that effect, is competent and admitted only for the purpose of showing the condition of mind of the defendant at that time; and whether or not it has any weight in showing the condition of his mind at the time of the shooting is a question of fact for you to determine." We find that defendant's objection to this instruction is well taken. The evidence regarding defendant's expressed desire to kill the whole Walls family tended to prove that the defendant killed Lovins to gratify a desire for revenge rather than through fear of injury to himself and, for the reasons explained in a preceding paragraph, was properly admitted. But, notwithstanding the evidence was competent and strongly pointed to defendant's guilt, the court was not justified in calling special attention to it in an instruction, thereby giving it more prominence than other evidence in the case.

There are certain well-defined classes of

evidence, such, for instance, as evidence of recent possession of stolen goods, evidence of former conviction of crime, and evidence of an accomplice, which may properly be commented upon and the legal effect thereof explained by trial courts in their instructions to juries, but not only our statutes (section 5244, R. S. 1909), but many rulings of this court, forbid trial courts from singling out other evidence and telling the jury that it is competent and that it is admitted for a specific purpose. For instance, it would have been highly improper and unfair to the state for the court in this case to have told the jury that evidence tending to prove that defendant did not voluntarily go to the Walls home, but was invited there by Walls, Sr., or a member of his family, was competent and admitted to prove that he went there on a peaceful mission and not with the intention of shooting deceased. For this same reason it was unfair to the defendant to specifically call the attention of the jury to the evidence tending to prove that very shortly after the killing, and after he was out of danger, he (defendant) entertained a murderous design upon the whole Walls family, where Lovins had been stopping, and who, by the evidence, appeared to be his associates and friends.

Where, as in this case, the evidence is very conflicting, and the trial court singles out and specifically comments upon some of such evidence, the jury are liable to place undue significance upon the evidence thus singled out, because the court has directed their attention to it. The jury should be allowed to weigh all evidence which is admitted and not stricken out by the court and, with the aid of the arguments, to form their own conclusions of what it proves or tends to prove. This doctrine is supported by the following authorities: *State v. Rutherford*, 152 Mo. 124, loc. cit. 133, 53 S. W. 417; *State v. Reed*, 137 Mo. loc. cit. 138, 38 S. W. 574; *State v. Hibler*, 149 Mo. 478, 51 S. W. 85; *State v. Mitchell*, 229 Mo. 683, 129 S. W. 917, 138 Am. St. Rep. 425; and *State v. Holmes*, 239 Mo. 469, 144 S. W. 417.

#### IV. Self-Defense—Right of Attack.

The defendant also complains of instruction No. 6, given by the court on behalf of the state, as follows: "You are further instructed upon this matter of self-defense that a danger existing only in the imagination of the defendant will not excuse or justify the killing of Lovins. There must have been the apparent danger, affording a reasonable ground for an apprehension on the part of the defendant that, unless he killed or disabled Lovins, his own life or limbs were in imminent danger. Whether the appearances of danger to the accused were such as to afford such reasonable ground of apprehension is a question for the jury. *The law of self-*

*defense does not imply the right of attack*, nor does it permit of acts done in retaliation or for revenge. Therefore, if you believe from the evidence that the defendant shot and killed said Lovins at a time when defendant had, because of the acts of the deceased, no reasonable cause to apprehend the approach of immediate danger to himself, and did so in the heat of passion or from a spirit of an utter disregard for human life, or for the purpose of gratifying spite or ill will toward Lovins, then the defendant cannot avail himself of the law on self-defense and you cannot acquit him on that ground." It is asserted that this instruction is erroneous in that it tells the jury that the "law of self-defense does not imply the right of attack," citing *State v. Matthews*, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594. This last-mentioned instruction seems to be slightly argumentative, and we think it would be less objectionable if the italicized words had been omitted; but, whether the giving of it in the form in which it was given would constitute reversible error, we do not decide.

#### V. Remarks of Counsel.

[4] Defendant complains that the trial court approved the action of the prosecuting attorney in making the following remarks to the jury: "Men, it would be a disgrace for you to acquit the defendant under the testimony." We are unable to agree with the defendant on this point. If the prosecutor believed that a crime was clearly proven, he had the right to tell the jury, as a matter of argument, that he believed that it would be a disgrace for them to acquit the defendant.

For the error of the trial court in giving instruction No. A of its own motion, which commented upon the evidence in an unwarranted manner, we reverse the judgment and remand the cause for new trial.

FARIS, J., concurs in result and in all opinion except paragraphs 2 and 5. WALKER, J., concurs in all of opinion except paragraph 3, and dissents from the result announced.

#### WENDLING et al. v. BOWDEN et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. WILLS (§ 163\*)—UNDUE INFLUENCE—BURDEN OF PROOF.

Where the proponent of his father's will, contested on the ground of undue influence, lived with his father and mother for several years prior to their deaths, and attended them constantly, and especially during their last illnesses, and transacted practically all of the business of the father during that time, a confidential relation between him and the father existed, and imposed on him the burden of overcoming the prima facie case that the will

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

executed during that time was executed through his undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

## 2. WILLS (§ 166\*)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that a will was procured through undue influence exerted on testator who, at the time of the making of the will, was over 80 years of age and in feeble health.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

## 3. TRIAL (§§ 236, 252\*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

An instruction that the jury are the sole judges of the credibility of the witnesses, and that, in determining their credibility, they should consider their character, conduct, and appearance on the stand and interest in the result of the trial and of the probability or improbability of their statements, etc., correctly directs the jury in weighing the evidence, and is not objectionable as directing a consideration of the character of the witnesses, where there was evidence so contradicting the testimony of a witness as to involve his character.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 531-533, 596-612; Dec. Dig. §§ 236, 252.\*]

## 4. WITNESSES (§§ 266½, 336\*)—CROSS-EXAMINATION—EXTENT.

A party who testifies for himself subjects himself to all the rules as to cross-examination and impeachment of witnesses, and he may be cross-examined on the details of his life affecting his character, not exposing him to a criminal prosecution, but unless the details are material to the issues, the answers are conclusive.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 921, 922, 1112; Dec. Dig. §§ 266½, 336.\*]

Appeal from Circuit Court, Clark County; Chas. D. Stewart, Judge.

Action by Ida Wendling and others against Richard Bowden and others, to contest the validity of the will of Samuel Bowden, deceased, and set aside the probate thereof. From a judgment granting relief, proponents of the will appeal. Affirmed.

The respondents instituted this suit in the circuit court of Clark county to contest the last will and testament of Samuel Bowden, who lived for more than a half of a century, and died, in that county in the month of April, 1908. The contestants and proponents are the sole surviving children, who are devisees under the will, as well as the only heirs at law of deceased. The petition charged mental incapacity on the part of the testator to make the will, and undue influence exercised over his mind by the proponents. The answer put in issue those charges, and asked that said will be adjudged the last will and testament of said Samuel Bowden. The will was signed and witnessed on July 5, 1906, nearly two years prior to the death of the testator.

The provisions of the will were substantially as follows:

First. That all of the testator's just debts be paid out of his personal property.

Second. Because as stated, he gave his son, Henry, only \$250, for the reason stated therein, "he had previously given him certain personal property and because he had heretofore received certain personal property belonging to me," the testator.

Third. Samuel H. Bowden, his son, was likewise given only \$250, because, as stated therein, he had previously given him certain real and personal property.

Fourth. To his daughter, Mrs. Ida Wendling, was given \$2,000, free from the control of her husband, which is to be loaned at the highest rate of interest obtainable, she to receive the interest thereon during her life, but no part of the principal, except in case of extreme necessity she might "draw the principal in sums not exceeding \$50. The remainder of the principal, at her death to go to her children surviving her."

Fifth. To his son Richard was given the home place, consisting of 110 acres, with the dwelling house and other improvements thereon. This, however, was charged with the payment of all the aforesaid legacies, in case the personal property was insufficient to pay them.

Sixth. Appointed Richard Bowden executor of the will.

On May 9, 1907, the following codicil was duly added to said will: "I, Samuel Bowden, this 9th day of May, 1907, do hereby make and constitute the following as a codicil to the foregoing my last will and testament; I hereby direct and will that the sum of two-thousand dollars, named in item 4 of my will, at my death be by my executor, deposited in Clark County Savings Bank, of Kahoka, Missouri, at the highest rate of interest paid by said bank and the interest thereon be paid annually to my daughter, Ida E. Wendling, until she arrives at the age of fifty years, when the principal is to be paid to her to be held by her as in said item four and at her death to be disposed of as stated in said term four."

A trial was had and after the introduction of all the evidence the court gave the jury a mandatory instruction to find for the proponents as to the charge of mental incapacity, thereby leaving only one issue for the jury to determine, namely: Did proponents, through undue influence and fraud exercised over the mind of the testator, induce him, against his will, to make the will in controversy? This question was, by the court, under certain instructions given, submitted to the jury, who by their verdict answered it in the affirmative. Thereupon the court rendered a judgment setting aside the will, and in due time the proponents filed a motion for a new trial, which was by the court overruled. After taking timely and proper steps therefor, the proponents appealed the cause to this court. Counsel for proponents assign 16 errors, most of which, however, from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the views we have taken of the case, are immaterial.

Counsel for appellants strenuously insist that this record contains no evidence which warranted the submission of the question of undue influence to the jury, and that the court should have given an instruction telling the jury that there was no evidence introduced tending to show undue influence on the part of appellants, the proponents, and to return a verdict establishing the will. Upon the other hand, counsel for respondents, with equal vigor and earnestness, insist that the record contains ample evidence to support the verdict of the jury and the judgment of the court.

From this brief statement of the principal legal proposition presented for determination, it becomes necessary for us to review the evidence introduced pro and con upon that question.

Mr. T. L. Montgomery, for the proponents, testified:

That he was an attorney at law, and resided at and practiced his profession at Kahoka, Mo., and in surrounding cities and towns. That he was well acquainted with Samuel Bowden, and had known him for 35 years, knew him intimately, and transacted his legal business. That he prepared the will in question, read it over to him, and signed it as a witness, at the request of the testator. That before he signed it, the testator declared it to be his last will and testament. That at his request he signed the name of the testator to the codicil to the will. That George W. King at the request of, and in the presence of, the testator and himself signed the will as a witness. That he and Bert Gridley attested the codicil at the request of the testator. That he saw both the testator and Gridley sign the codicil. That the codicil was written, signed, and attested in his law office in Kahoka, after having been read to the testator. That he wrote the codicil at the request of the testator, and after hearing it read, the testator stated that it was just what he wanted. That in his opinion at the time the testator signed the will and codicil thereto he was of sound mind and disposing memory. That the testator was about 82 years of age at the time he wrote the will.

On cross-examination he testified that he thought the testator had rheumatism, but knew of no other ailments, except heart disease. At some former time he had a cataract upon one eye, but that had been removed, and after its removal he could see very much better. That the testator could write his name, and usually did so, and in a very good hand. That he did not write his name to the codicil, but he requested the witness to sign it for him. That he wrote a previous will for the testator, which was prior to the death of his wife, but did not remember the provisions of it, nor who was the executor named therein. That he had not made a previous—that is, a second—

will to the one in controversy, to his knowledge. That at the time he wrote the will in question, Richard Bowden was residing in the same house with the testator, the home place. That he had no knowledge as to whether or not Richard transacted the business of his father, the testator. That at the time of the testator's death he had no live stock on hand. He had transferred it to Richard by a deed of sale. That the witness wrote the bill of sale at the request of the testator in 1904, and told him, Richard, to have it recorded. Had no knowledge what induced the testator to make the bill of sale, except he stated that he wanted Richard to have the stock. The testator told him how he wanted the will drawn, and he drew it accordingly. Richard was with the testator when the codicil was written. That during the last few years of his life, Richard usually came to town with the testator. The latter did some business with the Exchange Bank. That he, the witness, was president of the bank where the bequest to Mrs. Wendling was to be deposited. The testator paid him for his services for writing the will. There was nothing unusual in having the bill of sale recorded that he could see.

Redirect examination:

Richard was not in the room while the will was being written. The testator knew what he wanted done, and would do it or have it done; and when he once made up his mind regarding a matter, it was hard to influence him to change his mind. He always had a mind of his own and he, the witness, always let him have his own way. "You had to."

George W. King testified in behalf of the proponents as follows:

That he had lived within a quarter of a mile of testator since 1875, and was well acquainted with him and had visited his house. That he saw him often and conversed with him frequently. That he signed the will at the request of the testator. The testator and Mr. Montgomery were present when he signed the will. At that time the testator was of sound mind and disposing memory. That he saw the testator frequently after he attested the will. Sometimes he would see him frequently and then again he would not see him for some little time. He never saw anything to indicate that the testator's mind was unsound up to the date of his death. He was a man of strength and of strong will power, a good business man and farmer. He was energetic and strong willed. The testator came to Clark county before he did.

On cross-examination he testified:

That he never attested any other will for the testator, and was there but a short time upon that occasion. Richard did not go into the room with him when he signed the will. The testator at that time was almost helpless with rheumatism, and walked very feebly, with a cane, also had some trouble with

his eyes, but he read some. He had an operation performed on his eyes. That he did not know who transacted the business. Richard had charge of the testator's farm, but prior to that Henry had charge of it. That he did not know who was the testator's family physician in the latter part of his life. In 1902 Mr. and Mrs. Bowden were quite sick. Richard was the only child at the house when the will was signed. The testator was sitting down and signed the will, just as any one else would have done. He was troubled with a swelling in his feet and limbs, and was in that condition when he signed the will.

Bert Gridley testified on behalf of the proponents as follows:

That he resided in Kahoka and was a lawyer by profession, and had known the testator about 30 years. Was fairly well acquainted with him. That he signed the codicil at the office of Mr. Montgomery. He was sent for, and found the testator and Mr. Montgomery there, and some other gentleman who came in later. That he signed the codicil at the request of the testator, who said he was changing his will and wanted him to sign it as a witness. Mr. Montgomery wrote the testator's name to the codicil, and the latter touched the pen. The testator said he wanted to make a change in his will, and the witness said he understood that he was adding a codicil to the will. The testator was right there, present, when the witness signed it; and he was of sound mind and disposing memory. The testator was an Englishman by birth, and was always regarded as a man of strength and power and a strong mind, somewhat stubborn, one who could not be influenced to do a thing he did not want to do. Richard came after the witness and requested him to sign the will.

Here the proponents rested their case; and thereupon the contestants introduced their evidence as follows:

Counsel for contestants in their statement of the case have chopped up and so mingled and confused the testimony of the various witnesses that it is of but little value to us, and consequently we will have to go over the record and select such evidence as we think tends to prove their side of the issues.

Henry Bowden testified on behalf of the contestants as follows:

That he was a son of the testator and a brother of Richard and Samuel H. Bowden, and of Mrs. Wendling. Richard and Samuel married before he did. That his father purchased two 80-acre tracts of land near the home place; he gave one to Richard and the other to Samuel. That was before they married; and the testator hired men and had those lands cleared up for them. That he was about 25 years old when he married, and at that time lived with his father on the home place. That he did the farm work and took care of his father and mother. That

his father had rheumatism, and was in bad shape. That he received no wages from his father for said work. His father made a will before he, the son, was married. That the testator told the neighbors time and again that he was to have the 80 acres on which the dwelling house stood; Mrs. Wendling was to have the 30 acres, the remainder of the home place, and he was to pay her the difference in the values of the 30 and 80 acre tracts. That the testator told him that he had made a will to that effect. That was after he married and was living with the testator. That he and his wife lived with the testator about three years, and they got along nicely together; and his father was as fond of his, Henry's wife, as if she had been his own daughter. That after living there about two years, a change came over the testator. That during the first two years he lived with his father he and his brother Richard exchanged work with each other, but during the third year he told his brother he was not satisfied with that arrangement, and that he then told him from thence on he would do his own work, and he, Richard, to do his own. That seemed to offend Richard, and he said, "You will be sorry for that." Thereafter Richard would come to the house while he, the witness was away, and when he would return home he would find his father in a bad humor. Richard would tell him the fences needed fixing, and that everything was going to rack; and his father would say to witness: "Why don't you fix the fences and not let everything run down?" Something of this character would occur almost every time Richard would visit the father; some two or three times a week. That finally Richard asked his father why he did not notify him, the witness, to leave the place, and told him that he, the witness, would then have to leave. That a few days afterwards he received a notice notifying him to quit the place, and shortly thereafter he left. That testator never gave him any real estate and but little personal property. When he was 17 his father gave him a colt, and he traded that for a mare, from which he raised three colts. That when he was married his father gave him a cow and calf. Later he gave him a heifer and a steer, and said that he, the witness had taken good care of things, and for that reason he gave them to him. That when he began to farm his father gave him a new breaking plow. Those things are all the property that his father ever gave him. At the time the will was made he had purchased a farm, but had not paid for it. That he consulted his father about marrying, and he had no objections thereto. That in addition to doing the farm work he assisted in doing the washing, sweeping, making beds, and caring for his mother. Part of the time she could not comb her hair, and then he would do it for her. That after Richard moved to the home place,

he transacted practically all of his father's business. At that time his father had seven or eight head of horses and about the same number of cows, calves, and yearlings. That the fall before he left his father's place Richard came and got the cattle and drove them home. In 1901 or 1902, he and his wife went to his father's home to see their mother, who was sick in bed; and while sitting there and talking, his father came in and ordered them from the premises, adding that they had no business there, and that he wanted them to leave. They left when so ordered. At first his father treated them all right, but later he was satisfied that his father had a talk with Richard, and it was then that he ordered them away. In 1906, prior to the operation, his father was at one time blind. That he saw his father occasionally after his mother's death, and whenever he saw him he would speak, and his father would ask, "Is that you, Henry?" and would then shake hands. Before his father died, witness heard he was very sick and low, and he went down to see him. That he himself had been sick at that time. That after he left his father's house he never had an opportunity to have a private conversation with his father; either Richard, his wife or daughter was ever present when he was on the premises. That his father never visited him; he always made some excuse for not so doing. That he had heard that his father had made a will before he died, but never knew or heard what its provisions were. That he never knew of his father visiting Mrs. Wendling, but heard that he did so once. That his father gave Richard the same amount of live stock that he gave him. That during the first two years that he lived with his father, they had no serious troubles. They had some family disputes, but when they were over, they were all over; never had any hard feelings toward each other. But beginning in April or May of the third year of his stay with his father their troubles began. "When Richard would come over he would take father into a room and talk to him privately. This would occur once or twice a week. The talk Richard had with father regarding his getting the place was not held in my presence." That within three or four days after Richard had that conversation with his father, witness was served with a notice to vacate the premises. That at this time his father "was getting feeble in mind and body."

On cross-examination he testified as follows:

That he resided nine miles from his father, and had lived there about seven years. Lived upon a farm of 170 acres. That he had been married 13 years. Richard was married about 1 year before. At that time he was living with his father, and shortly thereafter he moved to his own place which was only a mile away. At that time Samuel was

living with his father on the home place, or at least he was when Richard was married. Samuel was married shortly before the marriage of the witness, some six or seven months. Richard and Samuel each had a farm of 80 acres of their own. That his sister, Mrs. Wendling, had been married about 15 years. That he gave his father one-half of the crops raised on the farm for the rent thereof. That his father told him that he could bring any stock to the farm he saw proper to do, provided it was no more than what he, his father, had. That while he lived with his father, the latter had some 8 or 10 cows and 5 or 6 head of heifers and calves, and 7 or 8 head of horses. That when he left the home place he took with him some 10 or 12 head of cattle, 4 sows, and some pigs, one load of corn and three loads of hay. That he did not take any of his father's cattle with him, and all the hogs that he took belonged to him, and not to his father. That he took his own buggy, harness, and team. That at the time he left, his father and mother were in poor health and needed some one to take care of them. That he left the farm in 1900. That he went back in about a year, when his mother was sick. Richard was at the home either the day or the day previous to the first trouble he, the witness, had with his father. That at that time he and his wife went visiting, and when they returned he found his father and mother out of humor. That his father never complained as to how the place was managed and cared for during the first two years he lived there, but after that time the trouble began. Just after Richard would come over, his father would complain of him for not keeping up the fences, clearing out the stables, etc. That in reply he would tell him that the fences were in good repair, and the stables were kept clean, etc. Did not take from the farm one hoof of stock that belonged to his father.

Charles Vanosdol testified on behalf of contestants as follows:

That he resided in Keokuk, Iowa, and was acquainted with Samuel Bowden, deceased. That some 10 or 11 years ago he went to the farm of Mr. Bowden to purchase a horse, and while there Henry was combing his mother's hair, like she was a child. "Mr. Bowden said to me, 'I have divided up my property, and I think I have done it right.' I told him I didn't know that it was a good idea to divide the property now. He says, 'I have two sons, and I have given each one 80 acres of land. Henry gets the home place,' and 40 or 30 acres to the daughter, and then, and Henry then would have to pay enough cash to make the daughter even up with him; that is, that Henry would have to pay enough, would have to pay his sister enough, to make them two even. I said, 'I think you have done it as good as you could.' Q. What was said in the morning? A. In

the morning we walked out in the yard, and he pointed out this land, this 40 acres, or 30, and said, 'This land my daughter gets, and Henry gets the home place but he has to pay his sister enough to make it even.'"

Cross-examination by Mr. Montgomery:

"Henry was living on the place when I was there. He was married. That was 11 years ago. I can't give the month. Was the latter part of the summer; it was warm yet. \* \* \* Q. I mean this conversation you never told anybody about it? A. I probably told this attorney this forenoon. Q. Is that the only person you told? A. Yes, sir. Q. When did you tell the attorney? A. This forenoon. Q. This is the only time you have told it since the conversation occurred? A. Yes, sir; that is all. Q. You must have a pretty good memory. A. I think my memory is pretty good yet. Henry Bowden and his wife were there and heard the conversation between me and his father."

Recross-examination by Mr. Montgomery:

"Q. You were subpoenaed here in town? A. Yes, sir. Q. You came across the line voluntarily? A. I had a little business in town. I believe Mr. Bowden sent for me to come over. Q. When did he tell you he wanted you? A. Last Wednesday he phoned to me. I told him I didn't know whether I could come or not."

J. B. Wade sworn on the part of the plaintiffs testified as follows:

"Reside at Kirksville. Am 66. I formerly lived in Knox county, and I also lived over here on Fox. I was acquainted with Samuel Bowden. Q. How intimately were you acquainted with him? A. I suppose ever since about '70. I thrashed for him in '70. Q. When you lived in Knox county did you visit in the neighborhood? A. Sometimes, and would see him. Q. Did you have any talk with him after his wife died? A. Yes, sir. Q. What was that conversation as near as you can remember? A. Something about the division of his property. \* \* \* Q. After his wife died what was the conversation that you had with him? A. Well, it was after his wife died, and he was talking about the property, and he said he had made a will, and that he had given Henry Bowden and his sister the home place. That's what he told me. Q. Did he say why? A. He said he had helped the other boys. Q. What did he say about his condition? A. He said he was in bad health, that he was almost helpless, and that he thought it was time he was fixing up his affairs, talked along that line. I stayed there for dinner that time. Q. Did he say anything about any other wills. A. He spoke about my father's will, and about the disposition he had made of his property, and that he thought it was a just will. We talked about a good many things. Q. Did you see him after that? A. I saw him once or twice after that. I can't remember the dates. Q. Did he say anything to you about Henry and his wife? A. He said he

had been out of humor with Henry; that he didn't like Henry's wife. I don't remember when his wife died, but anyway me and my wife were sent for, and I was there back and forth, and that's how this matter came up. After his wife died I had been there a time or two, and I didn't notice Henry or Sam, then I heard that the old man wouldn't let them come. I went down to the place to see the old gentleman about it, to speak to him about it, about the boys not coming. The old man said that he would like to have them come, and finally at his request I notified them, notified Henry, and he come down. Q. In 1905 and 1906 did you notice any change in the old man's mind? A. He was considerably afflicted then with rheumatism. I can't state exactly the state of his mind. Q. You knew Henry when he went on the farm? A. I always thought he worked well."

On cross-examination:

"Q. The time you had the conversation about the timber was Mrs. Bowden alive? A. Yes, sir. Q. When you had the second conversation Mrs. Bowden was dead? A. Yes, sir; about a week or a little longer. Q. He never said anything to you about a will? A. He never told me he was going to make one. Q. When you had this conversation was Dick there? A. Yes, sir. Q. Was Dick living there then? A. Yes, sir; he was living there when his mother died. Q. You observed the boys at work on the farm? A. Yes, sir. Q. The old gentleman was a very good farmer? A. Yes, sir; he was a very good farmer. Q. Tried to have his farm work done good, and looked after it well? A. Yes, sir. Q. I will ask you if he wasn't self-willed, a man of strong will, and wanted to have his own way? A. Yes, sir. Q. That was characteristic of him? A. Yes, sir. Q. He had been a successful farmer? A. Yes, sir. Q. Managed his business well? A. Yes, sir; I think so. Q. Was a man of ordinary intelligence? A. Yes, sir. Q. He never did state what provision he was going to make for his wife? A. His wife was dead when he talked to me this time I spoke about. Q. His mind was all right? A. Yes, sir. Q. What year was that? A. 1902. Q. His wife died that same year? A. Yes, sir." He was a sufferer from rheumatism.

W. R. Vanfossen sworn on the part of the plaintiffs testified as follows:

"Am acquainted with Henry Bowden, one of the plaintiffs here. Q. Do you remember when he left his father's farm and moved onto a farm he had rented? A. Yes, sir; John Houston farm. Our farms joined. Q. Do you remember what property he brought there when he came? A. Not exactly. Q. Approximate it. A. Ten or eleven or twelve calves, might be more or might be less, four head of horses and two colts, a little driving team, and I think one of the four was a blind horse, and I believe there was another. I am almost sure there were four head of horses. Q. Were you acquainted with Henry

Bowden when he lived on his father's farm?

A. Yes, sir. Q. How was he as to being industrious? A. He was an industrious, hard-working man. I know he got more done than I could."

On cross-examination:

"Q. How long since he lived on the Houston place? A. I suppose '99 or 1900. Q. What month was it he left the Houston place? A. First of March. Q. Before you went on the witness stand had you been discussing how much stock he had? A. He asked me. Q. Have you discussed it with him? A. He told me what he wanted. I told him I didn't know much about it. Q. Didn't he tell you how much stock he took there? A. No, sir. He said, 'You know about what stock I had when I went there.' I told him I didn't know for certain. I told him I didn't think he had more than 10 or 12 head of cattle. Q. Did he say he had less? A. No, sir. Q. When did you have that talk? A. Just about a week ago. Q. Did he discuss how many hogs, and how much grain, oats, and corn he took there? A. No, sir. Q. Never discussed that with you? A. No, sir.

Fritz Boon sworn on the part of the plaintiffs testifies as follows:

Direct examination:

"I reside a mile east of here. Was acquainted with Samuel Bowden, senior. Have known him all my life. Q. Were you well acquainted with him? A. Yes, sir. Q. Would you see him quite often? A. Yes, sir. Q. Did you ever have any conversation with him about his property? A. Yes, sir. Q. About when was that? A. I have talked with him two or three times about his property 12 or 13 years ago. Q. What was the conversation you had with him first? A. He told me about the land that Sam and Dick had, that they had it paid for, that Sam got one 80 and Dick the other and he said he would divide the home place between Henry and Ida. Q. How many times did you have that conversation? A. Two or three times he told me that Henry and Ida were to have the home place. Q. Did he say he had given 80 to the boys? A. Yes, sir. Q. In the latter part of his life did you observe any change in his condition. A. Not very much. I didn't see him very many times. Q. Did you notice that he was failing in health? A. The last time I talked to him he seemed to be a little feeble. He was growing pretty feeble. His eyesight was poor, and he was in pretty bad shape. Q. Did you notice whether or not his mind was weaker? A. I don't know that it was. I didn't talk to him only a few minutes. Q. Do you know who attended to his business, the running of the farm? A. Dick attended to the farm. Q. Tended to the old man's business for him? A. I think so; yes, sir. Q. Did the old man do any business that you know of? A. Not that I know of."

Redirect examination:

"Q. Did he have stock on that farm, and use the farm as if it was his own farm? A. I suppose so. Q. Were you acquainted with the place before Henry was married? A. Yes, sir. Q. How was the place kept up then? A. I couldn't see very much difference at any time. Q. How was Henry as to being industrious and a hard worker? A. I think he was industrious, and a very hard worker."

Sam Hiller sworn on the part of the plaintiffs testified as follows:

Direct examination:

"Q. What is your occupation? A. Cashier of Exchange Bank, Kahoka, Mo. Q. How long have you been there? A. Fourteen years. Q. Did Samuel Bowden keep an account with you? A. Yes, sir. Certificates of deposit and accounts. Q. From 1900 to 1907 have you got an account showing his certificates? A. Yes, sir. Have the certificates, and the records of the different transactions. This memoranda I have is prepared from the certificate register. I can get the certificates. Q. Very well: I guess we better have them."

Mrs. Ida Wendling, sworn on the part of the plaintiffs, testified as follows:

"Q. What relation are you to Samuel Bowden, senior? A. His daughter. Q. Were you the only daughter? A. Yes, sir. Q. How far did you live from him the latter part of his life? A. I suppose about three miles and a half. Q. When were you married? A. 1894. Q. Do you remember about the time your mother died? A. 1902. Q. Did you stay at home at your father's house during the time she was sick? A. I was there just a week before she died. I stayed there from Monday until Friday. She died Friday night. I lacked two days of staying there a week. Q. After Henry left, or any time, did you have a conversation with your father about his property? About what he was going to do with it? A. I have heard father say what he intended to do with his property. He had given Richard and Samuel these two 80's, and the homestead, 110 acres, was to be divided between Henry and I. Henry was to have the home place, 80 acres, and then he was to pay me enough to make it even; that's what he wanted to do with the property. Q. You don't know whether Richard had any influence over your father or not? A. I can't say as to the influence. We couldn't talk to father but what Richard would be there listening. Q. Do you know of Richard tending to any business for Henry after he left there? A. I was there one time, and remember of father sending him after some money, and he brought the money home. Q. Did your father give him any check to draw it? A. I didn't see any papers. Q. What was the feeling between Richard and your husband? A. Not very good. Q. Not friendly? A. Never was friendly. Q. Did you have any conversation with your father about the financial condition of your husband? A.



Yes, sir. Q. What statement did your father make in reference to that matter? A. He said he had heard my husband was financially busted. Q. How did he say he had heard it? A. He said brother Richard brought the news from town. Q. Did your father then make a demand on your husband for \$300 that he had borrowed from your father? A. Yes, sir. Q. What did you do? A. Paid it right then. Q. What was the financial condition of your husband then? A. Always had money whenever he wanted it. Q. When did you ascertain that this will was made in the shape it was? A. Not until after father's death. Q. Had you ever heard about such a will as that? A. I had heard that brother Dick was to get all the property. I didn't know what was in the will until after his death. Q. Had you ever heard that your father had given Dick a bill of sale for all his personal property? A. No, sir. Never until after his death. A. Did your father ever give you any personal property? A. Before I was married father gave me a Jersey calf, and he gave me a colt. A. How old were you when you were married? A. Twenty-seven past. Q. Had always lived at home and kept house? A. Yes, sir. Q. At any time did you put any money in a loan with your father? A. Yes, sir. Father was making a loan at one time, and I put in \$20. Q. What did Richard give you? A. It was \$20 at the rate of 8 per cent. per annum, and there would be \$1.60 interest, and he gave me a dollar and a half and said it was worth 10 cents to bring it to my place. Q. Were you ever there when your brother Henry lived there? A. Yes, sir; twice. Q. What was the relationship between them then? A. Seemed to be getting along good. Q. What was the condition of your father physically the latter part of his life? A. Was very feeble. Q. How long had he been that way? A. I can't say. Q. What seemed to be the matter with him? A. Rheumatism and heart trouble. Q. Could he move around good? A. He was crippled up, couldn't move his feet good, had to slip them along. Q. How was his eyesight? A. He had a cataract on his eye, and had it taken off. Q. Were you ever there when he would fail to recognize you until you would speak? A. He couldn't recognize even members of the family at times, until after they spoke. He couldn't see a chair in the room; would have to feel for a chair to sit down on. Q. Did he visit you after Richard moved on the place? A. He was there once. Q. Did you have a conversation with him? A. Only just before the family he bid me good-bye. He pressed \$5 in my hand. Richard and his family had stepped out to go home. Q. They didn't see him give it to you? A. Not that I know of. Q. What was Henry's condition financially at the time this will was made in 1906? A. I don't know. Q. Do you know what property he had? A. No, sir. Q. Did

you ever receive any of the household goods at the time you were married, or at any other time? A. No, sir."

W. B. Slisson, sworn on the part of the plaintiffs, testified as follows:

"Q. What is your occupation? A. Physician and surgeon. Q. You reside in Kahoka, Mo.? How long have you been practicing here? A. Twenty-one years in March. Q. Were you acquainted with Samuel Bowden, senior, in his lifetime? A. Yes, sir. Q. How long had you known him before his death? A. Fifteen or 16 years. I think I met him in '92 or '93. Q. Were you ever called to attend him? A. I was called there on consultation with old Doctor McKee. Q. Who was sick? A. Mrs. Bowden. Q. How long were you his family physician? A. Continuously from 1901 to his death, and before that for a part of the time. I done his practice from 1895. Q. Do you remember of being out there at a time a will was said to have been made? A. Yes, sir. I think that was in 1902. Q. What condition did you find him in? A. He had been sick, I think he and his wife had pneumonia; that's my recollection, I think maybe that same day he was a little excited. I was out there in the morning, and was called again after supper. Q. How did you know that a will had been written at that time? A. I can't say. Mr. Montgomery and his brother were there. I don't know whether they were there when I got there or not. Q. Was the old man excited? A. Yes, sir. Q. What had the old gentleman been suffering with towards the latter part of his life? A. Rheumatism, and organic heart disease. He had had a cataract on his eye, and I assisted Dr. Lapsley in removing it. Q. This organic heart trouble with which he was afflicted, in addition to his other ailments, would that have a tendency to weaken his mind, or cause him to be in such a condition that he would be easily influenced? A. Frequently it does; yes, sir. A man in that state of mind would be weaker and probably more easily influenced. He was childish. He wasn't demented, but naturally was childish. Q. Would you say that he was in a condition that he would be easily influenced? A. Any man that is childish would be easily influenced."

#### Cross-examination:

"Q. You had occasion to go and see him when he was suffering? A. Yes, sir; when he was sick. Q. You never interrogated him about his business affairs? A. No, sir. Q. You would simply examine him and administer the medicine you thought best for him to have? A. Yes, sir. Q. You never had occasion to talk to him only when he was sick? A. For several years before he died he was in the habit of taking some medicine, I think. I don't think he went over two or three weeks without taking medicine. Q. How often did you visit him in 1906? A. I don't know without looking at my books. Q.

The time he had pneumonia and his wife died you saw him more frequently? A. Well, the last three years before he died I would see him once a month anyhow. Q. Haven't you sent him medicine without going to see him? A. Yes, sir; he had organic heart disease. Q. Since you have known him, what would you say as to whether he was a man of strong will power? A. In his younger days I should judge he was a man of considerable will power. Q. Ordinarily when you would go to see him it was when he was sick and suffering? A. I suppose he would be sick; yes, sir. Q. He was a man that had a good memory? A. Probably did have in his younger days. Q. You are simply telling his condition when you would be there and see him? Q. Yes, sir."

Re-direct examination:

"Q. What were the remedies you administered to him? A. Well, remedies for the heart trouble and dropsical affliction; and he would improve for a while. You see his circulation was poor, and I would give remedies to improve that. Q. Would he be kind of drowsy? A. Yes, sir; at times. Q. Might not the medicine have a bad effect on his mind? A. Primarily it would benefit him, would benefit his mind from the fact that it would restore the circulation; his heart trouble would tend to produce dullness, and the heart stimulant would relieve that to some extent."

The bill of sale previously mentioned, from the testator to Richard, was for two horses, three milch cows, one two year old heifer, three yearling steers, three spring calves, one binder, one two-horse wagon, one cultivator, one planter, one corn sheller, one sulky hay rake, and all farming implements and utensils on the farm, and the consideration therefor was \$200. This was duly acknowledged and recorded November 15, 1904.

Contestants then introduced in evidence about 20 certificates of time deposits of various dates and for various amounts, on the Exchange Bank, in the name of Samuel Bowden, all of which were indorsed by R. S. Bowden; the two last by him as administrator. The cashier of the bank testified that all of those transactions were conducted by Richard Bowden for his father, Samuel Bowden; also that prior thereto Henry Bowden had made three similar deposits for his father.

Andrew O'Day, sworn on the part of the plaintiffs, testified as follows:

Direct examination:

Was acquainted with Samuel Bowden in his lifetime. Was acquainted with Mr. Wendling, and Richard Bowden. "Q. Did you have a conversation with Richard Bowden about Mr. Wendling? A. Yes, sir. Q. What was it? A. He spoke to me about Mr. Wendling going to hard drinking. I said it was a mistake; that he would only take a glass of beer or two. Q. Was he drinking to

excess at that time? A. No, sir. Q. How has he been financially from 1902 on up? A. He was pretty well fixed, a hard-working, industrious man with plenty money. He was in good circumstances. Q. You have been around his home? A. Yes, sir. Q. Do you know how much land he has? A. Three hundred and seventy-five or 400 acres. Q. How does he live? A. He lives mighty well. Q. Did you have a conversation with Samuel Bowden, Sr., about his daughter? A. Yes, sir. Q. State what that conversation was? A. I had visited there (Mr. Bowden's) on Sunday before he died. We sat there in the room and talked probably two hours, and in his talk he said he understood that Mr. Wendling had gone to drinking, drinking hard. I said, 'That's a mistake; he has not.' Q. What further was said? A. He said Ida worked hard on this place, and 'I feel sorry for her.' And he says, 'She is working hard yet.' Q. Was there anything said in that conversation about the financial condition of Mr. Wendling? A. I don't recollect of anything being said."

Cross-examination:

"Q. During the years 1902 and 1903 was he very much in debt? A. I don't know. I didn't look after these matters. I don't know how much he was in debt. Q. You said you knew he owned this land? A. I knew he was in possession of it."

All this testimony was objected to, and exceptions duly saved.

P. I. Wilsey, sworn on the part of the plaintiffs, testified as follows:

"Q. What position do you occupy in Clark county? A. I am collector, of Clark county, Mo. Q. Have you got a copy of the assessment list of H. H. Bowden, 1901, for the taxes 1901? A. Yes, sir. Q. Will you turn to it? A. Taxes show the assessment was for 1900, assessment year 1900 for taxes 1901 shows it was on two horses, six cattle, and six hogs, and \$30 worth of other personal property."

Cross-examination:

"Q. What is that you have? A. Assessment for 1900 for taxes 1901."

Plaintiff rests.

Richard Bowden testified on behalf of proponents as follows:

"I am one of the defendants in this case. Henry Bowden lived on Father's farm in 1899 and left in 1900. At the time he left he took with him 21 head of cattle from yearlings up. They were worth about \$30 a head. He also took eight head of horses, worth about \$100 each, 40 head of hogs, worth \$4 or \$5 each, four or five loads of corn, worth 40 cents per bushel, three or four loads of oats, worth 30 cents a bushel, four or five loads of hay, worth \$6 a ton. He also took a buggy, plow, a cultivator, and some harness. All of said property was worth about \$1,500 or \$1,600. The farm was not in a very good condition when Henry left it; he had let the

hedge fences grow up, all of which were about one mile in length. It had not been trimmed for two or three years. The manure was about two feet deep in the stables. All other fencing on the place was in bad shape." That he did the chores for his parents from 1900 to 1902, and after that rented the farm and moved down there, and gave one-third of what was raised thereon as rent. Father and mother were at that time in poor health. He rented the farm and moved down there at the suggestion of his brother-in-law, Mr. Wendling, and that suggestion was satisfactory to his father, as he said he and Henry could not get along together. That he had nothing to do with his father having Henry move from the place. He knew his father was dissatisfied with Henry, but he did not talk to Henry about his going on the place; but did talk to Wendling. That after he moved to his father's place, Mr. Wendling visited there frequently; so did Mrs. Wendling. They were both there at the time of his mother's death, which was in 1902, and came there after her death. That he knew of the bill of sale from his father to himself, selling the personal property therein mentioned. Father said he was unable to care for the same, and would sell it to him for \$200, the price therein stated. He paid the price and took the property. That while there he transacted his father's business. "Q. At whose direction? A. At his direction. His money and property were kept separate from mine. I hauled and sold his grain, and he cashed his own checks given therefor. I was always directed by my father as to how to transact his business." He was named as executor in the will, but did not know that fact until after the death of his father. He got it from the office of Mr. Montgomery. He had it sealed and locked up in his desk. That he never in any manner influenced his father in making the will; nor did he ever have a conversation with his father as to what he should will to Samuel, nor as to any of the other children. That he never told his father that Mr. Wendling was financially broken, or regarding his financial condition. That he heard Henry testify regarding his looking after his father's certificates of time deposits. That said testimony was correct, and that he attended to the same at his father's direction, but always kept his business separate from his own. That his father kept his certificates in the bureau drawer, and the witness kept his in his trunk upstairs. In all money matters the witness would give his father his certificates and keep his own. He would put his away. Whenever his father wished to cash a certificate or deposit, he would give it to witness, and he would take it to the bank and have it cashed; and if the certificate was to be renewed, he would have it renewed, surrender the old one to the bank and give the new one to his father. That after the death of his father he found all of the

certificates of deposit in the bureau drawer where his father kept them. That they were inventoried by him as executor, and he cashed them and accounted for the proceeds thereof. There was shown to witness a number of checks drawn by himself and payable to various parties, for various amounts, for various purposes, which were identified and introduced in evidence without objection, among which was one for \$2,000, payable to himself, and deposited for one year in the Clark County Savings Bank, bearing 3 per cent. interest on account "of Mrs. Ida Wendling, under the will of Samuel Bowden, deceased." On cross-examination he testified as follows:

That he knew his father had made a will, and that his father told him that he left it with Mr. Montgomery for safe-keeping. That he and his father never talked of the will before it was made. That at the request of his father he went for Mr. Montgomery to go out to his father's house, as he wanted to see him. That he did not go after Mr. King to come and sign the will. That he knew nothing about a will that was to be made; that his father had never mentioned it to him, and that knew nothing of it until his father made the codicil thereto. Did not then know what disposition his father had made of his property, nor never knew that until he heard the will read after his father's death. That he knew nothing about Henry's going off the place. Did not go down there and talk to his father about that fact. Did not go down there and tell his father that Henry was letting the place go to rack. "Father gave William and Samuel each an 80-acre tract of land near his home place. William went West, and deeded his 80 to Samuel, and in consideration thereof, Samuel deeded his 80 to me. My sister worked at home while living there; so did Henry; all of us worked on the farm, but Sister did not work in the fields; she had plenty of work in the house to do. We had a girl there to assist her to do the work." Never said to any one Mr. Wendling was drinking. Never talked to his father about depositing his sister's legacy in the Clark County Savings Bank. "Father did his business with the Exchange Bank." Never talked to his father about how many cattle Henry took from the place when he moved therefrom. He was not there when he took them, but he drove them by his house when leaving there. Young Irvin was assisting him to drive them, and there were 21 head, but did not remember how many cows, calves nor yearlings there were. He had eight head of horses and two colts. Did not tell any one about this. He supposed his father knew of it. "I don't know of it, if I did. Q. Didn't you tell him [your father] that you saw him, Henry, taking 21 head of cattle, 40 head of hogs, eight head of horses, when you were talking to him about it? A. I don't remember. \* \* \* We talked some. Yes, sir. He

drove the stock right by my house." He did not go to his father's that evening. He went the next day, but never said anything to him about the stock which Henry drove from the place. He had nothing to do with the notice that was served upon Henry to leave the place, nor never heard of it until yesterday. He had heard his father complain of Henry. "We talked about the matter a couple of times." He talked to his father whenever he went over there, and paid no attention as to whether Henry was there or not. He had some trouble with Mr. Wendling. It grew out of a loan of \$100 he made to him. "He agreed to pay me 5 per cent. interest, but never paid it. Never had any trouble with him over his wife." He never told her to stand up for her rights and he would pay her attorney fees. Never bought any calves with Henry. He had received a horse and cow from his father.

Thomas McCarty testified for proponents as follows:

That he had resided in Pike county ever since 1852, and knew Samuel Bowden ever since 1870. Resided about one mile from him. Had visited him and had various business transactions with him. That he never saw anything wrong with his mind, and it was good the last time he saw him. Mr. Bowden was a man of very strong will, and nothing could influence him. He was a successful farmer and business man. He kept the farm up, and everything in good repair.

On cross-examination:

"Richard Bowden married my niece. Mr. Samuel Bowden was very feeble during the last few years of his life. He could not get around. He was fixed in his opinions, but reasonable; if he made up his mind about a person he stuck to it."

Frank Neff testified for proponents as follows:

"I reside in Pike county, and am a farmer." Knew Samuel Bowden, Sr., since 1868. He resided about one mile from him; their farms joined. Saw him quite often, and visited him at his home. He remembered when he died. In his opinion, he was a man of sound mind and reasonable. He had a mind of his own, and it was characteristic of him that he could not be easily influenced. He had a talk with deceased a week or two before his death, and in his opinion he was then of sound mind. Did not see any difference in his mind when sick or well. He always kept his farm up in good condition. His fences were good. Did not remember much about that when Henry left, but he thinks he left the hedges untrimmed.

On cross-examination:

In 1892 he moved a little further from Mr. Bowden than he was prior to that time, and consequently did not see him so often, although he would see him occasionally. Knew Henry; he was a good worker. He and his father got along all right up to about a year

or two before the old gentleman died. He never knew what their troubles were about; only what he was told. Mr. Bowden was feeble, had rheumatism and he heard he had heart trouble; also, he could not walk very well. He always walked with one, and part of the time with two canes, and some of the time not at all. His eyesight was poor; at times he could hardly see. He had an operation performed on his eyes, and after that he saw much better.

Thomas Wood testified on behalf of the proponents as follows:

That he was a farmer, and resided  $2\frac{1}{2}$  miles from Mr. Bowden. Knew him well. He was a man of sound mind, self-willed, and was not easily influenced as to his opinion.

On cross-examination:

He had rheumatism and could not get around very well.

C. W. Yant testified for proponents as follows:

"Reside in Kahoka; am a lawyer. Have known Mr. Bowden for many years." He lived near him before he began practicing law. The families were good friends. He was a man of sound mind and strong will.

Robert Wood testified for proponents as follows:

Knew Mr. Bowden well, and that he was a man of sound mind.

John Wood testified for proponents that he had known Mr. Bowden well ever since 1896; that he was a man of sound mind, and strong will power.

Louis Neff testified for proponents that he knew Mr. Bowden; that he was a man of sound mind and was a self-willed man, not easily influenced. He was that way up to his death.

James Brickey testified for proponents, substantially the same as did Louis Neff.

Hesekia Kilmer, by deposition, testified for proponents substantially the same as Neff.

John King testified for contestants in rebuttal, as follows:

"I know the Bowden farm; it is worth \$65 per acre. Have seen Mrs. Wendling working there, raking hay and gathering up the haycocks when they were putting up hay. Do not remember of seeing her do any other farm work."

Sarah Irvin testified for contestants as follows:

"Don't remember of Dick coming to his father's place in the absence of Henry, and showing him over the farm."

John Irvin testified for contestants as follows:

"Don't know how often Dick came there while Henry lived there. I helped Henry Bowden move his stock from the old place. He took cattle and horses both, 16 or 17 head, that includes the colts, calves, and everything. Q. Do you remember one Sunday when Richard Bowden came down to the old home

place and took his father out over the farm, on Sunday while Henry was away? A. I cannot say whether it was Sunday, Monday, or Tuesday. Q. While Henry was away? A. Yes, sir. Q. Do you remember of Dick going down there and taking the old gentleman out over the farm in a buggy, when Henry was away from home? A. I can't say whether Henry was there or not. Q. When was that? Was it towards the latter part of the time that Henry stayed there? A. I think it was along in summer. Q. Went before Henry left? A. Yes, sir."

Cross-examination:

"I had a conversation with Henry Bowden with reference to being a witness, in the jury box yesterday. Nobody in there but just I and him. He says, 'John we was all friends together, and I would like to have you help me out, what you know about it if you can,' he said to help him out if I could, and he would see it was all right. Said, 'Help me out, and I will see it is all right with you.' I says, 'Henry, I don't care whether it makes you mad or makes Dick mad. I am going to tell the straight. I helped to drive the stock over, and have never thought about it afterwards until the sheriff subpoenaed me.' I didn't keep any memorandum of the exact number. Since that time, I have helped drive cattle several times. There is nothing special to impress the number on my mind, nothing unusual about it. Henry was paying me for this. The road he took had pretty nearly slipped my memory. I cannot have any clear recollection which way he went. I think Henry and I drove the cattle. Dad went along, my pa. Some of the stuff was hauled in a wagon."

Deposition of E. D. Ritchey introduced by plaintiffs. E. D. Ritchey, being duly sworn, deposed and says:

"Have lived in Clark county, Mo., 16 or 18 years. I was acquainted with Samuel Bowden, Sr., in his lifetime, for 37 to 40 years. Was in business at Kahoka part of the time, handling stock. I had a conversation with Samuel Bowden, Sr., deceased, in his lifetime as to the disposition of his property among his children. As to the dates of this conversation, it is hard for me to tell, but I would say 10 or 12 years ago. He and his wife took dinner with me when he lived in town. It might have been longer than that. He owned the farm where he was living, and two places north of that; there was three places at the time. My best recollection is there was 80 acres in the two north places, and I think more than that in the south place. He was making a will. I came down town with him and went back and took dinner and I witnessed the will, as I remember it. These two places north of, he told me he was paying them out for the two oldest sons, and the old place was a part of it to go to his younger son, and his younger son was to pay the sister some money, and I cannot recollect the exact amount. My recollection

was that it was \$1,000, but I would not be positive. Henry is the youngest son. I can't tell; my recollection is that it was here in this building; don't know who the other witness was. I didn't read the will, but I heard it read. Bill Robinson had something to do with it if I remember right. We came down from home after dinner, and the papers were drawn, and I was a witness to it. I don't remember of any other conversation that I had that I can recollect. During the time that I lived here and was in the stock business, I purchased stock from these farms. I did all the trade with the old gentleman. Still you might say with the family. I paid the old gentleman. I know that I have been on these farms, the old gentleman told me he was paying out, and that it was going to go to the oldest sons, but I can't remember whether I bought it or not."

This was all the evidence introduced on the trial of the cause.

Wm. L. Berkheimer and T. L. Montgomery, both of Kahoka, for appellants. John D. Smoot, of Kirksville, John A. Whiteside, of Kahoka, and W. T. Rutherford, of Jefferson City, for respondents.

WOODSON, P. J. (after stating the facts as above). I. From the foregoing statement of the case it is seen that the two primary questions presented by the pleadings and the evidence were: First, that Samuel Bowden, the testator, was at the time of making and publishing the will in controversy of unsound mind; and, second, that the will was not his free act and deed, but was the result of undue influence exerted over his mind by Richard and Samuel Bowden, Jr., sons of the testator, and the proponents of the will.

At the close of all the evidence in the case, the trial court, by a mandatory instruction, compelled the jury to find for the proponents as to the question of mental incapacity of the testator to make a will, and thereby eliminated, and properly so, in my opinion, that question from the case. That ruling, of course, carries with it all of the incidental or subsidiary questions thereto, and without further ado, we place it and them aside.

We now take up the other primary question presented, namely, the question of undue influence exerted over the mind of the testator by the proponents, and the questions that are incidental thereto.

Attending the first: Was the evidence introduced at the trial sufficient to support the verdict of the jury setting aside the will?

[1] In approaching this question it should be borne in mind that the burden of proof as to that issue rested upon the proponents. Our reason for so stating is that the proponents admit, and all the witnesses testified, that Richard Bowden, the principal or real proponent, admitted that he lived with

his father and mother for several years prior to their deaths; that he attended them constantly, and especially during their last illness; and that he had charge of and transacted all, or practically all, of the business of his father, the testator, during those years. Under that state of facts, which constitutes the elements of a confidential relation between the father and son, or, more properly speaking, is proof of that relationship from which the law draws the inference or presumption that the will was procured through the undue influence of the son and agent, and imposes upon the latter the burden of overcoming that prima facie case, and of proving that the will was executed by the testator as his own free act and deed. That doctrine has been so often and uniformly held by this and the various Courts of Appeals that we think that it would be a useless waste of time and space to cite authorities in support thereof.

[2] That being true, now let us examine the question, and see whether or not the proponents have so completely overcome the prima facie case made by the contestants, and have so completely established the fact that the will was made as the free act and will of the testator, that a court of justice *should say* as a matter of law that there is nothing whatever tangible left upon which the verdict of the jury and the judgment of the circuit court can stand; and for those reasons this court should as a matter of law so declare, and hold that there is no evidence preserved in this record upon which the verdict and judgment can rest. In approaching this question we should never lose sight of the fact that equality is equity, and that all of the proponents and contestants are of the same blood, flesh, and bone of the testator; that he is the father of them all, and brought them helpless into the world, that he primarily owed to each and all of them the same love, maintenance, and duty, and that all of them were equally entitled to his bounty. So strongly did this natural feeling of justice exist among the ancient Romans that they enacted laws absolutely preventing parents from disinheriting any of their children, and a most casual examination of the civil law will clearly show that the courts of that renowned empire scrupulously enforced those laws. That same love and natural feeling of justice and equity ordinarily exists in the heart and mind of every true man or woman toward his or her offspring, be he or she Roman or American; and, whenever the contrary appears, the just mind naturally asks for the reason thereof. If we should apply this natural relation and feeling to the parent and children in the case at bar, the question would naturally suggest itself: Did that love and relation exist between the testator and his children? That it did up to a short time prior to the date when Henry left the home

of his father there is no doubt; for all the children and neighbors so testified. All of them spoke in one accord upon that subject; that the father was very fond of Mrs. Wendling and Henry, also the wife of the latter; that he had manifested his affection for Richard and Samuel by purchasing and clearing up for each of them a farm of 80 acres of land, and by giving to them certain live stock, and repeatedly he told the children and neighbors that he intended to give to Henry 80 acres of the home place, and the remaining 30 thereof to his daughter, Mrs. Wendling, with a provision that Henry was to pay Mrs. Wendling a sum of money sufficient in amount to make her 30 acres equal in value to his 80 with the improvements thereon. This was his fixed and settled purpose for years, so testified to by all of the interested parties, as well as by practically all of their neighbors. That pleasant and equitable feeling and relation existed between the testator and all of his children up to about 1902, when an estranged feeling sprang up between Richard and Henry, and later, for a reason not fully explained, a coolness sprang up between Richard, upon the one part, and Mrs. Wendling and her husband on the other part. And almost simultaneously therewith, a feeling of coldness and dislike sprang up on the part of the testator toward his daughter, Mrs. Wendling, and his son Henry, and from that time on he frequently gave vent to that feeling when talking to numerous neighbors of his, and almost invariably when speaking unkindly to or about them, he would almost invariably state in connection therewith some of the unkind remarks, some of the witnesses testified, that Richard said to the testator of and concerning them.

Another strange coincident occurred about this same time, and that was that testator began to change his views as to who were the natural objects of his bounty, or rather the natural objects of his bounty were no longer entitled to an equal distribution of his property. First one will and then another was made by him, showing a change had come over his mind regarding an equal and equitable distribution of his estate among his children, and that in proportion as his dislikes grew toward Henry and Mrs. Wendling, his desire to make them equal distributees of his estate diminished, and a corresponding desire grew up in his mind in favor of making Richard practically his sole devisee. At any rate, when the testator reached the age of 80 odd years, confessedly infirm in health, and practically helpless on account of heart trouble, rheumatism, and defective eyesight, and with a corresponding decreased mental vigor and will power, he had become, under the care and control of Richard, to thoroughly dislike Henry, and none too well pleased with Mrs. Wendling and her husband; and it

seems to me that, in consequence thereof, he changed his fixed determination to make an equal distribution of his property among all his children, and at the same time made up his mind to give practically all of his estate to Richard. This was all in keeping with the testimony which tended to show that Richard threatened Henry, and said to him that he would be sorry for not letting him work on the home place with him; that Richard was ever complaining to the testator about the inattention Henry was giving the fences, stables, etc., that Henry could never have a private conversation with his father because Richard, his wife or daughter, was ever present when he was about, and that Henry had driven away some of his father's stock, etc.

The evidence is almost conclusive to the effect that the testator was a man of sound mind and of unusual will power, exceedingly hard to influence or change his purpose, when once he had made up his mind to do or not to do a particular thing; and the evidence is practically undisputed that it was the long and well-settled purpose of the testator to give to Henry and Mrs. Wendling the home place, as previously stated, in order to make them equal with Richard and Samuel Bowden, Jr., in the distribution of his estate. With those two facts practically undisputed, we have searched this record to ascertain what caused this man of strong mind and will, with a fixed purpose, to change his mind, to become unjust in the distribution of his estate, and to turn his love and affections for his son and daughter, Henry and Mrs. Wendling, especially the former, into hatred, and ill will, so strong as to practically accuse Henry, in his will, of having stolen several head of his horses, cattle, and hogs. I challenge any one to answer this question, from this record, without it is attributable to the facts, previously stated, namely, the covetous desire of Richard to unjustly acquire the birthrights of his brother and sister, and in order to accomplish that purpose he set about to oust Henry from his father's farm, and, after accomplishing that, he began to quietly and insiduously pour into the ears of the testator, who was over four score years of age, broken in health, and thoroughly dependent upon Richard for everything earthly, including his necessities, comforts, and business, the false and slanderous charges previously stated regarding Henry. I say false and slanderous because there was an abundance of evidence tending to so show, and the jury found that they were such. So viewing the case from this standpoint, in connection with the confidential relation that existed between the testator and Richard, and the further fact that the latter was the recipient of the bounty which would have gone to Henry and Mrs. Wendling, had not the testator changed his mind regarding the disposition of his estate, we must hold that there was not only a prima facie case made by the contestants, but

that the evidence was ample independent thereof to support the verdict of the jury.

The following cases are in harmony with the views before expressed, and in brief hold that a will contest is a suit at law, and that when there is substantial evidence introduced bearing upon the question of mental incapacity and undue influence, this court will not reverse the judgment because the jury found against the weight of the evidence: *State ex rel. v. Guinotte*, 156 Mo. 513, loc. cit. 520, 57 S. W. 281, 50 L. R. A. 787; *Turner v. Anderson*, 236 Mo. 523, loc. cit. 542 to 545, 139 S. W. 180; *Young v. Ridenbaugh*, 87 Mo. 574; *Appleby v. Brock*, 76 Mo. 314; *Harrison v. Lakenan*, 189 Mo. 581, loc. cit. 609, 88 S. W. 53; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Mowry v. Norman*, 204 Mo. 173, 103 S. W. 15; *Mowry v. Norman*, 223 Mo. 463, 122 S. W. 724; *Moore v. McNulty*, 164 Mo. 119, 64 S. W. 159; *Roberts v. Bartlett*, 190 Mo. 680, 89 S. W. 858; *Harris v. Hays*, 53 Mo. 90; *Sehr v. Lindemann*, 153 Mo. 276, loc. cit. 288, 54 S. W. 537; *McFaddin v. Carton*, 133 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289. We are, therefore, of the opinion that there was ample evidence to support the verdict, and that the trial court correctly refused the instruction telling the jury that there was no evidence tending to prove undue influence.

II. The second, third, fourth, and fifth errors complained of by counsel for appellants are as follows:

"Second. Neither courts nor jurors can make wills for men; they ought to be careful in unmaking them.

"Third. There is no substantial direct or circumstantial evidence in the record showing that Richard Bowden, by undue influence at the time it was written, procured the execution of the instrument read in evidence, and the court should have given the instruction marked 'A' asked by proponents, at the close of all the evidence, directing the jury to find for proponents.

"Fourth. There is no substantial evidence in the record authorizing the submission to the jury, on the part of contestants, that there were such confidential and fiduciary relationship existing between the testator and Richard Bowden that cast the burden of proof upon the latter to establish there was no undue influence exercised at the time of the execution of the will, and instruction marked 'B' should have been given as asked by proponents.

"Fifth. Instructions numbered 5 and 7, casting the burden of proof upon proponent, Richard Bowden, to show that there was no undue influence exerted upon the testator, to procure the will, should not have been given, because there was no evidence upon which to base them or either of them."

The disposition made of the first assignment of error in paragraph I of the opinion, against appellants, necessarily requires us to

also decide all of the foregoing assignments against them, for they involve the same principle of law, and are predicated upon the same evidence, and for that reason we will not consider them further.

[3] The sixth complaint is directed against instruction No. 2, given by the court, over the objections of appellant, on behalf of respondents. That instruction reads as follows: "Sixth. The jury are the sole judges of the credibility of the witnesses and of the weight and value to be given their testimony. In determining as to the credit you will give to a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the character of the witness, the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, the witness' relation to or feeling for or against the defendant, or the alleged injured party, the probability or improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to matters, respect in which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper. If upon a consideration of all the evidence, you conclude that any witness has sworn willfully false as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony." The specific objections lodged against this instruction are: First, that it is a comment upon the evidence; and, second, that there was no evidence introduced upon which to base that part of the instruction telling the jury, in weighing the evidence, they might consider the character of the witnesses, etc. Neither of those objections are tenable. As to the first; it is the usual instruction given as a general guide to the jury in weighing the evidence; and, as to the second, there was much evidence tending to contradict the testimony of Richard Bowden, which necessarily involved his character. Counsel for appellants have evidently confused this question with that of reputation. There is a broad distinction between character and reputation. The former is what a person really is, while the latter is what his neighbors think he is. The character of a witness may be established in two ways: First, by the testimony of witnesses who know it; and second, by his own testimony and conduct upon the witness stand. The character of a witness is rarely assailed in a direct manner, but is left for the jury to determine from the facts of the case which bespeak the same, while as to the reputation of a witness, it

can only be brought in question in a direct manner. For this reason it was perfectly proper for the court to have instructed the jury that they might take into consideration the character of the witness and his conduct upon the witness stand, in weighing his testimony, but such an instruction regarding reputation should never be given, except where it has been directly attacked by the evidence introduced. These views are fully supported by the following authorities: Newell on Slander and Libel, 890, says: "If, however, the plaintiff testifies in his own behalf, he can be cross-examined on all the details of his previous life which affect his character, but unless such details are material to the issue, the defendant must take the plaintiff's answer, and cannot call evidence to contradict it." Odgers on Libel and Slander, 642, is to the same effect.

[4] Evidence not relevant to the issue involved is often competent on collateral matters, such as the impeachment of a witness. The plaintiff had testified for himself. In doing so he was subject to all the rules as to cross-examination and impeachment of witnesses. The law in that respect is declared in 1 Greenleaf on Ev., § 461B. It is there held that testimony from other witnesses of particular instances of misconduct is an improper mode of discrediting a witness, because of the confusion of issues and the waste of time that would be involved, and because the witness cannot know what charges may be made, and cannot be prepared to expose their falsity. It is also there stated that for these reasons the impeaching party (except when proving a conviction of crime) is relegated exclusively to the cross-examination of the witness to be impeached, as the sole mode not open to the above objection of bringing out particular conduct affecting character, and the author then states that the trial court has discretion to set limits to such an examination, and to forbid it whenever it seems to be unnecessary or profitless or undesirable, and that such is the rule now in vogue in the majority of jurisdictions.

Wigmore on Ev., vol. 2, § 981, sustains the same rule, and says: "The reasons already examined (ante, section 979) appear plainly to have no effect in forbidding the extraction of the facts of misconduct from the witness himself upon cross-examination. There is no danger of confusion of issue because the matter stops with questions and answers. There is no danger of unfair surprise because the impeaching witness is not obliged to be ready with other witnesses to answer the extrinsic testimony of the opponent, for there is none to be answered, and because, so far as the witness himself is concerned, he may not unfairly be expected to be ready to know and to answer as to his own misdeeds." That doctrine was recognized by this court in *Goin v. City of Moberly*, 127 Mo. 116, 29 S. W. 985; *Muller v. St. Louis Hospital Ass'n*, 73 Mo. 242, affirming the opinion of 5 Mo. App. 402; and



Miller v. Journal, 246 Mo. 722, 152 S. W. 40. In this case the plaintiff was asked as to the allegations in a divorce petition filed by his wife. The petitions were then introduced to discredit him. Held error; but, as there was no objection, judgment would not be reversed on that ground.

In the case of Goins v. City of Moberly, 127 Mo. loc. cit. 118, 29 S. W. 985, the defendant tried to impeach a witness by asking him of his relations with his wife before their marriage. The court refused to compel witness to answer. "The court committed no abuse of its discretion in refusing to compel the witness to answer the question propounded." "If a witness is asked as to some shameful act for the purpose of discrediting him, those asking the questions are concluded by the answers. The court will not go into the collateral issue which would otherwise be presented. This is the rule, and we do not think it was violated." Muller v. St. Louis Hospital, 5 Mo. App. loc. cit. 402, affirmed in 73 Mo. 242; Goins v. City of Moberly, 127 Mo. 118, 29 S. W. 985.

"It is assigned as error that the circuit court erred in permitting the prosecuting attorney to ask \* \* \* a witness for the defendant on his cross-examination if he had not, in the month of May, 1905, committed a detestable crime. When the question was asked, the witness himself made no claim of privilege, and when the court overruled the defendant's objection, the witness promptly denied the charge. There can be no doubt that under the decisions of this court the state was concluded by the witness' answer, and indeed, no effort was made to show anything to the contrary. But the contention here is that, notwithstanding the witness promptly denied the disgraceful matter, and notwithstanding the state was concluded by the witness' answer, it is insisted that the very fact of permitting such a question to be asked was erroneous. \* \* \*" It is error to ask the witness if he had been charged with a crime, or whether an information or indictment had been preferred against him, but not if he committed the crime. "There is an obvious distinction between asking one if he had been charged with a crime and asking if he had committed the offense. The point presented by the defendant is not a new one. In Muller v. St. Louis Hospital, 5 Mo. App. loc. cit. 401, the rule as announced in Stephen's Digest on the Law of Evidence, 123, as follows: 'When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge, was adopted, \* \* \*

and on appeal to this court the opinion of the Court of Appeals was reaffirmed. 73 Mo. 242. This rule has been followed in the case of State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; State v. Miller, 100 Mo. 606, 13 S. W. 832, 1051; State v. Huck, 118 Mo. loc. cit. 99, 23 S. W. 1089; State v. Taylor, 118 Mo. loc. cit. 159, 24 S. W. 449, and cases there cited. The better doctrine would seem to be that while such questions may be asked a witness on cross-examination, it is a matter largely within the discretion of the court before whom the case is to be tried." State v. Long, 201 Mo. loc. cit. 674, 100 S. W. 587.

There is no merit in either of these objections.

III. The seventh error assigned by counsel for appellant is stated in these words: "The instructions given for contestants are inconsistent with and contradictory of instructions given for proponents." The instructions given for the appellants and respondents are quite lengthy, covering some 15 pages of printed matter; and for this reason they are not set out in the statement of the case. Counsel have not called our attention to any inconsistency existing between the instructions given on behalf of appellants and those given for respondents; and, after a careful reading of them, we have failed to discover any such inconsistency. We, therefore, rule this point against appellants.

IV. As previously stated, the assignment of errors consists of 16 grounds, but counsel for appellants have pressed for our consideration, in their brief and argument, only the 7 mentioned; and, finding no merit in any of them, we are of the opinion that the judgment of the circuit court should be affirmed; and it is so ordered. All concur.

STATE ex rel. JONES, Circuit Atty., v.  
HOWE SCALE CO. OF  
ILLINOIS.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

1. COURTS (§ 231\*)—JURISDICTION—SUPREME COURT—CONSTITUTIONAL QUESTION.

The fact, if so, that the penalty imposed by Rev. St. 1909, § 3040, upon foreign corporations doing business in the state without procuring a license, when collected, must go into the school fund under Const. art. 11, § 8, is immaterial to the corporation, so that any invalidity in the provision of section 3040, directing recovery to go to the revenue fund of the county, would not raise a constitutional question, so as to give the Supreme Court jurisdiction of an appeal in a proceeding to enforce the statutory penalty.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

2. COURTS (§ 231\*)—SUPREME COURTS—CONSTITUTIONAL QUESTION.

The question of who is authorized to maintain a proceeding under Rev. St. 1909, § 3040, to enforce the penalty against foreign corporations for doing business in the state without securing a license, is purely one of statutory con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

struction, so that the fact that that question is involved would not give the Supreme Court jurisdiction of an appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

### 3. COURTS (§ 231\*)—JURISDICTION — SUPREME COURTS—CONSTITUTIONAL QUESTION.

Where the sole question for determination in a proceeding to enforce the statutory penalty against a corporation for doing business without a license is whether the statute involved provided for the collection of the penalty by a civil action, and it was not claimed that the statute infringed the fourteenth amendment to the federal Constitution, there was no construction of the fourteenth amendment involved, so as to give the Supreme Court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

### 4. APPEAL AND ERROR (§ 170\*) — PRESENTATION BELOW—DENIAL OF JURY TRIAL.

Where defendant did not claim at trial, in a proceeding against it to enforce the penalty imposed by Rev. St. 1909, §§ 3039, 3040, upon foreign corporations for doing business in the state without first securing a license, that it was denied the right of trial by jury, it cannot first make that claim on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1035-1052, 1099, 1100; Dec. Dig. § 170.\*]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Proceeding by the State, at the relation of Seebert G. Jones, against the Howe Scale Company of Illinois. From a judgment for plaintiff, defendant appeals. Case transferred to the Court of Appeals.

McPheeters & Wood and Wm. R. Gilbert, all of St. Louis, for appellant. John T. Barker, Atty. Gen., and Wm. M. Fitch, Asst. Atty. Gen., for respondent.

BLAIR, C. This is a proceeding by the state of Missouri, at the relation of Seebert G. Jones, circuit attorney for the city of St. Louis, instituted in the circuit court of the city of St. Louis, against the Howe Scale Company of Illinois, a foreign corporation, for violating the statute (sections 3039 and 3040, R. S. 1909) prohibiting foreign corporations from doing business in this state without first securing a certificate or license authorizing them so to do. The judgment below was for plaintiff, and the minimum punishment (\$1,000) was assessed against appellant.

The principal questions argued in the briefs relate to the jurisdiction of the circuit court of the city of St. Louis, the capacity of the plaintiff to sue, and the right of plaintiff to proceed under section 3040, except by indictment or information. It is also contended: (1) That the portion of section 3040 which provides that all sums collected for violation of sections 3039 and 3040 "shall go to the revenue fund of the county in which the cause shall accrue" is invalid by reason of being in conflict with section 8 of article 11, which provides that the "clear

proceeds of all penalties, forfeitures, and fines" shall belong to the school fund; and (2) that, "under the fourteenth amendment to the United States Constitution, \* \* \* neither plaintiff nor relator has any right to maintain this action."

The amount involved is not sufficient to confer jurisdiction of this appeal upon this court, and it remains to determine whether the character of the questions raised is such as to do so. It is not contended that the invalidity of that provision in section 3040 which directs that recoveries under it shall go to the revenue fund of the county (in this case the city) invalidates the entire section and act, or any other part of it. It is conceded it does not do so.

[1] It is beyond dispute that, if the penalty fixed by section 3040 falls within the language of section 8 of article 11, it must, when collected, go into the school fund, but this is a matter with which appellant has nothing to do, as it pertains merely to the disposition of the money taken from it, after it has been collected, and is not at all a thing which now concerns appellant. *State v. Newell*, 140 Mo. 282, 41 S. W. 751; *State ex rel. v. Warner*, 197 Mo. loc. cit. 665, 94 S. W. 962.

[2] The question, Who is empowered to institute and maintain the proceeding authorized by section 3040? is purely one of statutory construction, and consequently is not of such character as to confer jurisdiction of this appeal upon this court. There is no debatable question involving the construction of the Constitution of this state raised in the record which can be considered on this appeal, and, as a result, no warrant for this court's assuming jurisdiction can be found in this branch of the case. It is said in the brief, however, that "the statutes of Missouri, as cited under previous points (sections 3039 and 3040, R. S. 1909), make no provision for prosecuting a foreign corporation in a civil action and authorize no such process of law"; and it is contended that therefore "this action violates the fourteenth amendment of the Constitution of the United States."

[3] It is not contended that a statute providing for the collection of a penalty by civil action or the application of a common-law civil remedy would infringe any provision of the fourteenth amendment, so that the sole contention of counsel in this connection is whether the statute involved in this proceeding makes such provision. Whether or not it does is a question of statutory construction and in no way involves a construction of the fourteenth amendment.

[4] The suggestion that appellant is by the statute or this action denied the right of trial by jury has no basis in either the statute or the record and was never raised in the trial court and cannot be relied upon now.

No other reason being suggested or appear-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing which authorizes the retention of jurisdiction of this appeal by this court, the case is transferred to the St. Louis Court of Appeals.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur.

BOOTHE et al. v. CHEEK et al.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

1. EVIDENCE (§ 208\*)—ADMISSIONS—PLEADINGS IN FORMER ACTION.

In a partition suit in which defendants claimed by adverse possession, a petition filed by defendants in a former partition suit, in which they alleged that they jointly owned one-half of the same lands and believed that the present plaintiffs owned the rest as heirs, was admissible in evidence on the issue of adverse possession, as an admission that defendants were not then holding adversely, though no estoppel was pleaded in the present action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.\*]

2. ADVERSE POSSESSION (§ 85\*)—SUFFICIENCY OF EVIDENCE.

Evidence in partition held not to show that defendants held the land adversely so as to prevent partition.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 498-503, 556, 657, 660, 663, 683-690; Dec. Dig. § 85.\*]

3. TENANCY IN COMMON (§ 15\*)—ADVERSE POSSESSION AGAINST COTENANTS.

The mere possession of land by a cotenant was not sufficient to compel his cotenants to bring ejectment before maintaining a suit in partition.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.\*]

4. FRAUDULENT CONVEYANCES (§ 176\*)—RIGHTS OF ORIGINAL PARTIES—RESULTING TRUST.

If land was purchased with another's money, under an arrangement with the latter, for the purpose of defrauding his creditors, equity would not raise a trust in the land in favor of the person who actually furnished the money.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 537-541; Dec. Dig. § 176.\*]

5. WILLS (§ 6\*)—ESTATES PASSING—TRUST INTEREST.

An equitable interest, such as a resulting trust, would pass under the beneficiary's will if its terms were sufficient to pass such interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 5-10; Dec. Dig. § 6.\*]

6. WILLS (§ 742\*)—ESTATE CONVEYED—INTEREST UNDER WILL.

A conveyance of an interest in land by the sole devisee thereof before probate of the will would take effect upon the subsequent probate, after contest, by relation back, as of the date of the deed; Rev. St. 1909, § 6313, impliedly recognizing the operative effect of unproved wills in case of actual notice.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1900-1906; Dec. Dig. § 742.\*]

7. TRUSTS (§ 147\*)—RIGHTS OF BENEFICIARY—CONVEYANCE OF INTEREST.

A cestui que trust entitled to a conveyance, may direct that it be made to another so as to pass his whole interest in the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. § 147.\*]

8. DEEDS (§ 120\*)—PROPERTY CONVEYED.

A grantee, though the grantor's heir, cannot take more than the grantor has to convey.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 375-393, 401, 407-412, 416-454; Dec. Dig. § 120.\*]

9. PLEADING (§ 8\*)—CONCLUSIONS OF LAW.

An allegation that a certain deed was ineffective is a conclusion of law and not an allegation of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Boone County; N. D. Thurmond, Judge.

Action by S. B. Boothe and others against Stephen M. Cheek and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

N. T. Gentry, of Columbia, for appellants. Gillespy & Conley, of Columbia, for respondents Boothe and others. Don C. Carter, of Sturgeon, for respondents Hulen and others.

BLAIR, C. This appeal is from a decree of the circuit court of Boone county partitioning 120 acres of land. John Hutts formerly owned the land, but in 1876 a judgment for \$1,628.65 against him was obtained by the administrators of John Kinkead and the land was sold under execution in April, 1877. Under an arrangement with Hutts, George T. Drain bought in the land for him with money which the weight of the evidence shows Hutts furnished. The price paid was less than half the judgment. There is evidence this plan was adopted by reason of other debts Hutts owed and to prevent the subjection of the property to their payment. Drain held the title thereafter, Hutts retaining possession and repaying to Drain the sums expended for taxes. Drain several times urged Hutts to take the title, saying it was not his (Drain's) land and he wanted it "fixed up." Hutts told him it was as he desired and said he wanted him to have it if he (Drain) outlived him. Hutts died in March, 1901, leaving a will he had executed in Virginia in 1862, whereby he devised all his property to his wife, Sophia Hutts, who survived him. The couple was childless. In November, 1901, Drain, at Mrs. Sophia Hutts' direction, executed a deed to the land in suit whereby he conveyed to her a one-half interest in the land in fee and a life estate in the remaining one-half interest, remainder in fee to the heirs of John Hutts. At this time Mrs. Hutts knew of the existence of the will mentioned, but one of the witnesses testifies she thought it was too old to be effective. In December, 1901, Sophia Hutts executed a deed whereby she conveyed to ap-

pellant Stephen M. Cheek, "for and in consideration of love and esteem and one dollar, \* \* \* her interest, which is one-half interest in the undivided tract or parcel of land described" as in the petition, the deed then reciting that Mrs. Hutts reserved "full control of said land and all of the profits thereof during her natural life." October 26, 1905, appellant Stephen M. Cheek, for a recited consideration of \$700, executed a deed whereby he conveyed to his sister and coappellant, Mary E. Cheek, "the following described tract or parcel of land, situated in the county of Boone, in the state of Missouri, to wit, all of my undivided interest in," describing the land in suit, and proceeding: "This deed is given subject to the lifetime dower now held by Sophia Hutts. This deed is also given with the understanding that in case of the marriage or death of the said Mary E. Cheek the land herein described is to go to Stephen M. Cheek." In October, 1906, Sophia Hutts died, and thereafter at some time prior to the February, 1907, term, of the Boone circuit court, the present appellants, Stephen M. and Mary E. Cheek, instituted a suit to partition the land here involved. The original petition in that suit was not offered in evidence in this, but on March 7, 1907, an amended petition was filed in which plaintiffs, the present appellants, alleged they owned jointly an undivided one-half of the lands now in suit, and that they were "informed and believed" that those made defendants, the heirs at law of John Hutts, owned the remaining half. In May, 1907, appellant Stephen M. Cheek caused the will of John Hutts to be probated, but it does not appear when, if at all, the partition suit, instituted by him and his sister, was dismissed.

In May, 1908, this suit was instituted. The plaintiffs and defendants constitute all the heirs at law of John Hutts and Sophia Hutts. June 1, 1908, these appellants filed in this suit an answer in which the will of John Hutts and the deeds executed by Drain and Sophia Hutts are set up; and it is averred, among other things, that "whatever right, title, or interest plaintiffs (the heirs of John Hutts) acquired under the aforesaid deed of the said George T. Drain inured to the benefit of these defendants (the appellants here) or to the heirs at law of the said Sophia Hutts," and prayed that certain other heirs of Sophia Hutts be brought in, which, it appears, was done. In April, 1909, a second amended petition was filed. The parties plaintiff are all the heirs of John Hutts except Geneva and Leroy Hulen, who are made defendants. Plaintiffs, excepting Mollie Hutts and Patrick Hutts, are the children, and defendants Geneva and Leroy Hulen are children of a deceased daughter of J. H. Boothe, who was a brother of Sophia Hutts and whose wife was a sister of John Hutts. Plaintiffs, excepting Patrick and Mollie

Hutts, and defendants Geneva and Leroy Hulen, are therefore heirs at law of both John Hutts and Sophia Hutts, his wife. The second amended petition proceeds somewhat upon the theory of the original answer filed in this case by appellants, alleges that by the deed from Drain, providing that at the death of Sophia Hutts an undivided one-half of the land in suit should go to the heirs of John Hutts, these heirs took nothing, but "whatever title they acquired inured to the benefit of Sophia Hutts, who was their equitable owner," etc., and prayed that the property be partitioned, one-half to appellants and one-half to the heirs at law of Sophia Hutts. Appellants' amended answer "admitted" that Sophia Hutts took the whole under Drain's deed, prayed that the deed from Sophia Hutts to Stephen M. Cheek be reformed by striking out the words "which is one-half interest," and averred that appellants were in the adverse possession of the land. The minor defendants answered, denying all allegations in the petition. A reply, denying all allegations of new matter in appellants' answer, was filed.

The weight of the evidence showed that Drain executed the deed to Sophia Hutts by her direction and by his deed in November, 1901, conveyed the land as she desired it conveyed. The evidence offered by appellants to show that Sophia Hutts intended by her deed of December, 1901, to attempt to convey to appellant Stephen M. Cheek the whole of the land in suit, has a very clear tendency to the contrary. It consisted of her declarations that she intended he should have "all she owned," "all she possessed," "her interest" in and "her part" of the land. The evidence on the issue of adverse possession will be adverted to in the course of the opinion. The trial court found appellants to be entitled to one half the land, that the heirs at law of John Hutts were entitled to the remaining half, and found that partition in kind could not be made, and ordered the land sold and distribution of the proceeds made accordingly. Stephen M. Cheek and his sister are the sole appellants.

Counsel contends: (1) That appellants were in such adverse possession as to preclude partition; (2) that the court erred in admitting in evidence the petition filed by appellants in the suit previously instituted by them; (3) that the deed from Sophia Hutts to Stephen M. Cheek should be either (a) construed to convey the whole of the land, or (b) reformed; and (4) that there was error in awarding to plaintiffs a larger share of the land than claimed in the petition.

[1] 1. (a) The petition filed by appellants in the suit they previously instituted was competent upon the issue of adverse possession as an admission by appellants that they were not holding adversely but were, in fact, recognizing the rights of their cotenants to

one-half the land. The authorities cited are to the effect that an estoppel to be available as an independent defense must be pleaded. That rule in no way affects the competency of the petition as evidence of the character of the claim appellants were making.

[2, 3] (b) The trial court expressly found against appellants on the issue of adverse possession. Appellant Stephen M. Cheek lived from childhood with John and Sophia Hutts until they died, and after the death of the latter remained in possession of the land. His mere possession, however, was insufficient to force his cotenants to proceed to judgment in ejectment before they could maintain a suit in partition. Neither appellant testified to claiming the land adversely, though Stephen M. Cheek did testify he paid the taxes and leased the land and collected the rents. One of the plaintiffs testified that plaintiffs could not get possession and that Stephen M. Cheek had had possession since the death of Sophia Hutts, but also testified that formerly Stephen M. did not claim the land, but that it "seemed" he was claiming it, at the time of the trial. Considered together with the petition filed in the suit appellants instituted and the original answer filed in this case, in neither of which any claim is made except in accordance with their view of the record title, the former expressly setting up the interests of the heirs at law of John Hutts and the latter conditionally recognizing interests in the heirs at law of Sophia Hutts, there is no foundation for the claim that appellants were in such adverse possession as would preclude the institution by plaintiffs of partition proceedings. *Collier v. Gault*, 234 Mo. loc. cit. 465, 137 S. W. 884; *Coberly v. Coberly*, 189 Mo. loc. cit. 16, 17, 87 S. W. 957; *Chapman v. Kullman*, 191 Mo. loc. cit. 247, 89 S. W. 924; *Rozter v. Griffith*, 31 Mo. loc. cit. 174; *Shepherd v. Fisher*, 206 Mo. loc. cit. 249, 103 S. W. 989.

2. The evidence clearly shows that the deed Drain executed was drawn and executed at the instance of and in conformity to directions given by Sophia Hutts.

[4] (a) The trial court expressly held that Drain held the fee-simple title. This finding was doubtless based upon the court's conviction of the truth of the evidence, offered by appellants, tending to show that Drain bought in the land in 1877 under an arrangement with Hutts, the purpose of which was to defraud the creditors of the latter. If that evidence is true, then equity would raise no enforceable trust in the property, and, for the purposes of this case, neither Hutts nor his general devisee, Sophia Hutts, had, before the conveyance of Drain, any interest in the land, and the finding of the court was right. No complaint that the evidence is insufficient to support that finding is made in the briefs. If Drain had the fee-simple title, then his conveyance in 1901 vested a half interest, in remainder, in the

heirs of John Hutts, and the decree gives appellants all to which they have any claim.

(b) If it be conceded, however, that the allegations of the petition were of a character precluding a finding on the ground of fraud against the validity of the trust, there is yet a reason which discloses that appellants have no interest in the land save that the decree gives them.

[5, 6] Whatever equitable interest John Hutts had passed by his will to Sophia Hutts. She became the beneficiary in the trust, if trust there was. Had John Hutts had the full title, then a conveyance by Sophia Hutts delivered prior to the probate of the will under which she was sole devisee would not have been fully effectual upon delivery, but, upon the subsequent probating of the will, it would have taken effect by relation as of its date. It would have conveyed an equitable interest, subject to be defeated by a final rejection of the will. This is the clear import of those decisions in this state to the effect that the institution of contest proceedings restores the status, so far as the operation of the will is concerned, existing before the will is offered for probate, and that a conveyance by a devisee during contest of a will carries his interest subject to the judgment in the contest proceedings (*McIlwraith v. Hollander et al.*, 73 Mo. 105, 39 Am. Rep. 484; *Hughes v. Burriess*, 85 Mo. 660; *Hines v. Hines*, 243 Mo. loc. cit. 496, 147 S. W. 774; *Robertson v. Brown*, 187 Mo. loc. cit. 458 et seq., 86 S. W. 187, 106 Am. St. Rep. 485), and the principle is in full harmony with many other decisions and authorities (*Richards v. Pierce*, 44 Mich. loc. cit. 446, 7 N. W. 54, and cases cited; *Scott et al., Ex'rs, v. West et al.*, 63 Wis. loc. cit. 552, 24 N. W. 161, 25 N. W. 18; *Will of Dardis*, 135 Wis. loc. cit. 461, 115 N. W. 832, 23 L. R. A. [N. S.] 783, 128 Am. St. Rep. 1033, 15 Ann. Cas. 740; *Hanley v. Kraftczyk*, 119 Wis. loc. cit. 356, 357, 96 N. W. 820; *Flood v. Kerwin*, 113 Wis. loc. cit. 680, 89 N. W. 845; *Walton v. Ambler*, 29 Neb. loc. cit. 643, 45 N. W. 931; *Mackey v. Mackey*, 71 N. J. Eq. 688, 63 Atl. 984; *Miller v. Douglass*, 30 Ohio Cir. Ct. R. loc. cit. 668; *Ives v. Allyn*, 13 Vt. loc. cit. 630; *Ex parte Fuller*, 2 Story, 327, Fed. Cas. No. 5,147).

There is nothing in our statute expressly postponing the vesting (sufficiently to support a conveyance) of devises until probate of the will, and one section (6313, R. S. 1909) by implication recognizes the operative effect, in case of actual notice, of unproved wills. If this is not true, the provision in that section relating to wills unproved, but recorded prior to 1887, imparting notice after the lapse of a year, is meaningless. An intimation of like effect is found in *Keith v. Keith*, 97 Mo. loc. cit. 230, 10 S. W. 597.

Sophia Hutts, at the time of the execution, at her direction, of the deed by Drain, had full knowledge of the existence of her husband's will and of its provisions, and was ad-

vised by the probate judge, through the interposition of appellant Stephen M. Cheek, according to his testimony, that the will could be "renewed," but that some expense would be necessary to procure the evidence of the witnesses who lived in Virginia. She purposely, therefore, withheld the will from probate; but there is no reason to doubt her knowledge of its validity in view of Stephen M. Cheek's testimony, despite the testimony of another witness that he heard her "say something about it," that it was too old.

By the will Sophia Hutts became the sole beneficiary in the trust, if trust there was, before the probate of the will. A conveyance by her would have passed her equitable interest, subject to be defeated by the final rejection of the will. She could not have compelled, or conveyed to another the right to compel, Drain to convey the legal title before the will was probated; but it can hardly be doubted that either she or her grantee could have accepted a voluntary conveyance from Drain which upon the probate of the will would have taken effect by relation as of its date. That difficulties might, in such a situation, arise upon the rejection of the will, cannot affect the argument as to the effect of the conveyance if made.

[7] A cestui que trust, of full age and under no disability, entitled to a conveyance, may direct it to be made to another, and the whole title will thereby pass (*Matthews v. Thompson*, 186 Mass. loc. cit. 18, 19, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. Rep. 550; *Rogers v. Tyley*, 144 Ill. loc. cit. 686, 32 N. E. 393; *Altschul v. Casey*, 45 Or. loc. cit. 188, 189, 76 Pac. 1083; *Cotton v. Ward*, 3 T. B. Mon. [Ky.] loc. cit. 311, 312; *Witter v. McCarthy Co.*, 43 Pac. 969<sup>1</sup>), and there is no reason for saying that Sophia Hutts, who, upon the assumption that a trust existed, could have herself conveyed, might not accomplish directly her purpose by directing a conveyance by the trustee, nor for saying his voluntary conveyance executed by her direction would not draw to itself the equity she might have conditionally conveyed at that time and be as effectual to pass the title, subject to be defeated by the rejection of the will, as her own conveyance would have been or, after the will was probated, as conclusive as if the will had first been probated and then Drain had conveyed at Mrs. Hutts' direction.

With full knowledge, of full age, and under no legal disability, Sophia Hutts saw fit to divide the remainder in the land equally between appellants (her kinsmen) and the heirs at law of her husband. That she knew the will was valid is evidenced by the fact that she had Drain to convey to her a greater interest than she could have claimed in case of her husband's intestacy. She intend-

ed to divide the property as the decree finds she did divide it, dealt with it on the theory she had so divided it, and died doubtless in the belief that one-half of the land her husband had acquired would go to his kinsmen and one-half to her kinsmen, the appellants here.

[8] Of the disposition she made of the property her other heirs at law cannot complain, and her grantees, though also heirs, cannot take more than she had to convey. Her own intent to convey to Stephen M. Cheek but one-half of the land is clear from the deed to him and the declarations proved.

Whether there was or was not a trust equity will recognize, the trial court's decree properly describes and defines the interests of the parties.

[9] 3. It is insisted, however, that the court erred in awarding certain of plaintiffs greater interests than the petition alleges they own. The petition sets out the facts on the theory of a valid trust of which Drain is alleged to be the trustee. The conclusion of law that Drain's deed was ineffective is not an allegation of fact nor an allegation the trial court was obliged to notice. It is a mere statement of a conclusion of law. Upon the facts, the trial court performed its duty, i. e., determined the interests of the respective parties and decreed accordingly.

The judgment is affirmed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur; LAMM, J., in result.

#### CITY OF RICHMOND v. CREEL.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. LICENSES (§ 6\*)—POWER OF STATE—OCCUPATIONS.

The state has power to tax all trades, professions, and occupations, and to delegate such power to municipalities.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.\*]

#### 2. LICENSES (§ 7\*)—POWER OF MUNICIPALITY—OCCUPATION.

When the power to impose a license tax upon insurance companies has been delegated to municipalities, it may be exercised by them without any infringement of Const. art. 10, § 3, providing that taxes shall be uniform upon the same class of subjects within the territory limits of the authority levying the tax.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

#### 3. COURTS (§ 231\*)—SUPREME COURT—JURISDICTION—CONSTITUTIONAL QUESTION.

Since the validity of Rev. St. 1909, § 9253, delegating to municipalities the power to impose a license tax upon insurance companies, has been settled, a controversy involving such power cannot confer jurisdiction of an appeal

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 111 Cal. xvii.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon the Supreme Court on the ground that it involves a constitutional question.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

**4. COURTS (§ 231\*)—SUPREME COURT—JURISDICTION—REVENUE QUESTIONS.**

Under Rev. St. 1909, § 9253, purporting to authorize cities of the third class to impose a license tax upon foreign insurance companies, no construction of a revenue law is involved to give the Supreme Court jurisdiction of an appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 491, 644, 646-648, 650, 652-659, 661; Dec. Dig. § 231.\*]

Appeal from Circuit Court, Ray County; Francis H. Trimble, Judge.

E. B. Creel appeals from a conviction of violation of an ordinance of the City of Richmond imposing a penalty upon any agent of an insurance company which has not paid a license tax. Cause transferred to the Kansas City Court of Appeals.

Nathan Frank and Richard A. Jones, both of St. Louis, and J. L. Farris, Jr., of Richmond, for appellant. M. M. Milligan, of Richmond, for respondent.

**BLAIR, C.** In the city of Richmond, a city of the third class, there exists an ordinance imposing a license tax upon insurance companies and providing that any person acting as agent for any company which has not complied with its provisions shall be subject to a prescribed penalty. The Metropolitan Life Insurance Company, a corporation organized under the laws of New York, failed to comply with this ordinance, and appellant was found guilty of acting as its agent within the city, and has appealed.

The company had previously paid the tax levied upon it under section 7099, R. S. 1909.

The amount of the fine assessed against appellant is \$5, and this court has no jurisdiction of this appeal unless such jurisdiction is conferred by the character of the questions raised.

On the trial it was contended: (1) That the ordinance in question is violative of section 3, art. 10, of the Constitution, which provides that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax"; and (2) that section 9253, R. S. 1909, in so far as it purports to authorize cities of the third class to impose a license tax upon foreign insurance companies, has been repealed, by implication, by the amendment of 1895 to article 8, c. 61, R. S. 1909.

[1, 2] That the state has power to tax all trades, professions, and occupations and to delegate this power to municipalities has been the settled law of Missouri for 60 years (St. Louis v. McCann, 157 Mo. loc. cit. 307, 59 S. W. 1016), and that, when the power to impose a license tax upon insurance companies has been delegated to municipalities,

it may be exercised by them without an infringement of the constitutional provision now invoked, was expressly held by this court in *City of St. Joseph v. Ernst*, 95 Mo. 360, 8 S. W. 558. The identical question attempted to be presented here was considered and decided in that case, and the fact that the amended statute substituted for the 1 per cent. levy upon net premiums, by the state and the separate levies thereupon by the counties, cities, and school districts a single levy of 2 per cent. on net premiums for state, county, city, and school purposes, adds nothing to the question decided in the case last cited, however important it may (or may not) be upon the question concerning the repeal of the provision in section 9253 relating to license taxes upon insurance companies.

[3] The constitutional question raised having been settled more than a generation before this controversy arose, it cannot confer jurisdiction of this appeal upon this court. *State v. Campbell*, 214 Mo. 363, 113 S. W. 1081, and cases cited; *Bank v. Glass Co.*, 243 Mo. 409, 147 S. W. 1030, and cases cited.

[4] While counsel do not contend that the construction of the revenue law is involved, and jurisdiction thereby conferred, there is no impropriety in adding that it has been previously held (*City of St. Joseph v. Metropolitan Life Insurance Co.*, 183 Mo. 1, 81 S. W. 1080) that no question of such construction arises in determining whether the statutes confer upon a city the power to impose a license tax upon insurance companies.

The cause is transferred to the Kansas City Court of Appeals.

**BROWN, C.**, concurs.

**PER CURIAM.** The foregoing opinion of **BLAIR, C.**, is adopted as the opinion of the court. All the Judges concur.

**STATE v. WELLMAN.**

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

**1. SODOMY (§ 5\*)—STATUTORY OFFENSES.**

Rev. St. 1909, § 4726, punishing every person committing the crime against nature with the sexual organs or with the mouth, enlarges the common-law offense, and the acts by which the crime is committed must be designated at least in a general way.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 6; Dec. Dig. § 5.\*]

**2. SODOMY (§ 5\*)—INFORMATION—SUFFICIENCY.**

An information alleging that accused committed the crime against nature by having sexual intercourse with prosecutrix with his mouth does not charge the crime as defined by Rev. St. 1909, § 4726, notwithstanding the statute of jeoffails (section 5115).

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 6; Dec. Dig. § 5.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. CRIMINAL LAW (§§ 1054, 1059\*)—EVIDENCE—OBJECTIONS.

The admission of improper testimony is not reviewable where there was no objection until after its admission, or where accused merely objected without specifying any reason for the exclusion, for to secure the exclusion of evidence there must be specific timely objection pointing out the reasons.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2662-2664, 2671; Dec. Dig. §§ 1054, 1059.\*]

### 4. CRIMINAL LAW (§ 372\*)—EVIDENCE—ADMISSIBILITY.

On a trial for sodomy the admission of evidence that accused had the reputation of committing such crime is erroneous, as practically amounting to trying accused for crimes not designated in the information, in violation of Const. art. 2, § 22.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.\*]

### 5. CRIMINAL LAW (§ 372\*)—EVIDENCE—ADMISSIBILITY.

The attempt by the state to prove by rumor or common report that accused had committed the crime on a woman alive at the trial but not called as a witness, and had been guilty of adultery, was improper on the same ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.\*]

### 6. CRIMINAL LAW (§ 1064\*)—QUESTIONS REVIEWABLE—MOTION FOR NEW TRIAL.

The point that the court erred in failing to charge that prosecutrix must be corroborated must be ruled against accused where the point is not specifically assigned in the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.\*]

### 7. CRIMINAL LAW (§ 1171\*)—IMPROPER ARGUMENT OF COUNSEL.

The closing argument of the prosecuting attorney, to the effect that accused had lived in adultery with his wife before his marriage to her, and that he lived with a harlot at the time of the commission of the crime, is ground for reversal, in the absence of any evidence justifying the argument, where the court merely mildly criticized the prosecuting attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

### 8. CRIMINAL LAW (§ 1171\*)—IMPROPER ARGUMENT OF COUNSEL.

The closing argument of the prosecuting attorney, wherein he denounced a witness for accused as a prostitute and a woman unworthy of belief, was prejudicial where there was no evidence justifying the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

### 9. CRIMINAL LAW (§ 1037\*)—IMPROPER REMARKS OF PROSECUTING ATTORNEY—REVIEW—OBJECTIONS.

The court on appeal may disregard improper remarks of the prosecuting attorney in his closing argument where the remarks were not objected to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.\*]

### 10. CRIMINAL LAW (§ 722½\*)—ARGUMENT OF PROSECUTING ATTORNEY.

Proof that accused on trial for sodomy had been convicted of adultery does not justify the prosecuting attorney in referring in his re-

marks to the conviction of adultery as evidence of his guilt of the crime charged; but the argument must be confined to an effort to discredit the testimony of accused where he testified in his own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1675; Dec. Dig. § 722½.\*]

### 11. CRIMINAL LAW (§ 376\*)—IMPEACHMENT.

Evidence of the bad character of accused is admissible solely to impeach him as a witness, and, where he does not testify or otherwise place his reputation in issue, the evidence is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836-839, 841, 843; Dec. Dig. § 376.\*]

Appeal from Criminal Court, Jackson County; Ralph S. Latshaw, Judge.

Joseph Wellman was convicted of sodomy, and appeals. Reversed and remanded for new trial.

Convicted of the crime against nature as defined by the Laws of 1911, p. 198, defendant appeals from a judgment of the criminal court of Jackson county sentencing him to a term of three years in the penitentiary. The following is a summary of the evidence:

During the months of December, 1912, and January, 1913, the defendant kept a rooming house in Kansas City, Mo., which house he had operated for five years. A few doors from defendant's rooming house was a jewelry store owned by one Louie Shaffer, in which store defendant was employed as an optician. In the same store was employed one Belle Shaffer, a 16 year old sister of Louie Shaffer. Belle Shaffer testified that during the absence of her brother from the store defendant made love to her, kissed her, made her some small presents, and asked her to marry him; that he told her that her brother was going to fail in business, and he would take care of her; that defendant requested her to go with him to a room on Union avenue in Kansas City, where he would tell her an important secret about her brother's jewelry business, and that, having gained her confidence, she went with him as requested; that when they entered the room defendant locked the door, and solicited her to have sexual intercourse with him; that she refused, and that he then threw her down on a bed, put his head under her clothes, and inserted his mouth into her private parts, keeping her in that position for about an hour; that at his request she met him outside the store almost every other day for a period of about two weeks, when they would go to his room, and defendant would repeat this crime against nature; that defendant warned her that they would both be prosecuted if she told any one what he had done.

In the month of July, 1913, Belle Shaffer informed her mother and brother Louie of defendant's crime, and her brother took her to the prosecuting attorney's office and procured a warrant for defendant. There was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



evidence that Belle Shaffer was afflicted with melancholy about five or six months after the commission of the alleged crime upon her by defendant, and that she acted as though she was losing her mind; but this evidence was withdrawn from the jury by instruction. There is no evidence that defendant and Belle Shaffer were ever seen together outside the jewelry store, except on one occasion when defendant accompanied her and his wife to a store and purchased each of them a coat. It does not clearly appear who paid for the coats. Belle Shaffer further testified that she did not know that defendant was married; that in speaking to her about his wife he referred to his wife as his housekeeper.

Defendant, testifying in his own behalf, denied the crime, and denied that he ever attempted to wrong Belle Shaffer in any manner. He stated that Belle Shaffer knew that he was a married man when she was working in her brother's store; that she sent his wife a box of candy in which there was a card directed to her as Mrs. Wellman. He also introduced a certificate showing that he was duly married in Clay county, Mo., in August, 1911, to Mrs. Mary Hull, the woman with whom he was living in January, 1913. Defendant also denied that he had committed adultery with his wife before they were married; but he admitted that she was a partner with him in his rooming house before their marriage. He also testified that he took her to Hot Springs, Ark., when she was sick before they were married, and stated that they stopped at different hotels, and he sustained no improper relations with her.

Defendant also introduced one Ida Sours, a chambermaid who worked in his rooming house. She testified that immediately after defendant's arrest Louie Shaffer came to see her and told her, in substance, that, if defendant would "come across" with a few hundred dollars, the case could be settled out of court, otherwise defendant would have to stay in jail; that he (Shaffer) was broke, and needed some money. It appears by other evidence that Louie Shaffer did go into bankruptcy in the month of January, 1913. Two witnesses testified that defendant's general reputation for morality was bad; two others testified that it was good. In rebuttal Louie Shaffer admitted that he called on Ida Sours, but denied that he told her that the case could be settled for a money consideration. He stated that he called on Ida Sours to see if he could secure her evidence as a witness for the state, and to learn from her the whereabouts of another witness. Belle Shaffer was also recalled and denied sending the box of candy to defendant's wife. The prosecuting attorney offered to prove by the records in the juvenile court of Kansas City that prior to her marriage to defendant Mrs. Wellman's child was taken from her because she was living in adultery with defendant; but that evidence was rejected by the court.

H. A. Owen and F. W. Paschal, both of St. Joseph, and C. B. Leavel, of Kansas City, for appellant. John T. Barker, Atty. Gen., and Ernest A. Green, Asst. Atty. Gen., for the State.

BROWN, P. J. (after stating the facts as above). *I. Information.* For reversal defendant asserts that (1) the information does not charge the offense of which he was convicted; (2) that improper evidence was admitted; (3) that the court erred in its instructions to the jury; and (4) that the assistant prosecuting attorney made improper and prejudicial remarks to and in the hearing of the jury.

[1] We shall first consider the error of the trial court in refusing to arrest the judgment on account of the alleged insufficiency of the information. The law which defendant is charged with violating is section 4726, R. S. 1909, which, as amended by the Laws of 1911, reads as follows: "Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years."

The information, omitting caption, signature, and verification, is as follows: "Now comes Floyd E. Jacobs, first assistant prosecuting attorney for the state of Missouri, in and for the body of the county of Jackson, and upon his oath informs the court that Joseph Wellman, whose Christian name in full is unknown to said first assistant prosecuting attorney late of the county aforesaid, on the \_\_\_\_\_ day of January, 1912, at the county of Jackson, state of Missouri, did then and there unlawfully and feloniously commit the detestable and abominable crime against nature by then and there having sexual intercourse with one Belle Shaffer with his mouth, against the peace and dignity of the state."

Do the acts recited in the foregoing information constitute the detestable and abominable crime against nature? Some courts have said that this crime is so well understood that an indictment need not describe the acts by which it is committed. In *Honselman v. People*, 168 Ill. 172, loc. cit. 175, 48 N. E. 304, 305, it was said: "The Legislature has not seen fit to define it further than by the general term, and the records of the courts need not be defiled with the details of different acts which may go to constitute it." The quoted language may be sound reasoning as applied to the crime as it existed at common law; but the General Assembly of Missouri added a material amendment to the law in 1911, extending the crime so that it may be committed with the mouth. It has been held in several jurisdictions that this latter method of committing the detestable crime against nature is not embraced in the general term

of "crime against nature." *Harvey v. State*, 55 Tex. Cr. R. 199, 115 S. W. 1193; and *People v. Boyle*, 116 Cal. 658, 48 Pac. 800. It is apparent that the General Assembly intended to expand the meaning of the words "detestable and abominable crime against nature" by the amendment of 1911, *supra*, and we are convinced that under this new statute it is necessary to designate, at least in a general way, the acts by which the crime is committed. It is to be regretted that the public records of our state should be contaminated with the details of such loathsome crimes; but it is difficult for the writer to bring himself to understand how section 22, art. 2, Constitution of Missouri, prescribing that the accused may demand "the nature and cause of the accusation against him," can be materially modified or suspended. The criminal acts which a defendant is called upon to meet must be described with reasonable certainty. *State v. Murphy*, 141 Mo. 267, 42 S. W. 936.

[2] The indictment in this case charges that defendant committed the detestable and abominable crime against nature "*by then and there having sexual intercourse with one Belle Shaffer with his mouth.*" The words "sexual intercourse" have a well-defined meaning, both in law and common usage. They have been judicially defined to mean "the actual contact of the sexual organs of a man and woman, and the actual penetration into the body of the latter." 35 Cyc. p. 1450; and *State v. Frazier*, 54 Kan. loc. cit. 725, 39 Pac. 819. We have searched in vain for other definitions of the words "sexual intercourse," and, while we think they might reasonably be expanded to cover a lustful contact between the sexual organs of mankind and the sexual organs of beasts, accompanied by penetration, they cannot be held to embrace a contact between the sexual organs of one person and the nonsexual organs of another.

An examination of the information shows that it charges the defendant with committing the crime against nature by an ordinary act of coition in the natural way, and of course that part of the information is grossly repugnant to the main charge. We are aware that under our criminal statute of jeofails (section 5115, R. S. 1909) repugnant allegations in indictments may be rejected as surplusage; but the difficulty in rejecting the repugnant clause in this information, to wit, "by then and there having sexual intercourse with one Belle Shaffer," is that the information would be left without the name or any description of the party upon whom the alleged crime was committed, so that the statute of jeofails cannot aid the state in sustaining this conviction.

The information in this case presents a similar situation to the one which arose in the case of *State v. Leonard*, 171 Mo. 622, 71 S. W. 1017, 94 Am. St. Rep. 798. In the

*Leonard Case* an attempt was made to charge the defendant with having in his possession a forged railroad ticket. The indictment showed on its face that the railroad ticket found in the possession of Leonard was not such a forged instrument as came within the purview of the statute, and it was held that the recital in the indictment of facts showing that a forgery had not been committed could not be rejected as surplusage. In that case the court, speaking through Judge Fox, said: "If the state admits in her pleading a state of facts which shows that the defendant cannot be convicted of the offense charged, then and in that case he ought not to be put upon trial for such alleged offense. As an example, if the counsel representing the state should, when the case is called for trial, announce in open court that some material fact necessary to the conviction of the defendant does not in fact exist, and he would be unable to prove it, would the court, upon this admission, put the defendant upon his trial, or would it suggest the dismissal of the case? \* \* \* While it was discretionary with the court as to sustaining the motion to quash, there is one of three things it should have done. It should have, at the close of the state's case, instructed the jury that, under the indictment and evidence in this cause, they should find defendant not guilty, or this instruction should have been given at the close of the entire case, or it should have sustained the motion in arrest of judgment."

As this case must be remanded for a new trial, the information should be amended so as to conform to the evidence of the prosecutrix by specifically charging that defendant unlawfully and feloniously committed the detestable and abominable crime against nature upon one Belle Shaffer, a female human being, by then and there inserting his mouth into the sexual organs and private parts of her, the said Belle Shaffer, against, etc.

[3] II. *Objection to Evidence.* The appellant's attorneys strenuously insist that the court erred in admitting improper evidence. There was some improper evidence admitted; but the record shows that much of this improper testimony was only objected to after it was admitted, and as to some of it the defendant merely objected to its introduction without designating any reason why it should not be admitted. We have often announced the rule that the only proper way to secure the exclusion of evidence is by specific timely objection, pointing out the reasons why it should not be received. *State v. Pyles*, 206 Mo. loc. cit. 632, 105 S. W. 613; and *State v. Crone*, 209 Mo. 316, loc. cit. 330, 108 S. W. 555.

[4] III. *Other Crimes—Proof of by Rumor.* As the case must be remanded for a new trial, we will call attention to one erroneous view expressed by the trial court

in regard to the evidence of Jacob Fromson. Fromson was asked if defendant had the reputation of committing the class of crimes for which he was then on trial. The trial court ruled that this character of evidence was admissible, and announced that the Supreme Court had so construed the law. The cases of *State v. Beckner*, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535; *State v. Pollard*, 174 Mo. 607, 74 S. W. 969, and *State v. Shields*, 13 Mo. 236, 53 Am. Dec. 147, are cited by the Attorney General as tending to sustain the views of the trial judge above noted. Those cases merely go to the extent of holding that the bad reputation of defendant for morality and chastity may be shown to discredit his testimony, notwithstanding he be on trial for violating some law which affects the public morals. Those cases also sustain the well-known proposition that evidence regarding the reputation of defendant must be confined to his general reputation for morality, and cannot single out his propensity or reputation for violating some particular law.

To sustain the view announced by the honorable trial judge would lead to the admission of evidence of independent crimes not connected with the one for which a defendant is on trial and not tending to establish motive, and would, in effect, amount to trying him for crimes not designated in the indictment. This would be a plain violation of section 22, art. 2, of the Constitution. *State v. Spray*, 174 Mo. 569, 74 S. W. 846; and *State v. Teeter*, 239 Mo. 475, 144 S. W. 445. It is contended that the Kansas City Court of Appeals, in the case of *State v. Oliphant*, 128 Mo. App. 252, 107 S. W. 32, announced a different rule; but, in so far as the doctrine of that case is in conflict with this decision, it is overruled.

[5] There was throughout the trial a labored effort by the assistant prosecuting attorney to prove by rumor or common report that defendant had committed the crime against nature upon a woman by the name of Fromson, who was alive at the time of the trial but not called as a witness. There was also an effort to prove by the same class of testimony that defendant had been guilty of the specific crime of adultery. All this was improper. Such evidence, in addition to being an effort to prove independent crimes not in any way connected with the offense for which defendant was on trial, was a plain violation of that part of the Constitution which ordains that a defendant has the right "to meet the witnesses against him face to face." No one could meet a mere rumor face to face. The only exception to this rule seems to be in the case of dying declarations.

These observations are made to point the way for the retrial of this case in accordance with the Constitution and laws of the state.

[6] IV. *Corroboration of Prosecutrix.* In his brief appellant contends that the trial court erred in failing to instruct the jury that the prosecutrix must be corroborated. This upon the theory that she consented to the commission upon her of the crime against nature, if such crime was committed. This point is ruled against appellant because not specifically assigned in his motion for new trial. *State v. Conway*, 241 Mo. 271, 145 S. W. 441; *State v. Dockery*, 243 Mo. loc. cit. 599, 147 S. W. 976; *State v. Chissell*, 245 Mo. loc. cit. 554, 555, 150 S. W. 1066; and *State v. Horton*, 247 Mo. loc. cit. 663, 153 S. W. 1051.

[7] V. *Improper Conduct of Prosecutor.* This brings us to the alleged improper conduct of the assistant prosecuting attorney. In his argument to the jury the following occurred:

"Is he the kind of a man that would do it? Did he come in here with a clean record, or does he come in here blackened, as he should be? A man who lived in adultery on Union avenue.

"Mr. Gordon: We object to that. There is no evidence of that.

"Mr. Curtin: I say that Dr. Mathis, the juvenile officer, told you what kind of a man he was. I say Fromson told you what kind of a man he was. What did Fromson base his opinion upon? The confession of his wife, who was then the daughter of this man.

"Mr. Gordon: We object to the statement that the defendant and his wife lived in adultery. There is no evidence to that effect. Save our exception to the failure of the court to rule upon it.

"Mr. Curtin (continuing): Let us see if this man got this girl's confidence. She says she was working in her brother's store. This defendant was working there with her. He made love to her, and told her he would marry her, although at that time he was living with a harlot—

"Mr. Owen: We object to that. There is no testimony—

"Mr. Curtin: I say there is, and I object to you butting in. I say the record of the juvenile court shows that this child was taken away from him because he was living with this woman in adultery—

"The Court: His general reputation was admitted; but the other was withdrawn."

The record does not show that defendant lived in adultery with his wife, whose name was Mary Hull, before they were married. The state attempted to prove the charge of adultery by the record of a suit in the juvenile court, to which suit the defendant was not a party; but that evidence was excluded. The defendant denied having lived in adultery, and introduced a marriage record showing that he was lawfully married to his wife (the woman referred to by the prosecutor) about a year and a half before the

date of the alleged crime upon Belle Shaffer.

The trial court having failed to rule upon the improper remarks of the prosecuting attorney in regard to the alleged adultery, he was emboldened to go still further out of the record and charged defendant *with living with a harlot at the very time he is accused of committing this abominable crime against nature*. There is not a word in the record showing any improper conduct on the part of Mrs. Wellman after her marriage to defendant in August, 1911. On the contrary, the record shows that they were living in lawful wedlock. The last remark brought a mild criticism from the trial judge; but no admonition to the prosecutor to confine himself to the record. The remarks before quoted were not warranted by the evidence, and were highly prejudicial to defendant.

[8, 9] During the trial of the case the assistant prosecutor, over defendant's protest, several times denounced defendant's witness Ida Sours as a prostitute. Her reputation was not then in issue, and there was not the least excuse for the prosecutor's vitriolic epithets. After Ida Sours testified, and her veracity and chastity might have been placed in issue, not one word of evidence was offered by the state to show that her reputation was bad in any respect. Yet, notwithstanding there was no evidence to throw discredit on her testimony, the prosecutor, in his closing argument, denounced her as a woman wholly unworthy of belief, and again insinuated that she was a prostitute. It is true that these latter remarks were not objected to, and we can disregard them if we choose; but they tend to establish the fact that the public prosecutor conducted this case without any regard to the rules of law or common fairness. Louie Shaffer testified that he caused this prosecution to be instituted, and stated that he called on Ida Sours, hoping he could secure her evidence for the state; but, when it developed that her evidence was favorable to defendant, she was at once denounced as wholly unworthy of belief. We regret to say that the record in this case and in the case of *State v. Brown*, 247 Mo. 715, 153 S. W. 1027, tend to indicate that in Jackson county, when any witness refuses to testify for the state, he or she is promptly denounced as a criminal by the public prosecutors of that county, regardless of whether there is any evidence of wrongdoing on the part of such witness.

[10, 11] If the defendant had been duly convicted of the crime of adultery, and the record of his conviction had been admitted in evidence, he would have been entitled to an instruction to the effect that the jury could only consider his conviction as tending to discredit his testimony as a witness, and not as tending to prove him guilty of the crime for which he was then on trial, and the public prosecutor could not legally have referred to the conviction of adultery as evi-

dence of his guilt of the crime against nature. *State v. Phillips*, 233 Mo. 299, loc. cit. 303, 135 S. W. 4; *State v. Jones*, 249 Mo. 80, loc. cit. 98, 155 S. W. 33; *Taylor v. State*, 50 Tex. Cr. R. 560, 100 S. W. 393; *State v. McNamara*, 212 Mo. 150, 110 S. W. 1067; and 12 Cyc. p. 415. Such an argument would have been a mere invitation to the jury to disregard the law. Evidence of bad character on the part of defendant was not evidence of his guilt, but in this case was admitted solely to impeach and discredit his testimony as a witness. When he does not testify or otherwise place his reputation in issue, such evidence cannot be admitted. *State v. Beckner*, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535. The prosecutor should never be allowed to appeal to the jury to convict the defendant because he has committed some other crime not in any way connected with the one for which he is being tried, or because his reputation is bad. A defendant who testifies in his own behalf in a criminal case occupies a dual rôle. In one rôle he is a witness; in the other a defendant. *State v. Beckner*, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535; and *State v. Phillips*, 233 Mo. 299, 135 S. W. 4.

The defendant is charged with a loathsome crime; but the courts should, nevertheless, accord him a fair trial according to the Constitution and usages of law.

Prosecutors should be zealous in their efforts to enforce the criminal laws; but this does not mean that they are either required or authorized to override the Constitution and thus become lawbreakers themselves in order to secure convictions.

For the misconduct of the assistant prosecuting attorney and the invalidity of the information, the judgment is reversed, and the cause remanded for a new trial.

WALKER, J., concurs. FARIS, J., concurs in all of opinion except paragraph 1, as to which he is dubitante.

#### HERSMAN et al. v. HERSMAN.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

#### 1. SPECIFIC PERFORMANCE (§ 121\*) — ORAL CONTRACT TO CONVEY—SUFFICIENCY OF EVIDENCE.

To authorize a decree for specific performance of an oral contract to convey, upon proof of part performance, the contract to convey must be shown by evidence so clear and convincing as to leave no reasonable doubt of its existence and terms.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

#### 2. SPECIFIC PERFORMANCE (§ 51\*)—ORAL CONTRACT—CONSIDERATION.

To authorize a decree of specific performance of an oral contract to convey, where there

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

has been part performance, the consideration of the contract must have been fair.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154; Dec. Dig. § 51.\*]

### 3. SPECIFIC PERFORMANCE (§ 42\*)—ORAL CONTRACT—PART PERFORMANCE.

Acts claimed to have been done in part performance of an oral contract to convey must be referable only to the contract, and not explainable on any other theory than that they were done in part performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 124, 129, 133; Dec. Dig. § 42.\*]

### 4. SPECIFIC PERFORMANCE (§ 121\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in a suit for specific performance of an oral contract to convey, *held* not to show that defendant promised to convey to plaintiff in consideration of services to be rendered by her to her and defendant's parents.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

### 5. APPEAL AND ERROR (§ 1012\*)—FINDINGS—CONCLUSIVENESS.

Where the trial judge decided the case on a transcript taken before another judge and on depositions, and the only witness who testified orally did not testify as to the contract relied on, and none of the witnesses resided in the circuit over which the trial judge presided, he could not be presumed to be in a position to more advantageously weigh the evidence than the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.\*]

Appeal from Circuit Court, Macon County; Nat. M. Shelton, Judge.

Action by Belle Hersman and another against Strauther G. Hersman. From a judgment for plaintiffs, defendant appeals. Reversed.

R. W. Beeson, of Red Oak, Iowa, and Guthrie & Franklin, of Macon, for appellant. A. W. Mullins, of Linneus, and F. E. Lindquist, of Kansas City, for respondents.

BLAIR, C. Defendant is a brother of the plaintiffs, and appeals from a judgment of the circuit court of Macon county, divesting him of the title to a certain house and lot in Brookfield, Mo., and vesting it in plaintiff Belle Hersman. The original petition was filed August 15, 1907, in the circuit court of Linn county, whence the cause was taken to Macon county by change of venue, where it was heard in 1908 by a special judge. The cause was taken under advisement, and at the September term, 1908, the objection being made that the special judge's power ended with the term at which he heard the case, it was resubmitted by agreement, to the regular judge of the circuit, Hon. Nat. M. Shelton, on the transcript of the evidence previously taken and some additional depositions and the oral testimony of one additional witness.

The amended petition on which the case was finally submitted was filed by leave, and

to conform to the proof after the evidence had been heard by the special judge, and before the case was finally submitted to the regular judge.

Plaintiffs' amended petition, in substance, alleged that on the 18th day of August, 1898, plaintiffs were the owners in fee of a certain lot of ground in the city of Brookfield, Linn county, Mo. That while the title to said real estate was taken in the names of plaintiffs, \$1,000 of the purchase price thereof, which was \$1,800, was contributed by their mother, Mrs. Mary Hersman, and the remainder, \$800, by the plaintiffs, each paying \$300, and that, in fact, plaintiffs held said property in trust for the use and benefit of their mother. That on the 29th day of May, 1899, plaintiff Belle Hersman conveyed by warranty deed her interest in said real estate to her sister and coplaintiff, Mrs. Kittie M. Edwards, and that, while said deed recites a consideration of \$2,000, in truth and in fact, the only consideration therefor was an agreement between them that Mrs. Edwards should take care of their father and mother, Michael M. and Mrs. Mary Hersman, and said Belle Hersman, during the remainder of their respective lives, all of which facts the defendant well knew. That on the 9th day of May, 1901, said Kittie M. Edwards and her husband, J. B. Edwards, by warranty deed, conveyed said real estate to the defendant, and that while the deed recites a consideration of \$2,000, "the only cash consideration therefor was the sum of \$500, about \$400 of which had theretofore been paid out by said Kittie M. Edwards for repairs on the buildings and improvements situated on said premises, and the further stipulation and agreement that said defendant would well and truly care for said Michael M. Hersman and Mrs. Mary Hersman and the plaintiff Belle Hersman, support them, and let them occupy said property as long as they should live, and that, in consideration of the services to be rendered by said Belle Hersman, as hereinafter stated, said defendant would convey to or cause to be vested in said plaintiff, Belle Hersman, the title to said real estate and premises at the death of said Michael M. Hersman and Mary Hersman, and plaintiffs aver that the defendant acquired said property as aforesaid in trust for the use and benefit of said Michael M. Hersman and Mary Hersman and the plaintiff Belle Hersman, and to furnish support for them during their natural lives." That said Michael M. Hersman, on the — day of February, 1903, departed this life at the city of Brookfield. That at the time of the making and delivery of said deed to the defendant, said Mary Hersman, mother of plaintiffs and defendant, was suffering with nervous prostration, stomach trouble, and other ailments, and remained sick and under the care of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—51

physicians from said time up to the time of her death on the 10th day of June, 1907. That from the 29th day of May, 1901, up to the 10th day of June, 1907, defendant contributed about \$25 a month towards the support of said Mary Hersman and Belle Hersman, and permitted them to use and occupy said premises, and that, at the time of the aforesaid conveyance of the property to defendant by plaintiff Kittie M. Edwards and her husband, it was agreed by and between plaintiff Belle Hersman and the defendant that she, the said Belle, "would nurse, care for, and wait upon said Michael M. Hersman and Mary Hersman while they lived, the defendant providing the maintenance for them, and for which defendant would make no charge, and at the death of said Michael M. Hersman and Mary Hersman said property should belong to and be vested in said plaintiff, Belle Hersman; and that said plaintiff faithfully fulfilled her said agreement, and in all respects discharged her said undertaking and the duties she assumed." That the defendant, wholly disregarding his undertaking in the premises, subsequent to the death of said Michael M. Hersman and Mary Hersman, and on the 5th day of October, 1907, made a voluntary conveyance of said real estate to his son-in-law, J. L. Miller, for the purpose of defrauding the said Belle, and depriving her of any redress in the premises, and has refused and still refuses to make her any compensation whatsoever. That defendant did not care for said Mary Hersman nor provide for her any nursing, except by said Belle Hersman, by reason whereof the said Belle was compelled to and did watch over, care for, and nurse the said Mary Hersman, day and night during all of said time and up to the time of her death. That, since the death of said Mary Hersman, said defendant has wholly failed and refused to in any way provide for said Belle Hersman, except permitting her to reside in and occupy the said premises. That the reasonable value of the services so rendered by said Belle Hersman from said 29th day of May, 1901, up to the time of the death of said Mary Hersman, June 10, 1907, a period of 2,201 days, is \$2,201, and that defendant is indebted to the said Belle for said sum. That plaintiff Kittie M. Edwards says she claims no interest in the amount so claimed, but joins in the petition in order that right, equity, and justice may be done between said Belle Hersman and the defendant. That in equity and justice, said sum of \$2,201, or such part thereof as does not exceed the value of said property, should be adjudged and decreed to be a lien on the aforesaid real estate for the amount so due, and said property sold to satisfy said lien. The prayer of the petition is, "that said Belle Hersman have and recover of and from the defendant the said sum of \$2,201; that said amount be adjudged and decreed by order

of this court to be a lien upon said above-described real estate; that said real estate be sold to satisfy said lien, and that the court may make such other and further orders, judgments, and decrees in the premises as may seem just."

Defendant's answer to the amended petition was a general denial.

In addition to vesting the title in plaintiff Belle Hersman, the court found against her demand for a money judgment, and found that plaintiff Kittie M. Edwards had no interest in the matter.

Michael M. and Mary Hersman, the parents of the parties hereto and six other living children, formerly lived in Illinois, where Mrs. Hersman owned a cottage which she sold in 1898, and \$1,000 of the proceeds, together with \$600, furnished in equal parts by plaintiffs, was invested in the property in suit, plaintiffs taking the title in their names, with the understanding that they were to care for their aged parents while they lived. In October, 1898, plaintiffs and their parents and the husband of plaintiff Kittie M. Edwards moved to the premises now involved, and lived there together, the support of this family devolving largely upon Mr. and Mrs. Edwards. On May 29, 1899, Belle Hersman, by general warranty deed, conveyed her interest in the property to her coplaintiff, Mrs. Edwards, the real consideration for the conveyance being, according to plaintiffs, the promise of Mrs. Edwards that she would thereafter provide for and support the parents and Belle during their lifetime. The deed recited a consideration of \$360, but the testimony of plaintiffs is that no money passed. Plaintiffs' mother was present at the time the two sisters entered into the agreement, pursuant to which Belle Hersman conveyed to Mrs. Edwards, and assented thereto. About a year after this transaction, the parents became dissatisfied with the manner in which the title to the property was held, and Mrs. Hersman expressed a desire to have the property conveyed to her. The evidence indicates this dissatisfaction was largely the result of interference on the part of other members of the Hersman family, who made occasional visits to the old people. There was correspondence between various members of the family, and complaints were made that the parents were being mistreated. There is no evidence that such was the fact. A letter written by defendant to Belle Hersman, after the dissatisfaction arose, contained the following: "I received your letter a few days ago; glad to hear from you and to hear that everything is going to be fixed up so that it will be satisfactory to all concerned, as I know everything in the end will be for you and Kate. I was sorry that Kate felt as she did over it, as there was no one that wanted to take anything away from her. \* \* \* Now, Belle, if Kate will deed the place to me, and you folks want to stay there, it will be perfectly satisfactory to us boys; the only

thing we want is for pa and ma to live the rest of their days in peace and quiet, and to have what they need."

By reason of the dissatisfaction alluded to, Mrs. Edwards, with her husband, had a deed prepared in May, 1901, for the purpose of conveying the property to the mother, Mrs. Hersman; but before it was executed, defendant, by letter mailed to another sister, Mrs. E. Young, offered to pay Mrs. Edwards \$500 for the property, or for Mrs. Edwards' interest therein, the letter containing defendant's check for said sum. Defendant and his letter arrived in Brookfield simultaneously, and the same day, May 29, 1901, Kittle M. Edwards and her husband, J. B. Edwards, executed a deed conveying the property to defendant, and the latter delivered his check for \$500 to Mrs. Edwards. Mrs. Edwards testified that prior to this transaction she had paid out about \$400 for improvements and repairs on the property.

With respect to what defendant said in conversations concerning the conveyance by Kittle M. Edwards to him, plaintiff Belle Hersman testified that previously a deed from Mrs. Edwards and husband to Mrs. Mary M. Hersman, the mother, had been prepared, but it was not executed; that "brother Strauther said he would not take it that way; that he did not want to, and if we would make it in his name he would provide for them (the parents) as long as they lived, and at their death, when they were through with it, it should be mine," i. e., Belle Hersman's. The witness continued: "After that talk, the deed was made and signed over to brother Strauther. I don't think I know who wrote the deed; no, I cannot say. Brother Strauther told me that he would see that I was provided for. I should have provisions. I had nothing to live on. I had nothing to buy anything for my father and mother, nothing." On cross-examination she testified that after defendant came to Brookfield he secured the \$500 he had previously sent, "and the deed was made and settled, and my brother (defendant) came to the room where mother and my sister, Mrs. Edwards, and Mrs. Durham and I (were) and he said 'Now, Ma, it is all fixed just as long as you live. I take it in my name to save it for Belle there, none of the rest will get any.' That is just the conversation, and I think we can prove that."

Regarding the same conversation, Mrs. Kittle M. Edwards testified that after defendant reached Brookfield, May 29, 1901, and secured the check previously alluded to, he had the deed prepared to himself as grantee, and "he had the justice of the peace bring it to the house and he gave us the money, and we signed the deed. My brother, the defendant, gave us the \$500. Yes, he turned to mother and says: 'I am going to put this property in my name so when you and pa die we can save it for Belle. What I do for you I want nothing in return for what I do

for my parents;' and then mother says 'who will take care of us?' and he says, 'I expect Belle to do so.' Sister Belle was with us at the time." This conversation was on the 29th day of May, 1901, the day the deed was executed. The deed had been made then and there. She further testified defendant told her "he would not put up any money on the property unless it was in his name so he could save the property for Belle."

Mr. J. B. Edwards, husband of plaintiff Kittle M. Edwards, testified that after the deed was made, and, he thought, on the same day, either he or his wife asked who "was going to look after the folks," and defendant said "Belle will do that."

Mrs. Rutliff testified that, some time in the spring of 1903, she heard Mrs. Mary Hersman say to defendant that "she felt sorry for Belle, and she was sorry she was causing her so much trouble;" that defendant told her "not to let that worry her, he would see that Miss Belle was cared for." This, the witness said, was a fragment of a conversation, the remainder of which she did not hear.

Mrs. Durham, a grandniece of the parties hereto, testified that, on the day the deed was made, she heard defendant say to his mother: "The reason I want the deed to be made in my name was so none of the rest of the children would come in for anything at yours and father's death \* \* \* at yours and father's death the home shall go to Belle. \* \* \* I don't want anything for what I do for you." Witness said plaintiffs were present at the time this was said.

It is clear that defendant agreed to furnish \$25 per month toward the support of his parents and sister Belle, and the evidence shows he furnished this much or more each month after the deed was delivered to him, and, in addition, occasionally paid bills for fuel, medical attention, etc., amounting to a considerable sum, and also paid the taxes and his father's funeral expenses. Plaintiff Belle Hersman lived with the father and mother until their deaths in 1903 and 1907, respectively, and took constant care of them. They were quite old and required much attention. The only means she and they had during the six years from May 29, 1901, to June 10, 1907, when the mother died, was the money defendant furnished. The total amount defendant furnished was about \$2,500 or \$2,600.

It conclusively appears that, on the day the deed to defendant was executed, the Hersmans and Edwardses moved out of the property in suit, going to a house occupied by a sister of the parties hereto, Mrs. Young. Plaintiffs say the purpose of the removal was that Mrs. Young might aid in caring for the parents until plaintiff Belle, who was in poor physical condition, might recover her strength. The father, Michael Hersman, was dissatisfied at Mrs. Young's and defendant was notified, and consented to the return of his parents and sister Belle to the property in suit. Thereafter they occupied it until the

mother, the surviving parent, died in June, 1907. Belle Hersman testified that on the day of the mother's funeral she said to defendant, "Now, what are you going to do. I am left here all alone and nothing to do on;" and that defendant replied, "I will tell you, Belle, I am going to sell this home:" at which witness says she fainted.

Plaintiffs instituted this suit August 15, 1907.

Defendant testified he understood his mother had an interest in the property, having invested \$1,000 in it, and that the reason the deed was made to him was that there was a judgment against his father and mother and sister Belle; that the understanding was he was to sell the property and use the proceeds for the support of his parents, and that this was the reason they removed to Mrs. Young's home when the deed was executed to him; that he sent \$25 per month to them after the deed was made, and, after his father's funeral, his mother asked him if he would continue these remittances. He says he told her he would, and she then said that, if he did so, any interest she had in the property should be his at her death, and Belle Hersman then said, "Strauther, if you will do that I will stay here and take care of mother;" and the mother then told Belle she, in that case, should have the personal property. The plaintiffs' evidence shows Belle Hersman has the personality. Defendant says his sister Belle never made any claim for services during the years after 1901, though he saw her a number of times, and the first he heard of such a claim was when he received a copy of the notice by publication in this suit. Defendant denied the conversation attributed to him, and testified that the only agreement he made was the one made at the time of his father's death.

With respect to material parts of the conversation with the mother and Belle, which defendant detailed, he is corroborated by a brother, John Hersman, and is fully corroborated by another brother, Joseph Hersman. Laura Seibert, another sister, corroborates defendant as to the same conversation, and further testifies she heard her mother say, in 1907, she would "die easier if Strauth would promise to take care of Belle," but, she added, defendant "never promised." She says the understanding was that Belle Hersman should, after the mother's death, live with Mrs. Edwards.

After this suit was instituted and his pendens filed, defendant executed a deed to his son-in-law, in consideration of a cash payment of \$500 and notes for a balance of \$2,000.

There is no direct evidence defendant knew of any agreement between plaintiffs and their mother, made in consideration of the transfer by Belle Hersman to Kattie M. Edwards, and no evidence he knew plaintiffs had contributed anything to the purchase of the

property. He denies any knowledge of either matter. He knew, however, that his mother had paid \$1,000 of the purchase price. He says he did not convey to his son-in-law in order to put the property beyond the reach of Belle Hersman, but did so as a part of his plan, then being worked out, to get his affairs in shape for easy settlement in case of his death, his health being poor.

Counsel for defendant contend the decree is not warranted by the evidence.

So far as the principal issue presented is concerned, it is unnecessary to follow counsel through the controversy concerning the question whether the property was impressed with a trust. This is true because the decree vests the entire title in Belle Hersman; and whether defendant took title under the Edwards' deed in his own right or as trustee, there being no pretense of any conveyance or devise to Belle, the only thing suggested by either pleadings or evidence, which it could be contended justifies the decree, is the agreement the petition alleges was made, whereby Belle Hersman was to care for her father and mother during their lives in consideration of the conveyance of the property to her after they died. In view of the fact that the agreement is alleged to have been made between Belle Hersman and defendant, and the fact that it is not alleged Mary Hersman, the mother, was a party thereto, it well might be said that the question as to defendant's trusteeship for his mother is eliminated by the petition itself, in so far as it could affect the question as to the sufficiency of the evidence to support the decree rendered. The character of the evidence is such, however, that this phase of the matter need not be further discussed in connection with the particular question now under consideration.

The decree is one for the specific performance of an alleged oral agreement, and the evidence must be examined in the light of the principles applicable in such circumstances. These principles frequently have been formulated by this court (*Collins v. Harrell*, 219 Mo. 301, 118 S. W. 432 et seq.; *Forrister v. Sullivan*, 231 Mo. loc. cit. 373, 132 S. W. 722 et seq.; *Walker v. Bohannon*, 243 Mo. loc. cit. 135, 147 S. W. 1024 et seq.; *Oliver v. Johnson*, 238 Mo. loc. cit. 373, 142 S. W. 274), and it is unnecessary to indulge in a recapitulation of them.

[1-3] The particular rules to be kept in mind, in examining the evidence, are that the contract pleaded is the one which must be proved; that the contract pleaded and proved must be clear and certain in its terms, and must (in this case) be one for the conveyance of the property involved; that the evidence of the making of the contract contended for must be so clear, cogent, and convincing as to leave no reasonable doubt on that head; and that the consideration must be fair, and the acts done in alleged performance of the contract by the plaintiff must be referable solely to the contract, and explicable on no



other reasonable theory. These principles have been approved so frequently and recently and the danger of rules less exacting has been so often pointed out that any discussion of them would serve no useful purpose. Measured by this standard, the evidence in this case does not justify the decree rendered.

[4] In the first place, the evidence does not show that defendant ever made any promise to convey to plaintiff Belle Hersman, upon consideration of services to be rendered the parents by her. The most that appears is that, when asked who would look after the parents, defendant said he "expected Belle to do that." "After the deed was made and signed," according to plaintiff herself, defendant told her "he would see that she was provided for." In explanation of this statement plaintiff says: "I had nothing to live on. I had nothing to buy anything for my father and mother, nothing." No witness testifies to any promise by defendant to convey to plaintiff Belle, on condition that she care for the father and mother. Certainly a simple announcement by defendant, after the execution of the deed to him, that he would "save the property for Belle" could not warrant the decree rendered. Besides, there is other evidence tending to prove that no contract was made.

The fact that the witnesses for plaintiff disagree somewhat as to what was said, and somewhat as to the persons present when the conversations relied upon are said to have occurred, must be considered. Further, the fact that, on the very day that Mr. and Mrs. Edwards executed their deed to defendant, plaintiff Belle and the parents moved out of the property, and deemed it necessary to notify defendant and procure his consent to return thereto, after Michael Hersman complained he did not want to leave the old home, is of much significance and tends strongly to support defendant's statement that the real agreement was that he was to sell the property and use the proceeds for the support of the old people. In addition, the contract pleaded is rather a singular one. By it, defendant was to receive nothing for the \$500 he paid Mrs. Edwards, nothing for the support he was to furnish his parents and Belle Hersman, but the latter were to occupy the property until the parents died, and then Belle was to get the property itself, and thereafter defendant was to support Belle as long as she lived. No comment on this is necessary to make clear the remarkable character of the contract contended for. The letter defendant wrote Belle was written in July, 1900, nearly a year before the Edwards deed was executed, and its importance in the case is very slight. It is also to be noted that, even if the property is worth all plaintiffs say it is, defendant's contributions to the support of the parents and his sister amount to a sum far in excess of that value.

Defendant's testimony concerning the agreement with his mother, made after his father's death in 1903, to the effect that, if he would continue to remit \$25 per month, the property should be his, is corroborated by that of two brothers and a sister, and, in view of all the evidence, better seems to explain the acts of the parties concerned.

The conveyance by defendant to his son-in-law, even if made to defeat the claim of plaintiff after the suit was filed cannot supply a lack of evidence of the contract pleaded.

[5] The learned trial judge did not, in this case, have the witnesses before him, but decided it on a transcript of the evidence taken before another judge, and upon depositions. The one witness who testified orally was not called to prove the contract relied upon. Neither were the witnesses residents of the county in which the case was decided nor of the circuit over which the trial judge presided, and consequently he cannot be presumed to have had them before him in other cases and to be thereby in a more advantageous position to weigh their evidence (an idea sometimes advanced) than is this court.

Tested by the standard fixed by the principles stated, the evidence of the agreement pleaded is insufficient, and the decree cannot stand. Under the pleadings and evidence there can be no recovery, and the judgment is reversed.

BROWN, C., concurs.

PER CURIAM. The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the Judges concur. BOND, J., in the result.

#### STATE v. SHAFFER.

(Supreme Court of Missouri, Division No. 2.  
Dec. 9, 1913.)

#### 1. CRIMINAL LAW (§ 134\*)—CHANGE OF VENUE—PROCEEDINGS ON MOTION—ADMISSION OF EVIDENCE.

On a motion to change the venue, in a prosecution for grand larceny by hog theft, on the ground of prejudice against accused, evidence that more than 20 years ago, when accused was only 5 or 6 years of age, his brother and three cousins were charged with a notorious murder in the county was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252; Dec. Dig. § 134.\*]

#### 2. CRIMINAL LAW (§§ 121, 1150\*)—CHANGE OF VENUE—LOCAL PREJUDICE.

The granting of a change of venue for local prejudice against accused is within the sound discretion of the trial court, and its action will not be disturbed in absence of a palpable violation of such discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 241, 3044; Dec. Dig. §§ 121, 1150.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. CRIMINAL LAW (§ 121\*)—VENUE—MOTION FOR CHANGE—SUFFICIENCY OF EVIDENCE—LOCAL PREJUDICE.**

Evidence on a motion for change of venue, in a prosecution for grand larceny, on the ground of local prejudice *held* not to show an abuse of discretion in denying the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 241; Dec. Dig. § 121.\*]

**4. CRIMINAL LAW (§ 1049\*)—APPEAL—OBJECTIONS—PRESENTATION BELOW.**

An objection that the elisor violated the order of the court in summoning the venire from the central part of the county instead of from the southern part will not be considered on appeal, where no exception was saved to the order overruling the motion to quash the panel on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2656; Dec. Dig. § 1049.\*]

**5. CRIMINAL LAW (§ 510\*)—TESTIMONY OF ACCOMPLICE—CORROBORATION.**

A conviction may be had upon the uncorroborated testimony of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.\*]

**6. CRIMINAL LAW (§ 780\*)—EVIDENCE OF ACCOMPLICE—CORROBORATION BY CIRCUMSTANCES.**

An instruction is correct, in a proper case, that an accomplice's testimony may be corroborated by the circumstances given in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

**7. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REQUEST.**

Even if otherwise proper, a requested instruction attempting to definitely define reasonable doubt was properly refused, where the court had already given instructions, at accused's request, sufficiently defining the nature of such reasonable doubt as would authorize an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**8. CRIMINAL LAW (§ 811\*)—INSTRUCTIONS—COMMENTS ON EVIDENCE.**

A requested instruction, in a prosecution for hog theft, that, even if the jury found that the entrails of one of the hogs claimed to have been stolen was found in accused's icehouse, unless it found that they were placed there with accused's knowledge and consent, such fact was not evidence of guilt was properly refused as commenting upon a particular phase of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.\*]

**9. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS ON CREDIBILITY.**

Instructions that, while both accused and his wife were competent witnesses for the defense, the jury might consider, as affecting their credibility, the interest which accused and his wife had in the result of the trial were not reversible error, though it would be better to omit such instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

**10. LARCENY (§ 55\*)—SUFFICIENCY OF EVIDENCE.**

Evidence in a prosecution for grand larceny for hog theft *held* to sustain a conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.\*]

Appeal from Circuit Court, Clark County; Samuel Davis, Judge.

Grover Shaffer was convicted of grand larceny, and appeals. Affirmed.

There was filed on the 21st day of March, 1912, in the circuit court of Clark county, an amended information charging defendant and one Guerdon Best with having, on the 8th day of February preceding, committed grand larceny, for that they had stolen certain hogs in said information described. Guerdon Best pleaded guilty on April 1, 1912, was duly sentenced to the penitentiary on such plea, and thereafter paroled pursuant to statute. The defendant, upon his trial, was found guilty, and had assessed against him as punishment, imprisonment in the penitentiary for a term of two years.

The appellant (whom we shall hereafter call the defendant) filed on the 1st day of April, 1912, which was the date upon which the circuit court of Clark county convened in regular term, his application for a change of venue on account of the prejudice of the inhabitants of Clark county against him. Thereafter and on the same day, defendant filed a second application for a change of venue on account of the alleged prejudice against him of Judge Stewart, the regular judge of the Clark county circuit court. The latter application, coming on to be heard first, was sustained, and thereupon Judge Stewart called in Judge Samuel Davis, judge of the Fifteenth judicial circuit, to try the case, and reset the same for trial at an adjourned term to be convened on Tuesday, April 23, 1912.

The case coming on for hearing before Judge Davis on the date last above mentioned, defendant refiled his application for a change of venue. This application, omitting caption and verification by defendant and his compurgators, all of which latter things are formal, is in the following form: "Now comes Grover Shaffer, one of the defendants in the above-entitled cause, and states that the minds of the inhabitants of said county of Clark are so prejudiced against him that he cannot have a fair trial in the above cause in said county, wherefore he asks that the venue of said cause be changed to the circuit court of some other county in this circuit, where such prejudice does not exist."

Upon a hearing had, defendant, to support the alleged prejudice which he averred existed against him, called, including himself, some 13 witnesses, residing, for the most part, in the neighborhood, or within two or three miles of the place where the alleged offense of the defendant was committed, and of whom at least three, if not more, were related to defendant, who swore to the existence of certain prejudice against him, which prejudice largely grew out, as was vaguely hinted in the record, of a murder and a trial therefor, in which murder a brother and

certain cousins of defendant, as we are told in defendant's brief, had a part. This murder seems to have occurred more than 20 years before the instant case was tried, and at a time when defendant was only some four or five years of age.

There was offered, to combat the case thus made, some 17 or more witnesses for the state, coming for the most part from the central and southern part of Clark county, and coming from divers avocations and walks of life. These witnesses for the state testified practically with unanimity that they knew of no prejudice existing in their several neighborhoods against defendant, and had heard no prejudice expressed against him whatever. The court thereupon overruled the application for a change of venue, and defendant saved his exceptions.

After the trial jury of 12 men was chosen and sworn to try the case, defendant filed a motion to quash the panel for that, as it was averred in his said motion, the jurors had been selected from the central part of the county, the elisor who acted in this behalf having been, as it was averred, directed by the court to select them from the southern part of said Clark county. This motion was overruled, but defendant took no exceptions to the action of the court in this behalf, nor does the record show that any order was made by the court that the jurors be gotten from the southern part of the county.

The testimony offered by the state tended to show that defendant, who resided in the little village of Peaksville, in Sweet Home township, in said Clark county, was, at and prior to the date of the alleged theft of the hogs in question, contemplating engaging in the business of a butcher, and that to this end he had rented and had had partly fitted up a shop in the village of Revere, and that he had tentatively arranged with one Painter, who was a witness for the state, to have charge of this shop for him. The testimony of Guerdon Best, the accomplice of defendant, who, after his plea of guilty, sentence to the penitentiary, and parole, was offered as a witness by the state, tended to show that Best began working for the defendant on the 5th of February, and that defendant communicated to Best his intentions of setting up a butcher shop, and asked Best to go with him and get some hogs; that defendant and Best started at night, at about the hour of half past 10, and went along the public road a distance of a mile and a quarter from and in a direction northwest of defendant's residence to the premises of one Ben Best, who was the grandfather of the said Guerdon, and who is alleged in the information to have been the owner of the hogs stolen. Defendant and his accomplice Best drove seven hogs from Ben Best's premises back along the way in which they had come and to a point about a quarter of a mile

from defendant's residence, when one of the hogs becoming unruly, objecting to going further, and showing a desire to return, defendant shot and killed it with a small 22 caliber rifle. Thereafter, defendant and Best proceeded with the remaining hogs to defendant's barn, returning shortly thereafter with a sled for the one they had killed. After placing the hog which was killed in the road upon the sled, straw was thrown over the blood and burned so as to destroy the blood signs which existed there in the road upon the snow. Thereafter they killed five of the remaining hogs in defendant's barn, took them to the kitchen, skinned them, removed the offal, cut them in halves or quarters, and hung them in the attic of defendant's residence upon nails driven in the rafters. On the night following, the entrails and skins of the hogs were taken by Best and the defendant to a small creek and thrown into said creek under a culvert. One of the hogs stolen, which was deemed at the time too small to kill, was subsequently on the following night, or morning, killed by Best and the defendant and skinned, and the skin and entrails were hidden by Best, at defendant's suggestion, in an icehouse, at a place subsequently pointed out by Best, and at a place where the same were afterwards found by the sheriff and others. Another witness, one Elmer Ritchey, an ex-convict, testifying for the state, says that he saw the meat of the hogs in question hanging in the attic of the defendant. Testimony was also offered that the attic of defendant's house was examined, and, while no nails were found in the rafters, the broken parts of nails, having the appearance of having been recently broken off, were found, as well as marks indicating grease and blood on the floor under the spot from whence the nails had been broken. Other testimony offered by the state tended to show the identity of the hogs and the ownership as laid in the information.

Testimony offered on the part of defendant tended to show that his near neighbors, one of whom, at least, was his near relative, saw nothing of the facts of the killing of the hogs, nor heard anything thereof, nor heard any noise of the shooting of the same on the premises of defendant, as detailed by his accomplice, Best. It was also shown that defendant's alleged accomplice and one Quinn Ritchey were very much together, loafing about town about the time of the theft of these hogs. The relevancy of this testimony is difficult to see, because the record discloses no definite connection of Quinn Ritchey with the matter otherwise in any way. We cannot find that Quinn Ritchey was ever sworn as a witness. By large inference, he is identical with Elmer Ritchey, who was a witness for the state, and who, it was shown by the defense, had served a term in the penitentiary of South Dakota for grand larceny. The record, without any explanation of the

discrepancy which we have been able to find, does show that one "Quinn Ritchey was recalled," and admitted that he had come back and tried to get defendant to pay him money, inferentially to refrain from testifying against him.

The defendant and his wife both testified briefly in the case, denying categorically the salient facts testified to by the witness Best. Defendant's wife denied that said Best had ever worked for the defendant at the time, or about the time of the theft of the hogs, or at any time; while defendant himself, without saying so in words, in effect corroborated Best in this detail and contradicted his wife on this point.

There was some effort made by the state to show that defendant had endeavored to hire the witness Elmer Ritchey to stay out of the state and not testify in the case. There was proof (which was not denied either by or for defendant) that defendant had given him, at one time, the sum of \$5, and that counsel for defendant had sent him on another occasion \$10, and, on another, had written him, with the suggestion in substance, that the witness would better go home and stay there; that he need not trouble himself about returning to Missouri, unless he were arrested, and that he could not be legally subpoenaed in Iowa.

Upon the trial, the court gave, of his own motion, a cautionary instruction to the jury touching the testimony of an accomplice. This instruction is bitterly assailed by defendant on the ground that the portion of it set out in italics is an innovation producing error meet for reversal. This instruction is as follows: "The court instructs the jury that an accomplice is one who participates with another person in the commission of a crime, and that the testimony of an accomplice is admissible in evidence against or in behalf of the party on trial; but the jury are further instructed that the testimony of an accomplice in crime, when not corroborated by some person or persons not implicated in the commission of the crime, *or corroborated by circumstances given in evidence as to matters material to the issues, that is, as to matters connecting the defendant with the commission of the crime charged against him, ought to be received with great care and caution by the jury, and the jury ought to be fully satisfied of its truth before they should convict the defendant on such testimony. In this connection, however, the jury are further instructed that they may convict the defendant upon the uncorroborated testimony of an accomplice, if they believe the testimony given by the accomplice, if he be an accomplice, to be true, and if the jury also believes the testimony given by the accomplice establishes the guilt of the defendant.*"

The court also gave, of his own motion, to the jury, touching the testimony of defend-

ant and his wife, instructions 3 and 4, which we set out below, to wit:

"(3) The court instructs the jury that the defendant is a competent witness to testify in his own behalf in this case, and the jury should fully and fairly consider his testimony, together with all of the other testimony in the case; but the jury may take into consideration the fact that the defendant is testifying in his own behalf, and the interest he has in the result of this trial, as affecting his credibility as a witness.

"(4) The court instructs the jury that the defendant's wife is a competent witness to testify in behalf of her husband, the defendant, and the jury should fully and fairly consider her testimony, together with all of the other testimony in the case; but the jury, in determining what credit and weight they should give to the testimony of the defendant's wife, may take into consideration the fact that she is the wife of the defendant, and the interest she has in the result of this trial."

The defendant offered and the court refused to give instructions E and G, which are as follows:

"(E) The court instructs the jury that if the whole evidence in this case leaves their minds in such condition that they are neither morally certain of the defendant's innocence, nor morally certain of his guilt, then a reasonable doubt exists, and the jury must give the defendant the benefit of such doubt and acquit him."

"(G) Even though the jury may find from the evidence that the entrails of one of the hogs alleged to have been stolen was found in an icehouse in the possession of the defendant, yet, unless the jury find beyond all reasonable doubt that the said entrails were placed there with the knowledge and consent of the defendant, said fact is no evidence of defendant's guilt."

Upon all of these instructions, either for the giving thereof or for the refusal to give the same, defendant hangs his most strenuous contentions for reversal, and we have set them out herein, at the expense of brevity, in order that the full force of his contentions may be seen. This statement includes, we think, enough of the facts both as to the evidence adduced and the proceedings had in the trial to render clear the points discussed in the many contentions lodged with us in the case by the defendant. Such other facts as it shall become necessary to state, if any, will be found in the subjoined opinion.

John A. Whiteside and T. L. Montgomery, both of Kahota, for appellant. John T. Barker, Atty. Gen., and W. M. Fitch, Asst. Atty. Gen. (S. P. Howell, of Jefferson City, of counsel), for the State.

FARIS, J. (after stating the facts as above). There are lodged with us by the

learned counsel a number of strenuous contentions, which have been briefed and are urged with much earnestness, learning, and ability. Among these, defendant urges upon us that the learned court nisi erred (1) in refusing to grant to defendant, upon his application, a change of venue on account of the bias and prejudice of the inhabitants of Clark county; (2) that defendant's motion to quash the panel of jurors, after they had been selected and sworn to try him, should have been granted; (3) that instruction 2, given by the court of his own motion, as to the necessity of corroboration of the testimony of an accomplice, was erroneous; and (4) that the court committed error in (a) refusing to give, on the part of the defendant and as requested by him, instruction marked E, and (b) that the court similarly erred in refusing to give, at the request of defendant, instruction marked G. Both of these instructions refused by the court, as well as the instruction numbered 2 given by the court, are set out in the statement of the case for a better understanding of the points involved.

I. Returning now to the contention of defendant, as urged by him with much of zeal, that the court ought, upon the proof, to have granted defendant a change of venue, on the ground of the prejudice of the inhabitants of Clark county, to some other county where such prejudice did not exist, we find that so far as the evidence offered pro and con upon the hearing was concerned, defendant on his behalf, including himself, offered 13 witnesses, who resided, for the most part, in the northern part of Clark county, and for the most part, also, in the immediate neighborhood where the offense of defendant is said to have been committed, and some of whom, as already stated, were related to defendant. The testimony of these witnesses tended to show the existence of some prejudice against defendant in their respective and immediate neighborhoods. The grounds for this prejudice, as learned counsel for defendant sought to prove, seem to have been in a sense inherited, and to have arisen from the fact that more than 20 years before the trial, and while the defendant was but a child of some 5 or 6 years, a brother of his and three cousins were charged with a notorious murder, the victim being a member of a very prominent family of Clark county. We may say, in passing, that the court sustained objections to testimony which the defendant sought to offer as to the fact of this murder, and to the fact that his relatives were charged therewith and tried therefor, as showing a foundation for the alleged prejudice which existed against defendant. This testimony, to which the court sustained objections made by the state, would, it sufficiently appears, have tended to show that there was prejudice arising from the facts stated, against any one bearing the name of Shaffer. The action of the court in refusing to hear this testimony is urged as error.

[1] We go out of the way and wander somewhat from the point before us to say that, in our view, the learned trial court was correct in its refusal. The point before the court was whether there was prejudice against defendant himself; not whether there was prejudice more than 20 years of age against his relatives. We must credit the citizens of Clark county with too much intelligence to say of them that they would visit blame upon and hold prejudice against defendant, who was but a toddling child when the facts occurred upon which the alleged prejudice was founded, for acts in which he had no part and of which he was as innocent as the unborn babe. We cannot believe that so little of fairness and so little of intelligence would be used by the citizens of that county in distinguishing between the things done almost a generation ago by defendant's relatives and the circumstances of the life and citizenship of the defendant himself.

Returning to the main question under discussion here, we may state that some 17 witnesses were offered by the state as to whether there existed such prejudice against defendant in Clark county as would prevent him from obtaining a fair and impartial trial. These witnesses came, for the most part, from the central and southern part of Clark county, from the part of that county, we may here say, from which the trial jury afterward came. Many of these witnesses, perhaps a majority of them, did not know defendant, nor had they ever heard of him, and none of them either knew of the existence of any prejudice against him, or had they heard that any such prejudice existed. Some of them, it is true, said that such prejudice might exist, and they might not be advised of it. But clearly such a statement as this elicited on cross-examination proves little of pith or value.

The record further shows that comparatively little difficulty was had in the selection of a jury. Five jurors only, if we take the letter of the record for it, disqualified themselves, and each of them for the reason, not that he was prejudiced, but because he had talked with the parties or the witnesses and had formed an opinion. Some three others, whose names do not appear in the panel of 24, from which the jury was ultimately selected, were examined upon their voir dire, but what became of these three the record does not show.

[2, 3] We have had this point before us on many occasions, and we have uniformly held, since the adoption of the present statute on this subject, that the matter of granting a change of venue is bottomed upon the sound discretion of the trial court, and that it is only when the trial court so far palpably violates the discretion lodged in him, as to preclude to the defendant a fair and impartial trial, that this court will interfere. *State v. Anderson*, 158 S. W. loc. cit. 822;

State v. Barrington, 198 Mo. 23, 95 S. W. 235; State v. McCarver, 194 Mo. 717, 92 S. W. 684; State v. Rosco, 239 Mo. 535, 144 S. W. 449; State v. Sharp, 233 Mo. 283, 135 S. W. 488. Especially is this true when, as in the instant case, the testimony is conflicting, with the weight of it, as the record shows it, in favor of the absence of a sufficient quantum of prejudice to prevent a fair and impartial trial. We would hold the same view if, upon the record, the testimony seemed to be evenly balanced, thus deferring to the view of the learned trial court who had the witnesses before him and to the discretion which the statute and the cases cited lodge in him; section 5180, R. S. 1909; a fortiori do we so hold where the weight of the testimony seems clearly against the position of the defendant. Hence, we disallow this point.

II. The record shows that, after the trial jury of 12 had been impaneled and sworn to try the cause, the defendant filed a motion to quash the panel for that, as he averred in his motion, the ellisor, whose appointment upon motion he had procured, had violated the order of the court in summoning the venire from which the trial panel was obtained, from the central part of Clark county, instead of from the southern part thereof. There is no showing whatever in the record, except from the bare statement in this motion, that any order was made by the court to the ellisor to obtain this jury from the southern part of Clark county. A map of Clark county, showing the municipal townships thereof, was introduced, and, from this map and the information afforded us by the voir dire examination of the venire, we are informed that the jury came from the central and southern townships of the county, and not from the northern townships adjoining (except as to a corner) that in which the offense is alleged to have been committed, or from that township itself.

[4] No exception was saved to the ruling of the court in overruling the motion to quash this panel. For this reason, if for no other, the point is not properly before us for decision. We reserve our ruling as to whether it would be error sufficient for reversal for a sheriff to violate the order of the court as to the part of the county from which a trial panel should be summoned, until this point shall be a live one in a case before us. It is not in this case for both of the reasons suggested above.

III. Defendant concedes that instruction numbered 2, which we set out in full in the statement, is, in the main, the usual cautionary instruction which the law warrants the giving of, touching the testimony of an accomplice, and that no error can be based upon the giving of the same, except as predicated upon the words which we have italicized, that is to say, that clause which permits corroboration of an accomplice's testimony to be made "*by circumstances given in evidence.*" The books are full of authorities holding that

the instruction as given, without the words "corroborated by circumstances given in evidence," is a good and proper one. It has been repeatedly in that form passed on and held good by this court. State v. Crab, 121 Mo. 585, 26 S. W. 548; State v. Shelton, 223 Mo. loc. cit. 137, 122 S. W. 732; State v. Daly, 210 Mo. 667, 109 S. W. 53; State v. Tobie, 141 Mo. loc. cit. 561, 42 S. W. 1076. So much being conceded, the narrow and exact question is whether the use of the term "corroborated by circumstances, given in evidence," makes this instruction bad and is so far error hurtful to the defendant as to bring about a reversal of this case. It will be borne in mind that this instruction is, without any sort of doubt, merely a cautionary instruction given by the court solely for the benefit of the defendant, and not for the benefit of the state.

[5] For it is the law, and this instruction so tells the jury, that a conviction may be had upon the uncorroborated testimony of an accomplice, if the jury find and believe such testimony to be true, and that the same establishes the guilt of the defendant. State v. Daly, supra; State v. Shelton, supra.

[6] If these words which we have quoted make this instruction bad, such condition arises because the thought conveyed is untrue either as a matter of fact, or as a matter of law, or both. We do not think it is necessary to cite authorities upon this point. Can there be any manner of doubt, in common sense, that corroboration may arise as well from circumstances as from the direct testimony of a witness? It is just as true that "confirmation strong as proof of Holy Writ" may come from circumstances arising in the case and shown by the evidence as from the testimony of one or many witnesses. No greater reason can be seen for the refusal of such corroboration of an accomplice's testimony by circumstances than for the refusal of circumstantial evidence in the ordinary trial. No one will doubt for a moment, in truth all of us know, that convictions may be had, and have been had, and will yet be had, upon circumstantial evidence alone. Then, if one may be convicted on circumstantial evidence alone, may not the testimony of an accomplice likewise be corroborated by such testimony? We think so, and so thinking hold that in a proper case, where competent proof is offered of corroborating facts and circumstances, the court may very properly instruct and should in the interest of justice instruct that the necessary quantum of corroboration of an accomplice's testimony may be drawn from the circumstances of the case shown in evidence.

IV. Defendant, upon the trial, requested the court to give instruction E, which we have for information's sake set out in the statement. Upon the refusal of the court so to do, the defendant saved his exceptions. This instruction as offered by defendant, was clearly an attempt to more nearly and clear-

ly define reasonable doubt. It is doubtful, as this court has repeatedly held, whether the defining of reasonable doubt tends toward clarity or the reverse thereof. *State v. Nerzinger*, 220 Mo. 49, 119 S. W. 379; *State v. Bond*, 191 Mo. 555, 90 S. W. 830; *State v. Leeper*, 78 Mo. 470; *State v. Robinson*, 117 Mo. 661, 23 S. W. 1066; *State v. Wells*, 111 Mo. 537, 20 S. W. 232. It is just a little like the gliding of fine gold.

[7] In addition to all this, the court had already given, at the request of defendant, an instruction sufficiently defining the nature of such doubt, in order to warrant an acquittal. For this reason, if for no other, this objection of defendant must be disallowed.

[8] The court also refused to give instruction marked G, which we have set out in the statement. It is clear that this requested instruction was but a comment upon one phase of the testimony offered in the case. The defendant singled it out in this instruction, and asked that, touching it, the jury be instructed that unless they found the single fact set out therein beyond all reasonable doubt that the same was no evidence of defendant's guilt. If the court had given it sua sponte, then it is very likely the defendant would be here urging that it was error because it is a comment upon the evidence and a singling out of one isolated fact and accentuating and calling special attention to it. This is a thing forbidden by the decisions, and the learned trial court was correct in refusing this instruction. *State v. Wertz*, 191 Mo. 569, 90 S. W. 838.

[9] V. It is also contended by defendant that the court erred in giving instructions numbered 3 and 4, which we have set out in the statement, and which deal with the weight and credibility of the testimony of the defendant and that of defendant's wife. Learned counsel cite us to a very late holding in a civil case, that of *Benjamin v. Railroad*, 245 Mo. 598, 151 S. W. 91, in which suit, a similar comment upon the testimony of the plaintiff was held to be error. We have no fault to find with the holding of the court in that case. But learned counsel overlook the fact that the statute itself, in conferring upon the defendant and defendant's spouse the right to testify, has seen fit to limit such right by permitting a showing of the fact that the witness is the defendant and on trial, and the fact of marriage to the spouse offered as a witness, for the purpose of affecting the credibility of either or both of them. Section 5242, R. S. 1909. We have no such statute touching the testimony of a plaintiff in a civil case, nor of a defendant in such case; hence the difference between the two holdings. If the statute permits the showing of the fact of interest on account of

the witness being a defendant or the spouse of a defendant, why may not the jury be likewise advised of the existence of the law applicable to such status by an appropriate instruction? We concede, however, that there is not much excuse for the giving of such instructions as these, where the court instructs generally as to the credibility of witnesses, and as to the fact that the interest of any witness or witnesses in the case may be considered by the jury for the purpose of affecting the credibility of such witness. But while these instructions have been many times given, and while in the view of the writer they ought not to be given, yet, when we consider the statute which we cite above, and when we have reference to the many holdings of this court that the giving of instructions such as these do not constitute reversible error, we are not disposed to go further than to say, as has been many times said before by this court, that in our view the giving of such instructions as these subserves no useful purpose, and would as well be omitted and the labor of preparing the same saved. Similar instructions have been before us in many cases. *State v. Napper*, 141 Mo. 407, 42 S. W. 957; *State v. Fox*, 148 Mo. 517, 50 S. W. 98; *State v. Dilks*, 191 Mo. 674, 90 S. W. 782; *State v. McDonald*, 232 Mo. 219, 134 S. W. 545; *State v. Lingle*, 128 Mo. 528, 31 S. W. 20; *State v. Newcomb*, 220 Mo. loc. cit. 66, 119 S. W. 405. And, while the giving thereof has often been criticized as unnecessary, we have not been able to find a single case reversed on account of these instructions.

[10] There was sufficient evidence in the case, if the jury believed it, and they evidently did believe it, to warrant the verdict which they rendered. In our view, every inference to be drawn from the facts shown in testimony, notwithstanding the attack made upon the different witnesses for the state, and notwithstanding the attempt to impeach them, is in favor of the theory of the state rather than that of the defendant. It is impossible to reach any other conclusion than that the verdict of the jury was correct and fully warranted by the facts shown. Compelling in this view is the fact that defendant, as neither he nor any one for him denies, paid money to one of the witnesses for the state, and made other strenuous efforts to keep this witness out of the state and thus prevent him from appearing against defendant. Thus viewing the facts, and finding, after a most careful investigation of the record, no error which will justify a reversal, we think that the judgment should be affirmed. Let this be done.

BROWN, P. J., and WALKER, J., concur.

**HYNDS et al. v. HYNDS.**

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

**1. EXCEPTIONS, BILL OF (§ 39\*)—TIME FOR FILING—STATUTES.**

Under Rev. St. 1909, § 2029, providing that exceptions may be filed during the terms of the court at which they are taken or within such time thereafter as the court may allow, exceptions to a motion to strike part of an amended answer, taken at one term of court, while the decree was entered and the bill of exceptions filed at the succeeding term, did not save the exceptions for review.

[Ed. Note.—For other cases, see Exceptions, Bill of Cent. Dig. §§ 51, 52, 54-56, 60; Dec. Dig. § 39.\*]

**2. APPEAL AND ERROR (§ 254\*)—NECESSITY OF EXCEPTION—RULING ON DEMURRER.**

An adverse ruling on a general demurrer may be reviewed without an exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1486, 1487; Dec. Dig. § 254.\*]

**3. APPEAL AND ERROR (§ 518\*)—RULING ON MOTION TO STRIKE—NECESSITY OF EXCEPTION.**

An exception to the ruling on motion to strike out parts of an amended answer, on grounds, some of which could only be reached by demurrer, but others of which could be reached by motion to strike, must be saved by bill of exceptions filed at the term or on leave granted, in order to bring up the grounds of the motion separable from the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.\*]

**4. PLEADING (§ 356\*)—MOTION TO STRIKE—AVAILABILITY.**

The question whether an amendment of the answer intended to make it conform to the proof, was, in fact, warranted by the evidence cannot be decided on motion to strike the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1111-1119; Dec. Dig. § 356.\*]

**5. QUIETING TITLE (§ 39\*)—PLEADING—SUFFICIENCY.**

Allegations of a cross-bill in ejectment, undertaking to state a cause of action under Rev. St. 1909, § 2535, to quiet title, that the ancestor of the parties died intestate, leaving a widow, who was appointed administratrix, and took possession of personal property and therewith purchased in her own name the land described in the petition, and thereafter settled in full with all the children except the defendant, who did not receive his distributive share, that she promised said land to defendant as his share of the estate, which it did not exceed in value, that he had been in full and exclusive possession of the premises as his own, claiming title thereto, paying taxes thereon, and exercising all the usual acts of ownership, were sufficient.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 80; Dec. Dig. § 39.\*]

**6. EJECTMENT (§ 69\*)—PLEADING—STATUTES.**

Under the express provision of Rev. St. 1909, §§ 1806, 1807, prescribing how a counterclaim must arise, and permitting defendant to set forth in his answer as many defenses and counterclaims as he may have, whether such as had been theretofore denominated legal or equitable or both, defendant in ejectment could plead by way of defense, and unite in his answer a general and specific denial with a state-

ment of any new matter constituting a defense and counterclaim.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 181-189; Dec. Dig. § 69.\*]

**7. TENANCY IN COMMON (§ 15\*)—ADVERSE POSSESSION—NOTICE.**

To establish adverse possession in favor of one cotenant as against another, there must be such outward acts of exclusive ownership as to impart notice of adverse possession to the other cotenant; but an actual notice in that behalf is not necessary.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.\*]

**8. TENANCY IN COMMON (§ 15\*)—POSSESSION OF ONE AS POSSESSION OF ALL—PRESUMPTION AND BURDEN OF PROOF.**

Unity of possession being of the essence of tenancy in common, there is a rebuttable presumption that the possession of one cotenant is the possession of all and the burden is on a cotenant seeking to rebut it to do so by cogent proof. The acts relied on, whether verbal or otherwise, must be open, clear, and so unequivocal as to coerce belief.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.\*]

**9. TRUSTS (§ 81\*)—RESULTING TRUSTS—LAND.**

Where a widow with minor children assumed to deal with the personal estate of her deceased husband as her own, and invested it in real estate in her own name, there was a resulting trust in the property so purchased in favor of the children whose money was so used, and in such ratable proportion to each as each contributed to the purchase money.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115-118; Dec. Dig. § 81.\*]

**10. APPEAL AND ERROR (§ 894\*)—EQUITY—BRINGING UP EVIDENCE.**

In an equity case, all the testimony should be brought up by the party seeking a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3637-3644; Dec. Dig. § 894.\*]

**11. EJECTMENT (§ 86\*)—TRIAL—BURDEN OF PROOF.**

Defendant in ejectment, who undertook to quiet his own title by showing that the widow and administrator of the ancestor under whom all claimed had purchased the land with the assets of the estate, and had settled with all the parties except himself, and that she had promised him the land in question as his distributive share, which it did not exceed in value, had the burden of establishing such claim.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.\*]

**12. EJECTMENT (§ 95\*)—SUFFICIENCY OF EVIDENCE—SETTLEMENT.**

In ejectment, where the rights of the parties rested upon a resulting trust created by the acts of the administrator of their ancestor, evidence held to show that a settlement had been made with all the other beneficiaries except defendant and one other.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.\*]

**13. EQUITY (§ 59\*)—MAXIMS.**

Where children after their majority acquiesced for a long time in some domestic arrangement, whereby each received from their father's estate an amount nearly equal to the share that each was apparently then entitled to the maxim "Equality is equity" applied.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 180; Dec. Dig. § 69.\*]



#### 14. APPEAL AND ERROR (§ 894\*)—RULES OF COURT—CONSTRUCTION.

Supreme Court rule 7 (73 S. W. v.), to the effect that in an equity case all the testimony must be brought up, must receive a reasonable construction, and it is also in the power of the court to sustain its own rules, or to except a particular case from their operation whenever the purposes of justice require it; and hence, where appellants in their bill of exceptions made a call for an exhibit which had been mislaid and could not be produced, they could not be held in fault.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3637-3644; Dec. Dig. § 894.\*]

Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge.

Ejectment by A. J. Hynds and others against George Hynds, with cross-bill by defendant. From a decree awarding certain interests, plaintiffs appeal. Reversed and remanded.

J. M. McCall and P. J. Reiger, both of Kirksville, and Joseph Park, of La Plata, for appellants. Higbee & Mills, of Lancaster, and Campbell & Ellison, of Kirksville, for respondent.

LAMM, J. Ejectment in the Adair circuit court. From certain evidence (in which a "partition suit" is referred to), we conclude plaintiffs had sued defendant at some prior time for the partition of certain lands in Adair county, that therein defendant claimed adverse possession, and that thereupon such proceedings were had in that suit, that plaintiffs were either cast or that the cause was abated until plaintiffs brought ejectment and tried out title.

At any rate, in March, 1909, plaintiffs sued in ejectment to recover three tracts of land in Adair county, for convenience here designated as A, B, and C. Tract A is the S.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 12, township 61, range 15, except the right of way of the Wabash railroad. Tracts B and C are two outlying tracts of timber land that need no description. Plaintiffs aver they were lawfully entitled to possession on a certain day in October, 1890. They lay ouster as of May 18, 1908.

Defendant answered with a general denial, following that by the averment that he was the owner in fee and in possession as such, claiming title, but that plaintiffs claimed some interest adverse to defendant's title. Thereupon the answer goes on to pray the court to ascertain the respective titles, estates, and interests of plaintiffs and defendant, and adjudge the same severally, and finally determine all the rights and claims of the parties, and adjudge and decree defendant to be the absolute owner, that plaintiffs or neither of them have any title, and for all proper equitable relief.

(Note: The pleader evidently undertook in his answer to state a cause of action under former section 650 to determine and quiet

title—now section 2535, R. S. 1909—and this by way of defense, without reference to a counterclaim.)

Presently, at the same term, plaintiffs filed their motion to strike out all that part of the answer following the general denial, for sundry and divers reasons, but, as the motion was overruled and no assignment of error is made on that ruling, it is put away from us. At the same term plaintiffs filed their reply, in which, after denying allegations of new matter, they more fully exploited their alleged title, claiming as heirs (children and grandchildren) of one Parmelia Hynds, who died intestate seised as owner of the premises and in possession at the time of her death, to wit, in 1898, and averring that defendant was also an heir (child) of Parmelia and was devisee of another deceased heir, one, Rit Hynds (also a child), that as such heir and devisee defendant was entitled to an undivided two-fifths of the land as tenant in common with plaintiffs; that two of plaintiffs, A. J. Hynds and Jennie Mahaffey, were each entitled to a one-fifth as such tenants, and that the other plaintiffs, naming them, were the widow and children of a deceased heir of Parmelia, to wit, William Hynds, and as such, entitled to his share, to wit, an undivided one-fifth as such tenant. After restating the averment of the petition that defendant wrongfully withholds possession, etc., plaintiffs renew their prayer for judgment.

At the next, to wit, the January term, 1910, on the trial at the close of the evidence, defendant filed an amended answer. This amended answer was a replica of the former, with the addition of what the pleader called a "cross-bill." In a nutshell, the cross-bill set forth these averments: That in 1858 John Hynds died intestate in Adair county, leaving a widow, Parmelia, and certain children, one of whom was defendant, then aged two years, and William, A. J., and Richie (Rit), and Jennie Mahaffey; that Parmelia was appointed administratrix, took possession of the estate, to wit, personal property of the value of \$2,500; that with the money and assets in her hands as such administratrix she bought the land described in the petition, taking title thereto in her own name; that afterwards, on dates and in ways mentioned in the answer, she settled in full with all the children of John Hynds for their respective distributive shares in his estate, with the exception of defendant, and that the distributive shares so paid to said children respectively were accepted in full settlement; that there remained only the described real estate, so paid for out of said trust funds in Parmelia's hands as administratrix; that defendant never received any part of his distributive share of his father's estate; that the land in question did not exceed in value his distributive share; that, long before the death of Parmelia, she promised to set apart

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and convey to defendant, as and for his distributive share, said land; that defendant accepted the same; and that "therefore (therefrom?) until the present time defendant had had full and exclusive possession of the premises as his own, claiming title thereto, paying taxes thereon, and exercising all the usual acts of ownership thereover." Wherefore, defendant says, that by reason of the premises he is the owner of all three tracts, and prays the court to adjudge and decree to that effect, and that plaintiffs and each of them be divested of all title and claim of title thereto, etc.

On that amended answer coming in, plaintiffs filed a motion to strike out that part of it purporting to be a cross-bill, for the reasons (1) that there was no evidence authorizing the filing of said amended answer; (2) that the part objected to is contradictory to defendant's original answer; (3) that it is inconsistent with defendant's said original answer; (4) because the cross-bill does not state facts sufficient to constitute a cause of action; (5) and does not state facts sufficient to constitute any claim or right to the real estate; (6) and was not filed at the time it purported to be. That motion was overruled. Plaintiff excepted in a record entry, but filed no term bill of exceptions. Thereupon the court took time to consider, and the cause was continued to the next regular term.

At the next term the cause came on for final disposition, and it was decreed that defendant was the owner of A; that title to A be vested in him in fee, to the exclusion of plaintiffs or either of them; that tracts B and C belong to defendant and plaintiffs, the other living children of Parmelia and John Hynds, and the heirs of their dead child, William, as tenants in common, to wit, an undivided one-fifth to defendant as such child, the same to defendant as devisee of his deceased unmarried brother, Rit (who died testate), one-fifth to Jennie Mahaffey (born Hynds), one-fifth to A. J. Hynds, and another fifth to the other plaintiffs, the children of William Hynds deceased—an undivided one forty-fifth to each child, subject to the dower of William's widow. The costs were ordered paid by plaintiffs and defendant, half and half. Thereupon plaintiffs appeal in due time and on such proper steps as bring here for review certain questions. Defendant abides the decree. Sufficient of the record and proof to determine points raised will appear in connection with a consideration of the point itself.

We make the following prophylactic observations as a foreword: By unhappy inadvertence, the cause on some phases was loosely tried on both sides. Both sides resort to the *nebular hypothesis*, and, to borrow a chimney-corner figure, in sewing seams dropped stitches. Shadows lurk in the record which experienced and able counsel (as here) could have cleared away, and witness-

es were cross-examined on documents not preserved in the record. So the brief of appellant violates that paragraph of our rule 15 requiring a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point, and all this to be separate and apart from the argument and discussion of authorities. Handicapped with such unnecessary troubles, we do the best we can with the record. By sifting and winnowing we will formulate propositions in our own way.

I. *Of the motion to strike out.* It is argued for appellants that the motion to strike out part of the amended answer should have been sustained. Respondent's counsel pass the point in silence. In fact there is no set line of battle in briefs, or steady measuring of swords. When appellants assert, respondent does not answer, and vice versa.

[1] In our opinion, the assignment must be ruled against appellants, because:

(a) The motion to strike out was made and ruled and the exception saved at one term of court, whilst the decree was entered and the bill of exceptions was filed under leave taken at a succeeding term. No term bill of exceptions was filed, and no leave granted to file one at the term the exception was taken; but appellants undertook to preserve the exception in the record entries made at the time and in a bill filed at the succeeding term. Such course does not save the exception, where one is necessary to a review. R. S. 1909, § 2029 reads: "Such exception may be written and filed at the time or during the term of the court at which it is taken, or within such time thereafter as the court may by an order entered of record allow," etc.

[2] (b) It has been ruled that an adverse ruling on a general demurrer may be reviewed without an exception.

[3] It has been ruled that a ruling on a motion to strike out is preserved only by an exception. But it has also been ruled that cases may arise where a motion to strike out fills the office of a general demurrer and, under guarded limitations, may be treated as such. But it is obvious that this motion to strike out (while it had pertinent matter to a general demurrer) covered other grounds appropriate to a mere motion; hence both the motion and the exception should have been saved in a bill filed at the term, or on leave granted, in order to bring up those grounds of the motion, separable from the general demurrer. We have been so lately over this ground that we will not restate the learning on the point. The curious may consult *Shohoney v. Railroad*, 231 Mo. loc. cit. 148, 132 S. W. 1059, Ann. Cas. 1912A, 1143, et seq., and cases therein cited; *Interstate R. R. Co. v. Mo. R. & C. R. Co.*, 158 S. W. 349, not yet officially reported, and cases therein cited.

[4] We rule, therefore, that the motion to strike out and the exception to the ruling

thereon are not here for review, except in so far as the motion is a general demurrer. This disposes of these grounds of the motion directed to inconsistency of the cross-bill with the original answer, its being contradictory thereto, the lack of evidence warranting the amendment, and its being filed out of time. Our ruling on this technical ground is softened to us for the reason that we can see no substance on the merits. There was no inconsistency, no contradiction, no untimeliness. The right, before final judgment, to amend the pleadings to agree with the proof is safeguarded by statute. R. S. 1909, § 1848. Plaintiffs asked no terms when the amendment was made, and, if the proof did not have the probative force warranting a decree on the amended answer, as argued, that question is open on the merits and is not to be decided on a motion to strike out the amendment.

[5] (c) Taken as in part filling the office of a general demurrer, it will be observed the motion did not strike at that part of the amended answer wherein the pleader makes averments invoking the aid of old section 650 to quiet title; and, if it did, the generality of the language used in that behalf in the answer was well enough. *Huff v. Land Co.*, 157 Mo. 65, 57 S. W. 715. The motion merely attacks the cross-bill, *eo nomine*. But in their brief they do not point out the absence of any specific averment essential to the statement of a cause of action in equity. An appellate court has no call to be astute to find what appellants neglect to put their finger on. While the cross-bill is so concise as to be scant and a little vague, yet we are not prepared to say that, liberally construed, it does not state a cause of action.

[6] In leaving the whole matter, we make the following further observations: To mingle matter of demurrer and motion in one pleading is an unscientific and disturbing novelty. *McKee v. Downing*, 224 Mo. loc. cit. 130, 124 S. W. 7. The motion, *inter alia*, raises exceedingly nice points of practice. For instance: Defendant was sued in straight ejectment. Undoubtedly he had the right under our practice act to plead by way of defense, and unite in his answer "a general and specific denial" with a "statement of any new matter constituting a defense or counterclaim." R. S. 1909, § 1806. The next section prescribes how the "counterclaim" must arise, and amends the very old rule of practice so that now defenses and counterclaims may be such as have been "heretofore denominated legal or equitable or both." Section 1807. In *Chambers v. Chambers*, 227 Mo. 262, 127 S. W. 86, 137 Am. St. Rep. 567, plaintiff sued under old section 650 to quiet title, but he interwove into his petition such equitable matter as clearly put the cause into equity. The answer was in two counts, the second a cross-action in ejectment. One question was (227 Mo. 273, 127 S. W. 86, 137 Am. St. Rep. 567) whether a strictly legal action of ejectment

may be grafted by defendant on the stock of plaintiff's suit in equity, looking to the cancellation of a deed and the removal of a cloud upon plaintiff's title. In the instant case we have the converse of that. Plaintiffs sue at law in strict ejectment, presumably driven to that course by an order in the partition suit because of a claim of adverse possession. When they do so, they are met with a defense by way of an action to quiet title under old section 650. May defendant take that course? Furthermore, they are met with a "cross-bill," not designated as a "counterclaim." Must there not be an *original* bill before there can be a "cross" bill? We say neither *aye* nor *no* on those questions, but mark the spot, that we may not be precluded hereafter should such questions of practice be brought here on a record in some other case challenging a ruling.

A main part of appellants' brief is leveled at the ruling on the motion to strike out. Under cover of that general head, as already hinted, they have discussed questions pertaining to the substantive law of their case, and which, in that view of it, in due course will receive consideration, regardless of the irregular classification of matter in their brief, this as a debt due justice.

II. *Of adverse possession.* We are furnished with a brief by appellants on the question of what constitutes adverse possession between cotenants.

[7] They insist on the proposition that, to establish such possession in favor of one cotenant as against another, there must be such outward acts of exclusive ownership as to impart notice of adverse possession to other cotenants. Defendant's counsel pass the point in silence. Such silence is tantamount to their concession that the rule is as stated. Whether conceded or not, such is the rule. *Allen v. Morris*, 244 Mo. loc. cit. 363, 148 S. W. 906, Ann. Cas. 1913D, 1310, et seq.; *Coberly v. Coberly*, 189 Mo. loc. cit. 16, 87 S. W. 957, et seq.; *Misenheimer v. Amos*, 221 Mo. 362, 120 S. W. 602. Actual notice to other cotenants in that behalf is not necessary. But a mere frame of mind, a mental attitude, unaccompanied with acts, will not alone do. The laws of men deal with the mere purpose formed in the mind only when the purpose comes into the open by flowering into concrete action in some overt act, or tends to stamp the character of some act in judgment. The laws of heaven are different. They search the heart itself with an all-seeing eye, and there see snakes in the grass to be bruised by the heel, e. g. *Matt. v. 28*.

[8] Now, unity of possession being of the very essence of tenancy in common, the possession of one is presumptively the possession of all. The presumption is a rebuttable one, but the burden is on the cotenants seeking to rebut it to do so by cogent proof. The acts relied on, whether verbal or otherwise, must be open, clear, and so unequivocal as to coerce belief. If they measure up to that

severe standard, and demonstrate to the world (by their openness and notoriety) an adverse claim, the cotenant may thereby establish disseisin of his fellows, and put himself in the way of finally getting title by adverse possession through mere effluxion of time. But, in the instant case, respondent does not claim title by limitation, nor that an adverse possession in him flowered and ripened into such title. His claim is that he is the sole remaining beneficiary of a trust fund springing from a resulting trust, a trust fund out of which the other original beneficiaries had received their distributive shares, the residue falling into his lap on equitable principles, even as falls an apple from its bough in its due season. True, he had and held exclusive possession for a time. True, he was in possession claiming adversely when the suit was brought. But he uses such possession only as persuasive evidence to show acquiescence, on the part of the other heirs of Parmelia and John Hynds, in his theory of a resulting trust and a settlement with the other beneficiaries. In view of this contention, we lay aside appellants' proposition of law for use in some other case.

III. *Of an express trust and gift.* (a) Appellants' brief in part invokes the trite rule that an express trust in land cannot be established by word of mouth. As no express trust is invoked by respondent, the matter is in so far afield that it is not here for judicial disposition. We mention it only to wash our hands of it. We have nothing to do with what is not before us. (b) The same ruling must be made on their proposition that the evidence is not of that direct, positive, and unambiguous character necessary in establishing a gift of real estate. The essential and stringent requisites of a gift of that sort are pointed out *ex industria* in appellants' brief, and are stressed *arguendo*. Why so? This case cannot break in whole or in part on such question. Respondent is not standing on a gift, *qua* gift. He asserts no donation, nothing received without money and without price as a gift *inter vivos*. Contra, he claims as of right, within recognized doctrines of equity pertaining to resulting trusts. He supplements that claim by the contention (in aid of it) that the trust was executed by turning the land over to him as his distributive share of his father's estate. Accordingly, we put gifts and express trusts aside.

IV. *Of a resulting trust.* Attending to the record on that head, the proof is to this effect: John Hynds died in 1858, intestate, in Adair county, possessed of personalty, but seised of no realty. As a settler, he had come into the country shortly before with some means, but died before buying land. He left a widow, Parmelia, who survived him 40 years, and six children, William, A. J., Rit, Jennie (who intermarried with Mahaffey), Tabitha, and George, aged two years. Tabitha died during minority, while under guardianship and unmarried. The record

does not show whether an administrator was appointed for her estate or what disposition was made of it. As all parties seem to assume such fact, we shall also assume it was treated as merged in the corpus of the general estate. Jennie married while a ward under guardianship. We infer that William was about of age at his father's death. At that time the other children were minors, and four of them were minors in 1865, to wit, A. J., Jennie, Tabitha, and George. Two of the sons, A. J. and Rit Hynds, while minors (aged respectively 18 and 20 years) enlisted and served as soldiers during the Civil War. At least one of them (A. J.), and possibly the other, sent his army pay home to their mother, but whether it was sent home as due to her as surviving parent during their minority or to be held by her as agent or as part of their estate does not appear. Neither does the amount of the estate of John Hynds positively appear. We shall have occasion, in due course, to recur to this phase. On August 4, 1858, it is shown, from a record produced from the probate office of Adair county, that Parmelia appeared "in vacation" and filed an affidavit of the death of John Hynds, and on that date the record entry shows this: "Letters of administration are granted to her on the estate of said deceased." The amount of her bond, the size of the estate, the character and condition of the assets, or the history of her administration nowhere appear in any subsequent entry. Indeed, from that day in August, 1858, down to the day of trial there is not a shred or thread of evidence relating to probate proceedings in the estate of John Hynds or her administration, except what may be faintly got aliunde, and by indirection and inference at that. There is testimony that (with the above scant result) the records in the probate office were searched for entries relating to the administration of the estate, but it does not appear that any search was made in the office of the clerk of the county court for data in this ancient matter (the significance of which omission will be presently referred to). The records produced from the probate court also show the following entries, and no more, relating to her guardianship: On August 8, 1865, she was appointed guardian and curator of the four children on that date remaining minors, to wit, A. J., Jennie, Tabitha, and George. Her bond was fixed at \$5,000, and it was filed and approved.

(Note: By reference to section 22, p. 468, c. 116, R. S. 1865, it will be seen that at that time guardians' and curators' bonds were required to be fixed at "double the value of the estate or interest committed to their care." Assuming such duty was performed by the court, then such entry is evidence of the fact that the mother as guardian and curator took into her hands an estate of not more than \$2,500, belonging to the four minors.)

From the same record produced from the same source another record entry was read

in evidence, apparently under date of "May 6, 1865," showing that Parmelia was charged with the sum of \$2,234.96 as assets belonging to said four minors, and on that date she received credit of the sum of \$876.96 "as per settlement here filed." Maybe the paper presently referred to as "defendant's Exhibit A" was this settlement "here filed," but the record is dark on that. It is obvious there is a mistake in either the date of her appointment as guardian and curator or in the date of the entry last above, for the charge, credit, and settlement spoken of apparently antedate her appointment. Fifteen years go by and then the following appears under date of August 9, 1880: "Estate of Hynds' minor heirs, Parmelia Hynds, G. and C., annual settlement filed." Why we are left to guess we do not know, but maybe this settlement, and not the other, was "defendant's Exhibit A." Another entry, we infer on the same date, reads: "Estate of Jennie Mahaffey, Parmelia Hynds, G. and C., final settlement filed and continued." On September 13, 1880, the following entry appears: "Estate of Jennie Mahaffey, Parmelia Hynds, G. and C., final settlement continued second Monday in next month."

(*Nota bene:* Under the Constitution existing in 1855, art. 5, § 12, it was provided that probate jurisdiction should exist in "inferior tribunals" to be established in each county. Under that constitutional grant of power, exclusive original probate jurisdiction was vested by statute in county courts. R. S. 1855, vol. 1, p. 534, c. 47. There it remained until 1877, except in the city and county of St. Louis, and except in counties, where by virtue of local statutes, it was vested in common pleas courts or other named tribunals by special enactment. It is not made to appear there was any such special act passed for Adair county, but in 1875 the Constitution was made to read so that "judicial power" was vested in "probate courts." Art. 6, § 1. And by section 84, Id., the General Assembly was required to establish such a court in each county and it was given probate jurisdiction. In 1877, in obedience to that mandate, such courts were established throughout the state by act of the General Assembly in each county [article 5, c. 23, R. S. 1879], and provision was thereby made for a transfer of those books, "relating solely to the estates of deceased persons," etc., and guardians and curators from the office of the clerk of the county court over to the probate court, as well as all files and papers. R. S. 1879, § 1191. It is singular that, in the case at bar, no attempt was made to show that entries relating to the estates of minors and deceased persons were kept in separate books, while the county court had jurisdiction, nor were the records of the county court searched. So that, if we assume said statute was obeyed and papers and separate books sent over, yet there is left, to be reckoned with, the fact that in many counties no separate prob-

bate books were kept, but entries anent county business proper and business transacted in county courts anent estates of decedents and minors were intermingled in the same record books.)

The abstract of the record shows that search was made shortly before the trial in the office of the probate court for files and papers relating to the guardianship of Parmelia, but none could be found. Before that, however, one of defendant's attorneys did find a document called "defendant's Exhibit A." As a point is made in respondents' brief in relation to the absence of this exhibit from the abstract, and a counterpoint is made in appellant's reply brief, we shall recur later to that exhibit and the examination of witnesses thereon.

The proof shows that at the death of John Hynds, Parmelia, his spouse, had no property in her own right, nor is it shown she acquired any such property since that time, independently of the estate. Under the state of law then existing she was entitled to certain personal property absolutely, to her widow's allowances, to dower in the personality as her distributive share. There is a sour saying, nobody owes a dead man, a dead man owes everybody. Allowing that to overshoot the mark, yet the rule is that, when a man pays his debt to nature, he does not thereby pay all his debts. Men usually owe debts and die owing them. The doctor levies his toll, the undertaker takes his share. Doubtless John owed and Parmelia paid debts, but this record is as dumb as the deeps on that matter. But there is a glimmer of light in the record. For instance, if we assume that \$2,234.96 represented the estate of four of the children, then, reckoning from that starting point, the entry is some evidence that the share of each child, minor and adult, was at least \$558.74. As the charge was joint, so the credit seems to be joint, as the record entry runs. If that supposition be indulged, the share of each minor child would be reduced by the rise of \$200 in 1865. If the size of the whole estate be calculated from the share of each minor, it would seem that the estate of John Hynds was between \$3,000 and \$4,000. His estate seems to have consisted of horses, etc., but the bulk of it was money. As there were six heirs, if we equalize the widow, we would have seven to share in such amount, and, by division by seven, it appears that would not be far from the amount she charged herself with for each of the minors.

Parmelia presently purchased one 40 of tract A for \$750. This purchase was made soon after her appointment as administratrix, to wit, on September 21, 1858. On the 1st day of that same month, she bought either tract B or C for \$100, and on the 21st of September, in the same year, she bought the other timber tract for \$125. In April, 1864, she bought the other 40 of tract A for \$675. She seems to have at once adopted the plan

of loaning out the money of the estate in her own name; for we find notes taken in that way, and in some instances the collection thereof was enforced by suit and judgment. At a time left dark and for a consideration left dark (it must have been before 1863), she purchased another 80 acres of land lying close to tract A; for in that year she conveyed it to her son William. At sometime before 1868 (also left dark), she bought a lot in Kirksville; for we find in that year she conveyed that lot to her son A. J. for \$800. He paid her no money. In 1866 one Kirby conveyed 70 acres close to tract A to Rit Hynds, and the proof is that the mother paid much the larger portion of the money for this purchase, the entire consideration being \$1,400. Said deed made to William Hynds showed a consideration of only \$150, but the proof is that tract A and these other lands ran at about the same value, and it is not clear that William paid his mother any cash for the land, or, if he did pay the \$150, it was not the true value, but must have been boot or the difference in some adjustment. William died a year after his mother, to wit, in 1899. His widow, Julia, who married William after the conveyance, gives her impression, in a deposition taken two generations afterwards, from talks that she heard between William and his mother or with either or both (and that is left dark), that he got this land and "a piece of money" for staying at home and taking care of the family after his two brothers had enlisted in the army, but the proof does not show that the mother had the wherewithal to pay him, except out of estate money, and there is evidence that William received as much as \$450 in cash from her at another time, and gave her a receipt, presumably as administratrix.

[9] To sum up the matter, we can make nothing out of the record except that the mother assumed to handle and deal with the estate as her own, invested it in tract A and other real estate in her own name, and made loans on the same basis. Under such circumstances, it is a well-settled equitable principle that a resulting trust arises in property so purchased in favor of those whose money is so used, and in such ratable proportion to each as each contributes purchase money. *Stevenson v. Smith*, 189 Mo. loc. cit. 466, 88 S. W. 86; *In re Ferguson Estate*, 124 Mo. 574, 27 S. W. 513; *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543; *May v. May*, 189 Mo. 485, 88 S. W. 75.

We hold, then, that tract A was purchased with money belonging to John Hynds' estate, and that a resulting trust arises on that fact in favor of his heirs. Such holding brings us to the deciding questions stated in the next paragraph.

V. *Of a settlement with the other heirs (and herein of "defendant's Exhibit A").* Attending further to the proofs, there was testimony tending to show as follows: Defend-

ant received no share in his father's estate. He and his brother Rit lived on tract A with their mother, and farmed it in partnership with Rit's 70. This for many years, the other children living away, some close by, and others not so close. The original house on A was of logs. One of two or more rooms of frame was built by Rit, George helping. At first Rit paid the taxes, but for a few years before his mother's death and continuously thereafter George paid them. The land was assessed during her life to her, and after her death to the Parmelia Hynds' estate. Declarations of the mother to the neighbors and visitors were to the effect that she had settled with all the heirs except George, and that the real estate she owned represented his share. These statements were begun in the 80's and continued on down to her death. They were not made in the presence of nor brought home to any of the other heirs. There is no proof indicating she intended to wrong any of her children, yet the entire absence of business form in dealing with the estate and failure to settle in court and get a legal acquittance is not persuasive that settlements were made with all of them, standing the test of the law. Neither was there evidence of any probative force that any complaint was made by the other heirs, or demands for more than they had received. Apparently she kept no books of accounts, and what she knew, or believed she knew, was alone preserved in the leaking cup of human memory.

After the mother died in 1898, George and Rit, bachelors both, continued to live on the farm, renting it out, farming both pieces of land in partnership, collecting the rent, paying the taxes, all this to the knowledge and acquiescence of the other heirs, and George considered himself the owner. He seemed to have been a dilatory man, not alert or assertive, once some given to liquor and hobnobbing with cronies in a nearby village but a good worker, beloved by his mother, and, if he noised his exclusive claim of ownership about in the neighborhood, it is faintly shown, if at all. The notoriety of his claim seems to have arisen from the statement of his mother. The proof shows conclusively that the old lady was willing and ready, more than once, to make a deed to George, that she insisted on his getting a justice of the peace and having the business attended to, but he procrastinated and dallied, and his mother died without executing the deed. After a few years, Rit also died, leaving a will, whereby George became devisee of Rit's 70. The record does not show that George ever claimed to his brothers A. J. or William or William's heirs that the real estate was his, until shortly before he was sued. On the other hand, none of them made any claim before or after the mother's death until they sued over 10 years after her death. Rit's will to George is exploited in briefs, and may have been the spur to action. Mrs. Mahaffey,

herself a widow for several years, testified that she had conversations with him, we think after the mother died, in which he told her that she and he were entitled to the estate left by their mother to the exclusion of the others. These conversations are not denied. There is testimony that Mrs. Mahaffey received \$110, and that her receipt was out to her mother for that amount, though the receipt (exhibited in court) was not offered in evidence. A. J. Hynds testified Mrs. Mahaffey received nothing, but, on being shown the receipt, admitted it was genuine. In whose custody this receipt had been does not appear.

At the trial a paper was produced by defendant's attorneys, together with a copy thereof made by them. This copy was offered and read in evidence, and marked "defendant's Exhibit A." The bill of exceptions makes the usual call for an exhibit (viz., "the clerk will here copy"), but the abstract of the record does not contain it or the substance of it. As we read the abstract, there was some question about the admissibility of the document. The trial judge held the original in his hand at the time, and the verity of the copy was disposed of by his suggestion that a comparison could be made instantaneously with the original. That view seems to have been acquiesced in. Another objection made was that the original document was not signed by Parmelia Hynds or by any one. There is no testimony as to whether it bore the file marks of the court having probate jurisdiction, but one of the defendant's attorneys testified that, in examining the records, he got it in the probate court as a document lodged there and pertaining to the administration of John Hynds' estate and the curatorship of the estate of the minor heirs, and found "among the papers." From references made to this paper during the examination of other witnesses, it is apparent that it related to both these estates, and it possibly was, or purported to be, the paper before the county court at the time the guardian was charged with \$2,234.96 in assets belonging to the minors, and received a credit of \$876.96 "as per settlement here filed." Or it may have been the annual settlement filed August 9, 1880. If that was a genuine settlement marked filed or shown to be an ancient document belonging to the files of that guardianship, it was of importance, and the fact that it was admitted as evidence would seem to indicate the court thought it was properly vouched for.

[10] Attorneys for respondent complain of the absence of the paper, and cite us to a line of cases holding that in an equity case all the testimony should be brought up by the party seeking a reversal. That is the rule of practice. So, too, runs our court rule number 7. When appellants' counsel were served with respondent's brief making that contention, they prepared, served, and filed in this court a brief, in reply in which, they undertake

to show that respondents' counsel produced the paper at the trial, then took charge of it, and that, in making up their abstract for this court, they searched the probate records for the paper without avail, that they then demanded it from respondent's counsel who were the last-known custodians of it, and were told by them that they "knew nothing about it." No counter-showing is made by respondent, and whatever force there is in such showing, as an excuse for the nonproduction of Exhibit A, appellants are entitled to.

[11] Defendant in his answer avers (and took the laboring oar in proving) that full settlement was made by Parmelia with all the distributees of the estate, that is, the beneficiaries of the trust fund, except him, and that the lands in question did not exceed his share. As pointed out in the preceding paragraph, the probate record shows she filed a final settlement as G. and C. of Jennie Mahaffey. But the same record shows it was *continued* twice, and at that point the curtain falls and the lights are put out. So in regard to her other wards.

[12, 13] On such summarized record, the questions are: First. Did defendant prove the allegation of his answer that a settlement was made with the other beneficiaries of the trust fund? Second. Is the absence of "defendant's Exhibit A" an insurmountable barrier to reversing that part of the judgment in favor of defendant?

As I have more than once taken occasion to say, it is an anxious and delicate task to reconstruct ancient matters with fidelity and in just relation and true perspective, when some of the actors are dead; when papers are lost or destroyed; when memory, the main reliance, is twisted by self-interest or family quarrel, or dulled by the flux of time; when conclusions (as wishes father to the thought) usurp the office of facts; when parties did not deal with each other in correct business form, but loosely, under the close and tender confidences of the domestic relation, and not at arm's length under the safeguards of a due course of business. But doing the best possible, I am of opinion that both those questions must be answered in the negative. This, because:

(a) If we had not to reckon with the daughter, Jennie Mahaffey, we would be inclined to hold that all the heirs, save George, were settled with. This in spite of the shadow in the record. Each of the sons received land and money save him. They were their own men for well-nigh half a century sui juris, and their long acquiescence in some domestic arrangement evidently made with them is not without significance. Besides that, the amount they each received was so nearly equal with each other, and (closer home) was so nearly equal to the share that apparently was coming to each of them out of their father's estate at the time theirs was received, that reason points her finger

to a settlement. In such situation, the maxims apply: "Equality is equity." "Equity, when the facts allow, will take that as done which should have been done." Moreover, these sons, in nature, are not to be supposed to drive a close or sharp bargain with their mother, but to allow what happened, viz., an equitable adjustment in view of a confused situation, they, doubtless, were partly to blame for. The mother would naturally turn to them for counsel, and cannot, now that she is dead and her lips sealed, be held wholly in fault for a slipshod business course.

(b) But when we turn to Jennie Mahaffey, the situation changes in all the above respects. She was a ward, under coverture, received no land, presumably was not her mother's adviser, and lived some distance away. There is a wry saw in Latin running thus: "The absent get nothing." And another in the vernacular: "Out of sight, out of mind." But no chancellor allows either in measuring out equity. She received, on the proof, \$110. When her mother filed a final settlement with her, it was not approved, but was continued, and so it remains to this day. What was in it? Did it show her curator indebted to her? That is the customary fact in such tentative settlement. Did the ward receive notice of it? Was her acquittance attached? If so, would it not have been approved? We look on the continuance as a fatal obstacle in the way of any assumption of settlement with her at that time, and there is nothing to show the matter came up anew. We must assume there was a lion in the way of the final settlement and discharge, else what was begun would have been carried out. Defendant's admission that she had a share in the estate with him weighs heavily against his claim of sole ownership. We hold, then, that defendant did not show that Jennie Mahaffey received her share of the trust fund, and that the chancellor erred in his decree in that regard.

[14] (c) As to the absence of "defendant's Exhibit A," we say this: The rule of this court being that in an equity case all the testimony must be brought up (73 S. W. v), that rule must receive a reasonable construction. "Rules of court are but means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules or to except a particular case from their operation, whenever the purposes of justice require it. *United States v. Breitling*, 20 How. 252, 15 L. Ed. 900; *People v. Williams*, 32 Cal. 280." *Pickett v. Wallace*, 54 Cal. 147. Under the showing made here, we cannot hold appellants were alone in fault. They did what they could to furnish it all. To make a call for it in the bill of exceptions is allowable. R. S. 1909, § 2083. It is likely it has been mislaid and can be produced at the next trial, or parol

testimony may be resorted to to establish its contents as a dernier ressort.

Besides all that, we are relieved from embarrassment in the premises, because there is nothing to show nor is it claimed that Exhibit A was a final accounting showing full settlement with and an acquittance by Mrs. Mahaffey. Therefore, as we have ruled with respondent on the present record for the purposes of their appeal, except as to Mrs. Mahaffey, respondent has not been injured by the absence of that exhibit.

VI. As the judgment must be reversed, as to Mrs. Mahaffey in so far as it is in favor of respondent's full ownership of tract A, and as the cause was loosely tried, we think it better to reverse it as to all the appellants, in order that no mistake be made by our passing on the merits on a record in the present fix.

Questions on the admissibility of evidence may not arise on the next trial, hence are passed by. Besides, they are of little avail in equity where excluded testimony comes up as well as that allowed and objected to. *McKee v. Downing*, 224 Mo. loc. cit. 135, 124 S. W. 7, et seq.

The premises all considered, the judgment so far as it is in favor of respondent's full ownership of tract A is reversed, and the cause remanded to be proceeded with on a new trial to final judgment, and decree in accordance with the views herein expressed.

WOODSON, P. J., and GRAVES, J., concur in full. BOND, J., concurs only in result and reversing and remanding.

QUINN v. ST. LOUIS & S. F. R. CO.  
(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

1. EMINENT DOMAIN (§ 119\*)—PROPERTY TO BE PAID FOR.

Where a city acquires title to a street by the statute of limitations, and a railroad company, with the city's consent, appropriates such street for its tracks, the former owner of the land in the street cannot recover compensation from the railroad company for such appropriation, even though the condemnation proceedings under which the city originally took were invalid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.\*]

2. PLEADING (§ 237\*)—PROCEEDINGS—AMENDMENT TO ANSWER—ADVERSE POSSESSION.

Where, in an action by the former owner of a street against a railroad company for compensation for appropriating the street for its tracks, with the city's consent, the answer pleaded the statute of limitations, it was not error to permit defendant, after the instructions were given, to amend its answer to conform to the evidence, by alleging that the lands in controversy were used as a street continuously for more than ten years next before commencement of the suit, especially where it did not appear that plaintiff was surprised or injured thereby.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 608-619; Dec. Dig. § 237.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**8. EMINENT DOMAIN (§ 296\*)—STREETS—PRESCRIPTION—EVIDENCE—COLOR OF TITLE.**

Where, in an action against a railroad company by the former owner of the land of a street which the company had appropriated with the city's consent, the defendant relied upon title in the city by prescription, evidence of invalid condemnation proceedings under which the street was originally taken by the city was admissible as evidence of color of title and to fix the boundary line.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 804-806; Dec. Dig. § 296.\*]

**4. EMINENT DOMAIN (§ 296\*)—COMPENSATION—ESTOPPEL TO CLAIM.**

Where, in an action by the former owner of the land of the street against a railroad company for compensation for appropriation of the street with the city's consent, defendant relied upon prescriptive title in the city and estoppel, a petition signed by plaintiff and others, requesting that the city permit the railroad company to use the street, and the ordinance enacted pursuant thereto were admissible in evidence to show that the adjacent property owners, including plaintiff, treated the strip of ground as a street, and that defendant was not a trespasser, and the petition was also admissible on the question of estoppel.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 804-806; Dec. Dig. § 296.\*]

**5. MUNICIPAL CORPORATIONS (§ 648\*)—STREETS—ESTABLISHMENT—PRESCRIPTION.**

Where a city uses a strip of land for public use for more than ten years under claim of title, and improves the same, the strip becomes a public street by adverse possession, though originally taken by the city under invalid condemnation proceedings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1421, 1422; Dec. Dig. § 648.\*]

**6. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.**

In an action by the former owner against a railroad company for compensation for the appropriation of a street with the city's consent, wherein the principal issue was whether a strip of land had become a public street by prescription, an instruction on the acquisition of title by adverse possession, if erroneous, was harmless, where the undisputed evidence showed that the defendant and its predecessors had exercised actual, open, exclusive, notorious, and continuous possession over the land for more than ten years.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

**7. EMINENT DOMAIN (§§ 79, 80\*)—COMPENSATION—ESTOPPEL TO CLAIM.**

Where, in an action by the former owner of the land of a street appropriated by a railroad company with the city's consent, it conclusively appeared that plaintiffs joined with others in petitioning the city to permit the street to be used for railroad tracks, that defendant's predecessor built its tracks on the street, believing it to be a public street, and that plaintiffs conveyed other land to defendant adjoining the street, for track and depot purposes, plaintiffs were estopped to recover; and hence the court was not only justified in instructing on estoppel, but would have been justified in directing a verdict for defendant on the ground of estoppel.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205-214; Dec. Dig. §§ 79, 80.\*]

Appeal from Circuit Court, Butler County; J. C. Sheppard, Judge.

Action by Luke F. Quinn against the St. Louis & San Francisco Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Ernest A. Green, of Jefferson City, for appellant. W. F. Evans, of St. Louis, and W. J. Orr, of Springfield, for respondent.

WOODSON, P. J. The plaintiff instituted this suit in the circuit court of Butler county against the defendant, in January, 1909, to recover the sum of \$2,500, compensation for a strip of ground he alleges belonged to him, and that the company wrongfully appropriated for its tracks in the month of March, 1901. Said land is located in Poplar Bluff, Butler county, and is particularly described in the pleadings and evidence. The pleadings are not assailed. The petition claims compensation for the wrongful taking of property, and the answer pleads two defenses, first the statute of limitation, and second, an estoppel. A trial was had before the court and jury, which resulted in a verdict and judgment for the defendant; and, after taking the necessary preliminary steps therefor, the plaintiff duly appealed the cause to this court.

The facts of the case, with one exception, which will be presently noted, are undisputed; and even that is scarcely disputed.

The plaintiff, at all the times mentioned, was and is the owner of the west half of lots 77a and 77b of the original town of Poplar Bluff. His ownership thereof antedates the year 1886. In that year the city council of that city attempted to condemn a strip of ground 40 feet wide through the center of those lots, as well as others, for a street and right of way for a sewer. An ordinance for that purpose was duly enacted by the city council, and the mayor, in pursuance of said ordinance, appointed a commission of three resident freeholders to assess the damages and benefits that would result from said taking; but, instead of the commissioners appointed for that purpose, three other persons performed that important duty, and filed its report with the clerk of the said city. No objection was made to said report by any one; the report was confirmed and the street was duly laid out, and presumably the damages and benefits levied were paid and collected. Shortly thereafter the city, by ordinance duly enacted, ordered the construction of a sewer in said street, of certain dimensions, and of certain materials. In pursuance thereof said sewer, a wooden or box sewer, was constructed, and was used as such until replaced by a stone sewer many years later.

The question in dispute, before mentioned, is, Was this street ever used as such by the traveling public of Poplar Bluff? The evidence upon this point is also practically un-

disputed, for all the evidence on both sides shows that it was never used for the passage of wagons, carriages, or other vehicles, but was generally and extensively used all the time by pedestrians.

In March, 1901, the plaintiff and other property owners, owning a majority of the front feet of "the property abutting upon said street, known as 'Sewer street,'" petitioned the city council of Poplar Bluff to grant to the Southern Missouri & Arkansas Railway Company the right to lay its tracks along and to operate its trains over said strip of ground. Said petition was in words and figures as follows:

"To the Honorable, the Mayor and Council of the City of Poplar Bluff, Missouri—Gentlemen: We, the undersigned owners of a majority in front feet of the real estate abutting and fronting on Sewer street, and the alley north thereof in Kinzer and Mengel's Addition hereby respectively petition and request your honorable body to grant to the Southern Missouri and Arkansas Railway Company by suitable ordinance the right to lay, operate, and maintain railway tracks in said Sewer street and said alley.

Names	Front Feet.
L. F. Quinn [this appellant].....	417
Byrd Duncan .....	40
T. D. Ferguson.....	285
J. J. Frank.....	232 1/2
J. L. Dalton, Adm'r.....	132 1/2
L. B. Walker (77c).....	104 1/2
Ruth & Mengel Realty Co., H. I. Ruth, Pres.....	323 1/2
J. R. Hogg.....	45 1/2
City of Poplar Bluff, per A. W. Davidson, Mayor .....	104

"Filed March 30th, 1901.

"W. A. Spence, City Clerk."

This petition was filed with the council in March, 1901, and that body passed an ordinance as requested, granting to the railroad company the right to lay its tracks along said street.

The defendant through mespe conveyances deraigns title, if any it has, to this land, through the Southern Missouri & Arkansas Railway Company.

The ordinance is quite lengthy, consisting of 15 sections, prescribing the location of the main and the number of side tracks, depot, and the character thereof, the number and character of bridges and sewers, the number, character, and location of grade crossings the company should construct and maintain, also the regulation of trains upon the streets of said city, and many other duties were imposed thereby, not material to the questions here involved. This ordinance was approved March 30th, 1901.

In April of the same year, the plaintiff conveyed to the company additional lands adjacent to said Sewer street, for railroad purposes, which are described in the deed, and upon the conditions therein stated. That deed is as follows: "\$1.00 and divers other good and valuable considerations to us moving. Luke F. Quinn and Mary P. Quinn, his wife, to Southern Missouri and Arkansas

Railroad Company, grant, bargain and sell unto the Southern Missouri and Arkansas Railroad Company, the following parcels of land in the city of Poplar Bluff, county of Butler, state of Missouri, to wit: Sixty (60) feet wide, fronting 208.0 feet on Sewer street, on the east, sixty (60) feet on Maple street on the north, and 60 (60) feet on Cherry street on the south, being a part of lot 77a, also piece of land described as follows: Beginning at a point at the northwest corner of Maple street and Sewer street, and running thence northerly on the westerly line of Sewer street to the south line of Cedar street, thence westerly on the south line of Cedar street twelve (12) feet, thence southwesterly to a point sixty (60) feet west of the west line of Sewer street and one hundred (100) feet north of the north line of Maple street, thence southerly on a line parallel to and sixty (60) feet distant westerly from the west line of Sewer street one hundred (100) feet, thence easterly on the north line of Maple street sixty (60) feet to the point of beginning. Also beginning at the southwest corner of Sewer street and Cherry street and running thence westerly on the south line of Cherry street sixty (60) feet, thence southerly curving to the westward on a line six feet distant westerly from and parallel to the center line of the proposed side track of the S. M. & S. A. R. R. Co. two hundred and twenty feet (220), more or less, to the northerly line of Ash street, at a point six feet distant westerly from the center line of main track of said railroad, thence easterly on said northerly line of Ash street to a point seven (7) feet distant from said center line of said main track, as now located, measured at right angles thereto, thence northeasterly on a line parallel to and seven (7) feet distant easterly from said center line of main track, two hundred and twenty-four (224) feet, more or less to place of beginning. To have and to hold unto said railway company forever, subject, however, to the following conditions: 1st. The property herein granted is granted for the use as a railroad and on condition that the grantor be released from his subscription of \$500 in freights. 2nd. The said railway company shall erect and maintain on the south end of lot 77a a suitable station building of modern architectural design, similar to the railway station of the said company at Cape Girardeau, Missouri. 3rd. The said company shall, at its own expense, remove from the land herein conveyed, the buildings located thereon at the present time to such other ground in the neighborhood as the said L. F. Quinn shall select. 4th. That whenever the property herein conveyed shall cease to be utilized for the purposes herein above set out for a period of six months then this deed shall be void and land herein granted shall revert to and become the property of the said L. F. Quinn. Acknowledged April 9th, 1901, by Luke F. Quinn and Mary P. Quinn, his wife."

The railroad company in 1901 took possession of the strip granted to it by the city, and the additional grounds deeded to it by appellant, and constructed its main line along the strip granted to it by the city, and built its depot on the other lands deeded to it by appellant, and in all respects complied with all the provisions of said ordinance.

Counsel for the plaintiff timely objected to the introduction in evidence of the proceedings had to condemn Sewer street, the petition and ordinance authorizing the company to construct and maintain its tracks and depot upon the land mentioned, and the deed from plaintiffs to the company, all of which were by the court overruled, and timely exceptions were duly saved.

At the conclusion of the introduction of all the evidence, counsel for plaintiffs requested the following peremptory instruction telling the jury to find for them, viz.: "The court instructs the jury that under the law and the evidence in this case that you will find the issues for the plaintiff, and assess his damages at such sum as you may believe from the evidence was the reasonable value of the strip of ground in question at the time it was appropriated by the Southern Missouri and Arkansas Railroad Company, not, however, to exceed the sum of two thousand and five hundred dollars (\$2,500.00)." Which instruction the court refused to give, and to which action of the court in refusing to give the same, plaintiff at the time duly objected and excepted.

And thereupon the court gave to the jury the following instruction on part of plaintiff: "The court instructs the jury that, unless you find and believe from the evidence in this case that the strip of land in controversy in this case was used as a public street of said city for a period of more than ten years continuously prior to the institution of this suit, and unless, in addition to the use of the street by the public for the period of ten consecutive years, you shall further find that there had been public money or labor expended thereon by said city of Poplar Bluff for such period, you will find the issues for the plaintiff, and assess his damages at such sum as you may find to have been the reasonable value of the strip of land in controversy at the time of its appropriation by said Southern Missouri and Arkansas Railroad Company, not exceeding the sum of two thousand five hundred dollars (\$2,500.00)."

And thereupon, over the objection of plaintiff, the court gave to the jury the following instructions on part of the defendant:

"I. The court instructs the jury that, if you shall find and believe from the evidence that for more than ten years prior to the 30th day of March, 1901, the land in controversy had been used by the public as one of the public streets in the city of Poplar Bluff, and that the same had been opened by and improved by the city council of said city, then said

land was, on said 30th day of March, 1901, a public street of said city of Poplar Bluff.

"II. The court instructs the jury that, if you shall believe and find from the evidence that for more than ten years prior to the bringing of this suit, that is to say, for more than ten years prior to the 22d day of January, 1909, the land in controversy had been used by the public as one of the public streets of the city of Poplar Bluff, and that it has since the year 1901 been used by the defendant railroad company and its predecessors, and that such use by the public, and by the defendant and its predecessors, has been continuous and uninterrupted for a period of more than ten years before the 22d day of January, 1909, then your verdict should be for the defendant.

"III. If the jury shall believe from the evidence that the land in controversy, on the 30th day of March, 1901, was one of the public streets of the city of Poplar Bluff, as explained in these instructions, and, if you further find that on said 30th day of March, 1901, plaintiff signed a petition to the city council of Poplar Bluff, praying for an ordinance granting to the Southern Missouri and Arkansas Railroad Company, the predecessor of this defendant, the right to lay its tracks in said street, then plaintiff is estopped to claim damages in this action, and your verdict should be for the defendant."

To the giving of which instructions on part of the defendant, plaintiff at the time duly excepted.

After said instructions had been given, the defendant, over the objections of plaintiff, by permissions of the court, amended its answer by interlining the following words: "And that said lands were used by the public as one of the streets of the city of Poplar Bluff, and by this defendant and its predecessors, continuously for more than ten years next before the bringing of this suit."

[1] I. The first legal proposition presented for determination is, Did the circuit court err in refusing to give appellants peremptory instructions telling the jury to find for them? I think not, for the reason that there was much evidence tending to show that the city of Poplar Bluff had acquired title to Sewer street under color of title by the statute of limitations or prescription, even though it be conceded that the condemnation proceedings mentioned were absolutely void. If that was true, which was a question for the jury, under the theory of the case taken by the trial court, the plaintiff had no right, title, or interest whatever in the strip of land in question. The statute of limitations in such cases, not only bars plaintiff's right to a recovery, but transfers his title to the city as completely as if the conveyance had been made by deed, duly executed. If that be true, the plaintiff would

have no right to a recovery, even though it should be conceded the defendant had no right whatever to be in the street mentioned. Moreover, said instruction ignores all the evidence introduced bearing upon the question of estoppel, which will be presently noted. For both of these reasons the action of the trial court in refusing said instruction was eminently proper.

[2] II. It is next insisted that the court erred in permitting the defendant to amend its answer in the particular mentioned in the statement of the case. This objection is untenable, for the reason our statute of Jeofails is very liberal in regard to permitting amendments of pleadings to conform to the evidence. It was not only proper, but it was the duty of the court to permit the amendment to be made in furtherance of justice, especially since the record fails to show the plaintiff was surprised or injured by that action of the court.

[3] III. The next complaint lodged against the trial is that the court erred in admitting in evidence the record of the proceedings had in the condemnation of Sewer street. We suppose (for no other reason is assigned) the validity of those proceedings is assailed because the commissioners, appointed by the mayor to assess the damages and benefits sustained by the property owners interested, did not make the assessment required by the ordinance, but was made by strangers to the proceedings. We assume that said proceedings were on that account void, which, I believe, they are, and of no force or effect. Nevertheless, all parties concerned acquiesced therein from that day until the institution of this suit, some 20 odd years, during all of which time the city has been using the street for sewerage purposes, and, as the evidence tended to show, for street purposes proper. That being true, said record was unquestionably admissible in evidence as color of title, tending to fix the boundary lines of the street within which the railway tracks are located.

[4] We are also of the opinion that the petition signed by plaintiff and others, requesting the city to pass an ordinance granting the railway company permission to construct its tracks and depot upon the ground in question, and the ordinance enacted in pursuance thereof, were admissible for two purposes: First, as tending to show that the adjacent property owners, including plaintiff, understood, believed and treated said strip of ground as a public street; and second, for the purpose of showing that the defendant was not a trespasser or had wrongfully appropriated the property to whomever it belonged. The petition also bore upon the question of estoppel, which, considered in connection with the deed made by the plaintiff to the company, was strong evidence thereof.

We are therefore of the opinion that the

court properly admitted all these instruments in evidence.

[5, 6] IV. Counsel for appellant next challenge the correctness of the law as announced in instructions numbered one and two, first, because there was no evidence introduced upon which to predicate them, and second, because they omitted some of the elements that were necessary for the jury to have found before they could have found for defendant on account of the statute of limitations.

Attending the first, this criticism is not well taken, as there was an abundance of evidence tending to show, as stated in paragraph one of the opinion, in passing upon plaintiff's peremptory instruction, that the city and defendant with its predecessors had been in the actual, exclusive, open, notorious, and continuous possession of this strip of ground for 20 off years.

The second criticism is equally unsound, for it is hornbook law, as stated in instruction numbered one, that, if the city used the strip of land in question as a public street for more than ten years, under claim of right as here, and improved the same, then it became a public street by prescription or adverse possession. The same may be said of instruction numbered two, which is more definite in telling the jury what uses are required to establish a street by prescription.

But independent of this, there is no dispute, but, whatever acts of possession the city, the defendant and its predecessors exercised over this land was actual, open, exclusive, notorious, and continuous ever since 1886; consequently, the error, if error it was, complained of was absolutely harmless.

[7] V. This brings us to the last error assigned, and that is: The circuit court erred in giving instruction numbered three for the defendant, telling the jury that if they found the facts to be as stated therein, then they would find for the defendant. The basis of this assignment is that there was no evidence introduced upon which to base the instruction. We are unable to understand upon what ground this contention can be seriously urged. The evidence is documentary, undisputed, and unimpeached, showing that, through the efforts of plaintiff and others, the defendant's predecessor built its tracks upon the street in question, all believing it was a public street.

Plaintiffs also conveyed other lands to defendant, adjoining the street, for track and depot purposes, all constituting its main tracks, switch yards, and depot, which cost more than \$25,000. Yea, more than \$50,000, if I correctly understand the record.

There was not only ample evidence of an estoppel, but the court should have instructed the jury to find for the defendant on the ground of an estoppel.

Finding no error in the record, the judgment of the circuit court is affirmed. All concur.

# **MEEHAN v. UNION ELECTRIC LIGHT & POWER CO. et al**

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

## **1. ELECTRICITY (§ 16\*) — MAINTENANCE OF POLES—LIABILITY.**

An electric light and power company, erecting, pursuant to its contract with a city providing for a centennial celebration of its incorporation, poles supporting electric lights, and for the anchorage of cables designed to prevent people lining the sidewalk from entering on the streets proper during the passing of parades forming a part of the celebration, need only exercise the care usually exercised by ordinarily prudent persons under similar circumstances, and it may presume that people viewing parades in the streets will understand the character and purpose of the cables, and that they will act accordingly, and it is not liable for injury to a spectator caused by a pole falling down by reason of a crowd pressing against the cable and encroaching on the street while viewing a parade.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 13.\*]

## **2. EVIDENCE (§ 7\*)—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.**

The court knows that ordinarily cement sets, and hardens, and becomes as strong as it ever will in a shorter time than eight days, and an electric light and power company, erecting poles on a granitoid sidewalk by means of bolts set therein and secured by means of cement filled around them, exercises proper care to erect poles in a safe manner where the poles are erected about eight days before any use will be made of them.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 6; Dec. Dig. § 7.\*]

## **3. PLEADING (§ 214\*) — DEMURRER — ADMISSIONS.**

A demurrer to the petition admits the truth of the allegations therein.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

Appeal from St. Louis Circuit Court; George H. Williams, Judge.

Action by James C. Meehan against the Union Electric Light & Power Company and others. From a judgment for defendants, rendered on sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

This was a suit instituted in the circuit court of the city of St. Louis by the plaintiff against the defendants to recover the sum of \$25,000 damages alleged to have been received by him for personal injuries inflicted by the alleged negligence of the latter. The defendants separately filed demurrers to the petition, which were by the circuit court sustained; and, plaintiff declining to plead further, judgment was duly rendered against him, from which he timely appealed to this court.

In the very nature of things this state of the record and the legal propositions presented thereby for determination calls for

a careful consideration of the petition. It reads as follows (formal parts omitted):

"Plaintiff, by leave of court first obtained, files this his second amended petition, and for cause of action against defendants states:

"That defendant Union Electric Light & Power Company is and was at all times hereinafter mentioned a corporation duly organized and existing under the laws of the state of Missouri and engaged in furnishing light and power for hire in the city of St. Louis, Missouri.

"That defendant Bell Telephone Company of Missouri is and was at all times hereinafter mentioned a corporation duly organized and existing under the laws of the state of Missouri, and engaged in operating a telephone system and in stringing and maintaining wires and cables along and over the streets of the city of St. Louis, Missouri.

"That defendant city of St. Louis is and was at all times hereinafter mentioned a municipal corporation duly organized and existing under the laws of the state of Missouri, and having charge of numerous streets in the city of St. Louis, state of Missouri.

"That plaintiff, James C. Meehan, is and was at all times hereinafter mentioned, a resident of the city of Decatur, state of Illinois, and employed as general foreman in the car department of the Wabash Railroad Company at said place.

"That prior to the injuries hereinafter complained of and on the ——— day of ———, 1909, defendants Union Electric Light & Power Company and city of St. Louis, for a valuable and sufficient consideration, entered into a contract for the lighting by Union Electric Light & Power Company of certain streets within the downtown business district of the city of St. Louis by means of electric lights supported on large, heavy iron poles or standards, about 20 feet high, placed or erected at or near the curb of the streets.

"That included in the streets thus embraced in said contract is and was Twelfth street in the city of St. Louis, Missouri, and that on or about the 27th day of September, 1909, the city of St. Louis, through its lighting department, issued a permit to the Union Electric Light & Power Company to erect and maintain a line of iron poles or standards supporting electric lights, as provided by said contract and hereinbefore described, along Twelfth street in the city of St. Louis, state of Missouri, and between Locust street and St. Charles street.

"That on or about July 24, 1908, the municipal assembly of the city of St. Louis adopted the following concurrent resolution: 'Whereas, the attention of the municipal assembly has been called to the fact that November 9, 1909, will mark the 100th anniversary of the incorporation of St. Louis as a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

town; and whereas, this event in the city's history should be officially recognized and appropriately observed by a celebration, participated in by all of our citizens: Therefore, be it resolved, by the council, the house concurring therein, that a committee of three from each house of the municipal assembly be appointed, and that his honor, the mayor, be requested to call a meeting of the presidents of all the business, civic, and professional organizations in the city to meet with the joint committee of the municipal assembly to arrange a plan for a dignified and appropriate celebration of the important event.'

"That thereafter, on or about May 14, 1909, the municipal assembly of the city of St. Louis adopted the following concurrent resolution: 'Whereas, the municipal assembly by joint resolution has declared that the 100th anniversary of the incorporation of St. Louis "should be officially recognized and appropriately observed by a celebration participated in by all of our citizens"; and whereas, the mayor, in response to the request embodied in said joint resolution, called a "meeting of the presidents of all the business, civic, and professional organizations in the city to meet with the joint committee of the municipal assembly to arrange a plan for a dignified and appropriate celebration of this important event"; and whereas, the joint committee of the municipal assembly and the presidents of the business, civic, and professional organizations have organized the St. Louis Centennial Association, with the mayor of the city as president of said association; and whereas, the plan for a dignified and appropriate celebration of this important event has been received with marked approval by the citizens of St. Louis; and whereas, the Centennial Association has advanced in its preparations sufficiently to indicate that the celebration will be worthy of the city's 100 years of progress since incorporation: Now, therefore, be it and it is hereby resolved, that the honorable mayor of the city of St. Louis be requested by the city council to extend to mayors of municipalities and to such other guests as he may see fit invitations to visit St. Louis during the week of October 3-9, 1909, and to participate in the celebration.'

"That under and by virtue of said concurrent resolution St. Louis Centennial Association was organized, being an unincorporated body composed of about 100 members, and of which his honor, the mayor of St. Louis, was president.

"That the week beginning Sunday, October 3, 1909, pursuant to said resolutions, was known in the city of St. Louis and the territory tributary thereto as centennial week, with numerous attractions of a national character, consisting of the Velled Prophet's, industrial, civil, and historical parades, which were arranged for and advertised to take place by said St. Louis Centennial Associa-

tion in said city of St. Louis, Missouri, during said week, and said St. Louis Centennial Association invited and caused to be invited, by causing newspaper accounts of said attractions, and urging the public to attend, to be published in the city of St. Louis and territory tributary thereto, the people generally in the United States, and particularly in the territory tributary to the city of St. Louis, to visit the city during said week, and to enjoy and participate in its festivities.

"That among the attractions advertised for centennial week by said St. Louis Centennial Association was the Velled Prophet's parade on the evening of October 5, 1909, which consisted of a large number of gorgeous floats brilliantly illuminated, which said floats were propelled by means of electricity on and along the street railway tracks in the city of St. Louis, Missouri, in a procession, and passing, and so advertised to pass, and was so known to the defendants at the time of and long prior to the injuries complained of, along Twelfth street, between Locust and St. Charles streets, in the city of St. Louis, Missouri.

"That in the street, and near the curb along Twelfth street, and between Locust and St. Charles streets, large reviewing stands had been erected with a view to accommodate parties wishing to view advantageously the Velled Prophet's parade, and that said reviewing stands, and the streets and sidewalks adjacent thereto, were known as the court of honor, and was one of the principal places for witnessing said parade in the city of St. Louis, and was calculated, and was so known to the defendants, or by the exercise of ordinary care might have been so known to them, to attract large crowds on the evening of said Velled Prophet's parade.

"That between the 27th day of September, 1909, and October 5, 1909, the exact date this plaintiff is unable to state, Union Electric Light & Power Company, under its said contract with the city of St. Louis and said permit, erected on the sidewalk near the curb on the west side of Twelfth street, between Locust and St. Charles streets, in the city of St. Louis, a large iron pole or standard supporting an electric light of the character hereinbefore described, together with other poles of the same type, placed along Twelfth street at convenient distances.

"That prior to the injuries hereinafter complained of, and on or about the — day of October, 1909, the city of St. Louis and Bell Telephone Company of Missouri strung along Twelfth street on the west side thereof an iron cable attached to said pole hereinbefore described located near the curb on Twelfth street, between Locust and St. Charles streets, and ran and connected said wire cable to the next succeeding pole on the north side of the pole which fell, hereinbefore particularly described and designated, and which fell, as hereinafter alleged. That said iron

rope or cable was strung along the edge of the sidewalk and at a height of about four feet therefrom, and was designed and intended by defendants herein to prevent large crowds then and there to assemble during centennial week to witness said attractions from crowding one another off the sidewalk into the street.

"That the particular iron pole or standard hereinbefore described erected by the Union Electric Light & Power Company was, at the time of the injury hereinafter complained of, and was so known to the defendants and each of them, or by the exercise of ordinary care might have been so known to them and each of them, to have been insufficiently and insecurely fastened to withstand the pressure of a large crowd of persons upon said iron rope or cable thereto attached, in this, to wit: That said pole or standard had been negligently erected by defendant Union Electric Light & Power Company upon the granitoid sidewalk at said point, between the dates hereinbefore alleged, by reason of the cement at and within the base of said pole or standard not having been allowed to remain a period of time sufficient to enable said cement to harden and hold firm and support said pole or standard, and that there was left as practically the sole support thereof four iron pins or bolts by which the base of said pole or standard was attached to the granitoid sidewalk as aforesaid, and that said pins or bolts and the threads upon the same were not sufficient to secure said pole or standard without the cement protection as aforesaid, and that said pins or bolts were insecurely driven, screwed, and placed in said base and sidewalk, all under the circumstances herein alleged, and that by reason thereof said pole or standard was insecure and insufficient to hold said pole or standard under the excitement and interest arising by the approach and passing of said Velled Prophet's parade, and defendants knew that, for the purpose of witnessing said Velled Prophet's parade approach and pass at said point, a large crowd was liable to assemble and to press heavily upon said wire and pole or standard, causing it to fall and injure persons on the sidewalk, or by the exercise of ordinary care said facts might have been so known to the defendants and each of them, and thereby rendered said sidewalk and street then and there perilous and dangerous to persons thereon.

"Plaintiff further alleges that said iron cable strung for the purpose and under the circumstances herein alleged was carelessly and negligently strung in this: That defendants city of St. Louis and Bell Telephone Company of Missouri knew, or by the exercise of ordinary care could have known, that said iron pole or standard which fell had been negligently erected by defendant Union Electric Light & Power Company as herein alleged. And plaintiff alleges that said defendant Union Electric Light & Power Company

negligently suffered and allowed said iron cable to be thus strung and attached to the said pole or standard which fell, and which had by it been carelessly and negligently erected, as herein alleged.

"That the plaintiff (in response to said general invitation given through the public press of St. Louis as aforesaid, visited St. Louis on October 5, 1909, and, while he, thus invited on the evening of said mentioned day) was lawfully and properly standing on the sidewalk on Twelfth street between Locust and St. Charles streets, and in close proximity to said iron pole or standard, negligently erected and herein particularly described, and with said iron cable carelessly and negligently attached and fastened to said iron pole or standard, thus insufficient and insecure as hereinbefore alleged, rendering his lawful position on the street unsafe and dangerous under the circumstances herein alleged, upon an outcry that the parade was coming, the large crowd then and there assembled upon the sidewalk, pushed forward heavily and violently against said iron cable, and thereby, and by reason of the carelessness and negligence of defendants herein alleged, caused said iron pole or standard to fall, striking plaintiff with great force and violence upon the head, knocking him unconscious, severely and permanently fracturing his skull, and bruising and contusing his breast, and greatly and permanently shocking his nervous system.

"That by reason of the injuries thus sustained plaintiff has suffered, and will in the future suffer, great pain of the body and mind; his hearing has been permanently impaired; his head is and will be permanently scarred and disfigured; he has lost, and will in the future lose, the earnings of his labor; he has incurred and become obligated for, and will in the future incur and become obligated for, large expenses for medicines, medical attention, and nursing—all to his injury and damage in the sum of \$25,000, for which sum he asks judgment against defendants, and for costs."

The demurrer of the city was as follows (captions and signatures omitted): "Now comes the city of St. Louis, one of the defendants in the above-entitled cause, and demurs to the second amended petition filed herein, and for ground of its demurrer says that said second amended petition does not state facts sufficient to constitute a cause of action against this defendant, the city of St. Louis."

On April 5, 1910, and during said April term, defendant Bell Telephone Company of Missouri filed its demurrer thereto, as follows: "Now comes the Bell Telephone Company and demurs to the second amended petition of plaintiff filed herein, and for ground of its said demurrer said defendant assigns that said petition does not state facts sufficient to constitute a cause of action against said defendant."

And that of the Electric Light Company was as follows (caption and signature omitted): "Comes the above-named defendant Union Electric Light & Power Company and demurs to the second amended petition herein, and for ground of demurrer shows: (1) The petition does not state facts sufficient to constitute a cause of action against this defendant. (2) The said petition on its face shows that the defendants created no obstruction to or nuisance in the street and place mentioned in said petition, and that what was done by defendants was a proper and lawful police regulation and for the public good and safety. (4) The petition on its face shows that the alleged damage to plaintiff was not the proximate result of the act of this defendant as set forth in said petition. (5) The said petition on its face shows that the accident to plaintiff was manifestly an extraordinary one, arising from extraordinary conditions, and beyond such foresight as could be reasonably required to be anticipated. (6) The said petition on its face shows that plaintiff could have as easily anticipated the consequences of the unusual condition resulting in the accident to him as could have this defendant, and by placing himself in the way of danger plaintiff was himself lacking in due care under the circumstances mentioned and set forth in said petition."

Joseph A. Wright, of St. Louis, for appellant. Schnurmacher & Rassieur, of St. Louis, for respondent Union Electric Light & Power Co. William E. Baird, of St. Louis, for respondent City of St. Louis. Seddon & Holland, of St. Louis, for respondent Bell Telephone Co.

WOODSON, P. J. (after stating the facts as above. [1] Counsel for all parties have presented many legal propositions, and have learnedly briefed and argued the same in this court; but the view we have taken of the case renders it unnecessary for us to consider but one of them, and that is, Does the petition state facts sufficient to constitute a cause of action against any or all of the defendants?

Counsel for plaintiff maintain the affirmative of this proposition, while those for the defendants insist upon the negative thereof.

In our opinion the circuit court properly held that the petition failed to state a cause of action against any one or more of the defendants, and our reasons for so stating are as follows: The petition discloses the facts that the plaintiff was injured during the celebration of the 100th anniversary of the city of St. Louis, and that the Velled Prophet's parade, among other things, was a part of the ceremonies—the fame of which, as the petition alleges, and as all know, has become national, and, as the petition also alleges, which is also current history, or common knowledge, brings together large crowds of people, so vast in number that great preparations must be and are made for their

entertainment in the public streets of the city, consisting of reviewing stands, with ropes and cables stretched along the curbs and outer edge of the sidewalks as warnings to prevent the crowds of people from encroaching upon the streets in front of the parade in its passage.

We cannot shut our eyes to the fact that the parade mentioned in the petition passes along many miles of the streets of the city, and that the crowds consist, as the petition alleges, of great numbers, and, as all know, hundreds of thousands who line the sidewalks practically throughout the length of the parade.

The petition alleges that ropes or cables mentioned are designed as barriers barricading the people lining the sidewalks from encroaching upon the street proper, which is reserved for the passage of the pageantry. Concede, as we must, that to be true, yet they must, in the very nature of the case, be temporary in character and frail in structure, and are not intended as fences or barricades to physically or forcibly keep the crowds of people on the sidewalks from encroaching upon the street.

We must read the petition in the light of common knowledge regarding such matters, and that is, these barriers are intended only for the purpose of warning the people that they must not pass that line, for the reason that the street proper is reserved for the pageantry, and not a barricade in the technical sense to retard or bar an enemy or a crowd which is bent upon entering the street. If that was the intention, then the cable would be wholly useless, because they could easily pass over or under the cable.

All of the respondents had a right to presume that the people viewing the parade understood the character and purpose of the cable or rope mentioned, and that they would act accordingly. That is true not only of the Velled Prophet's parade but of all parades which pass along the streets in all towns and cities, which call forth throughout the entire country large crowds of people. The line of demarcation separating the people from the space reserved for the parade, in the very nature of things, is indicated by some frail or temporary structure, rope, or cable, anchored to the most convenient objects already existing along the line thereof, or by picking sentinels to give warning and keep the crowds back.

Should the law require permanent barriers or barricades along the streets upon such occasions, which would physically withstand the great weight and force of a crowd of people such as is described in the petition, should they see fit to throw their weight violently against it, the cost thereof would be so great that no city or any one else for that matter could afford to give an entertainment of this character, which is for the pleasure



and amusement of the people, without profit to any one.

The law required no higher degree of care of those who gave or participated in this entertainment than that which is usually exercised by ordinarily prudent persons under similar circumstances.

The petition in this case discloses the fact that this parade was conducted in precisely the same manner, as all know, that all such parades are conducted throughout the state and country, with ropes or cables stretched along the edge of the sidewalks, attached to trees, lamp posts, hitching posts, fences, electric light, telephone, and telegraph poles, or any other object that may be standing along the line of the walk.

It is not claimed that the injury in this case was caused through the negligence of the defendants for furnishing a weak and insecure pole for the anchorage of the cable in question, but because the cable was tied to the pole in question, which was suitable and sufficiently strong for the purposes for which it was erected, but not strong enough to withstand the great weight and force of the crowd of people who pushed against the rope upon this occasion, which the respondents had no more reason to anticipate would be done than did the plaintiff.

[2] The petition states that the pole had been erected some time between September 27 and October 5, 1909, upon a grantoid sidewalk, by means of bolts set therein and secured by means of cement filled around them, and that they extended upward and through the base or flange or the lower end of the pole, and were made fast thereto by means of nuts screwed down on said bolts and against the said base or flange; that said cement had not had sufficient time in which to set and properly harden prior to the time of the accident; that the respondents knew of, or by the exercise of ordinary care could have discovered, that fact in time to have prevented the injury; and that in consequence thereof the cement and bolts gave way, and the pole fell and injured plaintiff when the people threw their weight violently against the cable, which, as before stated, was fastened to the pole about four feet above the ground.

[3] While the demurrer admits the truthfulness of those allegations, yet does it necessarily follow therefrom that the respondents are liable for that negligence, if negligence it was? I think not, for the reason that the petition states that the pole was erected some time between September 27th and October 5th, a possibility of eight days.

With that knowledge coupled with the common knowledge that ordinarily cement sets, and hardens, and becomes as strong as it ever will in a much shorter time than eight days, can it be said that respondents could have reasonably anticipated that the cement in this case had not hardened in that time, and that

the weight and force of the people against the cable would have been sufficiently great to have pulled the pole from its fastenings in the sidewalk, when anchored as this one was? I think not.

I am therefore of the opinion that the judgment of the circuit court sustaining the demurrers was correct, and that it should be affirmed.

It is so ordered. All concur.

# ARMOR et al. v. FREY.

(Supreme Court of Missouri, Division No. 2.  
June 28, 1913. Rehearing Denied Dec.  
9, 1913.)

## 1. APPEAL AND ERROR (§ 1097\*)—LAW OF CASE.

Matters determined on a previous appeal in the same action become the law of the case and will not again be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.\*]

## 2. EXECUTORS AND ADMINISTRATORS (§ 124\*)—CONVEYANCES.

Where only one of two executors joined in conveying land in accordance with an order of sale by the court of ordinary, the conveyance was inoperative and did not pass title.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 496-507; Dec. Dig. § 124.\*]

## 3. POWERS (§ 34\*)—EXECUTION—INTENT TO EXECUTE—REFERENCE TO POWER.

Whenever there is a conveyance by the donee of a power and the conveyance cannot be given full effect without its being construed as an execution of the power, it will be held to be such execution, even though there is no reference to the power.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 121-127; Dec. Dig. § 34.\*]

## 4. EXECUTORS AND ADMINISTRATORS (§§ 145, 397\*)—CONVEYANCES.

An executor in making a sale of realty under a power in the will or an order of sale by the court does not act merely as the donee of the power, but acts officially, and hence a conveyance by an executor cannot be construed to be his act as executor either under a power in the will or under an order of court, where on its face it appeared as his individual conveyance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 585-587, 1598-1604; Dec. Dig. §§ 145, 397.\*]

## 5. PARTNERSHIP (§ 246\*)—TITLE TO LAND.

While a partnership cannot hold the legal title to land, yet equity recognizes the right of a firm in partnership land, and a surviving partner has more than a mere lien to have the property applied to paying debts, having an equitable estate in the land and the right to treat it as personalty in order to wind up the affairs of the firm, though after the partnership demands are satisfied the surplus is treated as real estate.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 519-523; Dec. Dig. § 246.\*]

## 6. PARTNERSHIP (§ 246\*)—CONVEYANCE OF PARTNERSHIP PROPERTY.

Where no creditors of a firm made any claim to wild lands owned by the partners, and the surviving partner, before conveying the property, obtained deeds from the executor and heirs of the deceased partner, the surviving partner's conveyance of the property will not be upheld as a conveyance to wind up the part-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nership affairs; it appearing that the conveyance of the executor of the deceased partner was insufficient to pass title.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 519-523; Dec. Dig. § 246.\*]

#### 7. ESTOPPEL (§ 98\*)—EQUITABLE ESTOPPEL.

Where plaintiffs had an estate in remainder under the will of their grandfather, they were not estopped from claiming the remainder because their parents, who were the life tenants, sold the property and received the proceeds, for they did not take under the life tenants, but directly from the original owner.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. § 98.\*]

#### 8. REMAINDERS (§ 17\*)—LIMITATIONS—ACCRUAL OF RIGHT TO POSSESSION.

A testator devised to his several children a life estate in lands, with remainder over to the heirs of the children, and a provision that in case of the death of any of his children without issue the share should revert to the estate and be divided among the survivors. The testator died in the 70's, and the land was sold by the executors, but title did not pass. *Held*, that upon the death of one of the children in 1903 the right of the survivors to the remainder then accrued and was not barred by the lapse of time before then.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. § 17.\*]

#### 9. DESCENT AND DISTRIBUTION (§ 128\*)—WARRANTIES—LIABILITY OF HUSBAND.

While a husband at common law was liable on his warranty in a deed made by him and his wife conveying her land, an heir of the husband is not liable on the covenant of warranty by reason of advancements.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 473-477; Dec. Dig. § 128.\*]

#### 10. WILLS (§ 839\*)—WARRANTIES—LIABILITY OF DEVISEE.

At common law, a devisee or legatee was not liable to the amount of the devised legacy by reason of the testator's liability on a covenant of warranty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2148; Dec. Dig. § 839.\*]

#### 11. WILLS (§ 839\*)—EFFECT.

Where a resident of Georgia conveyed land in Missouri with covenants of warranty, the Missouri statute, making his devisees and legatees liable to the amount of their gifts by reason of a breach of the covenant of warranty, has no effect and cannot be applied against devisees and legatees in the former state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2148; Dec. Dig. § 839.\*]

#### 12. COMMON LAW (§ 11\*)—STATES ENFORCING.

Georgia is one of the states originally under the common law.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 9, 12; Dec. Dig. § 11.\*]

#### 13. EVIDENCE (§ 80\*)—PRESUMPTIONS—COMMON LAW.

Georgia being one of the states originally under the common law, it will be presumed that the common law remains in force therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.\*]

#### 14. POWERS (§ 41\*)—POWER OF APPOINTMENT—EXECUTION.

Where an owner of land devised it to his children for life, with the power of appointment by will in favor of their children, the execution by a child of the power in favor of his son is not a devise of property, rendering

the son liable on the father's covenant of warranty made in the conveyance of land; the son taking from the original owner.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 156; Dec. Dig. § 41.\*]

#### 15. HUSBAND AND WIFE (§ 15\*)—COVENANTS—WARRANTIES.

Where a wife joined with her husband in executing a power of attorney to convey land in which her husband had a life estate, and the power clearly showed that she had no interest in the land except as wife, her execution did not carry with it her contingent remainder in the land given by the will of her father-in-law.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 13, 16, 37, 84, 90-99, 283; Dec. Dig. § 15.\*]

#### 16. LIFE ESTATES (§ 8\*)—ADVERSE POSSESSION.

A life tenant cannot, by his acts or declarations, set up pretensions to an absolute estate, so as to make his possession adverse to the reversioner or remaindermen; those persons having no right to the estate until the termination of the life estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 24-28; Dec. Dig. § 8.\*]

#### 17. QUIETING TITLE (§ 19\*)—STATUTES.

Statutes for quieting title are enabling acts and not penal or restrictive.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 48; Dec. Dig. § 19.\*]

#### 18. QUIETING TITLE (§ 19\*)—NATURE OF ACTIONS—"SUIT TO QUIET TITLE."

A suit to quiet title under the statute is a proceeding by one claimant of an interest in property against another claimant asking the court to ascertain and determine the title, but a recovery of the possession of the real estate is not essential; this being so even though the amendment of 1909 was intended to give full affirmative relief in case the suit was changed from one to quiet title to one to quiet title and for possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 48; Dec. Dig. § 19.\*]

#### 19. REMAINDERS (§ 17\*)—RUNNING OF LIMITATIONS.

As the suit to quiet title is merely for an adjudication of the title of interested parties, and not for possession, being quite similar to a suit for partition, which under Rev. St. 1909, §§ 2572, 2575, provides that the court shall declare the titles of the parties and may decide upon adverse rights and titles, a remainderman is not barred by limitations because of his failure to institute a suit to quiet title during the continuance of the precedent life estate, even though the life tenant had conveyed the property as though he owned the fee which his grantee claimed, and the remainderman was relieved of disability more than 10 years before the termination of the life estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. § 17.\*]

#### 20. PARTITION (§ 44\*)—RIGHT TO PARTITION—LIMITATIONS.

The right to partition being a right common to both tenants, neither are barred from asking that relief by reason of lapse of time.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 111-113; Dec. Dig. § 44.\*]

#### 21. PARTITION (§ 85\*)—IMPROVEMENTS—RIGHT TO COMPENSATION.

A tenant in common who makes improvements on the property in good faith, not for the purpose of embarrassing his cotenants, or incumbering their estate, or hindering parti-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion, is upon partition entitled to compensation for such improvements.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236-245; Dec. Dig. § 85.\*]

## 22. EJECTMENT (§ 135\*)—MESNE PROFITS.

While ordinarily rents are recoverable in ejectment, no rent can be recovered in ejectment by tenants in common, where their interest was subject to defendant's claim for an allowance for improvements, and the evidence failed to disclose for what the land would rent without the improvements.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 459, 460; Dec. Dig. § 135.\*]

## 23. PARTITION (§ 13\*)—RIGHT TO PARTITION.

A disseizure on actual adverse possession destroys the unity of possession among tenants in common, and takes away the right of partition until the title is determined by appropriate action.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 36, 81; Dec. Dig. § 13.\*]

## 24. QUIETING TITLE (§ 50\*) — INCIDENTS TO RELIEF—PARTITION.

Where a party brings a suit to establish an equitable interest in land, he may, in the same suit, have partition; but the rule is otherwise where the plaintiff counts solely on his legal title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 100; Dec. Dig. § 50.\*]

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by Adrian W. Armor and others against Joseph Frey. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions.

This suit was begun in Newton county, February 8, 1904. The original petition was in two counts, one to quiet title, and the other in ejectment. There was a finding and judgment for the defendant, and on appeal the judgment was reversed and the cause remanded. See *Armor v. Frey*, 226 Mo. 646, 126 S. W. 483. A change of venue followed to Barton county. At the April term, 1912, the petition was amended so as to include a count in partition in addition to the former counts. The answer tendered new issues which were not involved in the former suit. We will not set out the pleadings, and will merely state they were broad enough to cover all the facts shown in this statement. On the second trial the court again found against the plaintiffs on all the issues and entered judgment accordingly. The plaintiffs have appealed.

In 1857, Charles A. Davis and Greene Moore, both residents of Greene county, Ga., were extensively engaged in buying wild land in Missouri, for the purpose of resale. To facilitate their business, they entered into a contract with Johnson & Coleman of St. Louis, Mo., in writing, in which Johnson & Coleman agreed to furnish their services in locating and entering and purchasing lands in Missouri, and in looking after them generally. Said contract contained the following: "Said lands so entered shall be held for the period of five years, unless the parties agree

to sell sooner, and said second parties, whenever called on, shall aid in the sale without charge. On the sale of said lands, the second parties, as compensations for the locations, entries and purchases, the assessment and payment of taxes, for general oversight and for assistance in making sales, shall receive the following percentage on the sales, to be paid out of each separate sale, viz.: If the tract brings five dollars (\$5.00) per acre or under, the second parties shall receive five per cent., if it brings above five dollars and not above ten they shall receive ten per cent., if it brings ten dollars and not above fifteen they shall receive 15 per cent. and for all sums per acre above \$15 they shall receive 20 per cent."

Johnson and Coleman made the following agreement with John H. Miller indorsed on said contract: "Assignment. Know all men by these presents: That in consideration of assistance rendered by him in the location of the lands made under this contract we hereby transfer and assign to John H. Miller one-third our interest in the contract and said Miller, by signing hereto, obligates himself to take a superintending control over the lands located and entered and bear his share in the burden of this contract. Witness our hands and names this 25th day of Sept. 1857."

About 10,000 acres of land were entered and patented to Charles A. Davis and Greene Moore in Newton, Barton, and other counties in this state. Greene Moore died in 1872. He left a will executed and proved according to the laws of this state and probated in the court of ordinary of Greene county, Ga. That will is copied in full in the former opinion of this court. We will not recopy it. By the second, third, fourth, fifth, and sixth items he gave to his children, Henry A. Moore, John W. Moore, Annie F. Adams, his grandson Holcomb G. Moore, and his wife, Eliza L. Moore, respectively, certain legacies and bequests of property in Georgia. There were other items in the will, as follows:

"Item 7. I have given my older children, to wit, Adrian W. Armor and Sarah Lee Harwell, as follows, to my daughter first named: Three thousand dollars in money and property and to my daughter last named, twenty-four hundred dollars. My purpose in this will, subject to the exceptions hereinafter mentioned, is to equalize my children so far as I can do so, in the distribution of my property and to that end I direct that in the division of the residue of my estate each child shall be made to account for all the property given him or her herein, or in any other way as advancements at the estimates made by myself and that my wife shall account likewise before sharing in the said residue. I except from the general rule of equality the cases of my son Henry Antoine and John Whitfield Moore and direct that the mill property and water power herein given them

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may be had by them over and above a share of my estate.

"Item 8. All the rest and residue of my estate not herein devised and bequeathed specifically I direct shall be shared by my children and wife, not including my grandson, Holcomb G. Moore, subject to the provisions of the seventh item of this my will.

"Item 9. Upon the death of my children without issue I direct that the share of such child shall revert to my estate and be divided equally amongst my surviving children and the children of such of my children as may be deceased, share and share alike. Upon the death of any one of my children leaving issue I direct that the property herein given to such child shall go to his or her children, and wife in case of a son, in such parts and proportions as he or she may direct by last will and testament, provided no wife of any son or grandson so dying shall take more than a child's share under any such will."

The testator appointed his son, John W. Moore, and his sons-in-law, James N. Armor and James M. Harwell, his executors. Harwell failed to qualify as such executor and the other two qualified and settled the estate. There was at that time a statute law (Code 1873) of the state of Georgia as follows: "2557. (2516). Sale of wild land. On application by the administrator and due notice advertised as hereinafter provided in case of lands, the ordinary may grant an order authorizing the administrator to sell, at private sale, wild uncultivated land lying in counties other than of the administration: Provided, no objection is filed by anyone interested in the estate, and the ordinary is satisfied that such sale is preferable."

On October 7, 1872, on the petition of the executors, the court of ordinary of Greene county, Ga., made an order "to sell the wild lands in Missouri at private sale."

On May 1, 1873, Ann F. Adams and husband, Sarah L. Harwell and husband, John W. Moore and wife, Henry A. Moore, Eliza L. Moore, and Adrian W. Armor, executed to James N. Armor a power of attorney, reciting: "Whereas, Greene Moore, late of Greene county, Georgia, by his last will and testament, willed, devised and bequeathed unto his wife Eliza L. Moore, and his children, Mrs. Adrian W. Armor, Mrs. Ann Fannie E. Adams, Mrs. Sarah L. Harwell, Henry Antoine Moore and John W. Moore, all the real estate hereinafter mentioned." And giving to said attorney power: "For us and in our names, to sell and dispose of absolutely in fee simple, all our right, title and interest, joint or several, of, in and to any and all lands, tenements and hereditaments and real estate, lying and being situated in the counties of Greene, Barton, Laclede, Barry and Newton, in the state of Missouri, the same being land located and owned by me Chas. A. Davis, and the said Greene Moore in his lifetime, yet unsold, and all our interest in all other lands in said state of Missouri, for such price

or sum of money, and to such person or persons, and on such terms and conditions as he shall think best and convenient, and also for us and in our names and as our act and deed, to sign, execute, acknowledge and deliver such deed or deeds and conveyances for the absolute sale and disposal thereof, either with or without covenants of warranty, or any part thereof, with such clause or clauses, covenant or covenants, and agreement or agreements, to be therein contained as our said attorney shall think fit and expedient."

On June 2, 1877, a deed was executed and acknowledged, the material parts of which are as follows: "Know all men by these presents: That the undersigned Ann Fannie E. Adams and Josiah F. Adams and Sarah L. Harwell and James M. Harwell her husband, and John W. Moore and Eliza C. Moore his wife and Henry Antoine Moore and Eliza L. Moore all by James N. Armor, their attorney in fact, duly authorized by their letters of attorney under their hands and seals, and James N. Armor and Adrian W. Armor, his wife, for themselves, all heirs and legatees under the last will and testament of Greene Moore, late of Greene county, Georgia, all parties of the first part, for and in consideration of the sum of \$7,000.00 to them in hand paid by Charles A. Davis of Greene county, Georgia, the receipt whereof is hereby acknowledged, have granted, bargained and sold and do hereby grant, bargain and sell unto the said Charles A. Davis, said party of the second part, and to his heirs and assigns forever, all our right, title and interest (the same being an undivided one-half interest as sole heir and legatees of Greene Moore, deceased, in the real estate hereinafter described) of, in and to the following described lots, tracts and parcels of land situated in the state of Missouri and in the counties mentioned, as follows, to wit: (Conveys the land in controversy and other lands.) To have and to hold the real estate hereinbefore described, with all the rights, privileges and appurtenances thereunto belonging or in any wise appertaining unto the said Charles A. Davis, and to his heirs and assigns forever. The said parties of the first part for themselves, their heirs, executors and administrators, do hereby covenant and agree to and with the said Charles A. Davis, his heirs, executors, administrators and assigns, that the said premises and every part thereof are free and clear of any incumbrance done or suffered by them, and that the title to said real estate and every part thereof against the lawful claims and demands of all persons whomsoever claiming or to claim any right or title thereto by, through or under them they will forever warrant and defend." At that time Eliza L. Moore, the widow, was dead. By mutual mistake that deed failed to describe that part of the lands now owned by this defendant, and on February 1, 1884, the grantors in the former deed executed and acknowledged

a general warranty deed, by which they conveyed the undivided half of the land in controversy herein and some other land to said Davis for the expressed consideration of a thousand dollars; the grantors therein being therein described as "heirs and sole legatees and devisees under the last will of Greene Moore." James N. Armor as attorney in fact executed and acknowledged that deed for all of the grantors except himself and wife who acted in their own right.

The following paper was executed by James N. Armor: "Greene County, Georgia. June 1, 1877. Know all men by these presents: That I, James N. Armor, executor of Greene Moore, late of Greene county, state of Georgia, deceased, have sold unto Charles A. Davis, Sr., of same state and county, the whole of the interest (being one-half) of all the lands owned jointly by said Davis and said estate in the state of Missouri, being seven thousand seven hundred and eighty-seven acres more or less, for which parcels aforesaid I have given unto said Davis my quitclaim deed as executor aforesaid, and in consideration of the conveyance unto said Davis of said parcels of land, as well as in full payment for any amounts due or unpaid unto the said Davis and said estate for sales made at any term previous to July 1, 1877. The said Davis has paid unto me for the two considerations above mentioned the sum of seven thousand dollars, the receipt whereof is hereby acknowledged; and whereas, there is a portion of the land sold previous to January 1, 1877, for the mutual benefit of the said Davis and the said estate, of the proceeds of which each of the parties at interest have received their equal share; and whereas, there may possibly arise some suit or litigation on the part of Johnson & Coleman, or parties claiming under them as regards their rights to a portion of the proceeds; now should such suit or claim be made against the said Davis, or estate of Greene Moore, I hereby obligate to pay half of any damage or claim that may be legally obtained, as well as half the expenses of defending such suit or claim against said Davis and said estate of Greene Moore. J. N. Armor, Executor of Greene Moore, Dec."

There was a stipulation as to facts on trial, containing the following:

"(1) The executors of the will of Greene Moore duly qualified as such in the court of ordinary of Greene county, Ga., and there made distribution and final settlement of said estate. That said executors in the distribution and settlement of said estate did so according to the provisions of the seventh clause of said will and caused each of the children and widow of Greene Moore to account for all the property given to him or her therein or in any other way as an advancement at the estimated values made and fixed by said Greene Moore and made said devisees equal to the amounts received by each from said estate as therein provided.

"(2) That recent search has been made in the records and files of the court of ordinary, and no record or paper can be there found showing or stating that the executors of said estate of Greene Moore ever made any report to the court of ordinary of Greene county, Ga., as to the sale of any lands in Missouri, or that there was any order made by said court approving any such sale, other than what is found in the annual and final settlements or returns of proceeds and vouchers of said executors and their approval by said court and distribution of proceeds of sales of such lands."

On December 27, 1882, Charles A. Davis conveyed to the defendant by general warranty deed in the usual form the S. E.  $\frac{1}{4}$  of section 1, township 26, range 30, in consideration of \$1,360, and on the same day he conveyed to Jacob Frey the S. W.  $\frac{1}{4}$  of the same section, by the same kind of a deed. The defendant has since acquired the title of Jacob Frey in said land. The will of Greene Moore and the power of attorney and the deeds herein mentioned were all promptly recorded in the proper county in Missouri.

Eliza L. Moore, the widow of Greene Moore, died at her residence in Greene county, Ga., March 9, 1877. She left a will by which she gave Mrs. Harwell \$2,000, Mrs. Adams \$1,000, Mrs. Armor \$100, and to Henry A. and Holcomb G. Moore each \$5, and gave the residue of her state to John W. Moore. Mrs. Harwell died in 1892, leaving five children, Adrian A., Annie H., Robert H., Sarah R., and Ransom H. The latter died in 1892, leaving four children, Armor M., Kate G., Annie F., Howard H., and a widow. Henry A. Moore died without issue, in January, 1903. He left a will by which he bequeathed to Park G. Moore, a son of John W. Moore, about \$2,500. James N. Armor, the husband of Adrian W. Armor, died in 1894, leaving a will, the material parts of which are as follows:

"Item 2. I give, bequeath and consign to my daughter, Cora Lou Armor, forty shares of stock in the Georgia Railroad and Banking Co., and one thousand dollars in money. I have already given to my said daughter two seven per cent bonds of the city of Augusta of one thousand dollars each, two six per cent Deantinac bonds of one thousand dollars each, ten shares of stock in the Georgia Railroad and one thousand dollars in money. The advancements to her with the above legacy of forty shares of stock in Georgia Railroad and Banking Co. and one thousand dollars in money amount to the sum I have advanced to each of my four sons heretofore and at different times.

"Item 3. All the rest and residue of my estate not hereinbefore disposed of including all my property, real, personal or mixed, of which I may die seised and possessed and in which I may have any interest legal or eq-

uitable, I give, divide and bequeath absolutely to my wife, Adrian W. Armor."

Mrs. Armor is still living. She has the following children: William G., James E., Walter F., and Cora L., who married Mr. Turnell in 1894. Mrs. Armor had a son, Charles H., who died March 9, 1910, leaving a widow and four children, Charles R., James E., Effie M., and Robert C. The children of Mrs. Armor have each received \$3,000 or \$4,000 from her as advancements.

John W. Moore died in April, 1911, leaving a widow, Eliza C., and three children, Park G., Girard A., and Lillias E., who married Mr. Wright. It was not shown that John W. Moore left any property of his own, but he left a will with the following provisions therein: "Item First. I give, bequeath and devise to my son, Park G. Moore, all that certain tract or parcel of land, known as the Cunningham place, in said state and county, bounded north by lands of T. H. Crawford, east by lands of said P. G. Moore and Mrs. J. W. Moore, south by lands of P. G. Moore, known as Park place, and west by Oconee river, said tract containing four hundred and thirty-five and one-half ( $435\frac{1}{2}$ ) acres, be the same more or less. I make this gift to my son by virtue of the authority given me in the last will and testament of my father, Greene Moore."

Mrs. Adams is still living; six of her children, to wit, William E., Ida M., Alice, May, Bessie, and Calhoun R., are living. One, Robert F., died leaving a widow and one child, Fannie E. Holcomb G. Moore is still living.

Immediately after the purchase of the land in 1882, the Freys took possession of the land, inclosed it, and made valuable improvements on it.

All of the living descendants of Greene Moore are made plaintiffs herein, and, so far as the record shows, none of them have ever resided elsewhere than in the state of Georgia.

O. L. Cravens, of Neosho, James B. Park, of Greensboro, H. G. Geyer, of Neosho, H. W. Timmonds, of Lamar, and John T. Sturgis, of Neosho, for appellants. George Hubbert, of Neosho, and Edwin L. Moore, of Lamar, for respondent.

ROY, C. (after stating the facts as above). [1] I. We will not enter upon a reconsideration of the question as to whether the remainder created by the ninth item of Greene Moore's will is valid. That was rightly determined on the first appeal, and, there being no change in the facts bearing on that issue, the question is not for consideration on this appeal.

[2] II. We shall not undertake to decide whether there is an implied power of sale given to his executors in Greene Moore's will; nor shall we determine whether the Georgia executors of the will had the power to sell

and convey lands in Missouri. We have reached the conclusion that there was no sale or conveyance of the land in Missouri by the executors, and that is decisive of the other questions mentioned.

In 18 Cyc. p. 1334, it is said: "At common law a mere naked power of sale as distinguished from a power coupled with an interest could not be exercised by less than the entire number of executors appointed. This rule was modified by statute as to cases in which a portion of the executors refused, and as so modified was adopted as a portion of the common law of the United States, and it may now be said to be the general rule in the United States that a power of sale unless expressly restricted may be exercised by the representatives who qualify or survive."

It is contended by the respondent that the question whether there has been a sale of this land by the executors must be determined by the law of Georgia. Without assenting to that proposition, we call attention to the fact that it was held in *Hosch Lumber Co. v. Weeks*, 123 Ga. loc. cit. 340, 51 S. E. 439, that, in selling wild land under the statute of that state, the executors must all join. That doctrine was reaffirmed on a second appeal, reported in 133 Ga. 472, 66 S. E. 168, 134 Am. St. Rep. 218. The industry of counsel for respondent has not been able to furnish a precedent to the contrary. They cite *Roe v. Smith*, 42 Misc. Rep. 89, 85 N. Y. Supp. 527. In that case the will gave two executors the land in trust with power to sell and distribute proceeds among the testator's children at the end of the trust. The executors both together entered into an oral agreement to sell, and the contract was reduced to writing at their direction. But when it came to signing, one of them was not present, but directed the other to sign for him. The contract purported to be by both, but was only signed by one. The court said: "The one being authorized by the other, his signing binds both, the contract not being under seal. It is the same as the case of an agent signing his own name instead of that of his principal to an executory contract: the principal is bound, and oral evidence to prove that he authorized the agent to sign is not excluded by the statute of frauds. *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617. The rule that delegated authority involving the exercise of judgment and discretion cannot be redelegated is not in the way. The trust authority to agree to sell was not delegated; no exercise of judgment and discretion was delegated; only the formal signing was delegated after the terms of the contract had been agreed upon."

In *Gates v. Dudgeon*, 173 N. Y. 426, 66 N. E. 116, 93 Am. St. Rep. 608, cited by respondent, it was held that where an executor with power under a will to sell realty, and with full knowledge of the facts, has determined to sell at a fixed price, he may authorize his attorney to close the sale, and

that the contract thus made by the attorney is binding upon him. Those cases have no parallel in the facts of this case.

We thus conclude that even, if Armor as such executor made a quitclaim deed to Davis, it was not effective for want of the concurrence of John W. Moore, the other executor.

[3, 4] It is earnestly contended that the deed of February 1, 1884, from the Moore devisees to Davis, constituted a good executor's deed from John W. Moore and James N. Armor as such executors to Davis. We say no. That deed nowhere has any mark to indicate that it is the deed of the executors. On the contrary, it indicates that it was intended to be and is the individual deed of the grantors.

In *Grace v. Perry*, 197 Mo. loc. cit. 568, 95 S. W. 875, 7 Ann. Cas. 948, it was, in effect, held that wherever there is a conveyance by the donee of a power, although there is no reference to the power, yet if the conveyance cannot be given full effect without its being construed as an execution of the power, then it will be held to be such execution. That rule does not apply in this case. An executor in making a sale of realty under a power in the will does not act merely as the donee of the power. He acts officially. It is so held in *Woerner's Law of Administration* (2d Ed.) § 480. The same author (volume 2, § 1067) says: "The deed of an executor or administrator should show upon its face the authority under which it was given with sufficient certainty to enable the act done to be traced to the authority vested in him; for such a deed conveys no title unless executed pursuant to the decree or order of some court of competent jurisdiction. But it is not necessary that the grounds or reasons upon which the court proceeded in making the order of sale be specified, if the legal necessity to sell appear. Deeds have been held sufficient, not reciting the authority by which given, but referring to the same, and the administrator describing himself as such; and even without being signed by the administrator, but the capacity in which he acted appearing in some part of it."

It was held in *Lockwood v. Sturdevant*, 6 Conn. loc. cit. 385: "It is an established principle that the authority, by virtue of which an administrator is empowered to sell and convey estate, must appear on the deed of conveyance, and with such certainty that the act done shall visibly be warranted by the power conferred. *Rex v. Austrey*, K. B. East. Term, 1817; 8 Stark. Evid. 1198; *Rex v. Croke*, Cowp. 29; 2 Swift's Dig. 789, 790; Oliv. Conv. 178. And although in some cases it has been held that the authority need not be referred to, when the act done is of such a nature, that it can have no operation, unless by virtue of the power (4 Cruise's Dig. 240; 3 Johns. Ch. Rep. 551; 6 Co. 17b; 2

*Brown's Chan. Rep.* 300; 8 Ves. 609; *Litchfield*, Com. Dig. tit. Polar. c. 4), yet this principle has never been supposed applicable to the conveyances made by executors and administrators. *Griswold v. Bigelow*, 6 Conn. 258."

We have not been able to find any authority for holding that a deed appearing on its face to be the individual act of the grantor can be construed to be his act as executor, either under power in a will, or under an order of the court.

[5] III. There is a contention as to whether the land in Missouri was partnership property of the firm of Moore & Davis. We shall consider the case on the theory that it was partnership assets.

In *Shumate on Partnership*, p. 202, it is said: "As has been seen, the legal title to real estate cannot be held by the firm, as such. Where the legal title to realty is vested in more than one partner, it is held by them as tenants in common, but in equity it is chargeable with the partnership debts, and with any balance which may be due from one partner to another upon winding up the affairs of the firm."

1 *Bates on Partnership*, § 300, says: "The remaining partner has more than a mere lien to have the property applied to paying debts; he has an equitable estate; he has the right to control the property, and to treat it as personalty in order to wind up. He can sell the entire beneficial interest without proceedings to get a decree for that purpose, and the buyer is not obliged to see to the application of the purchase money, as such burden would greatly reduce the value." And the same author (section 297) says: "But the now unanimous American doctrine is that, after the partnership demands are satisfied, the unexhausted surplus is real estate. The basis of absolute or partial conversion into personalty is the presumed intention, and equity will not go further and convert it into personalty for additional purposes, such as for the mere purpose of division, unless the intention to convert for more than partnership purposes appears; hence, in this country, the widow has dower out of a partner's share in the surplus, and the share goes to the heir and not to the executor."

*Chancellor Walworth*, in *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) loc. cit. 206, 47 Am. Dec. 305, holds that the legal title will remain undisturbed except to protect the rights of members of the firm. Of course, that includes the rights of creditors.

In *Buckley v. Buckley*, 11 Barb. (N. Y.) 75, it is said: "It is due to the creditors and the members of the firm that the property should not be withdrawn until the partnership affairs are adjusted. But as between heir and executor, the reason of the rule fails."

[6] There is no creditor of the firm of Moore & Davis making any claim against the

land. Unless there has been a conveyance of the land by the surviving partner as such, the title remains unaffected by the fact of such partnership.

There is a contention as to whether the surviving partner had the power to sell the land in Missouri. We leave that question without consideration, for the reason that we hold that there has never been any sale by the surviving partner.

The deeds made by Davis to the Freys were not made by him as such surviving partner, and did not purport to be so made. At that time Davis, as he supposed, had become the owner of the entire Moore interest and claimed to own the land absolutely as his own. By no process of reasoning can the deeds to the Freys be construed as the deeds of the surviving partner. In the receipt given by the executor Armor to Davis at the time of the making of the deed to Davis in 1877, it was agreed that each should pay half of the Johnson and Coleman claim. Whatever other effect such receipt may have had, it shows that Davis did not from that time assume to hold the land as partnership assets, but as his own.

[7] We are thus driven to the conclusion that the interests of the remaindermen under Greene Moore's will have never been divested by any deed either of the executors or of the surviving partner. Those remaindermen did not receive from the executors or from any one else any of the proceeds of the sale of the land to Davis. The receipt of such proceeds by the life tenants did not in any way bind or estop the remaindermen. They do not take under the life tenants, but directly from the testator, Greene Moore.

[8] IV. On the death of Henry A. Moore in 1903, without issue, Mrs. Armor, Mrs. Adams, John W. Moore, and Holcomb G. Moore each became entitled to a fifth of the twelfth interest devised to Henry A. for life. The interest thus acquired by John W. and Holcomb G. passed by virtue of the warranty in their deed to Davis to the defendant. The issue of Mrs. Harwell became entitled to the other fifth of the Henry A. Moore twelfth. The interests of Mrs. Armor and Mrs. Adams thus acquired are not barred by the statute of limitations, as they did not vest in possession until 1903, within ten years before this suit was instituted.

[9] V. It is claimed by the respondent that the four sons of Adrian W. Armor received advancements from their father, and that her daughter, Mrs. Turnell, received a bequest of several thousand dollars under the will of her father, and that a liability exists against them in favor of the defendant on the warranty of their father to the extent of the advancements and bequests received by them.

It is true that a husband was liable at that time on his warranty contained in a deed made by him and his wife conveying the wife's land. It was so held in *Pratt v. Eaton*, 65 Mo. 157 and in *Foot v. Clark*,

102 Mo. loc. cit. 405, 14 S. W. 981, 11 L. R. A. 861. But no authority can be found for holding an heir liable on the covenant of his ancestor on account of advancements, and we hold that no such liability exists.

[10-13] The question next arises whether Mrs. Turnell, a resident of Georgia, is liable on the warranty of her father, a resident of that state, by reason of the fact that she was given property in that state under the will of her father who died there and whose estate was there administered. At common law the devisee or legatee was not so liable. We have a statute making the devisee liable on the covenants of the ancestor to the extent of the assets received. The evidence does not show that such a statute exists in Georgia. This state cannot by statute impose an obligation upon a devisee in that state under such circumstances. Georgia is one of the states originally under the common law; and, in the absence of any showing of a statute of that state, it will be presumed that the common law is in force there. *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82.

*Foot v. Clark*, 102 Mo. 394, loc. cit. 408, 14 S. W. 981, 983, was a case similar to this, except that the plaintiffs inherited lands from the warranting ancestor in North Carolina. It was held that the plaintiffs were not estopped to claim their interest in the Missouri land, but it was held that they were liable on their ancestor's warranty to the extent of the lands descended. In that case it was said: "Now we do not say that the defendant has an equitable lien on the land in question for the damages which will arise from the breach of the covenants made by Mrs. Hunt. But the effect of a recovery of the land by the plaintiffs is to make breach of the covenants of their mother. The very judgment which they obtain brings upon them a liability to the defendant for a breach of those covenants. There are no assets in this state belonging to her estate, so there can be no administration upon her estate here. The plaintiffs are nonresidents and now insolvent. It is manifestly unjust and inequitable to allow the plaintiffs to recover the land, and then send the defendant to another state to recover his damages—a fruitless errand. His remedy at law is wholly inadequate under the circumstances here disclosed. Insolvency or nonresidence often furnishes a ground upon which a court of equity will declare an offset, where the offset would not be allowed at law. *Field v. Oliver*, 43 Mo. 200; *Fulkerson v. Davenport*, 70 Mo. 541; *Barnes v. McMullins*, 78 Mo. 280; *Wallenstein v. Selzman & Co.*, 7 Bush [Ky.] 175. Such relief is not granted on the ground that the parties have cross-demands, but in order to prevent injustice." In that case the heir was held liable at common law to the extent of assets descended in North Carolina.

As the Missouri statute creates no liability on account of a devise of property in Georgia, and as there is no such law in Georgia



so far as the record shows, we hold that Mrs. Turnell is not liable to the defendant on account of the bequest to her in her father's will.

[14] VI. John W. Moore by will executed the power of appointment contained in Greene Moore's will, and appointed his son Park G. Moore as the appointee of the remainder in the land devised for life to said John W. Moore. Such an appointment was not a devise of land by John W. Moore to his son Park G. It was a mere execution by will of the power of appointment; and the son took, not from his father, but from his grandfather, Greene Moore, by virtue of such appointment. Such being the case, Park G. Moore is not liable by reason of land received by him under such appointment.

[15] VII. Mrs. Eliza C. Moore, the then wife and now the widow of John W. Moore, was not bound by the warranty in the deed from the Moores to Davis. The power of attorney under which the deed to Davis was executed clearly showed that she had no interest in the land except as the wife of one of the grantors. The interest which vested in her as a remainderman under Greene Moore's will on the death of her husband did not pass under the warranty in the deed to Davis, and she is an equal owner with her children in the twelfth interest in which her husband held the life estate.

[16] VIII. The respondents insist that those plaintiffs herein who claim estates in remainder upon pending life estates, and who are not under disability, and who failed to sue to quiet title within ten years after their right to bring such suit accrued, are barred not only of their right to bring such suit, but also of their estate in remainder. Some of this series of suits were brought within ten years after 1897 and some later. *Mar-ray v. Quigley*, 119 Iowa, 6, 92 N. W. 869, 97 Am. St. Rep. 276, and *Crawford v. Meis*, 123 Iowa, 610, 99 N. W. 186, 68 L. R. A. 154, 101 Am. St. Rep. 337, under similar statutes, hold that the remaindermen are so barred. Judge Phillips, in *Hubbird v. Goin*, an Iowa case, reported in 137 Fed. 822, 70 C. C. A. 320, followed those cases. We have reached a different conclusion for the following reasons: The life estate is the support and foundation on which the remainder must stand.

In *Allen v. De Groodt*, 98 Mo. loc. cit. 162, 11 S. W. 240, 14 Am. St. Rep. 626 it was said: "And it is well established law that if a life tenant renew a lease, or buy in an incumbrance, or the like, the fealty which he owes to the remaindermen will convert him into a trustee for the benefit of such remaindermen."

In *Salmon v. Davis*, 29 Mo. loc. cit. 181, it was said: "A person having a life estate in property cannot, by his acts or declarations, set up pretensions to an absolute estate, so as to make his possession an adverse one to the reversioner or remaindermen. The

reason of this is that there is no right of action in the reversioner until the particular estate has determined, and the possession of the tenant is entirely consistent with the title of the reversioner. In fact, the latter concedes the existence of the former, and whatever the tenant for life may do or say about his title can be of no consequence to the reversioner; for, whether true or false, the latter cannot disturb the life tenant during the admitted duration of his tenancy. It is impossible therefore for the tenant for life to make his possession an adverse one to the claim of one who has the remainder or reversion." That case was cited with approval in *Keith v. Keith*, 80 Mo. loc. cit. 127; *Hall v. French*, 165 Mo. 439, 65 S. W. 769; *Charles v. Pickens*, 214 Mo. loc. cit. 215, 112 S. W. 551. To the same effect is *Bradley v. Goff*, 243 Mo. 95, 147 S. W. 1012.

[17] 4 *Pomeroy's Equity*, § 1397, speaking of statutes for quieting title, says they are enabling acts. It follows that they are not penal, restrictive, or destructive. A suit under the statute to quiet title may be transformed or converted into a very different kind of suit or suits.

[18] In *Griffin v. Nicholas*, 224 Mo. loc. cit. 291, 123 S. W. 1067, it was held that such a suit might be "converted into a suit in equity." The amendment made to the statute in 1909 was intended to give full affirmative relief in case the action was so converted. If a person invokes the jurisdiction of the court by the institution of such a proceeding, he must be ready to present every claim which he may have to any interest in the property; and his opponent must do likewise, and both will be concluded by the result as to every interest which either may have whether presented or not. *Emmert v. Aldridge*, 231 Mo. 124, 132 S. W. 1050.

[19, 20] It still remains that the suit to quiet title, as contemplated by the statute, and before it is so converted, is a proceeding by one claimant of an interest in real property against another such claimant, asking the court to ascertain and determine, define and adjudge the title, estate, and interest of the parties. It does not ask for the recovery of real estate or the possession thereof. It does not ask affirmative relief. It seeks simply an ascertainment of the status quo of the title or titles to the property. We will compare a suit to quiet title under the statute with one for partition. In partition, under section 2575, Rev. St. 1909, the court may decide upon the adverse claims of the parties. Under section 2572, it "shall declare the rights, titles and interests of the parties." In *Chamberlain v. Waples*, 193 Mo. loc. cit. 108, 91 S. W. 937, it was said: "the essential requisites of a proper judgment in a partition proceeding are that the court shall ascertain and define the interests of the parties among whom the land is to be partitioned, and it is equally essential

that the judgment predicated upon a proceeding based upon section 650 [Rev. St. 1899] should ascertain and define the title and interest of the parties to the land in dispute between the parties to the suit."

In *Real Estate Co. v. Lindell*, 133 Mo. 386, 33 S. W. 466, it was held that a partition suit is not one to recover lands and that the statute of limitations does not apply. Either one of several cotenants can ask for partition the one against the other. The right is reciprocal. If they let more than ten years go by, they will be equally at fault, and neither can charge the other with having gained or lost anything by the delay. The statute under discussion contemplates two or more adverse claimants and gives to each the right of action against the other regardless of the possession of the property. They may each allow ten years to elapse after knowledge of the other's adverse claim without proceeding to quiet title. The statute will not, for such failure, bar the rights of both, and its language does not give preference to one over the other. It may develop in the course of the proceeding that some right claimed or some affirmative relief sought by the parties is barred by the statute of limitations, but we feel sure of our position when we say that the mere failure for ten years to sue under the statute after the right to sue has accrued does not bar the right to so proceed thereafter, and such failure of a remainderman does not bar his estate in remainder.

The case of *Bradley v. Goff*, 243 Mo. 95, loc. cit. 102, 147 S. W. 1012, 1014, involved every question here under discussion. The remaindermen were made defendants in a suit by life tenants claiming adversely to them to quiet title. In their answer they made the necessary allegations and asked that their title to the estate in remainder be quieted in them. That case as reported does not show the date of the filing of that answer. We have examined the abstract of the record filed therein, from which it appears that the answer was filed December 1, 1908, more than ten years after the statute went into effect and more than ten years after their right to bring such suit accrued. It did not occur to counsel or court in that case that the act of 1897 had in any way affected the question of the statute of limitation as against remaindermen. The court said, speaking through Bond, J.: "Respondent suggests that the statute of limitations ran in his favor. Obviously there is no merit in that contention, for the remaindermen in the deed under review are not yet entitled to the possession of their estate."

*Brewster v. Land & Imp. Co.*, 247 Mo. 223, 152 S. W. 302, so far as it goes, is in harmony with our present position.

[21] IX. We are of the opinion that the defendant is entitled to an allowance for the

improvements made by him in good faith.

Freeman, in his work on *Cotenancy and Partition* (section 510), approved the doctrine announced in *Green v. Putman*, 1 Barb. (N. Y.) 507, as follows: "To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his cotenants to such improvements, or a promise on their part, to contribute their share of the expense; nor is it necessary to show a previous request to join in the improvements, and their refusal. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for the purpose of embarrassing his cotenants, or incumbering their estate, or hindering partition."

The defendant is entitled in a proper partition proceeding to have an allowance for whatever amount it may be found that the value of land has been increased by the improvements placed thereon in good faith by the defendant.

As a result of the law as above declared applied to the facts in this case, we find that the rights, interests, and estates of the several parties to this suit in said land are as follows:

The defendant owns the undivided half originally owned by Davis in fee simple.

The widow of Greene Moore got an undivided twelfth of the land in fee by the will, and that interest passed by her will to her children, and by their deed to Davis.

The twelfth interest devised to Mrs. Harwell for life, on her death in 1892, passed to her children under the will of Greene Moore as remaindermen. It is conceded that such interest has passed out of the Harwell children by the statute of limitations and is now vested in the defendant.

On the death of Henry A. Moore without issue and leaving no widow, in 1903, the remainder of his one-twelfth was divided into five parts; each part being a fifth of a twelfth or a sixtieth of the entire interest in the land.

John W. Moore was entitled to one of those shares, and such share passed to the defendant by virtue of the warranty in the deed to Davis.

The defendant thus owns in fee 41/60 of the land. He also owns the life estates of Mrs. Armor and Mrs. Adams each in a twelfth of the land.

The children and grandchildren of Mrs. Harwell, per stirpes, own and are entitled to the possession in fee simple of the one undivided sixtieth of the land which fell to them as remaindermen on the death of Henry A. Moore without issue.

The widow and children of John W. Moore are the owners in fee simple of a twelfth interest in the land which fell to them on the death of their husband and father, the

life tenant. We note that his widow is not made a party to this suit.

The issue of Mrs. Armor and of Mrs. Adams, respectively, have contingent remainders in the shares of one-twelfth each devised to them. Mrs. Armor, Mrs. Adams, and Holcomb G. Moore are each the owner of a sixtieth interest in the land and are entitled to the possession thereof in fee simple. Said interest fell to them on the death of Henry A. Moore.

X. The third count in the petition is in ejectment. Those plaintiffs who are the issue of Mrs. Harwell are entitled to a judgment that they recover the possession of their undivided sixtieth of the land, and those plaintiffs who are the children of John W. Moore are entitled to a judgment for the possession of their three-fourths of an undivided twelfth of the land. Mrs. Armor, Mrs. Adams, and Holcomb G. Moore are each entitled to a judgment for possession of a sixtieth of the land. As to all other plaintiffs, the judgment should be for the defendant on the third count. Such judgment should be subject to defendant's rights to an allowance for improvements.

[22] Ordinarily in ejectment rents are recoverable. It appears in this case that the interests of the plaintiffs who are entitled to judgment in ejectment are subject to the defendant's claim for an allowance for improvements. Plaintiffs are not entitled to their proportion of the full rental value, but only to such proportion of what the land would rent for without the improvements. There is no evidence in the case from which we can make such calculation.

[23] XI. The second count, which is for partition, is dismissed, without prejudice, however, to the rights of the plaintiffs to maintain a new action for partition of the land in controversy.

A disseizure on actual adverse possession destroys the unity of possession among tenants in common and takes away the rights of partition until the title is determined by an action of ejectment. *Forder v. Davis*, 38 Mo. 107; *Shaw v. Gregoire*, 41 Mo. 407; *Haeussler v. Mo. Iron Co.*, 110 Mo. 188, 19 S. W. 75, 16 L. R. A. 220, 33 Am. St. Rep. 431; *Hutson v. Hutson*, 139 Mo. 229, 40 S. W. 886; *Estes v. Nell*, 140 Mo. 639, 41 S. W. 940.

[24] Where a plaintiff brings suit to establish an equitable interest in land, he may, in the same suit, have partition. *James v. Groff*, 157 Mo. 402, 57 S. W. 1081; *Holloway v. Holloway*, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 339; *Barnard v. Keathley*, 230 Mo. 209, 130 S. W. 306.

The plaintiffs in this case have not alleged any equitable right to the land, and stand on their legal title. They are not entitled to sue for partition until after their possessory right is determined, and we are of the

opinion that the count for partition is premature.

The judgment is reversed, and the cause remanded, with directions to enter a judgment in accordance with this opinion.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

#### ARMOR et al. v. JESTER.

(Supreme Court of Missouri, Division No. 2.  
June 28, 1918. Rehearing Denied.)

PARTITION (§ 85\*)—IMPROVEMENTS—COMPENSATION.

Where a tenant in common in possession places improvements on the land in good faith, he is entitled to an allowance upon partition for such sum as may be equal to the increase in the value of the land by reason of the improvement.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236-245; Dec. Dig. § 85.\*]

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by Adrian W. Armor and others against Joseph E. Jester. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions.

James B. Park, of Greensboro, H. G. Geyer, of Neosho, and H. W. Timmonds, of Lamar, for appellants.

ROY, C. The record in these cases is complicated. So far as we have been able to discover, the facts in this case are in all respects material to the controversy the same as in *Armor v. Frey*, 161 S. W. 829, and the judgment herein is reversed and remanded, with directions to enter a judgment and decree on the first count of the petition, finding and judging that the defendant is the owner in fee of  $\frac{1}{12}$  of the land, and that he is also the owner of the respective life estates of Mrs. Armor and Mrs. Adams each in a twelfth of the land, and that he is also entitled to an allowance for such sum as may be equal to the increase in the value of the land by reason of improvements placed thereon in good faith, said allowance to be borne pro rata by the several interests in said land, and that the issue of Mrs. Harwell, to wit, Adrian A. Harwell, Annie H. Childs, Robert A. Harwell, Sarah R. Singleton, children of Mrs. Harwell, and Armor M. Harwell, Kate I. Harwell, Annie F. Harwell, and Howard H. Harwell, grandchildren of Mrs. Harwell by Ransom H. Harwell, her deceased son, subject to the interests of their mother, Minnie Harwell, are the owners in fee, per stirpes, of an undivided

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed sixtieth of the land. Also that Eliza C. Moore, widow of John W. Moore, and Lillias E. Wright, Park G. Moore, and Girard A. Moore, children of said John W. Moore, are the owners of an undivided five-sixtieths of the land in fee, and that the children of Adrian W. Armor, to wit, William G. Armor, James E. Armor, Walter F. Armor, Cora L. Turnell, and the following grandchildren of Mrs. Adrian W. Armor, to wit, Charles R. Armor, James E. Armor, Effie M. Armor, and Robert G. Armor, children of Charles H. Armor, per stirpes, are the owners of a contingent remainder in an undivided twelfth of the land to vest in possession on the death of said Adrian W. Armor, and that the children of Ann F. Adams, to wit, William E. Adams, Ida M. Rosser, Alice Waterson, May Adams, Bessie Adams, and Calhoun R. Adams, and the grandchild of Ann F. Adams, to wit, Fannie E. Adams, child of Robert P. Adams, deceased, per stirpes, are the owners of a contingent remainder in an undivided twelfth of said land, to vest in possession on the death of said Ann F. Adams. And that Adrian W. Armor, Ann F. Adams, and Holcomb G. Moore are each the owner of and entitled to the possession of an undivided sixtieth of the land. All the interests above stated are subject to their pro rata burden of paying for the improvements as above stated.

The circuit court will enter a judgment on the second count of the petition in favor of the defendants. On the third count, the circuit court will enter a judgment for the recovery of possession in favor of the above-named issue of Mrs. Harwell for an undivided sixtieth of the land, and in favor of the above-named children of John W. Moore for the undivided three-fourths of a twelfth of the land, and in favor of Adrian W. Armor, Ann F. Adams, and Holcomb G. Moore each for an undivided sixtieth of the land.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

#### ARMOR et al. v. KEARNEY.

(Supreme Court of Missouri, Division No. 2. June 28, 1913. Rehearing Denied.)

PARTITION (§ 85\*)—RIGHT OF TENANT IN POSSESSION TO COMPENSATION FOR IMPROVEMENTS MADE IN GOOD FAITH.

Where a tenant in common in possession places improvements on the land in good faith, he is entitled to an allowance upon partition for such sum as may be equal to the increase in the value of the land by reason of the improvement.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 236-245; Dec. Dig. § 85.\*]

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by Adrian W. Armor and others against Martin Kearney. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions.

James B. Park, of Greensboro, H. G. Geyer, of Neosho, and H. W. Timmonds, of Lamar, for appellants.

ROY, C. The record in these cases is complicated. So far as we have been able to discover, the facts in this case are in all respects material to the controversy the same as in *Armor v. Frey*, 161 S. W. 829, and the judgment herein is reversed and remanded, with directions to enter a judgment and decree on the first count of the petition, finding and judging that the defendant is the owner in fee of  $\frac{1}{60}$  of the land, and that he is also the owner of the respective life estates of Mrs. Armor and Mrs. Adams each in a twelfth of the land, and that he is also entitled to an allowance for such sum as may be equal to the increase in the value of the land by reason of improvements placed thereon in good faith, said allowance to be borne pro rata by the several interests in said land, and that the issue of Mrs. Harwell, to wit, Adrian A. Harwell, Annie H. Childs, Robert A. Harwell, Sarah R. Singleton, children of Mrs. Harwell, and Armor M. Harwell, Kate I. Harwell, Annie F. Harwell, and Howard H. Harwell, grandchildren of Mrs. Harwell by Ransom H. Harwell, her deceased son, subject to the interests of their mother, Minnie Harwell, are the owners in fee, per stirpes, of an undivided sixtieth of the land. Also, that Eliza C. Moore, widow of John W. Moore, and Lillias E. Wright, Park G. Moore, and Girard A. Moore, children of said John W. Moore, are the owners of an undivided  $\frac{5}{60}$  of the land in fee, and that the children of Adrian W. Armor, to wit, William G. Armor, James E. Armor, Walter F. Armor, Cora L. Turnell, and the following grandchildren of Mrs. Adrian W. Armor, to wit, Charles R. Armor, James E. Armor, Effie M. Armor, and Robert G. Armor, children of Charles H. Armor, per stirpes, are the owners of a contingent remainder in an undivided twelfth of the land to vest in possession on the death of said Adrian W. Armor, and that the children of Ann F. Adams, to wit, William E. Adams, Ida M. Rosser, Alice Waterson, May Adams, Bessie Adams, and Calhoun R. Adams, and the grandchild of Ann F. Adams, to wit, Fannie E. Adams, child of Robert F. Adams, deceased, per stirpes, are the owners of a contingent remainder in an undivided twelfth of said land, to vest in possession on the death of said Ann F. Adams. And that Adrian W. Armor, Ann F. Adams, and Holcomb G. Moore are each the owner of and entitled to the possession of an undivided sixtieth of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the land. All the interests above stated are subject to their pro rata burden of paying for the improvements as above stated.

The circuit court will enter a judgment on the second count of the petition in favor of the defendant. On the third count, the circuit court will enter a judgment for the recovery of possession in favor of the above-named issue of Mrs. Harwell for an undivided sixtieth of the land, and in favor of the above-named children of John W. Moore for the undivided three-fourths of a twelfth of the land, and in favor of Adrian W. Armor, Ann F. Adams, and Holcomb G. Moore each for an undivided sixtieth of the land.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

### ARMOR et al. v. COOPER.

(Supreme Court of Missouri, Division No. 2.  
June 28, 1913. Rehearing Denied.)

**PARTITION (§ 85\*)—RIGHT OF TENANT IN POSSESSION TO COMPENSATION FOR IMPROVEMENT MADE IN GOOD FAITH.**

Where a tenant in common in possession places improvements on the land in good faith, he is entitled to an allowance upon partition for such sum as may be equal to the increase in the value of the land by reason of the improvements.

[Ed. Note.—For other cases, see Partition. Cent. Dig. §§ 236-245; Dec. Dig. § 85.\*]

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by Adrian W. Armor and others against W. A. Cooper. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions.

James B. Park, of Greensboro, H. G. Geyer, of Neosho, and H. W. Timmonds, of Lamar, for appellants.

ROY, C. The record in these cases is complicated. So far as we have been able to discover, the facts in this case are in all respects material to the controversy the same as in *Armor v. Frey*, 161 S. W. 829, and the judgment herein is reversed and remanded, with directions to enter a judgment and decree on the first count of the petition, finding and judging that the defendant is the owner in fee of  $\frac{41}{60}$  of the land, and that he is also the owner of the respective life estates of Mrs. Armor and Mrs. Adams each in a twelfth of the land, and that he is also entitled to an allowance for such sum as may be equal to the increase in the value of the land by reason of improvements plac-

ed thereon in good faith, said allowance to be borne pro rata by the several interests in said land, and that the issue of Mrs. Harwell, to wit, Adrian A. Harwell, Annie H. Childs, Robert A. Harwell, Sarah B. Singleton, children of Mrs. Harwell, and Armor M. Harwell, Kate I. Harwell, Annie F. Harwell, and Howard H. Harwell, grandchildren of Mrs. Harwell by Ransom H. Harwell, her deceased son, subject to the interests of their mother, Minnie Harwell, are the owners in fee, per stirpes, of an undivided sixtieth of the land. Also, that Eliza C. Moore, widow of John W. Moore, and Lillias E. Wright, Park G. Moore, and Girard A. Moore, children of said John W. Moore, are the owners of an undivided  $\frac{5}{60}$  of the land in fee, and that the children of Adrian W. Armor, to wit, William G. Armor, James E. Armor, Walter F. Armor, Cora L. Turnell, and the following grandchildren of Mrs. Adrian W. Armor, to wit, Charles R. Armor, James E. Armor, Effie M. Armor, and Robert G. Armor, children of Charles H. Armor, per stirpes, are the owners of a contingent remainder in an undivided twelfth of the land to vest in possession on the death of said Adrian W. Armor, and that the children of Ann F. Adams, to wit, William E. Adams, Ida M. Rosser, Alice Waterson, May Adams, Bessie Adams, and Calhoun R. Adams, and the grandchild of Ann F. Adams, to wit, Fannie E. Adams, child of Robert F. Adams, deceased, per stirpes, are the owners of a contingent remainder in an undivided twelfth of said land, to vest in possession on the death of said Ann F. Adams. And that Adrian W. Armor and Ann F. Adams and Holcomb G. Moore are each the owner of and entitled to the possession of an undivided sixtieth of the land. All the interests above stated are subject to their pro rata burden of paying for the improvements as above stated.

The circuit court will enter a judgment on the second count of the petition in favor of the defendant. On the third count, the circuit court will enter a judgment for the recovery of possession in favor of the above-named issue of Mrs. Harwell for an undivided sixtieth of the land, and in favor of the above-named children of John W. Moore for the undivided three-fourths of a twelfth of the land, and in favor of Adrian W. Armor, Ann F. Adams, and Holcomb G. Moore each for an undivided sixtieth of the land.

WILLIAMS, C., concurs.

PER CURIAM. The foregoing opinion of ROY, C., is adopted as the opinion of the court. All concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## NORTON et al. v. REED.

(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

**1. EXECUTORS AND ADMINISTRATORS (§ 362\*)**  
—SALES—PUBLICATION.

Under Rev. St. 1889, § 147, providing for sale of land by administrators, and requiring that notice of the sale shall be published for four weeks, a full four weeks' publication of 28 days is required, and a shorter period is insufficient, and will not support an order of sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1484-1487; Dec. Dig. § 362.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 362\*)**  
—PROBATE COURT — JURISDICTION TO SELL LAND.

Notice is an indispensable prerequisite to the jurisdiction of the probate court to order a sale of the land of a decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1484-1487; Dec. Dig. § 362.\*]

**3. COURTS (§ 36\*)—PRESUMPTIONS.**

The presumptions in favor of the action of the probate court over matters within its jurisdiction are the same as arise in case of courts of general jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 142-144; Dec. Dig. § 36.\*]

**4. JUDGMENT (§ 289\*)—RECITALS—PRESUMPTIONS.**

Where a judgment recites valid notice, this recital only refers to the facts appearing in the judgment roll when such facts are so preserved; and the recitals contained in the roll may be used to overthrow those in the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 570; Dec. Dig. § 289.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 362\*)**  
—SALE OF LAND—PROOF OF PUBLICATION.

That the judge, before whom proof of publication of a notice for the sale of decedent's land was taken did not sign the blank jurat attached to the publisher's affidavit will not invalidate proofs of publication.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1484-1487; Dec. Dig. § 362.\*]

**6. ADVERSE POSSESSION (§ 112\*)—BURDEN OF PROOF.**

A defendant who sets up adverse possession has the burden of proof, and hence in ejectment, where the only evidence of the date of actual ouster was that of plaintiff, showing that it occurred within 10 days after November 26, 1896, it will not be deemed that the adverse possession commenced earlier than December 6th.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657-659, 661-663, 665, 666; Dec. Dig. § 112.\*]

**7. ADVERSE POSSESSION (§ 106\*)—TITLE ACQUIRED.**

Adverse possession transfers the title from the owner to the occupant as effectually as would a deed, and the occupant after his title has ripened by prescription stands just as any other landowner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 604-623; Dec. Dig. § 106.\*]

**8. ACTION (§ 32\*)—FORMS OF ACTION—ABOLITION.**

There is but one form of action for the enforcement or protection of private rights, or the redress or prevention of private wrong.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 257-261, 316; Dec. Dig. § 32.\*]

**9. PARTIES (§ 14\*)—JOINDER.**

All persons having an interest in the subject-matter of a private civil action may be joined as plaintiffs or defendants.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 13, 16, 17½; Dec. Dig. § 14.\*]

**10. PARTIES (§ 75\*)—PLEADING (§ 193\*)—DEFECTS—ATTACKS.**

In case a petition shows on its face a defect of parties or a misjoinder of actions, the defect may be reached by demurrer, but if it does not show such defect on its face, the fault may be attacked by answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.\* Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.\*]

**11. PARTIES (§ 75\*)—PLEADING (§ 406\*)—DEFECTS—WAIVER.**

Where a defect in parties or a misjoinder of causes of action is not taken advantage of either by demurrer or answer, it is waived.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.\* Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.\*]

**12. JUDGMENT (§ 237\*)—ACTIONS—EJECTION.**

In ejectment, where the land sued for is held in separate possession by different defendants, the plaintiff may be compelled by motion to elect against which he may proceed; but, where such election is not required, judgment may be rendered against each defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 415, 418-421, 429; Dec. Dig. § 237.\*]

**13. LIMITATION OF ACTIONS (§ 105\*)—TOLLING OF STATUTES OF LIMITATIONS — PREVIOUS ACTION.**

Plaintiffs, before defendant's possession had ripened into title, instituted an action by filing a petition, alleging that defendant and others were in possession of lands belonging to plaintiffs, that the deed under which they held was void, and that plaintiffs had wrongfully been ousted. A voluntary nonsuit was taken, and a new action begun within the year. *Held*, that though the first petition prayed for the cancellation of the deed to the land, and included lands other than those belonging to defendant, yet in view of Rev. St. 1909, § 2391, providing for actions of ejectment against several defendants, the first action was substantially identical with the second action of ejectment, seeking possession of the same land, and hence it tolled the statute of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 514, 515; Dec. Dig. § 105.\*]

**14. LIMITATION OF ACTIONS (§ 130\*)—TOLLING OF STATUTE—NEW ACTION.**

Where plaintiffs, the owners of land, instituted an action before the running of the period of limitations, they could thereafter suffer a voluntary nonsuit, and within a year institute a new action, which would not be barred by limitations even though the period had then run, provided it involved the same issues as the first.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553-566; Dec. Dig. § 130.\*]

Appeal from Circuit Court, Reynolds County; Joseph J. Williams, Judge.

Action by Minnie Norton and others against Joseph A. Reed. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an appeal from a judgment for plaintiffs for the recovery of a tract of land in Reynolds county described as follows: "All that part of the east half of lot three (3) of the northwest quarter of section five (5) in township twenty-nine (29), north of range one (1), east, that lies west of the right of way of the Missouri Southern Railroad, and west and south of a line commencing at a point on the eastern side of said lot three, seven chains and thirty-seven links south of the northeast corner of said lot three, and running thence west nine chains and fifty-nine links, thence north one chain and thirty-three links, thence west four chains and thirty-three links, thence north to the north line of said lot three, excepting therefrom a strip three hundred feet wide on the south side of the east half of said lot three."

The original petition was filed October 23, 1907, and is not set out in the record. The amended petition, upon which the case was tried, was filed in term November 27, 1907. It is an ordinary petition in ejectment for an undivided four-fifths of the land described in it, to which the plaintiffs assert title by descent from Benjamin C. Vandyke (who died intestate in 1884), being four of the five children who survived him. It charges the ouster as of August 4, 1901. The defendant claims through an administrator's deed made May 13, 1889, by J. S. Rogers, administrator of Vandyke, to one Thomas Piles, for a consideration of \$75, and also by adverse possession.

On August 6, 1906, the plaintiffs Minnie Norton, James T. Vandyke and Catharine Dougherty, three of the children and heirs of the said Benjamin C. Vandyke, brought suit against this defendant, with I. F. Reed, William H. Reed, John L. Copeland, John Cooper, Bessie Cooper (born Vandyke), ——— Cooper, ——— Cooper, John C. Vandyke, and others, in the circuit court for Reynolds County, returnable at the November term. The Coopers mentioned as defendants are the husband and children of Bertie Cooper, a deceased daughter of Benjamin C. Vandyke, and John C. Vandyke is his son. The defendants other than the Vandyke heirs were occupying claimants in severalty of the land included in the administrator's sale already mentioned, which covered not only that now in controversy, but another tract described as 25 acres off the west side of the east half of lot 2 of the same quarter section. The petition attacked the administrator's deed in the following language: "Plaintiffs allege that the said deed was of no effect and void, that the said J. S. Rogers had no authority at law to make the same, but that said deed constitutes a cloud upon the title of these de-

fendants [plaintiffs] to the said lands, which in equity and good conscience ought not to be." Plaintiffs then "for a further cause of action \* \* \* state that on the 10th day of August, 1896, they were entitled to the possession, jointly with the defendants John C. Vandyke and Bertie Cooper \* \* \* of all the lands above described; that on the 20th day of August, 1896, the said defendants last above named wrongfully entered into the possession of said lands and ousted these plaintiffs, \* \* \* and still hold possession thereof." There is a single prayer for relief in the following words: "Plaintiffs pray the court to set aside and for naught 'hole' the said deed made by the said J. S. Rogers to the said Thomas Piles as aforesaid, and to set aside and for naught hold all of the mesne conveyances between the said Thomas Piles and the defendants herein; that the court ascertain and by its judgment and decree determine the damage by these plaintiffs sustained by reason of the waste committed by the defendants while in the possession of the said lands, if any, the value of the rents, issues, and profits, and the improvements made thereon, if any, by these defendants and each of them, and that judgment be rendered against the said defendants and each of them for such sum as the court may find to be just, and for the recovery of the possession of the premises. Plaintiffs pray for such other and further orders, judgments, and decrees as to the court shall seem just and proper and for costs."

At the following November term (November 26, 1906) the plaintiffs filed an amended petition, constructed practically on the same lines, except that all the Vandyke heirs were made plaintiffs. On April 22, 1907, a second amended petition was filed, in which Minnie A. Norton, Catharine Dougherty, John C. Vandyke, and James T. Vandyke are plaintiffs, and Joseph A. Reed is sole defendant. This last petition was straight ejectment for the land in controversy in this suit, omitting the other tract. It charges the ouster as of August 4, 1901. The next entry in the case was at the May term, 1907, and on June 3d as follows: "Minnie Norton et al. v. Jos. A. Reed. At this day by leave of court, plaintiffs take a voluntary nonsuit, whereupon it is adjudged by the court that defendant recover of and from plaintiff his cost in this behalf expended and have execution therefor."

The undisputed evidence shows that the defendant's predecessors entered the premises in controversy on some unknown date, within ten days after the rendition of a judgment in ejectment entered November 26, 1896. The proceedings in the administrator's sale through which the defendant deraigns his title are set out in the record as follows: On February 10, 1888, J. S. Rogers, administrator of the estate of B. C. Vandyke, deceased, filed his application for the sale of the land in controversy, containing 30.29 acres,

together with 25 acres off the west side of the east half of lot 2 in the same quarter section, for the payment of debts of the estate, subject to the homestead rights of the widow and children of the deceased. At the February term of the probate court, and on February 14, 1888, this petition was presented and taken up by the court and publication ordered. In this order the land was described as follows: "Twenty-five acres on the west side of east half of lot two, northwest quarter of section five, township twenty-nine range one, east, and east half of lot two, northwest quarter of section five, township twenty-nine, range one, east, except eight acres deeded to A. B. Winchell in northeast corner of said lot, subject to the homestead of Mattie A. Rogers, Bertie E. and James Vandyke, widow and minor heirs of the estate of B. C. Vandyke, deceased."

On May 15th proof of publication, accompanied by a copy of the order as published, was filed in the probate court. This proof is as follows: "State of Missouri, County of Reynolds—ss.: A. P. Shriver, on oath says he is the publisher of the Reynolds County Outlook, a newspaper published in Centerville, Reynolds county, Mo., and that the annexed notice was published in said paper for four successive weeks as follows: April 20th, 1888, vol. 11, No. 36, April 27th, 1888, vol. 11, No. 37, May 4th, 1888, vol. 11, No. 38, May 11th, 1888, vol. 11, No. 39."

The notice annexed to the proof is in words and figures following: "Order of Publication. State of Missouri County of Reynolds—ss.: In the Probate Court, February Term, 1888. Estate of B. C. Vandyke, deceased. J. S. Rogers, Administrator de bonis non. Order of Publication, Tuesday, February 14, 1888. Now on this day comes J. S. Rogers, administrator de bonis non of the estate of B. C. Vandyke, deceased, and presents to the court his petition praying for an order for the sale of certain real estate of which said B. C. Vandyke died seised, described as follows: 25 acres, on west side of east hf of lot 2 nw qr sec 5 tp 29, 1 e and e hf lot 3 nw qr sec 5 tp 29 r 1 e, except 8 acres deeded to A. B. Winchell in northeast corner of said lot, subject to the homestead of Mattie A. Rogers, Bertie E. and James Vandyke, minor heirs of the estate of B. C. Vandyke, dec'd, to pay the debts of said estate which said petition was accompanied by the account, list and inventory, as required by law, showing that said estate is indebted and that said debts are unpaid and that there is not sufficient assets on hand to pay the same; on examination thereof it is ordered by the court that all persons interested in said estate of said deceased be notified that application as aforesaid has been made, and that unless the contrary be shown on or before the first day of the next term of this court to be held on the 14th day of May, 1888, next, an

order will be made for the sale of the real estate in said petition described, or so much thereof as shall be sufficient for the payment of said debts and the expenses of said sale, and it is further ordered that this notice be published in some newspaper published in said county of Reynolds for four weeks prior to the next term of this court. A true copy of the original order now of record. Attest with seal of court this 20th day of March, 1888. E. D. Brawley, Judge of Probate and Clerk."

The order of sale was introduced by plaintiffs from record No. 2 at page 604, in which the land ordered sold is described as follows: "25 acres on west side of east half of lot 2, N. W. quarter, section 5, township 29, range 1, east, except 8 acres deeded to A. B. Winchell in the northeast corner of said lot, subject 'of' homestead of Mattie A. Rogers, Bertie E. and James Vandyke, minor heirs of the estate of B. C. Vandyke, deceased."

The defendant, against the objection of plaintiffs, introduced the minute book of the probate court, containing an entry of the same order, signed by the judge, in which the land was properly described. This was admitted. The next entry in that proceeding shown by this record is as follows: "Reynolds County Probate Court. November Term, 1888, 3rd Day of the Term, Nov. 14, 1888. Estate of B. C. Vandyke, deceased. Now at this day comes J. S. Rogers, administrator de bonis non of the estate of B. C. Vandyke, deceased, and shows to the court that the sale of the real estate made at the August term of this court was not made in compliance of law; not having the same appraised as the law directs, the sale is therefore rejected by the court; and it is further ordered by the court that the said administrator advertise and resell as the law directs and make his report at the next regular term of this court."

The administrator's deed is in the usual form, recites the original order of sale already referred to, and that sale took place February 11, 1889, but does not refer to the previous sale, or any subsequent order or proceeding for a resale. At the trial, which was by the court without a jury, the defendant asked, and the court refused, the following declarations of law:

"(2) The court declares the law to be that the administrator's deed, read in evidence on part of the defendant, was sufficient to pass the title to the lands therein described to the grantee therein named, and that the title and right to possession of the lands involved in this suit, which constitute a part of the lands conveyed by said administrator's deed, is in the defendant, and the plaintiffs are not entitled to recover the same, and the finding should be for the defendant.

"(3) The court declares the law to be that



plaintiffs' action to recover the premises sued for in this action was and is barred by the 10-year statute of limitations, and the finding should be for the defendant.

"(4) The court declares the law to be that the first petition filed in this cause did not state any cause of action for the recovery of the possession of the premises sued for, and that the filing of said petition did not arrest the running of the ten-year statute of limitations.

"(5) The court declares the law to be that the first amended petition filed in this cause did not state any cause of action for recovery of the possession of the premises sued for in this action, and that the filing of said first amended petition did not arrest the running of the 10-year statute of limitations."

These state sufficiently, in a general way, the theory upon which the case was tried.

Stuart L. Clark, Arthur T. Brewster, and Sam M. Brewster, all of Poplar Bluff, for appellant. Robert L. McLaran, of St. Louis, J. B. Daniel, of Centerville, and George E. Smith, of St. Louis, for respondents.

BROWN, C. (after stating the facts as above). I. The plaintiffs say that the administrator's deed under which the defendant claims is void, because the order of sale by the Reynolds county probate court was made without giving the notice which the statute requires, and was therefore void, so that the deed made by its authority conveyed nothing. They do not deny that the orders and judgments of the probate court are entitled to the same presumptions of truth in their statements that are accorded to the judgments of the circuit court in exercising a similar jurisdiction. They contended, however, that the courts must hear before they judge, and that all valid judicial action involves the opportunity to be heard. When the jurisdiction of the court is invoked, as was done by the administrator of Vandyke by filing his petition for the sale of the land for the payment of the debts of his intestate, it remains to acquire jurisdiction of the persons of all having an adverse interest to be affected, which may be done by their voluntary appearance, or by the service of notice of the proceeding. Without such appearance or notice the vital requisite of all judicial action is wanting. In all cases where the parties to a legal controversy do not appear, the first question for the court to determine is whether they have been given the opportunity to appear by having received such notice as the law deems sufficient. It would be absurd to say that one whose rights are to be judicially concluded has the constitutional right to a hearing, and then condemn him by a judicial finding, made in his absence and without notice, that he has had the opportunity to be heard. It is to guard against such absurdities, that the law has prescribed cer-

tain procedure by which the acts of public officers, each acting in his own sphere, are written down and faithfully preserved, so as to show the truth when human memory, entangled, as it is sure to be, with human interests, shall have become a snare for the feet of the unwary. When a party proceeded against does not voluntarily appear, and he is within the jurisdiction, formal process is issued under the seal of the court if it be of record, and the formal return of the sworn and bonded officer to whom it is intrusted for service must be indorsed on it, all of which is incorporated in the judgment roll and made a part of the permanent record of the court. If he is without the jurisdiction, so that he cannot be personally notified by its officers, and his property becomes the target of the law, that constitutional blessing called "due process of law" seems to require, as a prerequisite to its taking or condemnation, that constructive notice be substituted for the actual notice required, when practicable. This is usually served by publication, as in the case we are now considering. Its process is a formal order of the court, placed upon its record as solemnly and permanently as is the final judgment, and evidence of the service of this, like the return of the officer on his personal process, is incorporated in the judgment roll.

In this case the court became vested with jurisdiction over the subject of the proceeding by the filing of the administrator's petition asking for the sale of the two tracts of land separately described in it, and that the statutory notice by publication be given. This order must provide that all persons interested in the estate be notified of the filing of the petition, and that unless the contrary be shown on the first day of the next term of the court, an order will be made for the sale of the whole, or so much of the real estate as will pay the debts of the deceased. This order, as we have already said, constitutes, in fact, the process of the court which was required to be served by publication in a newspaper. While it described correctly one of the tracts of land which the administrator had included in his petition, it did not describe the tract which is the subject of this controversy. Whether this omission alone would have been fatal to the proceeding is unnecessary, in view of the subsequent proceedings, to decide.

The notice was published with the addition of the description of the tract of land involved in this suit. The statute required (R. S. 1889, § 147) it to "be published for four weeks in some newspaper in the county in which the proceedings are had, or by ten handbills, to be put up at ten public places in said county at least twenty days before the term of the court at which any such order will be made, in the discretion of the court." The court exercised its discretion by directing the publication to be made in a

newspaper. The statute further provided that "upon proof of publication \* \* \* as provided in the next preceding section, the court shall hear the testimony, and may \* \* \* make an order for the sale of such real estate, or any part thereof in this state, at public or private sale." It will be observed that the court is required to receive proof of publication. Being a court of record it may and should make a record of this proof, and it did make such record in this case in two ways: (1) The judge over his own hand filed, with the papers constituting the judgment roll, the signed statement of the publisher of the paper that he had published it in his newspaper for four successive weeks as follows: "April 20th, 1888, vol. 11, No. 36; April 27th, 1888, vol. 11, No. 37; May 4th, 1888, vol. 11, No. 38; May 11th, 1888, vol. 11, No. 39." To this proof was added the statement, in the form of an unsigned jurat, that it had been sworn to by the publisher who signed it, and attached to it was a copy of the order, with the description of the land in controversy added, as published. This was filed on May 15th. The first day of the term was May 14th, and the order of sale was made on the following day, on which the proof of publication was filed. It recited that the order of publication had been published for more than four weeks prior to the first day of the term. It will be seen, by inspection, that the first insertion as stated in the proof was on February 20th, only 24 days previous to the first day of the term, and only 25 days previous to the actual making of the order of sale.

[1] That the period of four weeks that the statute required this notice to be published was a full period of 28 days is not only evident from the words themselves by the application of their ordinary and usual meaning in such a connection, but has been permanently settled by the adjudications of this court. *Young v. Downey*, 145 Mo.. 250, 254, 259, 46 S. W. 1086, 68 Am. St. Rep. 568; *Id.*, 150 Mo. 317, 51 S. W. 751; *Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746.

[2] That the notice is an indispensable prerequisite to the jurisdiction of the court to make the order of sale is equally well settled in the same cases. The *Young Case* is not distinguishable in any particular from the one we are considering. In that case the order of sale recited that the notice had been published according to law. The proof of publication shows that there had been insertions of the notice in a weekly newspaper published in the county, that is to say, on September 8th, 15th, 22d, and 29th. The first day of the next term was October 2d, so that the same number of days and the same number of weekly publications intervened in that case as in this, yet the court decided that on account of the defective publication in that respect the order of sale and

deed made in pursuance of it were void. On the second appeal, reported in the 150 Missouri, the attention of the court was called to the fact that it had decided differently in *Cruzen v. Stephens*, 128 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549, and, after a full review of many cases both in this and other states, it expressly overruled that case.

[3] As we have already said, the same presumption prevails in favor of the action of the probate court in this respect that would apply in case of similar action by a court of general jurisdiction.

[4] This same question has been frequently before this court involving the validity of judgments rendered in the exercise of the general jurisdiction of the circuit courts, and it has been constantly held that, although in such cases the judgment recites a valid notice, this recital only refers to the facts appearing in the judgment roll when such facts are so preserved, and constitutes simply a legal conclusion drawn from them, so that if the fact does not sustain the conclusion the judgment rendered upon such notice is void. *Cloud v. Pierce City*, 86 Mo. 357, 369; *Feurt v. Caster*, 174 Mo. 289, 303, 73 S. W. 576; *Stark v. Kirchgraber*, 186 Mo. 633, 646, 85 S. W. 868, 105 Am. St. Rep. 629; *Howell v. Sherwood*, 213 Mo. 565, 567, 112 S. W. 50; *Id.*, 242 Mo. 513, 530, 147 S. W. 810.

[5] In the case first cited, quoting from *Freeman on Judgments*, the court said: "But no presumptions in support of the judgment are to be allowed in opposition to any statement contained in the record. If an act be stated in the roll as having been done in a specified manner, no presumption arises that at some future time the act was done in a more efficient manner. \* \* \* Generally the recital of jurisdiction or of service of process contained in the judgment will be construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record. \* \* \* If an attempt at notice appears in the record, the finding, if a general one, refers to and is limited by such attempted notice." At pages 368, 369 of 86 Mo. It has constantly adhered to the same doctrine up to the present time. The fact that the judge before whom the law requires the proof to be taken did not sign the blank jurat appended to it makes no difference. The statute does not require the oath to be preserved in that way. Placing its substance in the judgment roll with a formal filing was the act of the judge in his judicial capacity. In this case it was expressly identified in the body of the order of sale, which recited the publication of the notice in that particular newspaper. It follows that the order of sale and the deed made thereunder are void.

[6, 7] II. The only remaining question is whether this suit is barred by limitation, or to be more specific, whether the title has been divested from the heirs of Vandyke by the

adverse possession of the defendant and those through whom he claims. The only evidence in the record of the date of the actual ouster of the plaintiffs is that it occurred within 10 days after the 26th day of November, 1896. The burden being upon the defendant to prove the full period of his adverse possession, it will not be deemed to have begun until December 6, 1896. This suit was not instituted until October 1907, so that the full period of 10 years had elapsed, and the entry of plaintiffs would be barred, unless the running of the statute had been arrested before that time. The plaintiffs claim that it was arrested by the institution of a suit on August 4, 1905, in which three of these plaintiffs were plaintiffs, and this defendant, the remaining heirs of Vandike, and others, were defendants. This suit was continued by the filing of an amended petition on November 26, 1906, still within 10 years from the date of the ouster proven, so that we will disregard the original petition and consider the averments and arrangement of parties in the amended petition alone. We will also, for convenience and simplicity of statement, keep in mind that the question of adverse possession not only involves the right to maintain a suit, but is a question of title; for it is settled that when continued for the requisite time, it transfers the title from the owner to the occupant as effectually as would a deed, so that thereafter he stands as well with respect to such title when out of possession as if his occupancy were continued. *Fulkerson v. Mitchell*, 82 Mo. 13; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *Ridgeway v. Holliday*, 59 Mo. 444, 453; *Barry v. Otto*, 56 Mo. 177, 179; *Hiler v. Cox*, 210 Mo. 696, 703, 109 S. W. 679; *Biddle v. Mellon*, 13 Mo. 335, 341.

[8] It may also be helpful to remember that there is, in this state, but one form of action for the *enforcement* or *protection* of private rights or the *redress* or *prevention* of private wrong.

[9] To institute an action for any of the four purposes enumerated, all persons having an interest in the subject of the action, and in obtaining the relief desired, may be joined in a petition as plaintiffs, against all, or as many of the persons liable as they may think proper.

[10, 11] If there is any defect of parties so made, or if several causes of action have been improperly united, and the matter appears upon the face of the petition, any defendant may demur; and if it does not so appear, he may make the objection by answer; and if he does not make it, either by demurrer or answer, he will be deemed to have waived it.

[12] If the action should happen to be "for the recovery of possession of premises" (R. S. 1909, § 2382), in which two or more plaintiffs shall be joined, any one or more may recover any interest he or they may be en-

titled to in the same manner as if they had brought separate actions, even though others fail to prove any interest (Id., § 2391). And where the land sued for is held in separate possessions by different defendants, the plaintiff may be compelled by motion to elect against which he will proceed (*Keene v. Barnes*, 29 Mo. 377); and where it is not so taken advantage of, judgment may be rendered against each for his possession (*Sutton v. Casseleggi*, 77 Mo. 397).

[13, 14] Applying these principles, we do not hesitate to hold that the suit instituted August 4, 1906, involved, among others, the very matter at issue in this. The petition may have been inartificially constructed. It no doubt commingled in the same count, contrary to the rules of good pleading, causes of action formerly cognizable both at law and in equity. It stated, however, in terms not to be mistaken that the plaintiffs were the owners of the particular tract of land involved in this suit, that they were entitled to the possession of it, and that the defendants wrongfully entered into the possession of the same lands and ousted the plaintiffs, and continued to hold the same. The statement that they had no adequate remedy at law in no wise weakened the force or effect of this statement of facts under our system of pleading; nor did the anxiety they expressed to have the administrator's deed removed as a cloud upon their title. There may have been inconsistent statements in the petition. If so it was a matter to be settled in due course by the court in which the cause was pending. We are not now trying a demurrer to that petition, but we are determining whether its presentation was the commencement of an action involving the same question now presented to us, which is the ownership and right to the possession of the land involved in this suit. We hold unhesitatingly that it was. It follows that the plaintiffs might suffer a voluntary nonsuit, as they did without prejudice from the operation of the statute of limitations, provided they should begin a new action within one year after the nonsuit suffered. It is not necessary that the new suit should be in the same form, or along the lines of the same theories, as the old one. It is only necessary that it should involve an identical claim against which the old suit would have stopped the running of the statute had it been prosecuted successfully to final judgment. As ejectment by the same parties, or some of them, against one of the same defendants for a part of the same land, accurately answers this description, it follows that the judgment of the circuit court was right, and it is affirmed.

PER CURIAM: The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All concur, except BOND, J., not sitting.

## STATE v. GALLITON.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

1. INTOXICATING LIQUORS (§ 236\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE—LOCAL OPTION LAW.

Evidence in a prosecution for keeping for another intoxicating liquors, in violation of local option law (Rev. St. 1909, § 7227), held to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

2. INTOXICATING LIQUORS (§ 224\*)—CRIMINAL PROSECUTION—BURDEN OF PROOF—LOCAL OPTION LAW.

Under Rev. St. 1909, §§ 7227, 7228, prohibiting the keeping of intoxicating liquors for another in any county which has adopted the local option law, except when kept for one's own or family use, every keeping consciously for another of intoxicating liquors in such a county is prima facie unlawful, and when the keeping is admitted places the burden of explanation upon the accused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 275-281; Dec. Dig. § 224.\*]

3. CRIMINAL LAW (§ 1165\*)—HARMLESS ERROR—ERROR IN DEFENDANT'S FAVOR.

In a prosecution for violating the local option law by keeping intoxicating liquors for another, an instruction that the jury, to convict, must find that defendant kept the liquor to prevent disclosure of the fact that another was transporting it, being more favorable to defendant than the law demanded, did not afford error of which she could complain.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3085, 3086, 3088, 3089; Dec. Dig. § 1165.\*]

4. CRIMINAL LAW (§ 755½\*)—INSTRUCTIONS—COMMENT ON EVIDENCE.

In a prosecution for violating the local option law, an instruction that the jury, to convict, must find that defendant kept the whisky to protect another was not violative of Rev. St. 1909, § 5244, providing that the court shall not comment upon the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1766; Dec. Dig. § 755½.\*]

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Carrie Galliton was convicted of violating the local option law, and appeals. Affirmed.

Wm. P. Elmer and J. D. Gustin, both of Salem, for appellant. Lawrence T. McGee, Pros. Atty., and Eugene W. Bennett, both of Salem, for the State.

FARRINGTON, J. This appeal grows out of a charge by information, founded upon sections 7227, 7228, and 7229, R. S. 1909, that Carrie Galliton on March 24, 1913, in Dent county, while the local option law was in effect therein, "did then and there unlawfully and willfully keep and store for, and did then and there deliver to and for, another person, to wit, Lee Sprague, certain intoxicating liquors, to wit, one pint of whisky," etc. Upon the trial the jury returned a verdict of guilty of keeping intoxicating

liquors for Lee Sprague and assessed defendant's punishment at a fine of \$300.

A summary of the evidence: It was agreed by opposing counsel that the local option law pertaining to intoxicating liquors was adopted in Dent county on September 6, 1906, and has ever since been in force therein.

[1] Two witnesses testified for the state. One, the sheriff of Dent county, testified that he knew the defendant and Lee Sprague; that defendant resided at Cuba, in Crawford county, and worked for a man named Hogle, who was engaged in the wholesale liquor business; that he saw defendant on March 24, 1913, at Salem, in Dent county, alight from the train which came from Cuba, and that she went from the depot toward town, alone, carrying the grip which she held in her hand when she alighted; that he did not see Lee Sprague get off the train but heard him crying the name of some hotel while passengers alighted; that when defendant had proceeded but a short distance Sprague overtook her and relieved her of the grip, walking with her; that he (the witness) followed, and when they were three or four blocks from the depot he came up to them and asked them where they were going to put up, and she replied, "I am going to my aunt's." Quoting: "And so I said, 'Whose grip is this?' and she said, 'It is mine.' I said, 'Then you are going to your aunt's?' and she said, 'Yes.' I said, 'I want to go down where there is a light; I want to see what you have in here.' I said, 'What have you got in here?' and she said, 'I have got my things in there.' And when we got down to where I could see she objected to me going into it; and I asked Sprague if he had any claim on that, before I opened it, and he said, 'Yes, I'll be honest about that; that is mine; it ain't hers.' I said, 'Well, I'll see what is in it;' and I opened it and there was ten pints of whisky in it. Q. Before you opened it did she forbid you opening it? A. Yes, sir; she said she would have me arrested if I opened it, and she grabbed hold of it." The grip, containing eight pints of whisky, was produced in court, and this witness said it was in the same condition as when he first opened it except that he had given Sprague one pint of whisky that night, and that a few days later Sprague had returned begging for another bottle, and it had been given to him. The other witness for the state, evidently a deputy sheriff, testified that he arrested the defendant on March 25, 1913, for the offense in question, and that upon being asked by him what she was doing with the whisky, she replied, "We brought it for two other men." The court refused to give a peremptory instruction for the defendant.

The accused introduced two witnesses besides herself. The engineer on the train in which defendant and Sprague traveled from Cuba to Salem testified that he saw

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Sprague board the train at Cuba carrying the grip offered in evidence by the state. Another witness, who was a passenger on the train, gave testimony to the same effect; also that he had eaten a lunch at what he called "Hogle's Restaurant" before leaving Cuba, and that Sprague was there; that, as the train was nearing Salem, Sprague asked him to take the grip referred to and place it on the bus, saying he had to work for the hotel; that he (the witness) forgot about the grip, having engaged in conversation, and did not take it. Defendant as a witness in her own behalf testified that Sprague (whom she called Fatty) was on the train and brought the grip to her and asked her to take it off as he had to work for the hotel; that this was the first she knew of the grip; that she had the grip something like two minutes and did not know what it contained; that Sprague then took it; and that he did not tell her it contained whisky until he discovered that the sheriff was following. She admitted she told the sheriff the grip belonged to her and testified that she might have told him that her clothes were in the grip. She denied that she worked for Hogle, stating that she worked for herself. The court refused to direct a verdict for the defendant.

At defendant's request, the jury was instructed that there was no evidence of defendant's guilt of storing or delivering intoxicating liquors.

The court instructed that under the local option law it is unlawful for any person to keep for another any intoxicating liquors, and that, if the jury believed from the evidence that defendant did keep for one Lee Sprague one pint of whisky, they would find her guilty. The jury were cautioned in two instructions given at defendant's request that in order to convict her of keeping they must believe beyond a reasonable doubt that defendant had and retained possession of the grip with the knowledge that it contained intoxicating liquors (that she knew it contained intoxicating liquors while she kept it for Sprague); and this point is again embodied in the state's second instruction.

[2] We are called upon in this case to declare whether, under section 7227, R. S. 1909, every keeping for another of intoxicating liquors in a county which has adopted the local option law is unlawful. Sections 7227 and 7228, R. S. 1909, are as follows:

"Sec. 7227. Not to be kept, stored or delivered in local option counties.—No person shall keep, store or deliver for or to another person, in any county that has adopted or may hereafter adopt the local option law, any intoxicating liquors \* \* \* whatsoever."

"Sec. 7228. Exception to preceding section.—Nothing in the two next preceding sections shall be construed to prohibit any person from ordering liquor for his own or family use, where such liquor is sent direct to the person using same."

161 S.W.—54

The letter of the statute in question is no broader than the spirit which prompted its enactment. Those counties in the state which had adopted the local option law as a specific for what was deemed a public ill found that, by reason of subterfuge and cunning evasion, the remedy was inadequate. Volumes of the appellate court reports contained the proof. Curative legislation was required. The General Assembly has sought to answer the demand and, it may be assumed, will in the future make such enactments as will under the Constitution protect legal rights and yet provide the means with which to combat the schemes of the resourceful bootlegger. No hardship is likely to result. The state of Missouri, in its wisdom, has chosen to localize the question of the traffic in intoxicating liquors. The will of the majority of the voters in each county is the supreme law on this question, and, if the burden seems to bear too hard, it may readily be thrown off. Until that is done it is to be assumed that every county which has duly adopted the local option law stands for the abolition of the liquor traffic, as well as the keeping, storing, etc., by one person for another, within its confines. The methods of obtaining liquor in local option counties have accordingly been restricted until it seems that almost the last word has been said. As a part of this general plan, section 7227, R. S. 1909, was enacted by the General Assembly in 1907. It is plain and unambiguous and means just what it says. Our court has already held (*State v. McMurtrey*, 161 Mo. App. loc. cit. 411, 143 S. W. 521) that the "keeping" for another need not be such as is connected with an illegal sale in order to constitute a violation of the law. After a careful examination of the statute and the authorities cited in appellant's brief, we declare the law to be that under the statute every keeping, consciously, for another of intoxicating liquors in a county which has adopted the local option law is *prima facie* unlawful. This puts the burden of explanation upon the party who is best able to explain and follows the rule of statutory construction which requires the defendant to bring himself within the exception. This principle finds analogy in the decisions holding that under an indictment for the sale of intoxicating liquors without a license, if defendant relies on such a license as a defense, he must produce or prove such license, as a matter peculiarly within his knowledge (*State v. Edwards*, 60 Mo. 490); or the decisions under the statute forbidding wine growers to dispose of wine to a minor without the consent of his parent, master, or guardian, where the state makes a *prima facie* case by proving a sale to a minor, which can only be overcome by defendant showing the consent of the parent, etc. (*State v. Gary*, 124 Mo. App. 175, 101 S. W. 614); or the decisions that a sale of intoxicating liquors by a drug-

gist on prescription is a matter of defense, and that he must produce a prescription which conforms to the law and show, under section 5784, R. S. 1909, that only one prescription for intoxicating liquor was allowed to the same person at the same time (*State v. Wills*, 154 Mo. App. 605, 136 S. W. 25); or the late decision of *State v. Price*, 229 Mo. loc. cit. 682, 129 S. W. 650, holding that it is not necessary for the information to negative the exceptions found in section 7228, R. S. 1909, those exceptions being matters entirely of defense to be brought forward by the accused.

The defendant in this case, as a witness in her own behalf, admitted that she kept the grip containing intoxicating liquors for Lee Sprague. But appellant contends that to affirm this judgment is to stamp as criminal an act of courtesy. Not only in defendant's instructions but in those given for the state as well, the jury, as a condition precedent to conviction, were required to find from the evidence and believe beyond a reasonable doubt that defendant had and retained possession of the grip with the knowledge that it contained intoxicating liquors. This properly left the burden of proof on the state to show that defendant consciously violated the law against keeping for another. It is a familiar canon that laws must be given a reasonable construction, and it would be a grossly unreasonable construction of section 7227, R. S. 1909, to hold that it made unlawful an act which was entirely innocent (*State v. Torphy*, 78 Mo. App. 206), or to hold that it cast the burden of showing an innocent intent upon the keeper when he would be in no better position to prove an innocent intent than would the state to prove a guilty intent. In making a prima facie case of keeping, therefore, the state would necessarily have to rely upon the surrounding circumstances and upon the acts, conduct, and any statements made by the defendant. *State v. Martin*, 230 Mo. loc. cit. 696, 132 S. W. 595. Looking at the record from this viewpoint, we think the state established a prima facie case; and hence the verdict should stand as against appellant's contention that there was an utter failure of proof of a criminal act.

[3] The state's instruction No. 2 is criticised by appellant. We think the instruction was advantageous to her. It required more of the state than the law demanded. Besides the elements essential to a conviction, the additional element was introduced that the jury must find that she did it for the purpose of preventing the fact being disclosed that Sprague had the whisky and was bringing it to Salem. This, in fact, was a mere circumstance tending to show a guilty intent. Appellant cannot complain of an error committed in her favor. *State v. Burk*, 234 Mo.

loc. cit. 579, 137 S. W. 969; *State v. Heath*, 237 Mo. 255, 141 S. W. 26.

[4] It is said by appellant that this instruction was a comment on the evidence and amounted to a direction to convict the defendant. As stated in the case of *State v. Pyscher*, 179 Mo. loc. cit. 158, 159, 77 S. W. 836, 841: "The distinction must be kept in view, between singling out a particular fact and a comment on the evidence which establishes that fact. In the trial of a cause, the state or defendant may offer testimony upon any particular fact, and it is not a comment upon the testimony to specially refer to that fact; but it would be otherwise if the court should undertake to refer specially to items of evidence, as to its weight, etc., in support of the fact itself."

The statute (section 5244, R. S. 1909) provides that the court shall not sum up or comment upon the evidence. Under this statute it is held that it is not the province of the court to select certain facts shown by the evidence and tell the jury how much and what weight they shall give to such facts, or whether they shall give such evidence any weight at all. *State v. Smith*, 53 Mo. loc. cit. 271. In *State v. Homes*, 17 Mo. loc. cit. 382, 57 Am. Dec. 269, the court said: "In the instructions given to the jury, it would have been more in accordance with the law for the court to have defined the offense, to have told the jury what constituted larceny, instead of saying, if they believed the defendant did steal," etc. The instruction complained of in the case at bar does not assume the existence of facts, nor single out particular facts or items of evidence and comment thereon, or tell the jury whether they are entitled to little or great weight. This is the test. *Kelley's Crim. Law & Prac.* (3d Ed.) § 394. We think the instruction was properly hypothetical.

It appearing from the record that the accused had a fair and impartial trial and that her theory of the case was fully presented by the instructions, and finding no reversible error, the judgment of conviction is hereby affirmed.

ROBERTSON, P. J., and STURGIS, J., concur.

#### MCDONALD v. McDONALD.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

1. DIVORCE (§ 167\*)—SUIT TO SET ASIDE—RIGHT TO MAINTAIN.

Rev. St. 1909, § 2381, providing that no petition for review of any judgment for divorce shall be allowed, does not prohibit a suit to set aside a judgment of divorce for fraud in its procurement.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-548; Dec. Dig. § 167.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**2. DIVORCE (§ 167\*)—SUIT TO SET ASIDE—RIGHT TO MAINTAIN.**

Where a husband, in presenting to his wife a petition for divorce and an instrument whereby she waived service of summons and agreed to the submission of the case for trial, led her to believe that no action would be taken by him until after she was notified and given an opportunity to be heard at the trial, and he obtained a decree of divorce without notice to her, he was guilty of fraud in procuring the decree, justifying a suit by her to set the decree aside, though after receiving the petition and signing the waiver she wrote him a letter asking him if he thought it was unreasonable for her to ask him to return, marked paid, a note of hers which he had, and concluded, "If you do, don't proceed with papers."

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-548; Dec. Dig. § 167.\*]

**3. CONTRACTS (§ 111\*)—DIVORCE (§ 167\*)—SETTING ASIDE DECREE—GROUNDS.**

Since marriage is a matter of state concern and not merely a civil contract, any agreement for divorce or any collateral bargaining promotive of it is void, and a divorce obtained pursuant thereto will be set aside.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515-520; Dec. Dig. § 111.\* Divorce, Cent. Dig. §§ 533-548; Dec. Dig. § 167.\*]

**4. DIVORCE (§ 167\*)—SETTING ASIDE DECREE—GROUNDS.**

Where material facts claimed by husband and wife to exist were suppressed, and but for the suppression by the husband he could not have procured the wife's signature to an answer, waiving process and agreeing to submission of the case for trial on his petition, and could not have proceeded with his suit without a contest, a divorce obtained by him was properly set aside at the suit of the wife on the ground of collusion between the parties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-548; Dec. Dig. § 167.\*]

**5. DIVORCE (§ 167\*)—ACTION TO SET ASIDE—DEFENSES.**

Where a husband procured a divorce without contest, only by consent of his wife, such consent being fraudulently obtained, the fact that the wife, after learning of the decree, executed deeds describing herself as a single woman, was no obstacle to setting aside the divorce on her application, as nothing she could do could validate a divorce procured by fraud.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-548; Dec. Dig. § 167.\*]

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by Cora McDonald against R. F. McDonald. From a judgment for plaintiff, defendant appeals. Affirmed.

T. D. Steele, of Monett, and Hugh Dabbs, of Joplin, for appellant. T. O. Nelson, of Pittsburg, Kan., and Sizer & Kemp, of Monett, for respondent.

ROBERTSON, P. J. Defendant obtained a divorce from his wife, the plaintiff above named, in the circuit court of Barry county on July 15, 1912. This action was instituted in the circuit court of said county to have the decree in divorce annulled by reason of alleged fraud in its procurement. A change of venue was taken to Jasper county, where after a trial to the court the relief sought by the plaintiff was granted. The defendant has

appealed. Neither of the parties to this action has remarried; therefore no innocent third parties will be affected by the decision in this case.

[1] That section 2381, R. S. 1909, does not prohibit this action has been settled in the case of Dorrance v. Dorrance, 242 Mo. 625, 148 S. W. 94, where it was held that plaintiff's false affidavit, that the defendant had absconded from her usual place of abode so that the ordinary process of law could not be served on her in this state, was sufficient ground for the setting aside of a decree of divorce in a suit of this kind.

[2] The husband testified at the trial that he was 44 years of age, and the wife that she was 41 years of age, and they had been married over 20 years. Their domestic troubles originated apparently a long time before the attempted divorce proceedings. It appears that prior to the time the divorce suit was instituted considerable difficulty had arisen, and charges and counter charges of infidelity were passed between them.

The husband claimed to be a resident of Monett in Barry county, and the wife at that time was living with their daughter, who was about 20 years of age, in Oklahoma. Shortly before July 10, 1912, the defendant in this case notified his daughter by post card that he would visit her and her mother on that date. He accordingly arrived there about 9 o'clock in the morning of that day and greeted his daughter and his wife with the affection usually displayed in a family where the domestic tranquillity is normal. He was taken by the daughter and her fiancé in his automobile for a ride about town, made some purchases for the household, and returned to the home of his wife and daughter, where the four had dinner and a generally sociable and enjoyable time; the defendant showing unusual affection towards his wife. In the afternoon the daughter and her fiancé absented themselves for some time, and then about 4 o'clock that afternoon the defendant presented to his wife the proposed petition for divorce, containing brief, mild, and general charges of such indignities as it was alleged rendered his condition intolerable. She says that he talked to her at some length about their inability to live together; that he stated he had not concluded just what he would do about a divorce; that perhaps he would not bring suit at all; and that if he did so he would notify her. At the same time he presented to her the following paper: "Comes now the defendant in the above-entitled cause and hereby expressly waives the issue of summons in said cause and the service of the same by an officer, and agrees that the same may be submitted and tried at this term of court; and for answer to plaintiff's petition herein defendant admits the marriage as set forth in said petition, but denies each and every other allegation in said petition contained."

The wife made some objections to the allegations contained in the petition, but finally, after it was understood between them that some minor changes should be made in the allegations of the petition, the wife signed the answer above quoted, receiving the assurance from him, she testifies, that he would send her a copy of it; that the circuit court in Barry county would be in session the latter part of that month; and that he would notify her when court was in session. The wife states that she did not agree that she would not appear to defend the suit. She testifies that she intended to appear in court when the case was taken up, if the husband filed the papers; and, while admitting that she used some of the epithets charged against her in the petition, she says she told her husband that she wanted to explain to the court the provocations and the circumstances under which they were uttered. The testimony abundantly shows that the husband intentionally left the impression upon the mind of his wife that the case would not be taken up and that no final decree would be entered in the divorce case until after she was notified and given an opportunity to be present and have a hearing. After the answer was signed, the husband continued his kind treatment of his wife. He left that night at about 12:30. On the morning of the 11th the wife wrote to her husband asking him if he thought it unreasonable for her to ask him to return, marked paid, a note of hers which he had, and concluded the letter as follows: "If you do, don't proceed with papers."

Upon returning to Monett, the husband employed an attorney to appear in court as the attorney for his wife, which, he testifies, he thought was necessary to give the court jurisdiction, paying him a fee therefor. On July 15, 1912, the husband, with his regular attorney and two character witnesses, and the attorney employed to appear as attorney for the wife, proceeded to the place of holding circuit court in Barry county and filed the petition and the answer. The attorney employed to appear as the attorney for the wife signed the answer as such attorney at the request of the judge. The husband testified and introduced the two witnesses as character witnesses, and the decree complained of was entered. Whereupon he mailed to his daughter a newspaper containing a report of the court proceedings of that day, in which was included an account of the granting of the decree of divorce. The wife immediately took steps toward obtaining relief from this decree, although this suit was not instituted until in November following; but she undertakes to explain the reason for and to excuse the delay.

There being abundant testimony in our opinion to sustain the contention of the wife that she was led to and did believe that the divorce papers presented to her in Oklahoma would not be filed, if at all, and action taken thereon, without giving her an opportunity to

be heard, it is clear to us, so far as this case may be considered solely as a contest between the husband and wife, that the decree cannot stand. If it were an ordinary civil suit, the fact that the husband led his wife to believe that no action would be taken by him until after she was notified justified her in relying thereon, and the betrayal of this confidence, would render the judgment nugatory as to her. *Sherer v. Akers*, 74 Mo. App. 217, 225.

[3] There is, however, another question involved in this case that is of greater importance than the one we have just been discussing and one of which the litigating parties do not have exclusive control. By section 2371, R. S. 1909, the plaintiff in a divorce suit is required to accompany his petition with an affidavit that the complaint is not made by collusion between the plaintiff and the defendant for the mere purpose of being separated from each other. "Marriage is more than a mere civil contract. It is a matter of state concern; and, when the marital relation is once created, it cannot be dissolved by any agreement of the parties. \* \* \* The law is well settled that an agreement having for its object and consideration the granting of a divorce is illegal and void. \* \* \* The law does not favor divorce. \* \* \* Therefore any agreement for divorce, or any collateral bargaining promotive of it, is unlawful and void." Any bargaining between the husband and wife so that he can get a decree cheaper than he otherwise would get it is collusion. "It makes no difference how just a cause may be, if the parties collude in the management of the case before the court, this is collusion." *Blank v. Nohl*, 112 Mo. 159, 167, et seq., 20 S. W. 477, 479 (18 L. R. A. 350). In the same opinion it is said: "The authorities are numerous to the effect that any agreement that the defendant in a divorce suit will not make a defense, or having for its object the dissolution of a marriage contract, or designed to promote and facilitate divorce, is void, because opposed to the policy of the law. \* \* \*"

[4] It is apparent from the testimony of both parties in this case that material facts claimed by each of them to exist were suppressed, and that but for the suppression by the husband, according to his own testimony, of the charges he otherwise would have made against his wife, he would have been unable to procure her signature to the answer and would have been unable to proceed with his divorce suit without a contest.

"Courts are justified in calling for a full and complete disclosure of all of the facts, on both sides, before dissolving the relation. And when the parties then institute a pretended suit, under a collusive agreement between themselves to cheat the court by falsifying or concealing the facts, and this collusion is shown to exist at any stage of the proceeding, it is deemed a conspiracy against



justice and will 'stop the judicial wheels for the obvious reason that courts sit to advance justice and antagonize fraud.'" Gentry v. Gentry, 67 Mo. App. 550, 553. It is thus apparent that, ignoring the first proposition above discussed and accepting the testimony of the defendant in this case as true, it would be against public policy to allow the decree of divorce, under the circumstances existing in this case, to stand.

The defendant in this case places considerable stress upon the conduct of his wife in writing the letter from which we quoted; but we are unable to see that this can militate against her upon the first point discussed for the reason that there was nothing in that letter that would indicate that she in any manner intended to waive, or considered that she was waiving, the right she supposed she had under her agreement with him to be notified before the petition for divorce was taken up and the decree entered. The only question to which that letter could be addressed would be that she was not imposed upon, and that after she had had an opportunity to reflect and pass from under the influence of his kind treatment of her while he was there, she yet recognized that she had voluntarily signed the answer; but that question is not material to our determination of the case.

Conceding that this letter does show a mercenary spirit on the part of the wife and a willingness to sell the privilege of a divorce to her husband, that would have much weight in an ordinary suit where the parties had a right to agree as to the price and terms of a particular judgment. It counts for nothing, however, in a divorce proceeding, where all such bargaining is illegal and void. As between the public, which is a party to every divorce proceeding and is represented by the court, and the parties of record, the fact that the complaining party here was willing to or did collude in allowing the divorce to be granted, furnishes no reason why the court, representing the state, should not set aside the decree because of fraud and collusion in a suit of the character of the one now under consideration.

[5] It was also disclosed by the testimony that the wife, after she had received notice of the granting of the decree of divorce, signed deeds to real estate and acknowledged and declared herself therein as single and unmarried. This cannot affect our decision upon the second proposition discussed, because by no conduct of hers can she give validity to the unlawful conduct of the husband in procuring the divorce.

Nothing that we have said herein is intended to lend any encouragement to either of the parties hereto as to the merits of their claims against each other, because with that we have nothing whatever to do; that is a matter that cannot be inquired into in this

action, except to define the conditions under which the agreement, the defendant here claims to have had with his wife, was obtained and undertaken to be consummated. The judgment of the circuit court is affirmed.

STURGIS, J., concurs. FARRINGTON, J., not sitting.

## WELLER v. MISSOURI LUMBER & MINING CO.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

### 1. PLEADING (§ 214\*)—DEMURRER—EFFECT.

A demurrer admits all facts well pleaded and the inferences of fact which may be reasonably drawn therefrom, but not conclusions of law nor the conclusions of the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

### 2. PLEADING (§ 193\*)—DEMURRER—EFFECT.

It is no ground for demurrer in actions at law that the prayer for relief is not warranted by the averments of the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.\*]

### 3. PLEADING (§ 8\*)—PETITION—CONCLUSIONS OF LAW.

In an action for damages for obstructing a navigable stream upon which plaintiff rafted logs to his sawmill, allegation that by reason of the obstruction his mill was rendered entirely worthless, and that he was caused to remove it to another place where he could obtain the necessary logs, is a conclusion of the pleader, particularly when the petition stated that the obstructions were temporary and could be removed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

### 4. NAVIGABLE WATERS (§ 19\*)—PUBLIC NUISANCE—OBSTRUCTION OF RIVER.

The obstruction of a navigable stream is a public nuisance.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59-63, 67-72; Dec. Dig. § 19.\*]

### 5. NUISANCE (§ 72\*)—PUBLIC NUISANCE—RIGHTS OF ACTION.

In an action for damages because of the maintenance of a public nuisance, the plaintiff must show special damages different from those incurred by the public generally.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.\*]

### 6. NUISANCE (§ 72\*)—PUBLIC NUISANCE—RIGHTS OF ACTION.

That the injury to plaintiff by a public nuisance is greater in degree than that suffered by the public generally will not authorize the maintenance of an action where it is of the same kind.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.\*]

### 7. DAMAGES (§ 141\*)—PETITION—SUFFICIENCY.

It is not necessary for the petition to allege the measure of damages, for that is a matter to be regulated by the court in the instructions.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 406-408, 412, 414, 415; Dec. Dig. § 141.\*]

### 8. NAVIGABLE WATERS (§ 26\*)—PUBLIC NUISANCE—ACTIONS—PETITIONS—SUFFICIENCY.

A petition alleging that plaintiff was operating a sawmill on the banks of a navigable river and rafting logs to his sawmill, that defendant placed a boom in the river above his sawmill, preventing logs from passing by, to plaintiff's damage, is sufficient to state a cause of action for maintenance of a public nuisance; the allegations showing an injury different in kind from that suffered by the public generally.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 133-166; Dec. Dig. § 26.\*]

### 9. NAVIGABLE WATERS (§ 21\*)—PUBLIC NUISANCE—ACTIONS—DEFENSES.

Where defendant maintained a boom above plaintiff's sawmill, preventing him from rafting logs down the branch of a navigable stream upon which the sawmill was located, it is no defense that such channel came back to the main stream below the boom, and the logs might, by artificial means, have been forced upstream.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 121-127, 130, 131; Dec. Dig. § 21.\*]

### 10. DAMAGES (§ 106\*)—OBSTRUCTION OF STREAM.

Where defendant obstructed a navigable stream, preventing plaintiff from rafting logs to his sawmill, and the obstruction was of a temporary character, the damages recoverable for the maintenance of such temporary nuisance would be the loss caused by reason of the mill being idle during the time of maintenance, and neither can permanent damages be allowed, nor can plaintiff obtain damages for the cost of removing his mill to another point, except on the theory that the cost of removal would be less than the damages from the enforced idleness.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 272; Dec. Dig. § 106.\*]

### 11. DAMAGES (§ 62\*)—DUTY TO MINIMIZE.

A party who is damaged by the wrongful act of another should take all reasonable precautions to protect his property and minimize his damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. § 62.\*]

### 12. NAVIGABLE WATERS (§ 26\*)—PLEADING AND PROOF.

In an action for damages for maintaining a boom across a navigable river, which prevented plaintiff, a sawmill owner, from rafting logs to his mill, where the only damage alleged was the cost of removing the sawmill to a point above the boom, evidence of losses by reason of having timber worked up at other sawmills and by reason of the added expense of manufacturing the timber at the new location is inadmissible.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 133-166; Dec. Dig. § 26.\*]

### 13. TRIAL (§ 251\*)—RECOVERY—PLEADINGS.

An instruction which permits the jury to give a verdict for more damages than asked by the pleader is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

### 14. JUDGMENT (§ 253\*)—REVIEW—HARMLESS ERROR.

A judgment in excess of the amount claimed is improper, and will be reversed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.\*]

### 15. NAVIGABLE WATERS (§ 1\*)—WHAT CONSTITUTES.

Under Const. art. 1, § 1, reserving to the people the free use of all navigable streams

leading to the Mississippi as a common highway, a stream capable of transporting commerce in any manner in which commerce is ordinarily conducted, is deemed a floatable stream, and is a public highway.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 5-16; Dec. Dig. § 1.\*]

### 16. NAVIGABLE WATERS (§ 26\*)—NAVIGABLE STREAMS—WHAT CONSTITUTES.

The question whether a stream is navigable is one of fact for the jury.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 133-166; Dec. Dig. § 26.\*]

### 17. NAVIGABLE WATERS (§ 26\*)—OBSTRUCTIONS—ACTION.

In an action for damages for obstructing a navigable stream, it is no defense that defendant and its predecessors had deepened the channel and made it more suitable for the purpose used.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 133-166; Dec. Dig. § 26.\*]

Appeal from Circuit Court, Carter County; W. N. Evans, Judge.

Action by George Weller against the Missouri Lumber & Mining Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. F. Dinning, of Poplar Bluff, L. B. Shuck, of Eminence, Garry H. Yount, of Van Buren, and W. J. Orr, of Springfield, for appellant.

FARRINGTON, J. This is an action for damages alleged to have been suffered by plaintiff as operator of a sawmill by reason of the obstruction of a navigable stream in which plaintiff floated logs. The trial resulted in a verdict for plaintiff, the jury assessing his damages at the sum of \$550, and defendant has appealed.

The petition alleged that plaintiff, in November, 1911, was engaged in the operation of a sawmill on the banks of the Current river, a navigable stream, and that in the conduct of said business he was engaged in floating logs in said river to his sawmill; that all the logs received by plaintiff at his sawmill were either rafted or floated down said river to said mill, where the same were taken out of the water and manufactured by plaintiff into lumber for sale upon the various markets. It was alleged that defendant company was likewise engaged in floating logs and ties in said river, and that, to facilitate its business, and to enable it more easily to remove said logs from the water, defendant had constructed and maintained upon and across said river at various points near the location of plaintiff's sawmill certain obstructions for the purpose of arresting the progress of logs, said obstructions being commonly called booms, and which were so arranged and located in said river as to be removable, and when not in use could be so placed as not to interfere with the navigation of said river; that in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

November, 1911, defendant had constructed upon and across the waters of said river, above the location of plaintiff's mill, a certain boom for the purpose of arresting the progress of logs, and willfully and maliciously, with the intent to injure plaintiff and deprive him of the right to float logs in said river to his sawmill, did so place said boom as to prevent plaintiff floating logs in said river to his sawmill, "thereby rendering his said mill entirely worthless, and causing plaintiff, at great expense to himself, to remove said mill to another place where he could obtain the necessary logs for the operation of said mill." It is alleged that the expense of removing the sawmill to another place was \$500, for which actual damages judgment is asked. Punitive damages in the sum of \$2,000 is then prayed for by reason of the willful, and malicious, and unlawful obstruction of said river.

After the court had overruled a demurrer to the petition, defendant filed as its answer a general denial.

[1] Appellant makes the point that the petition does not state facts sufficient to constitute a cause of action, and that its demurrer thereto should have been sustained.

[2-4] Now it is a familiar principle that a demurrer to a pleading admits facts well pleaded and all inferences of fact that may be fairly and reasonably drawn therefrom (*American Brewing Co. v. City of St. Louis*, 187 Mo. 367, 86 S. W. 129, 2 Ann. Cas. 821), but not conclusions of law nor conclusions of the pleader on the facts of the cause of action (*Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543); it admits the truth of the facts stated in the pleading against which it is leveled, and invokes the judgment of the court thereon as to the law concerning plaintiff's right of recovery (*Pidgeon v. United Rys. Co.*, 154 Mo. App. 20, 133 S. W. 130). On demurrer, all reasonable inferences are indulged in favor of the pleading. *Mason v. Deitering*, 132 Mo. App. loc. cit. 35, 111 S. W. 862. A demurrer does not reach a prayer for relief. *Whitmore v. Yeager*, 3 Mo. App. 582. In actions at law, a demurrer will not lie because the prayer for relief is not warranted by the averments of the petition; the court may grant any relief consistent with the case made by the evidence and embraced within the issues. *Baker v. Railway Co.*, 34 Mo. App. loc. cit. 110; *Carthage Nat. Bank v. Poole*, 160 Mo. App. loc. cit. 143, 141 S. W. 729. The averment of the petition under consideration that plaintiff's mill was rendered entirely worthless, and that plaintiff was caused at great expense to remove it to another place where he could obtain the necessary logs for its operation, was a conclusion of the pleader, palpably so when it is observed that plaintiff had just alleged that the booms were temporary structures so arranged and located in the river as to be removable, and that

when not in use they could be so placed as not to interfere with the navigation of said river. Plaintiff charged an obstruction of a navigable river, i. e., a public nuisance (*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 9 L. Ed. 1012), and this charge was admitted by the demurrer (*Lepire v. Klenk*, 169 Mich. 243, 134 N. W. 1119, 1120).

[5, 6] Now it is held that, in an action for damages because of the maintenance of a public nuisance, special damages must be averred and proved. *Smith v. McConathy*, 11 Mo. 517. The rule as announced in 29 Cyc. at page 327, is as follows: "Where a private individual has sustained any particular and special injury over and above that sustained by the public generally, as a direct result of an obstruction [of navigable waters], he may maintain an action to recover damages therefor; but, if he has received no special damage, an action cannot be brought by him." Again, at page 328: "In an action by a private individual, the complaint must allege some special injury which he has sustained of a different character from the general injury to the public." The reason special damages must be alleged is that the law does not presume or imply damage to any particular individual from the public offense. *Hart v. Evans*, 8 Pa. 13. The gravamen of an action for obstructing a private way is the obstruction; in case of a public way it is the special injury to the plaintiff. *Powell v. Bunger*, 91 Ind. 64, 67; *Baker v. Boston*, 12 Pick. (Mass.) 184, 22 Am. Dec. 421, 425; *Platte & Denver D. Co. v. Anderson*, 8 Colo. 131, 6 Pac. 515; cases cited in 4 L. R. A. 212, note. It is not enough that the injury to him is greater in degree than the public generally suffer, if it be the same in kind. *Thelan v. Farmer*, 86 Minn. 225, 30 N. W. 670. It must be different in kind. *Pedrick v. Railroad*, 143 N. C. 485, 55 S. E. loc. cit. 881, 10 L. R. A. (N. S.) 554. See, also, generally, *Berry v. Railroad*, 214 Mo. loc. cit. 605, 114 S. W. 27; *Scheurich v. Light Co.*, 109 Mo. App. loc. cit. 421, 84 S. W. 1003.

[7-9] In the case of *Ireland v. Bowman* (Ky.) 114 S. W. 338, logs belonging to the owner of a mill on a navigable stream were caught and damaged by a dam constituting a nuisance, and it was held that the measure of damages was the deterioration of the logs while detained, the value of labor in getting the logs over the dam, and any expense incurred by reason of the dam, and any diminution in the value of the log owner's property by reason of the nuisance.

In the case of *Creech v. Humptulips B. & R. I. Co.*, 37 Wash. 172, 79 Pac. 633, the petition, in an action to recover damages caused by the obstruction of a navigable stream or slough, alleged generally that plaintiffs were thereby greatly delayed in marketing their logs, were put to great expense by reason of the obstruction, were unable to use

their logging engine which was on the land, were unable to keep the hired help in their camps employed, and had been damaged in the sum of \$500, and would be damaged thereafter in the sum of \$25 per day until the obstruction was removed. It was held that the petition, in the absence of a demand for a bill of particulars or a motion to make the same more definite and certain, was sufficiently specific to entitle plaintiffs to recover for the idleness of their logging engine and men, and for damages in being compelled to discharge men and employ others at a higher rate of wages.

In the case of *Page v. Lumber Co.*, 53 Minn. 492, 500, 55 N. W. 608, 609, this language is used: "No general rule can be laid down for determining whether a pleading shows, or whether the evidence produced upon a trial tends to establish, a cause under the principle or rule that, to maintain an action for a wrong or injury arising out of the maintenance of a public nuisance, an individual must have sustained special injury differing in kind, not merely in degree or extent from that sustained by the general public; and we shall not attempt it." In holding that particular case to be within the rule, the court overruled the case of *Swanson v. Boom Co.*, 42 Minn. 532, 44 N. W. 986, 7 L. R. A. 673, a case somewhat similar to the one at bar.

Has the plaintiff shown in his petition that he sustained special injury to his property, different from that which would be suffered by the public generally? If he has, he has stated a cause of action; otherwise, he has not. *Bailey v. Culver*, 84 Mo. loc. cit. 538. In determining this question in this particular case, it should be borne in mind that it is not necessary that the petition allege the *measure of damages*, as that is a matter to be regulated by the court in the instructions. *St. Louis Trust Co. v. Bambrick*, 149 Mo. 560, 51 S. W. 706. This petition alleges that plaintiff was engaged in operating a sawmill on the banks of the Current river and in floating logs down said river to his sawmill, and that all the logs received at his sawmill were either rafted or floated down said river to said sawmill; that defendant so placed a boom in said river above the location of plaintiff's sawmill as to prevent plaintiff floating logs in said river to his sawmill. We think this was a sufficient allegation of special injury to the plaintiff—different in kind from that suffered by the general public. This was an allegation that the ingress to plaintiff's mill was entirely cut off by the maintenance of the obstruction. It is true (as shown by the evidence) that the slough on the bank of which the sawmill was located came back to the main channel of the Current river below the sawmill. This, however, was not such a highway left open to the plaintiff as to be a practical way to get logs to his

sawmill, for they would not float upstream, and some artificial force would be required. He was entitled to float them down the stream (it being admitted by the demurrer that it was navigable), and that way was entirely obstructed.

As will be found upon examining the authorities in this country, the courts are divided on the question as to what is sufficient allegation and what is sufficient proof of *special injury* where the litigation grows out of an obstruction of a public highway, especially a navigable stream. As has been shown herein, the law is well settled that, if the party complaining is damaged in the same manner—if his damage is of the same kind—as the general public, he is forbidden, on the theory of preventing multiplicity of suits, to maintain a private action for damages. If, however, he sustains some damage over and beyond the rest of the community by reason of the maintenance of a public nuisance, his private action will lie. *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421. Many of the courts throughout the country have held that, in order that a private action may be maintained for the injury caused by the obstruction of a public highway, such obstruction must be adjacent to the property of the plaintiff. This question has been thoroughly reviewed in this state in the case of *Charles H. Heer Dry Goods Co. v. Citizens' Ry. Co.*, 41 Mo. App. 63, holding that it is not necessary that the obstruction be directly in front of or adjacent to the property of the plaintiff. The opinion in that case fully discusses the Missouri decisions on the question, and the reasoning and conclusion meet with our approval. That case was cited in *Foudry v. Railroad*, 130 Mo. App. loc. cit. 117, 109 S. W. 80. Although the Heer decision deals with an obstruction of a public highway in a city, the question is the same as is presented here, and the facts, so far as the reasoning leading up to that decision is concerned, are the same. It was shown in that case that, though the obstruction was not in front of plaintiff's property, it was at such a place as would prevent customers of the plaintiff dry goods company driving with their vehicles to its store, and that there was practically no other way they could reach its store. This, the court held, showed a *special injury*. In our case the petition avers that this stream was the only way in which plaintiff could supply his sawmill with logs, and that it was cut off by the obstruction; hence the loss to plaintiff was certainly one over and beyond that sustained by the public generally. So we say that the plaintiff in his petition does plead enough facts to show a *special injury*; but he draws an erroneous conclusion in his averment that the obstruction rendered his mill entirely worthless, and caused him at great expense to remove it to another place, having just before alleged that

the obstruction was a temporary affair and easily removable.

[10, 11] The damages recoverable for the maintenance of such temporary nuisance would be the loss he would be able to show by reason of his mill being idle during the maintenance of the obstruction and his being prevented from floating logs to his sawmill; this being the only way, according to the petition, by which he could get logs for the operation of the mill. Permanent damages are not allowed for temporary nuisances that may be abated. *Schoen v. Kansas City*, 65 Mo. App. 134. The only theory on which it would be permissible to allow the cost of removing plaintiff's mill would be in mitigation of the damages which would have resulted to plaintiff from leaving his mill stand idle during the time the river was wrongfully obstructed; i. e., the cost of removing the mill would be less than such other damages would have been. Even as against defendant's wrong in obstructing the river, the plaintiff not only had a right but it was his duty to take any reasonable precaution to protect his property and minimize the damage. See *Springfield Southwestern Railway Co. v. Schweitzer* (decided by this court) 158 S. W. 1058, and authorities therein cited bearing on this question.

[12] The plaintiff, however, by his petition only alleged special damages occasioned by having to move his sawmill. He was allowed to prove that he lost \$125, because a raft of logs which he was floating down the river could not be gotten by the obstruction, and he was compelled to float them on down the river to another sawmill, where it cost that much more to have them sawed than it would have cost to saw them at plaintiff's mill. Undoubtedly this would have been a special damage had the petition been so framed as to admit of this proof. *Arpin v. Bowman*, 83 Wis. 54, 53 N. W. 151; *Potter v. Railway Co.*, 95 Mich. 389, 54 N. W. 956; *Creech v. Humptulips B. & R. I. Co.*, 37 Wash. 172, 79 Pac. 633.

Plaintiff was also permitted to show that he had 300,000 feet of standing timber up the river, to which point he moved his sawmill, and that it would cost about \$900 more to work it up at that place than if he could float the logs down the river to be sawed at the old location. This was, of course, incompetent for the same reason, and for the further reason that there was no showing whatever how long it would have taken to cut the timber, and float it down the river to the old location, and saw it (the 300,000 feet) had he been permitted to float it to the old location. This proof was not admissible for the reason that, unless the timber could have been cut, floated, and sawed within the time the nuisance was maintained, so as to be proper damages for the maintenance of a temporary nuisance, its admission might result in the allowance of permanent damages for the maintenance of a temporary nuisance.

Indeed, the plaintiff on cross-examination testified that he had run his sawmill at the old location nearly 14 months, and that the capacity was from 4,000 to 10,000 feet per day, depending on the number of men employed; that only 4 cars of lumber (oak) had been shipped, each containing from 6,000 to 10,000 feet, and that he received \$14 per 1,000 feet for some, \$16 for some, and \$17 for some; that it cost him about \$17 per 1,000 feet to get the lumber from the timber land to the St. Louis market. Upon being asked to whom he sold lumber for \$17 per 1,000 feet, he answered, "The American Car & Foundry Company;" but later said they paid him \$25 per 1,000 feet.

The only evidence which was admissible on the measure of damages under the averments of the petition was that concerning the expense of removing the sawmill, and the plaintiff's testimony was that this expense amounted to \$150.

[13, 14] The petition prayed for \$500 actual and \$2,000 punitive damages. The court, in the only instruction on the measure of damages (given at plaintiff's request), told the jury that, if their verdict was for the plaintiff, his damages should be assessed at such sum as they believed from the evidence he sustained, "not exceeding, however, the sum of \$1,500." There was no instruction on punitive damages. The jury returned a verdict assessing plaintiff's actual damages at the sum of \$550, which was \$50 more than the petition prayed for as to that kind of damages, and which was evidently allowed on account of the jury having taken into consideration the evidence admitted which was incompetent under the petition. Defendant excepted to the instruction, and preserved the question for our consideration. It has long been the settled rule of law that an instruction is improper which permits the jury to give a verdict for a greater sum than that asked by the pleadings. *Wright v. Jacobs*, 61 Mo. 19; *Dunlap v. Kelley*, 115 Mo. App. loc. cit. 616, 92 S. W. 140. The measure of plaintiff's recovery is governed by the amount claimed, and, where the judgment is in excess of that amount, it will be reversed. *Horton v. Railway Co.*, 83 Mo. 541; *Beckwith v. Boyce*, 12 Mo. 440; *Cox v. City of St. Louis*, 11 Mo. 431.

[15-17] In view of the fact that our order in this case will make it subject to retrial in the circuit court, and because appellant squarely presents the question of the navigability of the slough on which plaintiff's sawmill was located, some discussion of the question is called for. The Constitution of Missouri, art. 1, § 1, reserves to the people the free use of all navigable streams leading to the Mississippi river as common highways. The law of this state, following the general trend of authority in this country, is that a stream capable of transporting commerce in any manner in which such commerce is ordinarily conducted is a navigable or floatable

stream, and is a public highway. In any given case the question as to whether the stream has such capacity is one of fact for the jury to determine. The law on this subject was well declared by Norton, J., in the case of *McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351. We think there was sufficient testimony introduced by the plaintiff to authorize the trial court to put the case to the jury. If plaintiff's evidence is to be believed, the slough in question was originally the main channel of the river, and had always continued at ordinary stages of the river to convey a part of its waters, and was capable much of the time of floating ties and logs. The mere fact that the defendant or its predecessors, being in control of the banks of the slough (except where plaintiff's sawmill stood), had cleared out the upper end of the slough so as to render it more navigable or better fitted to float logs would not be such an artificial improvement as would disconnect the slough as a part of the navigable river. Such work would in fact rather improve its navigability, and would benefit all persons desiring to use the river, and would certainly give the party so improving it no greater rights than were enjoyed by the general public.

Proof that to get logs to follow that arm of the river a boom was necessary, or that it was necessary to push the logs in the slough by means of poles and other contrivances, would not be conclusive evidence that the slough was not navigable as is assumed in defendant's instruction No. 1, which was given by the trial court. Common experience teaches that in floating logs it is at times necessary for those in charge to use such means as is found necessary to keep the logs in that part of the stream desired.

From what has been said, it is manifest that the judgment should be reversed, and the cause remanded. It is so ordered.

ROBERTSON, P. J., and STURGIS, J., concur.

#### MCNEILL v. MCNEILL

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

#### DIVORCE (§ 181\*)—PROCEEDINGS—WRIT OF ERROR—TIME FOR APPLICATION.

Under the express provision of Rev. St. 1909, § 2380, providing for writs of error to reverse or modify final judgments or orders in divorce proceedings, a writ of error must be sued out, if at all, within 60 days after the judgment is rendered.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 567; Dec. Dig. § 181.\*]

Error to Circuit Court, Dent County; L. B. Woodside, Judge.

Divorce action between Louisiana McNeill and Turquill McNeill. From a judgment of the circuit court, Louisiana McNeill brings error. Writ dismissed.

G. C. Dalton and A. J. Arthur, both of Salem, for plaintiff in error. Lawrence T. McGee and Eugene W. Bennett, both of Salem, for defendant in error.

PER CURIAM. The plaintiff in error in this proceeding complains of a judgment rendered by the circuit court of Dent county on August 27, 1912, in a divorce suit.

Our records show that the application for a writ of error was filed in the office of the clerk of this court on October 28, 1912; but the application was not sworn to until January 27, 1913. The cause was continued by agreement of parties to the present term of this court. Defendant in error now moves the court to dismiss the writ of error, for the reason that it appears of record herein that, from the date of the rendition of the judgment in the circuit court until the date the application for the writ of error was filed, more than 60 days elapsed. The judgment, having been rendered on August 27, 1912, in a divorce proceeding, cannot be inquired into by a writ of error applied for more than 60 days thereafter. The plaintiff in error should have applied for the writ on or before October 26, 1912. (The abstract furnished by plaintiff in error does not show that a motion for a new trial was filed in the circuit court.) Not having made her application until October 28, 1912, she was 2 days in default under section 2380, R. S. 1909, which provides for writs of error that have for their object the reversal, annulment, or modification of a final judgment or order in a divorce proceeding. It has been held a number of times that in a divorce suit a writ of error must be sued out, if at all, within 60 days after the judgment is rendered. *Judge v. Judge*, 88 Mo. 159; *Allen v. Allen*, 64 Mo. App. 417; *Scott v. Scott*, 44 Mo. App. 600.

Under the statute, therefore, this writ of error must necessarily be dismissed, without any consideration of the questions of alleged error arising upon the action of the circuit court.

#### BURGESS v. ST. LOUIS & S. F. R. CO.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

#### CARRIERS (§ 57\*)—RIGHT OF ACTION—GOODS SHIPPED TO CONSIGNOR'S ORDER.

A purchaser of goods shipped subject to the consignor's order, with draft and bill of lading attached, before honoring the draft, has no right to maintain replevin against the carrier to obtain possession of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 169-178; Dec. Dig. § 57.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Replevin by D. F. Burgess against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

peals. Reversed and remanded, with directions.

J. S. McPherson, of Ozark, and Geo. D. Harris, of St. Louis, for appellant.

**FARRINGTON, J.** This suit in replevin was instituted against the defendant in a justice's court; the plaintiff alleging that he was lawfully entitled to the possession of a box containing two pieces of plate glass and some copper, all valued at \$100, and that defendant wrongfully detained the same. The plaintiff prevailed both in the justice's court and in the circuit court on trial anew without a jury.

There is much testimony in the record concerning a purchase of some plate glass and copper by plaintiff from the Hadley-Dean Glass Company, of St. Louis, Mo., the same to be used in a building which plaintiff was erecting in the town of Ozark. It is sufficient here to merely state that part of the glass was broken when received at its destination, and that plaintiff immediately notified the glass company, demanding that said company "make it good," which it refused to do, because plaintiff had given the defendant railroad company a receipt showing that the order when received by him was in good shape. However, the glass company notified him, as the correspondence shows, that it would ship another order of glass and copper, provided he would pay for same, and that it would assist him in getting a claim for damages allowed against the railroad company for the broken glass. The evidence clearly shows without dispute that the glass company declined to ship the second consignment—which is the one involved in this replevin suit—unless the plaintiff would pay for it. Accordingly, the glass and copper were shipped, consigned to the glass company's order, and the bill of lading, with draft attached, was sent to a bank at Ozark. The plaintiff refused to pay the draft, which represented the price of the glass and copper, and proposed a compromise to the glass company. Before hearing from that company on his proposition, and on the same day that he made the proposition of compromise, he instituted this replevin suit against the defendant railroad company.

The sole question to be determined is whether a purchaser of goods has a right to maintain replevin against a common carrier to obtain possession of the goods which were shipped subject to the consignor's order, with draft and bill of lading attached, before he honors the draft. The decisions of this state conclusively show that such suit cannot be maintained, and we therefore hold that plaintiff's action was entirely without merit. This ruling is sustained by the following cases: *Bergeman v. Railway Co.*, 104 Mo. 77, 15 S. W. 992; *Burton State Bank v. Milling Co.*, 163 Mo. App. 135, 145 S. W. 508;

*Hunter Bros. Milling Co. v. Stanley*, 132 Mo. App. 308, 111 S. W. 869; *Strauss, Pritz & Co. v. Hirsch & Co.*, 63 Mo. App. 95; *A. J. Poor Grain Co. v. Franke Grain Co.*, 171 Mo. App. 354, 157 S. W. 840; *Howard v. Haas*, 131 Mo. App. 499, 109 S. W. 1076.

The judgment is reversed, and the cause remanded, with directions to the circuit court to enter judgment in favor of the defendant for the return of the goods or their value.

**ROBERTSON, P. J., and STURGIS, J.,**  
concur.

# **FIRST NAT. BANK OF CORNING, ARK., v. DOWDY.**

(Springfield Court of Appeals. Missouri.  
Dec. 11, 1913.)

## **1. JUDGMENT (§ 822\*)—AGAINST ANCILLARY ADMINISTRATOR—CONCULSIVENESS AGAINST DOMICILIARY.**

A judgment against an ancillary administrator furnished no cause of action, and is not even evidence, against the domiciliary executor or administrator.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. § 822.\*]

## **2. EXECUTORS AND ADMINISTRATORS (§ 519\*)—SPECIAL ADMINISTRATOR—FOREIGN STATE.**

Where a citizen of Missouri died leaving debts and property in Arkansas, a special administrator appointed in Arkansas received his authority from that state, and, if he acquired possession of intestate's property there to pay debts, his representation was a qualified one and did not extend beyond the state of Arkansas.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2310-2322; Dec. Dig. § 519.\*]

## **3. EXECUTORS AND ADMINISTRATORS (§ 519\*)—JURISDICTION.**

When an administrator is appointed by the courts of one state, such courts reserve to themselves full and conclusive jurisdiction over the assets of the estate within the limits of that state.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2310-2322; Dec. Dig. § 519.\*]

## **4. EXECUTORS AND ADMINISTRATORS (§ 525\*)—SPECIAL ADMINISTRATOR—ACTION—JUDGMENT—EFFECT.**

Where a special administrator was appointed in Arkansas over the estate of a resident of Missouri located in Arkansas, and a judgment was rendered against him on a claim owned by a citizen of that state, the judgment creditor could not proceed in the courts of Missouri against the domiciliary administrator by virtue of such judgment; the ancillary administrator's power being limited by the Arkansas statute to the defense of the suit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344-2349; Dec. Dig. § 525.\*]

## **5. EXECUTORS AND ADMINISTRATORS (§ 525\*)—ANCILLARY ADMINISTRATION—ACTION AGAINST ANCILLARY ADMINISTRATOR—JUDGMENT—ENFORCEMENT.**

Where a creditor of intestate recovered judgment in Arkansas against an ancillary administrator of his estate, who, under the statutes of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Arkansas, was only authorized to defend the suit, plaintiff was not entitled to proceed on the judgment in the state of the decedent's domicile against the domiciliary administrator in view of Rev. St. 1909, § 1737, which authorizes foreign administrators to maintain actions in Missouri when such authority is possessed by them under the laws of their own state.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344-2349; Dec. Dig. § 525.\*]

**6. JUDGMENT (§ 822\*)—ACTION AGAINST FOREIGN ADMINISTRATOR—FULL FAITH AND CREDIT.**

Where a judgment was recovered in Arkansas against an ancillary administrator, refusal of the court having charge of the domiciliary administrator to permit enforcement of the foreign judgment against the estate was not a violation of the full faith and credit requirement of the Constitution, since the parties to the judgment were neither privies in blood, in law, or by estate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. § 822.\*]

Appeal from Circuit Court, Butler County; J. P. Foard, Judge.

Action by the First National Bank of Corning, Arkansas, against S. M. Dowdy, as administrator of T. W. Dowdy, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

E. R. Lentz and H. N. Phillips, both of Poplar Bluff, for appellant. F. G. Taylor, of Corning, Ark., and David W. Hill, of Poplar Bluff, for respondent.

ROBERTSON, P. J. On April 4, 1910, T. W. Dowdy, a resident and citizen of Butler county, Mo., executed a note to the plaintiff in the state of Arkansas for the sum of \$1,200, due June 15, 1910, and on March 10, 1911, the plaintiff instituted a suit and attachment proceedings in the circuit court of Clay county, Ark., against the said Dowdy. On October 2, 1911, the said Dowdy appeared and filed his answer therein. On January 26, 1912, the death of Dowdy was suggested and the action revived in the name of a special administrator ad litem, who refused to act; and thereafter, on April 9, 1912, the action was revived in the name of J. N. Moore as special administrator, who adopted the answer theretofore filed in the case as his answer. On April 11, 1912, the cause was prosecuted to judgment against the special administrator in the sum of \$1,072.71, with interest at the rate of 10 per cent. from said date. On August 17, 1912, a copy of the judgment was filed in the probate court of Butler county, in this state, for allowance against the estate of said Dowdy, and his administrator, the defendant herein, duly notified. The amount of the judgment was allowed by the said probate court as a claim against the said estate, and the administrator appealed to the circuit court, where, upon a trial anew, the administrator met with the same fate and has appealed to this court.

The alleged statutory law of the state of Arkansas, by virtue of which the special administrator was appointed, reads as follows: "In all cases where suits may be instituted and either plaintiff or defendant may die pending the same, it shall be lawful for the court before which such suit or suits may be pending, on a motion of any party interested, to appoint a special administrator, in whose name the cause shall be revived, and said suit or suits shall progress in all respects in his name with like effect as if the plaintiff or defendant (as the case may be) had remained in full life." It further reads: "The powers of such administrator shall extend and be confined alone to the mere prosecution or defense of the particular suit or suits he may be appointed by the court to prosecute or defend." Another sections reads: "No special administrator shall be appointed, as in this act prescribed, where there is a general administrator. No such special administrator or executor shall be liable for the costs of the suit, for the management whereof he may be appointed."

[1] The rule is that "a judgment against an ancillary administrator furnishes no cause of action, and is not even evidence against the domiciliary executor or administrator." 2 Wharton on Conflict of Laws (3d Ed.) par. 629a, p. 1382; *Stacey v. Thrasher*, 6 How. 44, 12 L. Ed. 337; *Braithwaite v. Harvey*, 14 Mont. 208, 36 Pac. 38, 27 L. R. A. 101, 43 Am. St. Rep. 625. An unlimited number of cases might be cited upon this proposition, but those above cited will give the inquiring mind an opportunity to find the majority of the decisions touching this question. It appears that the authorities are uniform on this proposition.

[2] The special administrator appointed in Arkansas received his authority solely from that state, and, if he goes into possession of his intestate's property in that state for the purpose of paying his debts, he is, of course, in privity with him; yet this representation of his intestate is a qualified one and extends not beyond the assets of which his own state has jurisdiction.

[3] When an administrator, it is said, is appointed by the courts of one state, the courts of that state reserve to themselves full and conclusive jurisdiction over the assets of the estate within the limits of the state. "An administrator's power as such does not extend beyond the boundaries of the state in which his letters of administration are granted." *Emmons v. Gordon*, 140 Mo. 490, 498, 41 S. W. 998, 1001 (62 Am. St. Rep. 734). This being the rule, it is difficult to understand how the plaintiff in the case at bar could claim that, by virtue of its judgment against the special administrator, it acquired any greater rights than the administrator possessed.

[4] Again, we are unable to understand how, in view of the provisions of the Arkan-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



sas statute limiting the powers of a special administrator to the defense of the suit, the plaintiff in this case can claim to have acquired any right to proceed, by virtue of his judgment, in this state. It appears that it could not even exact of the special administrator the collection of the personal assets of the deceased, if any, in Arkansas.

[6] Section 1737, R. S. 1909, of our statutes does not, in our opinion, aid the plaintiff in this case, because that statute only enables foreign administrators and others of that character to maintain an action in this state when such authority is possessed by them under the laws of their own state.

[8] The suggestion that to deny the recognition of this judgment by the courts of this state is a denial of the full faith and credit required under the Constitution is answered by the authorities above cited, on the theory that the parties to the judgment in question are neither privies in blood, in law, or by estate. In a note on page 111 in the case of *Braithwaite v. Harvey*, 27 L. R. A. 101, supra, it is said that "the laws and courts of a state can only affect persons and things within their jurisdiction, and both as to the administrator and the property confided to him, and judgment in another state is *res inter alios acta* and is not even *prima facie* evidence of a debt," citing numerous authorities in support thereof. It is also held in *Rentschler v. Jamison*, 6 Mo. App. 135, that a judgment obtained in another state after the death of a person, against his administrator appointed in this state, is no evidence of indebtedness against the estate of the deceased here.

It follows that the judgment of the circuit court should be reversed, which is accordingly done.

STURGIS and FARRINGTON, JJ., concur.

LEESLEY BROS. v. A. REBORI FRUIT CO.  
(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

1. SALES (§ 334\*)—CONTRACT—BREACH.

A car load of onion sets having been shipped to defendants with draft attached to bill of lading, the car was placed in front of defendants' place of business, and defendants, after inspecting the same, wired plaintiffs, requesting a reduction of 10 per cent. on the draft. Plaintiffs wired the bank authorizing the reduction, but defendants made no inquiry as to the bank's authority, and, having later refused to accept the shipment, plaintiffs took charge of the same and sold it at private sale. *Held*, that defendants having requested a reduction, it was their duty to ascertain whether it was acceded to, and, not having done so, plaintiffs were entitled to sell the sets within a reasonable time after ascertaining that defendants had refused to accept them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 920; Dec. Dig. § 334.\*]

2. SALES (§ 335\*)—CONTRACT—BREACH—RE-SALE.

Where, in an action for breach of contract to purchase certain onion sets, the evidence justified a finding that the seller resold the sets for the buyer's account at a fair private sale, defendant was not entitled to object that, as a portion of the sets were resold to plaintiff's agent, the sale was no criterion by which to determine the amount of defendant's liability.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 921; Dec. Dig. § 335.\*]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by the Leesley Bros. against the A. Rebori Fruit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. Pepperdine and V. O. Coltrane, both of Springfield, for appellant. A. W. Lyon, of Springfield, for respondent.

ROBERTSON, P. J. The material facts involved in this case may be found in the opinion in 162 Mo. App. 195, 144 S. W. 138, when the case was here before upon appeal by the plaintiffs. The case was then reversed and remanded, and after another trial, in which the plaintiffs obtained judgment for \$808.13, the defendant appealed.

On the last trial, which was to the court without a jury, a finding of facts was made which, in addition to disclosing the facts set out in the opinion of this court when the case was here before, further recites that the car of onion sets, when it arrived in Springfield, was placed in front of the defendant's place of business, and that the defendant's officers and agents went into the car and removed therefrom several sacks of the onion sets and inspected the same, and that from the date of the arrival of the car until the final disposition of the onions it remained at or near the defendant's place of business, and was subject to the control and orders of the defendant company. The court also found that the defendant refused to accept the shipment, and that the plaintiffs, upon learning of such refusal, took charge of the onion sets, about March 9, 1910, and sold them at the best obtainable price, at a fair private sale, and that there was no open market, no general market existing at said time in Springfield, that the dealers generally were well supplied and overstocked with said character of goods, and that the sets were not, when the plaintiffs took charge of them, in a marketable condition, and that from the time the onion sets arrived in Springfield until they were finally disposed of there was a gradual decline in the market. The court also found that when the plaintiffs took possession of the onion sets and proceeded to sell them they had just heard of the refusal of the defendant to accept the same, and they immediately notified the defendant that they would resell.

The testimony discloses that, after the defendant had sent its telegram to plaintiffs

asking them to authorize the reduction of the draft at the bank, the defendant made no further effort to ascertain if such authorization had been received by the bank, and, although the car was on the track near its place of business, it did not undertake to find out what, if anything, the bank had received; neither did it notify the plaintiffs that it did not propose to carry out the new arrangement voluntarily suggested by itself after an examination of the sets. But the defendant did, some time later, write a letter to the plaintiffs, spelling their name wrong and placing no street address upon the envelope, although it had the plaintiff's street address, and consequently this letter was not delivered to the plaintiffs, but was returned to the defendant.

[1] We have examined and considered all the points and authorities submitted to us in defendant's behalf. In its first point the appellant insists that, if the telegram of plaintiffs to the bank at Springfield, authorizing the 10 per cent. reduction in the draft, constituted a new contract, then the defendant breached the contract on that day, and it would thereupon devolve upon the plaintiffs, if they undertook to resell the onion sets for the defendant's account, to resell them at once, or *within a reasonable time* after such breach, taking such steps as were necessary to protect the interests of the defendant, citing in support thereof the case of Rickey v. Tenbroeck, 63 Mo. 563, 567. When the defendant asked the plaintiffs to authorize a reduction in the draft, and the plaintiffs did what the defendant requested, knowing that the bank was located conveniently to the defendant, they had a right to presume, until they were notified to the contrary by defendant, that the defendant had accepted, unloaded, and disposed of the onion sets. It appears that as soon as the plaintiffs did ascertain that the defendant was not complying with its contract, they proceeded to dispose of the property, as the trial court finds, to the best advantage of the defendant; hence the plaintiffs did resell *within a reasonable time* after the breach. But the defendant says that, owing to the perishable nature of the sets, plaintiffs should have sold at once. They did sell at once after receiving the delayed information, which the defendant should have furnished them immediately upon its decision not to follow to a conclusion its new proposition, and it cannot thus take advantage of its own wrong. That it was the duty of the defendant, after requesting the plaintiffs to authorize the bank to reduce the draft, to inquire at the bank to ascertain if such authorization had been received is disposed of by the former opinion of this court. In that opinion, after discussing the necessity of a notice by plaintiffs to defendant, it is said: "The defendant made its own terms, and plaintiffs complied with them. This was sufficient."

[2] The defendant further says that a portion of the sets was resold to an agent of the plaintiffs, and therefore such a sale is no criterion by which to determine the amount of its liability, citing *Montgomery v. Hundley*, 205 Mo. 138, 149, 103 S. W. 527, 11 L. R. A. (N. S.) 122, and *Thornton v. Irwin*, 43 Mo. 153, 164. The finding of the trial court is that plaintiffs sold "at a fair private sale," and the defendant does not insist that there was no testimony to justify this finding. We, therefore, resolve this contention against the appellant.

The judgment is affirmed. All concur.

KEET-ROUNTREE DRY GOODS CO. v.  
HODGES et al. (LEWIS, Interpleader).

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

1. ATTACHMENT (§ 308\*)—LEVY—CLAIMS BY THIRD PERSONS—BURDEN OF PROOF.

One interpleader and claiming the ownership of property levied on under a writ of attachment issued for plaintiff against defendant in possession has the burden to show his title.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1102-1109, 1111-1118; Dec. Dig. § 308.\*]

2. ATTACHMENT (§ 308\*)—CLAIMS BY THIRD PERSONS—TRIAL—EVIDENCE.

A defendant in possession of personality levied on by plaintiff under a writ of attachment may not, where a third person interpleads and claims ownership, introduce evidence to support the third person's claim, because he is not a party to the interplea.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1102-1109, 1111-1113; Dec. Dig. § 308.\*]

3. EVIDENCE (§ 106\*)—ADMISSIBILITY—GENERAL REPUTATION.

It is error to permit an interpleader claiming goods levied on under a writ of attachment to show that his general reputation for truth and veracity in the community is good.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 177-187; Dec. Dig. § 106.\*]

4. ATTACHMENT (§ 311\*)—CLAIMS OF THIRD PERSONS—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction on a trial of an interplea filed by a third person claiming goods levied on under an attachment issued against defendant by plaintiff, that the sole question was whether the third person was the owner, was objectionable as leading the jury to believe that, if the third person had, as a matter of fact, purchased the goods and paid for them, his claim could not be defeated, though he had not taken the required possession, in view of the evidence that the third person claimed to have purchased the goods from defendant, and that defendant remained in possession.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1115, 1116; Dec. Dig. § 311.\*]

5. TRIAL (§ 219\*)—INSTRUCTIONS—DEFINITION OF TERMS.

An instruction that the jury could not find against the third person unless they found that the sale was made in fraud was defective for failing to state what character of frauds defeat a sale within Rev. St. 1909, §§ 2881, 2887, making every conveyance with intent to de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

fraud creditors void, and making every sale of personalty unaccompanied by delivery followed by an actual and continual change of possession void as against creditors.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. § 219.\*]

**6. ATTACHMENT (§ 311\*)—CLAIMS BY THIRD PERSONS—TRIAL—INSTRUCTIONS.**

An instruction that, if the third person bought the goods from defendant, and took and exercised ownership and possession in person or by a clerk, and held himself out to the public as the owner, it was not necessary that he should be personally present all the time and in personal charge should have added the element that the indicia of ownership should have been continuous.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1115, 1116; Dec. Dig. § 311.\*]

**7. ATTACHMENT (§ 311\*)—CLAIMS BY THIRD PERSONS—TRIAL—INSTRUCTIONS.**

An instruction that fraud will not be presumed, but must be proved, and that the burden of proving it rests on the party alleging it, and that, while the proof need not be direct, yet, if the jury believe that the facts agree with honesty as well as with dishonesty, the sale was made in good faith, and the verdict must be for the third person, was objectionable, not being so framed as to enable the jury to apply the law to the proof of a voluntary conveyance of defendant's goods, through and with the aid of the third person, to his wife, though not objectionable on the question of actual fraud.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1115, 1116; Dec. Dig. § 311.\*]

**8. APPEAL AND ERROR (§ 882\*)—ERRONEOUS INSTRUCTIONS — PARTY ENTITLED TO COMPLAIN.**

A party who assumes the burden of proof while the burden rested on an adverse party may not complain of an instruction placing the burden on him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**9. FRAUDULENT CONVEYANCES (§ 183\*) — RIGHT OF BONA FIDE PURCHASER—REIMBURSEMENT.**

Where a debtor, whose goods were attached, had sold them to a third person with intent to defraud creditors, but the third person purchased without notice, and in good faith executed notes for the price, and the notes were at the time of the levy in the possession and under the control of the debtor's wife, the third person could, as against the creditor, claim protection only to the extent of actual payment on the indebtedness for the price prior to the attachment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 578-582, 695; Dec. Dig. § 183.\*]

**10. ATTACHMENT (§ 302\*)—CLAIMS OF THIRD PERSONS—NATURE OF PROCEEDINGS.**

An interplea filed by a third person claiming ownership of the property levied on under an attachment procured by plaintiff against defendant is in the nature of a separate suit from the action between plaintiff and defendant, and the interpleader, for the purpose of trial of his claims, assumes the position of plaintiff, while plaintiff in the main action assumes the attitude of defendant.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1073-1082; Dec. Dig. § 302.\*]

Appeal from Circuit Court, Douglas County; John T. Moore, Judge.

Action by the Keet-Rountree Dry Goods

Company against N. J. Hodges and another, in which R. E. Lewis interpleads. From a judgment for interpleader, plaintiff appeals. Reversed and remanded.

Jos. V. Pitts, of Ava, for appellant. Fred Stewart and A. H. Buchanan, both of Ava, for respondent.

**ROBERTSON, P. J.** On April 15, 1912, the plaintiff sued the defendants in a justice of the peace court, alleging that they were partners, and three days later procured a writ of attachment, and on April 23, 1912, levied on a portion of the stock of goods in possession of defendant N. J. Hodges, individually, or as a member of the firm of W. G. Hodges & Son, at Merritt, in Douglas county. R. E. Lewis, on April 30, 1912, filed with said justice of the peace an interplea, claiming to be the owner of said property at the time of the levy under said writ. On the same day a jury trial of the interplea was had, which resulted in a verdict in favor of the plaintiff, from which the interpleader appealed to the circuit court, where, upon a trial anew, the jury disagreed. Upon a second trial before a jury in the circuit court a verdict was returned for the interpleader, and the plaintiff has appealed.

[1] It appears in the trial of the interplea in the circuit court that the plaintiff voluntarily assumed the burden of proof, although the burden is upon the interpleader to establish his title. *Torreyson v. Turnbaugh*, 105 Mo. App. 439, 443, 79 S. W. 1002; *Car Co. v. Barnard*, 139 Mo. 142, 145, 40 S. W. 762; *Stadden Bro. Co. v. Lusk*, 95 Mo. App. 261, 68 S. W. 587.

Defendant N. J. Hodges was engaged in the mercantile business at Merritt, and the interpleader claims to have purchased the entire stock of goods from said Hodges on February 24, 1912, by first making a deed to Hodges' wife, a sister of the interpleader, for 83½ acres of land valued at \$1,670, and executing to Hodges' wife a note for \$630. No invoice of the stock of goods was made. The deed was not recorded, and later it was returned by Hodges' wife to the interpleader, and interpleader then executed his notes to his sister for, using Hodges' language, "three hundred and odd dollars each, totaling \$1,670, and in the end had the R. E. Lewis notes for \$2,300, secured by nothing but his signature."

According to the interpleader's own testimony, he was worth, at the time of the alleged purchase of the stock of goods, in personal assets considerable less than \$1,000 over and above his exemptions. If he owned any other land than what he claims to have traded Hodges, it is not shown by the record. A very small portion, possibly not exceeding \$50, was claimed by the interpleader to have been paid by him on the notes given for the purchase price prior to the date of the at-

tachment. The interpleader did not obtain a merchant's license in his own name until in September, 1912.

Witnesses testified in behalf of the plaintiff that Hodges remained in possession of the store until after the first trial in the justice court, April 30, 1912, issuing due bills and possibly checks on the bank in his own name, and managing and conducting the business without any apparent change. Others testified in behalf of the interpleader that they were in the store and overheard a deal made between Hodges and the interpleader, and that the interpleader was frequently at the store thereafter, waiting on customers. The interpleader and Hodges claim that Hodges, after the alleged sale, was clerking in the store for interpleader. There was also some testimony to the effect that goods were shipped to the store in the name of the interpleader, and the address on the boxes to him was observed by patrons and frequenters of the store.

The interpleader offered in evidence, over the objection of the plaintiff, a letter from a wholesale grocery company to the interpleader acknowledging receipt of an order for goods dated April 1, 1912, and also offered in evidence, over the plaintiff's objection, six invoices from wholesale houses covering goods purchased, dated from April 1st to April 23d, aggregating in amount \$213.94. The interpleader's conduct in this regard would raise the presumption that these were the only purchases made by him for the business, because, if he considered that evidence in his behalf, he would naturally have introduced testimony of other transactions, if any. It is therefore apparent that not until more than a month after he claims to have purchased the stock, valued at \$2,300, did he personally undertake to replenish it.

The defendant N. J. Hodges was a witness for the interpleader, and admitted that he owed a portion of the debt for which plaintiff sued and attached.

[2] For some reason not disclosed by the record, the defendant introduced testimony all of which appears to have been in support of the interpleader's claim. This he should not have been permitted to do, if the plaintiff had objected, as the defendant is not a party to this interplea.

[3] The interpleader, over the objection of the plaintiff, offered in evidence the testimony of two witnesses to the effect that the interpleader's general reputation for truth and veracity in that community was good, and one other witness testified that his general reputation for truth and honesty in the neighborhood was good. This was error. *Black v. Epstein*, 221 Mo. 286, 305, 120 S. W. 754; *Bank v. Richmond*, 235 Mo. 532, 542, 139 S. W. 352.

The instructions given in behalf of the interpleader, to which the plaintiff excepted, are as follows:

(B) "The sole question in this case is whether R. E. Lewis was the owner of the goods in question on the 23d day of April, 1912. And, although you may believe that W. G. Hodges & Son owed the plaintiff for goods at the time these goods were attached, still you cannot find against the interpleader, Lewis, in this matter unless you also find that the sale of the goods in question was made in fraud."

(C) "If you believe that the interpleader, Lewis, bought the goods in question, and either in person or by a clerk took and exercised ownership and possession over them, and held himself out to the public in general as the owner of the goods, then it was not necessary that he be personally present all of the time and in personal charge of them, and you will find for the interpleader."

(D) "The jury are instructed that fraud will not be presumed, but must be proven, and the burden of proving it rests on the party alleging it, the plaintiff herein, and, while such proof need not be direct or positive evidence, but may be by facts and circumstances, yet, if the jury believe from the evidence that all of the facts and circumstances in evidence agree as well with honesty and fair dealing as with dishonesty, you should find the sale of the stock of goods in question to be in good faith, and your verdict should be for R. E. Lewis, the interpleader."

(E) "The burden of proof in this case is on the plaintiff to prove its case by a preponderance of the evidence. A preponderance means greater weight."

[4] Instruction B is erroneous because it told the jury that the sole question in the case was whether the interpleader was the owner of the goods in question on the date of the levy. A process of reasoning might be adopted to the effect that, if the jury found that there was a fraud in fact or in law, then, under this instruction, they would necessarily find that the interpleader was not the owner; but the instruction as it is framed would likely lead the jury to think that, if the interpleader had as a matter of fact purchased the goods and paid for them, then it would not defeat his claim, even if he did not take the required possession.

[5] The instruction is further objectionable in that it tells the jury that they cannot find against the interpleader unless the jury find that the sale of the goods in question was made in fraud, without telling the jury what character of frauds defeats a sale.

Section 2881, R. S. 1909, provides that every conveyance of goods or chattels made or contrived with the intent to hinder, delay, or defraud creditors is void. Section 2887 makes every sale of personal property unaccompanied by delivery within a reasonable time, followed by an actual and continued change of possession, fraudulent and void as against creditors. This latter section defines constructive fraud which vitiates

sales irrespective of the intent or the solvency of the parties.

And there is a class of transactions where in a party who is solvent, and gives or voluntarily conveys his property to another, is presumed to be guilty of fraud as to his creditors. *Welch v. Mann*, 193 Mo. 304, 325, 92 S. W. 98; *Star v. Penfield*, 166 Mo. App. 302, 304, 148 S. W. 382.

[6] Instruction C told the jury that, if the interpleader bought the goods in question, and took and exercised ownership and possession over them in person or by a clerk, and held himself out to the public and in general as the owner of the goods, then it was not necessary that he be personally present all of the time and in personal charge. It would have been better had it followed the requirement of the statute that such indicia of ownership must be continuous.

[7] Instruction D is wrong in that it told the jury that the burden of proof rested on the plaintiff. That may be true when actual fraud is involved; but as to the question of the fraud involved here by reason of the voluntary conveyance and transfer of defendant's stock of goods, through and with the aid of the interpleader, to his wife it is not the law, because, when it is shown that this transfer was voluntary, "the onus is cast upon the party seeking to sustain it to show that the grantor had ample means left to meet all of his indebtedness." *Bank v. Thornburrow*, 109 Mo. App. 639, 643, 83 S. W. 771. This instruction is not objectionable as an instruction upon the question of actual fraud; but, if given in a case of the character of the one at bar, it should be so framed that the jury would unquestionably understand that it so applied.

[8] Instruction E is erroneous for the reason that the burden of proof does not rest upon the plaintiff, although, since it voluntarily assumed, so far as the record discloses, that burden, we are of the opinion that it is in no position to complain of the giving of that instruction. We refer to the instruction only in contemplation of another trial.

[9] In the event the jury should find that Hodges had the actual intent to hinder, delay, or defraud his creditors, then, even if the interpleader purchased without notice of that fact, and in good faith executed the notes in question, yet, as it developed at the trial that those notes were at the time the attachment was levied in the possession and under the control of the payee, Hodges' wife, the interpleader could claim protection in the transaction only to the extent that he can prove actual payment upon said indebtedness prior to the time of the attachment. *Arnholz v. Hartwig*, 73 Mo. 485, 488; *Dougherty v. Cooper*, 77 Mo. 528, 532; *Wetmore v. Woods*, 62 Mo. App. 265, 270.

[10] In view of the fact that this case must be tried again, we direct attention to the

fact, which does not appear to have been recognized in the trial now under consideration, that an interplea of this character is in the nature of a separate suit from the action between the plaintiff and the defendant; the interpleader assuming, for the purpose of the trial, the position of plaintiff (*Torreyson v. Turnbaugh*, 105 Mo. App. 439, 443, 79 S. W. 1002), the plaintiff in the main suit being in the attitude of a defendant, the action being in the nature of a replevin to determine the right to the possession of the property attached (*Bank v. Keeney*, 134 Mo. App. 74, 78, 114 S. W. 553; *Bank v. Boyer*, 161 Mo. App. 143, 149, 142 S. W. 487), and the trial being wholly segregated from the main suit (*Glett v. McGannon*, 74 Mo. App. 209, 212).

On account of the errors above discussed, the judgment is reversed, and the cause remanded to be proceeded with as above indicated; the interpleader assuming the burden of proof to the extent that we have held it to be his duty.

Reversed and remanded.

STURGIS, J., concurs. FARRINGTON, J., not sitting.

# CONNOR REALTY CO. v. ST. LOUIS UNION TRUST CO. et al.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

## 1. ATTORNEY AND CLIENT (§ 135\*)—COMPENSATION—IMPLIED CONTRACT TO PAY.

Where an attorney renders valuable services which are accepted by his client, there is an implied agreement to pay therefor.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 308; Dec. Dig. § 135.\*]

## 2. PARTITION (§ 114\*)—COSTS—ATTORNEY'S FEE.

Under Rev. St. 1909, § 2275, providing that, in all cases where the parties do not dismiss, the trial court shall have discretion to award costs unless a different provision is made by law, and sections 2279 and 2609, specifically providing for attorney's fees in partition suits, the amount of the fee in a partition suit need not be fixed by contract; and this rule applies to a suit where, pending an order of sale, the parties formed a corporation to take title to the land in suit, and stock therein was issued to each in proportion to the interest he had in the land.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 440-449; Dec. Dig. § 114.\*]

## 3. PARTITION (§ 114\*)—COMPENSATION—REASONABLE FEE.

In partition involving mineral lands worth \$24,000, where the desired result was accomplished by the formation of a corporation, and the issuance of stock therein to the parties in proportion to their interest in the land, and where other attorneys testified that \$1,200 was a reasonable fee, the trial court was justified in awarding a fee of \$720 to plaintiff's attorney.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 440-449; Dec. Dig. § 114.\*]

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Partition by the Connor Realty Company against the St. Louis Union Trust Company and others. From an order allowing a fee of \$720 to plaintiff's attorney, defendants appeal. **Affirmed.**

McReynolds & Halliburton, of Carthage, for appellants. Howard Gray and W. H. Phelps, both of Carthage, for respondent.

FARRINGTON, J. This appeal was taken from an order allowing an attorney's fee of \$720 in a partition suit. The plaintiff and defendants were owners as tenants in common of 80 acres of land in Jasper county. On December 20, 1911, the plaintiff, by its attorney, W. H. Phelps, instituted a suit in the Jasper county circuit court to partition the property. The petition, signed by W. H. Phelps as attorney for the plaintiff, set up the respective interests of the parties, alleged that plaintiff was the owner of an undivided one-fourth interest, and prayed that the real estate be divided among the parties according to their respective interests. The defendants were served with process, and subsequently answered. The answer of Emma R. Holmes and the St. Louis Union Trust Company, two of the defendants owning an undivided one-half interest, admitted the averments in the petition as to the respective interests of the owners, set up the fact that the property was valuable mineral land and could be divided in kind, and asked that commissioners be appointed to examine and divide the property in kind. The answer of James W. Way admitted the allegations of the petition, set up the fact that the property was valuable mineral land, and averred that the same could not be divided in kind in an equitable way, and asked that an order be made directing a sale of the property and a division of the proceeds among the parties according to their respective interests. The plaintiff in reply admitted that the land was not susceptible of partition in kind. After a hearing, the court entered an interlocutory decree finding the interests of the parties to be as alleged in the petition and directing that the land be sold and the proceeds divided according to the interests of the parties as found. After the order of sale was made, all the parties owning this property agreed to form a corporation for the purpose of taking title to the land in suit. This arrangement was perfected, and stock in the corporation was issued to each of the parties for an amount bearing the proportion to the whole amount of the stock that each one's interest in the land bore to the whole of the land. In other words, instead of dividing the property in kind, a corporation was organized with the capital consisting of the property in suit, and each tenant in common took his respective part in stock of the corporation. After this arrangement had been entered into, the defendants moved the court to set aside the decree and dismiss the suit. Prior to pass-

ing upon this motion, the court took up the application of W. H. Phelps for the allowance of an attorney's fee and made an allowance of \$720 for his services, taxing the same as costs in the cause and ordering the costs to be taxed against all the parties according to their respective interests as set out in the interlocutory decree. Thereafter, the defendants' motion to set aside the interlocutory decree and dismiss the cause was by consent taken up, and the court found that the organization of the corporation and the arrangement of taking stock had been agreed upon, and sustained the motion as to the dismissal of the cause, but overruled that portion of the motion asking that the interlocutory decree be set aside, and ordered that the cause be dismissed and the defendants discharged, and that the costs including the attorney's fee be taxed against the respective parties. From this action the appeal was taken.

At the hearing as to the allowance of an attorney's fee, the plaintiff introduced as a witness T. V. Nolan, who testified that the value of the land when the partition suit was filed was \$24,000. Plaintiff then showed by the testimony of A. L. Thomas and R. A. Mooneyham, two lawyers of Jasper county, that the value of the services rendered by attorney W. H. Phelps in this cause was \$1,200. The defendants offered no evidence as to the value of the attorney's services, but did offer in evidence the deeds from the respective parties to the corporation and the documents evidencing the incorporation. So far as this record shows, W. H. Phelps acted throughout as the attorney representing the plaintiff in this partition suit, and there was no contest concerning his services until it came to the allowance of a fee.

There are but two questions raised by appellants in this appeal, one as to the power of the trial court to allow an attorney's fee in a partition suit under the facts herein, and the other as to whether the allowance of \$720 was excessive, unreasonable, and a manifest abuse of the discretion vested in the court.

Relying upon the cases of *Draper v. Draper*, 29 Mo. 13, and *Lucas Bank v. King*, 73 Mo. 590, appellants insist that, in the absence of a contract for a fee between the plaintiff and its attorney, none could be allowed.

[1, 2] We must rule against appellants on this contention, and it would seem that no other reasons need be given than those contained in the following cases: *Liles v. Liles*, 116 Mo. App. 413, 91 S. W. 983; *Donaldson v. Allen*, 213 Mo. 293, 111 S. W. 1128, 127 Am. St. Rep. 601; *Forsee v. McGuire*, 109 Mo. App. 701, 83 S. W. 548; *Eddie v. Eddie*, 138 Mo. 599, 39 S. W. 451; *State ex rel. Shipman v. Allen*, 124 Mo. App. 465, 472, 103 S. W. 1090; *Taussig v. Railway Co.*, 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674. These cases hold: First, that the amount of the

attorney's fee need not be fixed by contract or agreement in a partition suit to authorize the trial judge to allow the plaintiff's attorney a fee; and, second, that where an attorney renders valuable services which are accepted by his client, there is an implied agreement to pay for the same. It is distinctly pointed out in these cases why the rule announced in the two cases relied upon by the appellants is no longer the law in this state.

Appellants cite section 2275, R. S. 1909, which reads as follows: "Upon the plaintiff dismissing his suit, or defendant dismissing the same for want of prosecution, the defendant shall recover against the plaintiff his costs; and in all other cases it shall be in the discretion of the court to award costs or not, except in those cases in which a different provision is made by law." This statute does not apply to this case, because this suit was not dismissed by the plaintiff, or on motion of the plaintiff, nor on a motion of the defendants for want of prosecution. There is a portion of the statute, however, that bears on the question, to wit, "and in all other cases it shall be in the discretion of the court to award costs or not, except in those cases in which a different provision is made by law," and a different provision is made by the enactment of sections 2279 and 2609, R. S. 1909, which deal specifically with the assessment of costs including attorney fees in partition suits. See *McManus v. Price*, 246 Mo. 438, 152 S. W. 3. .

For the reasons stated in *Donaldson v. Allen*, supra, the attorney for the plaintiff in an equitable partition is entitled to have his fee taxed against all the parties taking under the partition according to their respective interests. How could a more just partition be arrived at than that accomplished in this case? The ultimate purpose of this, as well as any partition suit, was to give the respective owners their individual interests in the property rather than their interests in common. The petition filed by plaintiff's attorney brought about this ultimate result. In some cases, the property can be divided in kind; in others, the proceeds must be divided. While it is true the course here pursued was somewhat novel, the purpose of the suit and the result reached was that which is desired in any partition proceeding. Considering the character of the land sought to be partitioned, the process of adjustment of the rights of the various parties here was far better than to have divided the land in kind, in which event possibly one of the tenants in common would have acquired valuable mining land, and another land of much less value. The course pursued was better than to have sold the land because some of the owners might have been able to make it bring all it was worth, while others might have been unable to make it bring a value equal to their undivided interests. Here the form of the property was changed, and,

in its changed form, divided in kind. Bearing in mind that the result desired in the partition suit was accomplished by virtue of the proceeding, and that attorney fees are allowed the petitioning parties in legal or equitable partitions, it would seem that no more need be said to uphold the legality of the allowance made in this case.

The case of *Appleman v. Appleman*, 140 Mo. 309, 41 S. W. 794, 62 Am. St. Rep. 732, falls as an authority here for the reason that the plaintiff lost the suit because it was determined that he had no interest subject to partition. We are also referred to the case of *Murphy v. Smith*, 86 Mo. 333; but that was a suit in ejectment, and hence has no bearing on the question in issue here. So, in the case of *Schafer v. Roberts*, 166 Mo. App. loc. cit. 84, 148 S. W. 393, the question of attorney fees arose under the attachment law and not under the statutes referred to in the case at bar. In the case of *Whitsett v. Wamack*, 95 Mo. App. 296, 69 S. W. 24, the question involved was concerning an allowance to the guardian ad litem in a partition suit, and the question before us was not raised in that case, although some of the language used in the opinion, which was purely obiter, would seem to be contrary to our ruling. However, it seems to us that the court in that case went further in construing the statute so as to make an allowance for the guardian ad litem than it is necessary for us to go in this case to allow the attorney's fee, and the ruling in that case on that question is approved by us, and was properly made on the broad ground which courts should take in holding that, where valuable services have been rendered which had been accepted and the benefits thereof received, it is the duty of the court to so construe the law as to conform to natural justice as nearly as possible.

[3] As to the second contention, it may be merely noted that the showing made, to wit, that the property was worth \$24,000, that the desired result had been accomplished, and that an attorney's fee of \$720 had been allowed, would certainly be sufficient, and one which does not prompt us to hold that the discretionary power of the court was abused. Besides, the only testimony introduced concerning the value of the services was that of the two members of the Jasper county bar whose standing as lawyers and business men was unquestioned and known to the trial judge, and, as the amount fixed by the trial judge was less than two-thirds of that fixed by them as a reasonable fee, we hold that the trial court was amply justified in the amount of the allowance made.

It follows from what has been said that the action of the circuit court should be affirmed, and it is so ordered.

ROBERTSON, P. J., and STURGIS, J., concur.

**RONEY v. ORGAN.**

(Springfield Court of Appeals. Missouri.  
Dec. 11, 1913.)

**1. APPEAL AND ERROR (§ 867\*)—REVIEW—GRANTING NEW TRIAL.**

In determining whether the trial court erred in granting defendant a new trial, the appellate court must decide, not whether defendant could complain of the verdict on appeal, but rather whether the new trial was granted for good cause shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.\*]

**2. APPEAL AND ERROR (§ 854\*)—HARMLESS ERROR—ERRONEOUS REASON.**

The appellate court will not reverse an order granting a new trial because it specifies an erroneous reason for such action, if other valid reasons raised by the motion exist, but the burden is on respondent to show such other reasons.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.\*]

**3. LIBEL AND SLANDER (§ 7\*)—CONSTRUCTION.**

A bare statement that one has sworn falsely in court imputes the crime of perjury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.\*]

**4. LIBEL AND SLANDER (§ 7\*)—WORDS ACTIONABLE PER SE.**

A charge of perjury is actionable per se, the law implying damage from such a charge.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.\*]

**5. LIBEL AND SLANDER (§ 33\*)—DAMAGES—WORDS ACTIONABLE PER SE.**

The law presumes that damage results from the publication of words actionable per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 112, 277; Dec. Dig. § 33.\*]

**6. APPEAL AND ERROR (§ 1170\*)—VERDICT—ACTUAL DAMAGES—NECESSITY OF FINDING.**

A new trial should not be granted to defendant in an action for libel for charging perjury, because the verdict for plaintiff only found exemplary damages for him, without mentioning actual damages, in view of Rev. St. 1909, § 1850, requiring the court to disregard defects not affecting the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

**7. EVIDENCE (§ 82\*)—PRESUMPTIONS—OFFICIAL DUTY.**

It is presumed that the courts will pursue the proper course if their power is properly invoked.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82.\*]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by William W. Roney against John E. Organ. From an order sustaining a motion for a new trial after verdict for plaintiff, he appeals. Reversed and remanded, with directions to reinstate judgment rendered on the verdict.

Wm. P. Elmer and J. D. Gustin, both of Salem, for appellant. G. C. Dalton and A. J. Arthur, both of Salem, and Robt. Lamar, of Houston, for respondent.

**FARRINGTON, J.** Action for libel filed in the Dent county circuit court. Change of venue to Shannon county. Trial by jury, and verdict for plaintiff for \$100 exemplary damages, nothing being said in the verdict as to actual damages. The circuit court granted defendant a new trial, specifying as the reason that the form of the verdict was erroneous. Plaintiff appealed from the order sustaining the motion for a new trial.

In his petition, the plaintiff alleges that he is now and for a long time has been a resident of Salem, Dent county, Mo., and that the defendant is a resident of the same place, and engaged in publishing a newspaper called "The Salem Monitor" which has a circulation in Dent county and several other counties in Missouri and in various states; that plaintiff was sworn as a witness and testified in the trial of an action in the circuit court of Shannon county, wherein the city of Salem, at the relation and to the use of William W. Roney and Jesse Ward, was plaintiff, and W. W. Young was defendant, in September, 1911; that said defendant in said action, W. W. Young, advised and procured the defendant herein to publish, and that the defendant herein did publish, in The Salem Monitor certain false, defamatory, malicious, and libelous language of and concerning the plaintiff, to wit: "The case of the city of Salem against W. W. Young on tax bill for building a sidewalk was tried before a jury in circuit court in Shannon county last week and resulted in a verdict for the city. A motion for a new trial was made and a notice of an appeal to the state Supreme Court was filed. The verdict of the jury was probably influenced by the false testimony of one of the witnesses interested in the suit, and the April grand jury may investigate. This case was first decided in favor of Young here, Harry Clymer, special judge, but reversed and remanded by the Springfield Court of Appeals, and the end is not yet." The petition then averred that the person referred to in said publication was the plaintiff herein, and that it was so intended by the defendant, and that the readers of said newspaper should understand that the person referred to was the plaintiff, and that it was understood by the readers of said newspaper that the person referred to in said publication was the plaintiff. It is then alleged that said publication tends to expose plaintiff to public contempt and ridicule and deprive him of the benefits of business and social intercourse, and charges him with having committed the crime of perjury; that the publication was wantonly, willfully, and maliciously made and circulated as aforesaid, to the great damage of the plaintiff. Actual damages in the sum of \$10,000, and exemplary damages in the sum of \$10,000 constitute the prayer.

As the case stands in this court, it is un-



necessary to set out the answer or reply. The evidence and instructions are not contained in the abstract. The judgment is copied in the abstract, and in the judgment is recited the verdict, as follows: "We, the jury, find the issue for the plaintiff in the sum of \$100.00 as an exemplary damage against J. E. Organ, H. C. Adair, Foreman."

[1] Our question: Did the trial court commit reversible error in granting defendant a new trial? In answering this question, we are required to decide, *not* whether the defendant could complain of the verdict in this court, which was a question for decision in the case of *Adams v. Railroad*, 149 Mo. App. 278, 130 S. W. 48, but rather, whether the trial court granted a new trial for good cause shown.

[2] The order granting a new trial states a specific reason, to wit, "that the form of the verdict is erroneous." The respondent, as the record is presented to us, has accepted this as being the only ground assigned for granting a new trial. He has not shown, as he might have done, that even though the trial court assigned a wrong reason for its action, yet there were errors committed during the course of the trial warranting the order granting a new trial. This court will not reverse an order granting a new trial which specifies a wrong reason when it is shown that other valid reasons—complained of in the motion for a new trial—actually exist. *Hewitt v. Steele*, 118 Mo. 463, 473, 24 S. W. 440; *Morelock v. Railway Co.*, 112 Mo. App. 640, 644, 87 S. W. 5. But the burden is upon the respondent to show such other valid reasons. It is intimated in respondent's brief that the court granted the new trial because the verdict was against the weight of the evidence. The trial court had an undoubted right to do this, but the record presented to us shows it did not act on that ground, and neither the motion for a new trial nor the evidence are before us. Had this record shown that the order was based on the weight of the evidence, or any other ground assigned in the motion for a new trial which would be a valid reason to support the order, we would not disturb it, in the absence of an abuse of discretion. But as the case is presented here, the order granting the new trial must stand or fall on the ground specified in the order, "that the form of the verdict is erroneous," and if that is found to be untenable, the order must be set aside.

The cases of *Morrison Mfg. Co. v. Roach & Greene*, 104 Mo. App. 632, 637, 78 S. W. 644, and *Ensor v. Smith*, 57 Mo. App. 584, 589, hold that it is the duty of the appellant to bring up the whole record, so that the court may see that there is no reason assigned in the motion for a new trial justifying the court in sustaining it, and that in the absence of such showing the appellate court will presume there was sufficient reason.

The two cases last cited, however, cannot be recognized as authority, since the Supreme Court has placed such burden upon the respondent. See *Crawford v. Stockyards Co.*, 215 Mo. 394, 402, 114 S. W. 1057; *Millar v. Madison Car Co.*, 130 Mo. 517, 31 S. W. 574; *Dale & Bennett v. Mining Co.*, 110 Mo. App. 317, 320, 85 S. W. 929.

Section 1850, R. S. 1909, requires the trial court, in every stage of the action, to disregard any error or defect in the proceedings which shall not affect the substantial rights of the adverse party.

In the case of *Lampert v. Drug Co.*, 238 Mo. loc. cit. 415, 141 S. W. 1097, 37 L. R. A. (N. S.) 533, Ann. Cas. 1913A, 351, our Supreme Court said: "The consensus of authority is to the effect that punitive damages are not recoverable where no actual damages are allowed." And it was held in that case, as it has been in other Missouri cases, that exemplary damages are recoverable where there are allowed only nominal actual damages. Thus, in *Favorite v. Cottrill*, 62 Mo. App. 119, the verdict was for \$1 compensatory damages and a large sum as exemplary damages, and in *Ferguson v. Chronicle Pub. Co.*, 72 Mo. App. 462, the verdict was for 1 cent actual damages and \$300 as exemplary damages.

In *Mills v. Taylor*, 85 Mo. App. 111, no actual damages were assessed in the verdict, the finding being for the plaintiff, accompanied by an assessment of exemplary damages in the sum of \$500. When the verdict was returned the plaintiff requested the court to give to the jury a further instruction, directing it to retire and correct its verdict by further finding for the plaintiff nominal actual damages. The appellate court held that the trial court erred in refusing to direct the jury to correct its verdict, for the reason that in finding the issues for the plaintiff the jury found that defendant had willfully, wrongfully, and wantonly seduced and debauched the former's wife, and that upon that finding plaintiff was entitled to have actual damages in some amount assessed in his favor.

Nor is the case of *Brennan v. Maule*, 108 Mo. App. 336, 83 S. W. 283, helpful here. In our case, the plaintiff is satisfied with the verdict, and desires that it stand.

In the case of *Hoagland v. Amusement Co.*, 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740, the jury gave plaintiff no actual damages, but gave him one cent punitive damages, and the plaintiff appealed, complaining of the form of the verdict; the jury expressly found (according to the opinion 170 Mo. at page 345, 70 S. W. 878, 94 Am. St. Rep. 740) that plaintiff was entitled to recover, that he had sustained no compensatory damages, but assessed punitive damages at one cent. The Supreme Court held that the jury in finding for plaintiff in effect found that defendants arrested the plaintiff, etc., and that upon such finding plaintiff was

entitled to have actual damages in some amount assessed in his favor. The judgment was reversed and the cause remanded.

In *Courtney v. Blackwell*, 150 Mo. loc. cit. 277, 51 S. W. 668, according to the opinion, by some mischance in the form of the verdict which was given to the jury, no place was left therein for the separate assessment of the actual damages, and the whole was returned in a lump sum, according to the form, as exemplary damages; to make clear, the form of the verdict was: "We, the jury, find for the plaintiff, and assess and award to her as exemplary damages, the sum of ——— dollars." The jury filled in the sum. There was no finding at all in regard to actual damages. The court said: "The jury did find for the plaintiff, and in so doing found that the defendant had published the slander with which he was charged, and upon that finding the plaintiff was entitled to have actual damages assessed in her favor, the slander being of that character from which the law implies such damages." In that case there was in fact a basis under the instructions for the assessment of both actual and exemplary damages. (We assume in the case at bar, since appellant has not brought the instructions before us, that there was a basis under the instructions for the assessment of both actual and exemplary damages.) The Supreme Court in the *Courtney* Case refused to disturb the judgment at defendant's request, holding that the error in the verdict was one of form and not of substance.

[3] There is no doubt under the authorities that to say one has sworn falsely in a court of justice, without more, carries an imputation of perjury. *Krup v. Corley*, 95 Mo. App. loc. cit. 647, 69 S. W. 609; *Perselly v. Bacon*, 20 Mo. 331.

[4] The charge of perjury is actionable per se. *Brown v. Knapp & Co.*, 213 Mo. loc. cit. 682, 691, 112 S. W. 474, 484. In the case just cited, it is said: "Words charging another with a commission of a crime as heinous as perjury are actionable, although they do not set forth the particulars of the offense in language necessary to make a good indictment."

[5] The law presumes damage from the publication of words actionable per se. *Vanloon v. Vanloon*, 159 Mo. App. 255, 140 S. W. 631. In the case at bar, the jury did find for the plaintiff, and in so doing found that the defendant had published the libel, and upon that finding the plaintiff was entitled to have actual damages assessed in his favor; the libel being of that character from which the law implies such damages. *Courtney v. Blackwell*, supra, 150 Mo. loc. cit. 277, 51 S. W. 668.

[6] The rule that punitive damages cannot be recovered in the absence of an allowance of some actual damages—at least nominal actual damages—would seem from the decisions in this state to rest upon the principle that there can be no punitive damages, in the

absence of a cause of action which would warrant the awarding of at least nominal actual damages. Otherwise stated: Where there is an utter failure of proof of any actual damages, or a failure of the proof from which the law will imply at least nominal actual damages, or in a case where such proof has been made, but there is a special finding by the jury that no actual damage was sustained (as in the case of *Hoagland v. Amusement Co.*, supra), then a judgment for punitive damages alone is erroneous. On the other hand, when the verdict ignores the actual damages, but does find the issue for the plaintiff—i. e. in this case, that the libel was published—and it must therefore follow in law that some damage, either compensatory or nominal, has been sustained, the failure of the jury to fix or designate an amount will not defeat the assessed punitive damages, where the plaintiff is not the complainant. It is the substance rather than the form that the law looks to. When such a case is made establishing a basis for actual damages, the substance is supplied, the foundation for punitive damages is laid, and the failure to fix the amount of actual damages is a mere defect of form. Allowance of actual damages does not necessarily mean the fixing or designation of the amount of the allowance. The case of *Courtney v. Blackwell*, supra, having been cited and quoted in later opinions of the Supreme Court upon this subject with no word of criticism, we feel that it is to be followed in the case at bar, especially, since the error complained of in the motion for a new trial would, in this court, be considered harmless to the party complaining.

[7] With what grace, therefore, did defendant stand before the trial court on his motion for a new trial? If the jury had not been discharged, the trial court in all probability would have directed it to retire and correct its verdict by further finding for the plaintiff nominal actual damages, for such would have been the proper course to pursue under the authority of *Mills v. Taylor*, supra, and it is always presumed that courts will pursue the proper course where the way is open and the power is invoked. Defendant stood before the trial court on his motion for a new trial in much the same position as did the appellant in this court in the case of *Adams v. Railroad*, supra. Under the law, with the finding of the issue for the plaintiff, defendant's liability for at least nominal damages was established, and yet the defendant on his motion for a new trial in reality complained that he had not been obligated by the jury to pay over money, in some amount, which he was legally liable to pay. It is manifest that the trial court should have obeyed the mandate of the statute (section 1850, R. S. 1909) and disregarded the defect in the verdict, as not affecting the substantial rights of the defendant.

For the reasons herein appearing, the cause

is remanded, with directions to the trial court to set aside its order granting a new trial and to reinstate the judgment which was rendered on the verdict.

ROBERTSON, P. J., and STURGIS, J., concur.

### MARTS v. POWELL.

(Springfield Court of Appeals. Missouri.  
Dec. 11, 1913.)

#### 1. RAPE (§ 66\*)—ASSAULT WITH INTENT TO RAPE—CIVIL LIABILITY—VARIANCE—INTENT.

Where the petition stated a cause of action for damages for an assault with intent to rape, and the evidence merely tended to establish a common or simple assault, the variance was immaterial; the gravamen of the charge being the assault and it not being essential that plaintiff prove the intent with which it was committed, although intent was alleged in the petition.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 107-111; Dec. Dig. § 66.\*]

#### 2. ASSAULT AND BATTERY (§ 35\*)—CIVIL LIABILITY—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for damages for an assault held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 51; Dec. Dig. § 35.\*]

#### 3. TRIAL (§ 178\*)—DIRECTION OF VERDICT—EVIDENCE.

In passing on a motion for a peremptory instruction for defendant, the court will consider the evidence in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.\*]

#### 4. APPEAL AND ERROR (§ 1003\*)—VERDICT—EVIDENCE.

A verdict for plaintiff in an action for assault with intent to rape will not be disturbed on appeal when supported by substantial evidence, though against the preponderance of the evidence, and though the reviewing court would have found a different verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

#### 5. APPEAL AND ERROR (§§ 207, 301\*)—SCOPE OF REVIEW—RULING.

Where, in an action for damages for assault with intent to rape, an objection to a question whether plaintiff's father was a member of the M. lodge was sustained before an answer was given, and no request was made that the opposing counsel be reprimanded, or that the jury be discharged, and the matter was not mentioned in the defendant's motion for a new trial, error could not be predicated thereon; there being no ruling to be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1500, 1743, 1753-1755; Dec. Dig. §§ 207, 301.\*]

#### 6. APPEAL AND ERROR (§ 901\*)—RECORD—PRESUMPTION.

Since the trial court is presumed to have discharged its duty until the contrary is made to appear, the burden is on the appellant to show by the record that prejudicial error was committed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1771, 3670; Dec. Dig. § 901.\*]

#### 7. EVIDENCE (§ 116\*)—ADMISSIBILITY—EXPLANATORY MATTERS.

Where, in an action for damages for assault with intent to rape, defendant, in an attempt

to show that a business competitor instigated the action, shows that a conversation took place between such competitor and the plaintiff's father, plaintiff's evidence that such conversation was about lodge matters, and not about the trouble out of which the litigation arose, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 134, 135; Dec. Dig. § 116.\*]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by Columbia Marts against W. H. Powell. From judgment for plaintiff, defendant appeals. Affirmed.

Lorts & Breuer, of Rolla, for appellant. J. A. Watson, J. J. Crites, and G. W. Van Wormer, all of Rolla, for respondent.

FARRINGTON, J. Plaintiff, Columbia Marts, sued for \$10,000 actual damages and \$5,000 punitive damages, alleging that defendant "unlawfully, feloniously, brutishly and violently assaulted" her "with the intent then and there forcibly and against her will feloniously to ravish and carnally know; that by reason of such assault the plaintiff was greatly frightened, humiliated, and injured, and caused to suffer great mental anguish and disgrace," etc. The answer was a general denial. Upon trial by jury, plaintiff was awarded as her actual damages the sum of \$750; punitive damages being expressly disallowed in the verdict. The defendant upon this appeal urges three assignments of error, which we will pass upon in the order presented.

[1] I. The first is concluded against him by the late decision of the Kansas City Court of Appeals in the case of Booher v. Trainer, 157 S. W. 848. To elucidate: Appellant complains that plaintiff's petition predicated her cause of action for damages upon an assault with intent to rape, whereas her evidence merely tended to establish a common or simple assault, and that the rule that a plaintiff cannot declare upon one cause of action and recover upon another has not been changed by the practice act—that the allegations and proof must substantially correspond. Conceding, for a moment, that plaintiff's evidence merely tended to establish a common or simple assault, respondent's counsel quote from the decision in the Booher Case: "The gravamen of the charge is the assault, and it was not necessary for the plaintiff to prove the intent with which the assault was made in order to recover, *although intent was alleged in the petition*," as in the case before us. (Italics are ours.) Approving as we do that part of the Booher Case, no argument need be advanced in this opinion and that case may be examined for reasons and authorities. See, also, Lemmons v. Robertson, 164 Mo. App. loc. cit. 89, 148 S. W. 189. In justice to appellant's counsel it may be said that at the oral argument they frankly admitted that the Booher decision overruled their contention.

[2] II. Appellant insists that "the verdict in this case is against the weight of the evidence, and the court should have given defendant's instruction in the nature of a demurrer." At the close of all the evidence the defendant requested an instruction embodying this idea, and the question is squarely put for our consideration.

The statement of the facts in this case, as contained in appellant's brief, is as follows: "The plaintiff in this case is a young woman, living with her parents in the city of St. James, Mo., where she was employed as a night operator in the St. James telephone exchange and had been for something like a year previous to her alleged difficulty with the defendant. The defendant is a business man residing also in St. James, where he has lived for many years, and is engaged in the lumber business there, operating a lumber yard also at Salem, Mo. The evidence showed that it had been his custom to make frequent calls at the central telephone office, where plaintiff worked, for the purpose of talking over the telephone to out of town parties, and particularly to parties in charge of his lumber yard. On July 23, 1912, the date of the alleged difficulty, defendant went to the central telephone office, by appointment, between 7 and 7:30 o'clock, to talk over the long distance, as was his custom. After answering his call, plaintiff and defendant became engaged in conversation of an affectionate character. The plaintiff did not know just how it started, 'but anyway she said something about the boys, and he asked her if she didn't have a smile for him,' to which she replied that she had not. And he told her then that he was coming back later that night. About 9 that night defendant did go back to the office, and what happened on his arrival is best told by the plaintiff, as follows: 'Q. Now state to the jury just what he did, will you? A. Well, he come in— Q. Tell them in your own way. A. It was about 9 o'clock, and after time to lock the door, and he turned out the lights, and by that time I was up from the chair, and he grabbed me and held me so tight that I could not breathe, and he tried to throw me on the couch and pull up my clothes, and I got loose from him and opened the door and told him to go, and he said he didn't intend to get me in any bad shape, because I knew he was married and I was single, and I told him to go, and he went.' Before going, however, defendant gave plaintiff \$1 which she accepted and retained, so she told her mother, and the plaintiff herself admitted that she got the dollar and spent it, but said defendant left it on the floor. Plaintiff testified that the defendant did not tear her clothing in any way, or even disorder it; but said, 'He just wrinkled my dress; it was white.' The telephone office is situated in a building on a corner with a street on two sides, and in the heart of the city. The building itself is occupied on the first floor

by the Bank of St. James and Mr. Laun's store, which is always open long after the hour of this alleged assault, and a barber shop. The telephone office is situated on the second floor, where Mr. Laun had his dwelling rooms, and which were occupied at this time by Mr. Laun's family, consisting of his wife, a grown daughter, and two grown sons, and one room which has a door opening into the telephone office was at the time occupied by two young men who were visiting Mr. Laun. The evidence tended to show that these people were in their rooms at the time. Any ordinary conversation in the telephone office could be heard in the living rooms of Mr. Laun, and any noise louder than ordinary could be heard in his store downstairs. Plaintiff gave no alarm whatever, and made no outcry. She went on with her duties until next morning, went home, and her mother said she could see no change in her whatever. She continued to be friendly with the defendant and always spoke to him friendly when she met him on the streets, and 'talked to him just like she did to any other man,' and went to his office on one occasion with another operator. The alleged difficulty occurred on July 23d, but she told her father and mother nothing of it until December 20th, approximately five months, giving as her excuse for not telling them that she was ashamed to do so. After the difficulty, and long before she told her father and mother, she told Richard Kalb, Harry Greble, and Willie James, three young men with whom she kept company, all about her difficulty with the defendant."

[3] This is a well-prepared statement of the case from appellant's viewpoint. The facts and circumstances are presented to us, as they were to the jury, in a way calculated to discredit the plaintiff's story. This statement is an accusation—either that plaintiff's testimony that defendant assaulted her is wholly untrue, or that she sold her virtue for the dollar which she received and kept—and is therefore not such a statement as would be made by this court in determining whether the trial court erred in refusing to give defendant's peremptory instruction, because, upon such an issue, plaintiff would be entitled to a presentation of the evidence in the light most favorable to her. *Kendrick v. Harris*, 171 Mo. App. 208, 213, 156 S. W. 490; *Barr & Martin v. Johnson*, 170 Mo. App. 304, 155 S. W. 459. But taking the case as presented by appellant's counsel, is the trial court convicted of error in submitting the case to the jury? Defendant did not testify, choosing to stand on the general denial contained in his answer and the damaging circumstances brought out on cross-examination of plaintiff's witnesses.

[4] The jury, having the right to believe or disbelieve plaintiff's testimony (*Bradford v. Railroad*, 136 Mo. App. 709, 710, 119 S. W. 32), accepted it as true, and refused to construe the damaging circumstances as evi-

dence that she was not in fact assaulted or that she voluntarily sold her virtue for the dollar which she received and kept. This was within the province of the jury. *Johnson County Savings Bank v. Mills*, 143 Mo. App. loc. cit. 269, 127 S. W. 425. A verdict will not be disturbed on appeal if there is any evidence fairly tending to support it (*Baker v. Thompson*, 214 Mo. loc. cit. 509, 114 S. W. 497); and, where a verdict is supported by substantial evidence, it must stand, although the reviewing court would have found a different verdict on the same evidence (*Lehnick v. Street Ry. Co.*, 141 Mo. App. 158, 124 S. W. 542), or although it appears to be against the preponderance of the evidence (*Crouch v. Colbert*, 111 Mo. App. 93, 84 S. W. 992). These are established rules. There is ample evidence in this record to sustain the verdict, and appellant's statement of the case bears out this assertion. As said in the *Booher Case*, supra, although it was probable plaintiff could have obtained relief by screaming and crying, it was for the jury to say whether or not the course she pursued was consistent with virtuous motives and impulses. In the *Booher Case*, the parties were together in a buggy on a country road, whereas, in the case at bar, according to plaintiff's testimony as to what occurred, it is apparent that defendant was in her presence but a short time; in fact, she testified that she got loose from him and opened the door and told him to go and he went.

[5, 6] III. Grave prejudice is claimed to have arisen against appellant at the trial in the circuit court when plaintiff's attorney asked her this question on redirect examination: "Now, Columbia, your father is a member of the Masonic lodge, is he not?" Before an answer was given, defendant's counsel objected to the question and was sustained. There was no request for a reprimand and the next witness was called. There was no showing that plaintiff's father belonged to that lodge and no attempt to show that any member of the jury belonged to that lodge. It is a familiar principle that the burden is upon the appellant to show by the record that prejudicial error was committed, and that the trial court is presumed to have discharged its duty until the contrary is made to appear. *State v. Wilson*, 161 Mo. App. 301, 143 S. W. 534. Appellant may have been able to show that the asking of such a question absolutely destroyed his chance of securing impartial deliberation among the members of the jury, and the circumstances may have been such that, upon the asking of such a question, the only course would have been to discharge the jury and begin anew. This record does not even reveal that appellant's counsel asked that opposing counsel be reprimanded, much less that the jury be discharged. Wherein, therefore, is error? This is a court of review. Yet appellant seriously argues for a reversal of this judgment upon a contention not mentioned in his motion for a new trial. If, by any process of

reasoning, it could be said that error was committed by the trial court when it promptly complied with the only move the appellant made when the question was put, the error should have been pointed out in the motion for a new trial. *Street v. School District*, 221 Mo. 663, 672, 120 S. W. 1159; *Village of Koshkonong v. Boak*, 158 S. W. 874, 877. This justifies the overruling of appellant's contention, made for the first time in this court.

[7] But it will not be amiss to say that appellant was as much responsible for the alleged error as was the respondent. The lodge matter was brought out for the first time by appellant's counsel on cross-examination of the respondent in an attempt to show that one Wills, a competitor of the appellant in the lumber business at St. James, urged respondent to bring this action, and respondent, in answer to a question as to what Wills was talking to respondent's father about, said it was about lodge matters. This opened the door for the appellant to show that the conversation was about lodge matters and not about the trouble out of which this litigation arose. It is true that counsel for respondent should have put the question in a more general way—without specifying which lodge or secret order was referred to—but the matter had been put in such condition by appellant's cross-examination of the respondent that, were the question properly before us, we would have to say that reversible error was not committed.

We are convinced that under the rules of law this judgment cannot be disturbed. Nevertheless, we entertain grave doubt whether justice has been accomplished. The plaintiff's narrative of the alleged occurrence does not impress us favorably. The fact that she retained and spent the dollar which she admits defendant left with her; the fact that she made no outcry, although surrounded by persons in close proximity; the fact that she had "23" engraved on a ring soon after July 23d when the assault is claimed to have occurred and gave no explanation except that it was just an idea of her own; the fact that she made no disclosure of the occurrence to her mother and father until nearly five months had expired; the fact that she had been in defendant's presence at numerous times between the date of the alleged assault and the date when she told her parents of it and spoke to him on the street and went to his office at one time with another operator and treated him just as she did any other man that came to the telephone office; the fact that she did tell three young men, with whom she was keeping company, of the occurrence—would indicate at least, that her mental anguish was not as great as the jury viewed it. Her explanation of why she did not inform her parents of the assault, i. e., that she was ashamed of it, is refuted by the fact that she told three young men about it. As stated, all these facts and circumstances

are merely damaging to plaintiff's case before the jury, and were disregarded by the jury, and a verdict found on her testimony favorable to her theory of the trouble. As said in the *Booher* and in the *Lehnick* Cases, we are not sitting as triers of the fact where we might decide a case differently from the verdict rendered by the jury. It is our function to examine the record and ascertain if there is any substantial evidence to support the verdict, and in this case we have found that there is. The weighing of the evidence occurred in the trial court. Where there is evidence and strong and reasonable inferences to be drawn therefrom which tend to discredit the verdict, but there is sufficient evidence to uphold the refusal of a new trial, the trial court is at full liberty to exercise its discretion in either granting or refusing a new trial. *Karnes v. Winn*, 126 Mo. App. 712, 105 S. W. 1098. Section 2022, R. S. 1909, vests large discretion in the trial judge in the granting or refusal of a new trial, and it is as much his obligation to discharge his duties under that power as it is to rule on objections to evidence and requests for instructions.

The judgment is affirmed.

STURGIS, J., concurs. ROBERTSON, P. J., concurs in all except the next preceding paragraph, as to which he expresses no opinion.

#### BRIDWELL v. SPENCER.

(Springfield Court of Appeals. Missouri.  
Dec. 11, 1913.)

Costs (§ 32\*)—PREVAILING PARTY—EQUITY.

Rev. St. 1909, § 2275, gives the court discretion to award costs, except where a different provision is made by law, and section 2263, provides that in all proceedings the prevailing party shall recover his costs, except where a different provision is made. Plaintiff sued to cancel a note and deed of trust on property bought by him from defendant, and which he assumed, and to enjoin defendant from advertising the property for sale under the deed of trust, defendant counterclaimed for expenses in securing the money to take up the debt on plaintiff's default. Plaintiff obtained a decree for a perpetual injunction on condition of payment of the principal and interest on the note, otherwise his equity of redemption to be foreclosed, and no finding was made on the counterclaim. Held, that plaintiff was entitled to costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 108-132; Dec. Dig. § 32.\*]

Appeal from Circuit Court, Stone County; John T. Moore, Judge.

Action by R. T. Bridwell against J. C. Spencer. From a judgment in his favor, but requiring him to pay certain costs, plaintiff appeals. Remanded, with directions to strike out such costs.

J. William Cook, of Crane, for appellant.

FARRINGTON, J. Plaintiff appeals from a judgment in his favor, complaining of that

part thereof which requires him to pay \$10 as "part of the expenses of this action." Aside from this, the judgment gave plaintiff the remainder of his costs.

In his petition plaintiff alleged that on August 9, 1912, he purchased from defendant certain town lots, and that defendant made him a warranty deed therefor, subject, however, to a deed of trust which defendant had previously given to secure a promissory note, dated June 6, 1911, due one year after date, for \$100, at 8 per cent. interest, payable to Robert Bassett; that plaintiff assumed the payment of this note and interest on the same from August 9, 1912, and that defendant represented to plaintiff that said note "could run" until January 1, 1913; that on December 10, 1912, plaintiff wrote Robert Bassett, offering to pay the principal of said note, with interest, on the first of the year, or to pay the accrued interest and allow the principal to run another year; that Bassett did not reply; that on January 23, 1913, plaintiff received a letter from defendant, stating: "You promised to pay the mortgage on the property you bought of me before you left Crane, but you failed to do so, and I had to take the mortgage up myself, and I will say that I have but two propositions to make you, and the first is that you call and pay this mortgage and the interest up to date, the second is to make me a deed back to the property and I will give you back your territory which I bargained for, if you are not disposed to do either, I will advertise this property and sell it under the mortgage at once. So please let me hear from you at once, so I will know what to do in regard to this matter." Plaintiff alleged that soon thereafter, and during the same month, he did call on the defendant and tendered him the amount of the principal of said note and interest accrued since August 9, 1912, which payment the defendant refused to accept; that on February 7, 1913, plaintiff by his attorney again tendered the defendant the amount of said note and interest accrued on same since August, 1912, and asked defendant to deliver the note to him, which was refused. The petition contains a paragraph again tendering the amount of the principal with interest from August 9, 1912, until February 7, 1913. The prayer is that the court cancel the note and deed of trust, that an injunction be granted restraining defendant from advertising said property for sale under the deed of trust and selling same, and that the court make such other orders and decrees as may seem just. Defendant in his answer made no defense to the action except by way of counterclaim, as follows: "Now comes the defendant in the above-entitled cause, and for his amended answer admits that he made a deed conveying lots described in plaintiff's petition, but that said deed was made in consideration of the payment of a certain note

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

secured by a deed of trust executed by defendant and wife, as set out in plaintiff's petition, but that the said plaintiff failed and refused to pay said note as agreed, and that, in order that defendant might protect himself and property on account of nonpayment, was forced to mortgage other property in order to secure the money to pay the debt assumed by the plaintiff in this cause; that in doing so he, the said defendant, was compelled to pay out and expend in obtaining the money aforesaid to the sum of \$39.53 in consequence of this fact, and that the plaintiff wholly failed to carry out his agreement. This defendant demands the payment of the original note, with interest as agreed, together with the expense that was incurred by him, the said defendant, in obtaining the money to discharge said note and deed of trust in plaintiff's petition described, and defendant denies that plaintiff had until January 1, 1913, to pay the Bassett note, but that plaintiff agreed to pay same immediately, and for such other and further orders as to the court may seem fit and proper in the premises.

"Brokerage to Shartall.....	\$30 00
Releasing deed of trust.....	1 50
Releasing deed of trust.....	25
Abstract .....	2 00
Taxes, county, state and city.....	5 78
	<hr/>
	\$39 53."

There was a conflict in the testimony as to whether plaintiff on August 9, 1912, agreed with defendant that he (plaintiff) would pay off the note for \$100 at once. The evidence is convincing that defendant borrowed, not \$100, but \$900, and that the item of \$30 covered brokerage on a loan for that amount, only a part of that amount being used in paying the Bassett note and interest. The case was submitted to the trial judge. The decree was that upon payment by plaintiff of the sum of \$104 (being the principal and accrued interest of said note), together with \$10 additional "as part of the expenses of this action," the injunction would be perpetual, and that unless plaintiff paid said amounts to the clerk of the court within a reasonable time, his equity of redemption would be foreclosed. Aside from the \$10 item, the decree gave plaintiff his costs. The court made no finding for defendant on his counterclaim. As the judgment was in appellant's favor on the merits, the only point for our consideration concerns the action of the court in taxing the costs.

Section 2275, R. S. 1909, provides: "Upon the plaintiff dismissing his suit, or defendant dismissing the same for want of prosecution, the defendant shall recover against the plaintiff his costs; and in all other cases it shall be in the discretion of the court to award costs or not, except in those cases in which a different provision is made by law."

Section 2263, R. S. 1909, provides that in

all civil actions, or proceedings of any kind, the party prevailing shall recover his costs, except in those cases in which a different provision is made by law.

The decision in the case of *Turner v. Johnson*, 95 Mo. 431, 453, 7 S. W. 570, 6 Am. St. Rep. 62, is that, as a general rule, where the plaintiff is the prevailing party in a suit in equity, he should recover his costs. The finding in the case at bar was clearly for the plaintiff, there was no finding on defendant's counterclaim, and the court, under the authorities, was vested with no discretion in the matter of costs. The case does not fall within any exception to the general rule. *Turner v. Johnson*, supra, 95 Mo. loc. cit. 452, 453, 7 S. W. 570, 6 Am. St. Rep. 62; *Schumacher v. Mehlberg*, 96 Mo. App. loc. cit. 599, 70 S. W. 910.

The cause is remanded, with directions to the circuit court to modify its judgment to the extent that the portions thereof be stricken out which require of plaintiff the payment of \$10 as costs in this action.

ROBERTSON, P. J., and STURGIS, J., concur.

#### GREER v. ORCHARD et al.

(Springfield Court of Appeals. Missouri.  
Dec. 11, 1913.)

#### 1. BILLS AND NOTES (§ 352\*)—BONA FIDE PURCHASER—"VALUE."

Since, under Negotiable Instrument Law (Rev. St. 1909, § 10,022), one of the essential elements necessary to constitute a party the holder in due course is that he took it in good faith and for value, and section 9996 defines "value" as any consideration sufficient to support a simple contract, and section 10,160 provides that "value" means valuable consideration, a wife who received a note from her husband as a gift was not a bona fide purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 814, 898-908; Dec. Dig. § 352.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7275-7280, 7826.]

#### 2. MORTGAGES (§ 283\*)—TRANSFER OF MORTGAGED PROPERTY—ASSUMPTION OF DEBT BY PURCHASER.

Where mortgaged property is conveyed to one who assumes the mortgage debt, the land becomes a primary fund for the payment thereof, and such grantee becomes the principal and the mortgagor and grantor his surety.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 756-758; Dec. Dig. § 283.\*]

#### 3. MORTGAGES (§ 280\*)—TRANSFER OF MORTGAGED PROPERTY—ASSUMPTION OF DEBT.

Though a deed did not state directly that the grantee assumed a debt secured by a trust deed on the land conveyed, yet, as the deed mentioned the trust deed, and provided that the grantor should be released from liability for the debt, it amounted to an assumption by the grantee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 737, 740-750, 757-760; Dec. Dig. § 280.\*]

Appeal from Circuit Court, Butler County; John P. Foard, Judge.

Action by Elsie Greer against George C. Orchard and others. From a judgment for defendants, plaintiff appeals. Affirmed.

David W. Hill, of Poplar Bluff, for appellant. Lew R. Thomason, of Poplar Bluff, for respondents.

ROBERTSON, P. J. On January 10, 1913, the plaintiff sued the defendants, George C. Orchard, J. D. Greason, J. H. Greason, Grace E. Smith, and Maggie H. Orchard, on a promissory note signed by them and one Samuel W. Smith, dated January 2, 1911, for the principal sum of \$3,000, payable to the order of E. W. Graves on or before two years after date, with interest at the rate of 8 per cent. per annum, payable annually, and providing that if the interest be not so paid, to become as principal and bear the same rate of interest. At the time of the execution of the note the defendants and said Samuel W. Smith owned a tract of land in Poplar Bluff upon which they executed a deed of trust to Byrd Duncan as trustee to secure the payment of said note. On January 19, 1912, \$140 was paid on the interest due on the note. Plaintiff's husband on May 1, 1912, purchased of said Samuel W. Smith his undivided one-fifth interest in the land described in the deed of trust, which was conveyed to him by a warranty deed containing the following statement: "This deed is made subject to a deed of trust given to E. W. Graves for three thousand dollars, the proceeds of which were received by James D. Greason and George C. Orchard, who have agreed to pay said debt. It being understood by the parties to this deed that the grantor is released from any obligation to pay said debt." On September 20, 1912, the plaintiff's husband purchased the note sued on and gave it to his wife, with the following indorsement thereon: "For value recd., I hereby transfer this note to Elsie Greer or order without recourse on me. E. W. Graves." Some time prior to February 12, 1913, one Henry Turner purchased the remaining four-fifths interest in the land, and on that date paid to the husband of plaintiff \$2,702.24, four-fifths of the amount due on said note, and received the following receipt:

"Butler County Bank,  
"Poplar Bluff, Mo.,  
"Feb. 12, 1913.

"Received of Henry Turner on note and deed of trust for \$3,000.00, dated Jan. 2, 1911—given to E. W. Graves by Smith heirs, on a part of lot 78 of the original town of Poplar Bluff, Mo.,

\$2,400 00 on principal.  
302 24 on interest.

\$2,702 24 A. W. Greer."

The answer filed by the defendants on April 9, 1913, admits the execution of the note, pleads the facts as above disclosed by the testimony, but alleges payment of said

note. The plaintiff's replication is a general denial. The case was tried to the court without a jury, and resulted in a judgment for the defendants, and the plaintiff has appealed.

[1] In the first place it is essential to determine the status of the plaintiff in this case relative to the note in controversy and the parties thereto. She is in no better position than had the note in question been transferred to her husband, except that the bare legal title may be vested in her. She cannot be held to be a bona fide holder for value within the meaning of our negotiable instrument law. One of the essential elements necessary to constitute a party a holder in due course (section 10,022, R. S. 1909) is "(3) that he took it in good faith and for value." Section 9996, R. S. 1909, defines "value" as "any consideration sufficient to support a simple contract." Also, in section 10,160, R. S. 1909, it is provided that "'value' means valuable consideration." In 1 Daniel on Negotiable Instruments (5th Ed.) § 181, it is said: "A gift of a negotiable instrument of a third party is not such a negotiation of it in the usual course of business as to give the donee the full protection which is extended a bona fide holder for value." The reason for the rule which protects a bona fide purchaser for value and makes it applicable to commercial paper is absent in case of a gift of such paper from one person to another, where the purchaser and donor is familiar with all of the facts affecting the condition of the note.

[2] The general rule in this state is well established that where mortgaged property is conveyed to one who assumes the mortgage debt the land becomes the primary fund for the payment thereof, and such grantee becomes the principal in such debt and the mortgagor and grantor his surety. Nelson v. Brown, 140 Mo. 580, 589, 41 S. W. 900, 62 Am. St. Rep. 755; Regan v. Williams, 185 Mo. 620, 627, 84 S. W. 959, 105 Am. St. Rep. 600; Pratt v. Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602.

[3] The stipulation in the deed to plaintiff's husband does not state directly that he assumes and agrees to pay the debt here involved, but what he did agree to can have no other meaning. He agreed that his grantor was released therefrom, and as between them, such release could be effected in no other manner.

According to the testimony of experts, which was undenied by plaintiff's husband, who was a witness, the reasonable value of the undivided one-fifth interest, which he purchased in the land, was equal to, if not greater than, the amount he paid in cash plus the one-fifth of the debt involved here, and the party who bought the remaining four-fifths interest in the land testified that he, as part of the consideration therefor, assumed and agreed to pay four-fifths of said debt, so that it would appear that when the



trial court refused to permit the plaintiff in this case to recover no injustice was done.

It is stated in the deed to plaintiff's husband that the proceeds of the loan were received by two of the grantors in the deed of trust, who agreed to pay said debt, yet those two parties were not parties to the stipulation in the warranty deed, and consequently no evidence is thus furnished that the debt was equitably that of any other parties than as indicated by the note and deed of trust. It was also developed as above stated at the trial, and without objection on the part of the plaintiff, that the party who purchased the undivided four-fifths interest in the land paid that proportion of the debt to the plaintiff's husband, and as the husband of plaintiff had previously assumed the remaining one-fifth of said indebtedness, we have been unable to understand why the judgment of the trial court should not stand. The plaintiff's husband, the real party in interest here, is in the position of having become obligated to pay one-fifth of the indebtedness and of having received from the owner of the remaining four-fifths interest the balance due on the note. If, as stated in the deed to plaintiff's husband, the proceeds of the note were received by James D. Greason and George C. Orchard and they had agreed to pay said debt, that is a matter between the makers of the note, with which the plaintiff in this case could have no concern, and about which we announce no opinion.

The judgment of the trial court is affirmed. All concur.

SKELLEY v. ST. LOUIS & S. F. R. CO.  
(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

1. LIBEL AND SLANDER (§ 1½\*)—LIBEL—DEFENSE—STATUTES.

Rev. St. 1909, § 4818, defining libel is merely declaratory of the common law.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 1½.\*]

2. LIBEL AND SLANDER (§ 86\*)—"INNUENDO."

The purpose of an "innuendo," in an action for libel or slander, is to point out the meaning which plaintiff claims to be the true meaning of the defamatory language, and that on which he relies to sustain his action, and is required whenever the words alleged to be libelous are ambiguous, whether the ambiguity is patent or latent, and whether there are any facts alleged as inducement.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205-208; Dec. Dig. § 86.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3630-3634.]

3. LIBEL AND SLANDER (§ 86\*) — LIBELOUS WORDS—INNUENDO—CONCLUSIVENESS.

Where plaintiff, in an action for libel by innuendo, puts a meaning on the language published, he is bound by it.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205-208; Dec. Dig. § 86.\*]

4. LIBEL AND SLANDER (§ 100\*)—PETITION—INNUENDO.

Plaintiff, in an action for libel against a railroad company, arising out of a statement of the railroad company's agent in a freight expense bill, did not allege that defendant published certain false and slanderous words intending to charge plaintiff with larceny, but alleged that defendant falsely charged plaintiff with larceny by publishing a statement on the bill, sent to a consignee of certain logs, that plaintiff "confiscated" certain fence posts belonging to the railroad company. Held, that the gist of the petition was that defendant charged plaintiff with larceny, the publication of the words being merely stated as the means by which such charge was made, and hence the action could not be sustained without proof of the innuendo, unless the word "confiscated" necessarily imported a charge of larceny.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 246-256, 258-272, 291, 322, 323; Dec. Dig. § 100.\*]

5. LIBEL AND SLANDER (§ 7\*) — LIBELOUS WORDS—"CONFISCATED."

Where defendant's freight agent, believing that plaintiff in loading logs for shipment took certain fence posts belonging to the railroad company to hold the logs on the car, included in the freight expense bill, which was sent to the consignee, a charge for posts "confiscated by shipper," the word "confiscated" in its popular sense did not import a larceny of the posts by plaintiff, since the word is ordinarily used to mean a transfer of property from private to public use, or a forfeiture of the property to the state as an act of penal justice for punishment of crime, etc., and as used in the bill meant only that plaintiff had taken property belonging to the railroad company, which it was entirely willing he should take on paying the reasonable value thereof, and was not therefore libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1427, 1428.]

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by J. A. Skelley against the St. Louis & San Francisco Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Shannon & Phelps, of Carthage, for appellant. W. F. Evans, of St. Louis, and Mann, Todd & Mann, of Springfield, for respondent.

STURGIS, J. Action for libel. No evidence was offered except by plaintiff. The court sustained a demurrer to this evidence, resulting in plaintiff's appeal.

The pleadings and evidence may be considered together. The words charged as constituting the libel are, "For 8 company fence posts at 10c confiscated by shipper, 80," and this language is alleged to have been one item and part of a freight bill sent by the defendant for collection to the consignee of a car of walnut logs shipped by plaintiff over defendant's railroad. The matter arose in this way: The plaintiff was engaged in shipping walnut logs, and in November, 1912, shipped a car load from Verona, Mo., consigned to a firm in Kansas City; the plaintiff used eight fence posts in loading the logs

and securing them on the car; the local agent of defendant at Verona erroneously thought that plaintiff used posts belonging to defendant, from a pile of such posts on its right of way. In making out the waybill he made notation of same in the language above set out, with the item of freight charges and other items, and forwarded same to the defendant's office at Kansas City. A freight bill was then made out by a clerk of defendant in the Kansas City office, who it was agreed did not know and had never heard of plaintiff, and presented it to the consignee for payment and the same was paid. This freight bill is as follows:

**"Freight Bill.**

"Consignee: Penrod Walnut and Veneer Company, to St. Louis & San Francisco Railroad Co., Dr. Billing Station: Verona. Consignor: J. A. Skelley. Road issuing waybill: St. L. & S. F. R. Co.

77 walnut logs, freight charges.....	\$67 41
5 days' demurrage at Verona.....	5 00
For 8 company fence posts, at 10c	
confiscated by shipper.....	80
For rearranging logs, etc.....	9 25

Total charges ..... \$82 46 "

This freight bill contains the alleged libel, and its presentation to this consignee for payment constitutes its only publication.

The plaintiff proved that the fence posts in question were not the property of defendant, as defendant's local agent supposed, but that he bought the same from a local dealer at Verona. The local agent, who made out the waybill from which this and other items were copied into the freight bill above set out, was a witness for plaintiff, and testified that "the word 'confiscated' as used upon this bill is a term used by railroad men generally to show that company property has been used by the shipper, and that if it was taken away on the car the agent of the company at the destination was to collect the value of the property so used. It is not used by railroad men generally to mean that the property has been stolen, but simply to keep track of the railroad company's property. When I used the word 'confiscated' on this bill I did not intend to indicate that Mr. Skelley had stolen these posts. I used it for the purpose of informing the agent at Kansas City that there were eight fence posts on this car belonging to the railroad company, and that if the consignee took them away he was to pay their value, which was 80 cents. I always understood it to mean when you wanted anything you just went and took it and suffered the consequences; that is, took it with the understanding that it wasn't mine, but that I would use it, and would expect to make good to the owner whenever he called on me for it."

The petition in this case is somewhat different from the usual form of charging that defendant falsely and maliciously published of and concerning the plaintiff the defamatory words, setting them out in *hæc verba*,

thereby meaning and intending to charge, etc.—setting out whatever libelous meaning the plaintiff thinks the words will support. In this case it is charged thus: "Plaintiff further says that in loading said car with said logs he used eight fence posts for the purpose of securing said logs on said car, but that said fence posts belonged to the plaintiff and not to the defendant, and that by sending said freight bill to said consignee containing said words and figures, viz., 'For 8 company fence posts at 10c confiscated by shipper, 80,' the defendant falsely and maliciously intended to charge and publish, and did charge and publish, that the plaintiff had unlawfully taken, stolen, and carried away eight fence posts belonging to the defendant of the value of 80 cents, and that the said words and figures were so understood by said consignee and its officers and servants."

[1] There was no proof whatever as to the way in which the consignee or any one else understood these words. The plaintiff concedes this, and says that this innuendo (?) may be treated as surplusage, in that the words are unequivocal and actionable per se, and can be stripped of the useless luggage contained in the innuendo and still make a case for the jury. This concedes that the language and proof does not support the meaning and charge given by the innuendo, to wit, larceny. But plaintiff contends that the words charged are inoculated with and carry their own, though different, poison amounting to slander, under the statutory definition (section 4818, R. S. 1909), to wit: "A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives and friends. (R. S. 1899, sec. 2259)." This definition is not different from the common-law definition as is pointed out in *Kenworthy v. Journal Co.*, 117 Mo. App. 327, 335, 93 S. W. 882, where it is said that the object and purpose of the statute is to make all libels misdemeanors—i. e., criminal—and not to make any publication libelous that was not such at common law.

[2, 3] In *Callahan v. Ingram*, 122 Mo. 355, 366, 26 S. W. 1020, 1022 (43 Am. St. Rep. 583), the court said: "The innuendo is intended to define the defamatory meaning which the plaintiff places upon the words used. In case the defamatory meaning is apparent from the language charged, there is no necessity for an innuendo at all. The purpose of the innuendo, and its effect upon the party pleading it, is thus expressed by Townshend in his work on Slander and Libel

(section 338): 'Where language is ambiguous, and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out the meaning which the plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. This applies, whether the ambiguity be patent or latent, and whether or not there are any facts alleged as inducement. By this means the defendant is informed of the precise charge he has to meet, and to deny or justify; but the plaintiff is subjected to the risk that if he claims for the language a meaning which is not the true one, or one which he is unable to make out satisfactorily, he may be defeated on the ground of variance or failure of proof. For, when the plaintiff, by his innuendo, puts a meaning on the language published, he is bound by it, although that course may destroy his right to maintain the action.' To the same effect see Starkie on Slander and Libel (Folkard's Ed.) § 446; Newell on Defamation, Slander, and Libel, p. 629, § 39; Odgers on Libel and Slander, p. 100."

In *Ukman v. Daily Record Co.*, 189 Mo. 378, 394, 88 S. W. 60, 65, the court said: "Here, it is contended that these words impute insolvency or dishonest trickery in a business way. But by this contention of appellant it is sought to enlarge the meaning of the words, as set forth in the innuendo, which he may not do. 13 Ency. Pl. and Pr., p. 55; Townsh. on S. and L., § 338. If appellant desired to attribute such a meaning to the words, he should have so framed his innuendo."

In the late case of *Walsh v. Pulitzer Pub. Co.*, 250 Mo. 142, 149, 157 S. W. 326, 328, the court stated the principle thus: "For instance, where words have two meanings, one of them harmless and the other injurious, the innuendo may properly point out the injurious meaning. *Curtis v. Iseman*, 137 Ky. 796 [127 S. W. 150]; *Joralemon v. Pomeroy*, 22 N. J. Law, 271; *Grant v. N. Y. Herald Co.*, 138 App. Div. 727 [123 N. Y. Supp. 449]; *Gosling v. Morgan*, 32 Pa. 273. \* \* \* A court will not, in support of a pleading, infer a criminal intention when the pleader has not ventured directly to aver its existence. *Grand v. N. Y. Herald Co.*, 138 App. Div. 727, 123 N. Y. Supp. 449; *Bartholomew v. Bentley*, 15 Ohio, loc. cit. 670 [45 Am. Dec. 596]."

It will thus be seen that the office of the innuendo is to point out the poisonous meaning whenever the words are of doubtful or double meaning, one libelous and the other not, and in such cases the innuendo is a necessary part of the petition, and may not be enlarged or departed from either when the proof is made by extrinsic evidence, or is inferred from the words themselves. *Ukman v. Daily Record Co.*, 189 Mo. 378, 393, 394, 88 S. W. 60. Much more would this be true

where, as in this case, what is termed the innuendo is the whole charging part of the petition.

[4] It will be noted that this petition, instead of alleging that defendant published certain false and slanderous words, thereby meaning and intending to charge plaintiff with larceny, it alleges that defendant falsely charged plaintiff with larceny by publishing these words. The whole gist of this petition is that defendant charged plaintiff with larceny, and the publication of these words is merely stated as the means of so doing.

It is true that in *Callahan v. Ingram*, 122 Mo. 355, 367, 26 S. W. 1020, 43 Am. St. Rep. 583, and in *Cook v. Printing Co.*, 227 Mo. 471, 526, 127 S. W. 332, the court held that the innuendo and the meaning of the words pointed out thereby may be disregarded and treated as surplusage when not necessary to state a cause of action. But, as we have just shown, the innuendo is necessary to state a cause of action in all cases where the words published are of doubtful, double, or equivocal meaning, and might, when unaided by extrinsic evidence, be understood in a harmless sense. In order, therefore, to disregard the innuendo, the published words must not only be libelous per se in the sense that the jury might have a right to infer and find the libelous meaning from the words themselves and the publication (*McGinnis v. Knapp & Co.*, 109 Mo. 131, 140, 18 S. W. 1134), but such words must be necessarily libelous under any fair interpretation, and rebut every reasonable inference to the contrary. Learned counsel for appellant correctly says: "It may have two or more meanings; and, although it may not be certain from the publication itself in what sense it was used, if its several meanings are all libelous, per se, it is not necessary to prove in what sense it was used or understood." We also readily agree that in order to be libelous per se it is not essential that words should involve imputation of crime. 25 Cyc. 253; *McGinnis v. Knapp & Co.*, 109 Mo. 131, 18 S. W. 1134; *Sullivan v. Commission Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859. On the point now being discussed, the case of *McGinnis v. Knapp & Co.*, supra, is not applicable, for the reason that the court was there considering, on a demurrer to the petition, whether the language used was capable, with the aid of extrinsic evidence, of bearing the meaning put on it by the innuendo, and held that, as the demurrer admits the falsity of the charge and the meaning placed thereon by the innuendo, and that the readers so understood it, the question is always one for the jury, unless the language is so unquestionably not libelous that the court will not listen to proof that it was in fact such and was so understood.

[5] The only word in the publication now being considered which is claimed to be libel-

ous is the word "confiscated" and it is argued that such word in a popular sense carries the idea of high-handed dealings—the taking of another's property without intent to pay for same. The question, however, presented under the pleadings here is, Does such word necessarily carry such meaning? We think not. On the contrary, we think that, taken in connection with the context and under the circumstances and purpose for which the freight bill was made out, it is not fairly susceptible of any libelous meaning. Technically "confiscate" means to "transfer property from private to public use, or to forfeit property to the prince or state; either an act of penal justice for punishment of great crimes against the state, or the exercise of a belligerent right against the property of public enemies; the act of a sovereign against a rebellious subject." 8 Cyc. p. 567. Similar definitions will be found in *Ware v. Hylton*, 3 U. S. (3 Dall.) 199, 234, 1 L. Ed. 568, and *State ex rel. Rosenblatt v. Sargent*, 12 Mo. App. 228, 234. Such, too, is the common meaning when we speak of any legislative act fixing rates to be charged by public service corporations. Such laws and rates are said to be confiscatory when they compel such corporations to serve the public without any or an inadequate compensation, and thus in effect transfers property from private to public use. In this sense an individual could not confiscate anything; only the state or government can confiscate; that is, take or transfer private property to a public use. In this sense the context in which the word is used carries its own antidote for any supposed poison. There are many cases holding that where the publication, taken as a whole, negatives the harmful meaning, or shows the alleged wrongful act to be impossible, the words are not actionable. Thus in *Newell on Slander and Libel*, 2d Ed. 117, the following language of Chief Justice Shaw of the Supreme Court of Massachusetts is stated to be the rule: "The natural and most obvious import of the word 'steal' is that of a felonious taking of property, or larceny, but it may be qualified by the context. As if one says of another 'He stole apples from my trees,' it imputes a trespass and not a felony, and the words are not actionable." And in *Ogden v. Riley*, 14 N. J. Law, 186, 25 Am. Dec. 513, the words complained of were, "You are a thief; you have stolen my marle." These words were held to be not actionable because marle, being a mineral, was a part of the freehold, and therefore was not a subject of larceny. *Ogden v. Riley* is cited and followed in *Trimble v. Foster*, 87 Mo. 49, 56 Am. Rep. 440. Thus it is not actionable to say of a man, "He stole my farm," because a farm is not the subject of larceny. We apprehend, however, that these rulings mean no more than that the language charged, when read with the context, does not support the particular charge alleged. While the publication of an accusa-

tion of stealing a farm will not support an innuendo of larceny, we apprehend that it might support an innuendo of dishonesty or unfair dealing. In the present case, however, as in *Diener v. Publishing Co.*, 230 Mo. 613, 132 S. W. 1143, 33 L. R. A. (N. S.) 216, and *Id.*, 232 Mo. 416, 135 S. W. 6, the context, circumstances, and purpose of the publication negatives any bad intent or meaning. In that case the words "kill" and "killer," when taken in connection with the context, were held not fairly susceptible of being construed to mean the unlawful or criminal taking of human life. In the first case (230 Mo. 613, 628, 132 S. W. 1143, 1148) the court said: "To be sure, he might have used daintier language and put his screed into a softer or more roundabout form. He might have said the child was overtaken by an automobile and came to its death thereby, or its death was caused thereby, or that its death ensued, or that it gave up the ghost," etc. And in the second one (232 Mo. 416, 135 S. W. 6) it is said: "Libel cannot hang on so slender a thread as a mere matter of taste in the penman's selection of one word instead of another one, interchangeable as a synonym or (by condensation) in using laconically one word instead of expending and diluting his idea into a phrase, thereby toning and softening it down."

In this case the word "confiscated" was used and published only in presenting a freight bill for payment. No one saw the publication except the consignee, and that only in the regular course of business. The facts negative any intent or concerted action of the local agent and clerk in the freight office to give it publicity, or to do the plaintiff any harm. The language charged to be libelous merely constituted one small item of several which were to be paid by the consignee and charged back to the plaintiff, and no more indicated that plaintiff was wrongfully refusing or trying to evade the payment of this item than the freight charges or demurrage constituting the other items. The plain inference is that the defendant was making no objection to the taking and use of its fence posts, provided the same be paid for.

It is true that words when printed may constitute libel, which, if spoken, would not constitute slander. *Ukman v. Daily Record Co.*, 189 Mo. 378, 391, 88 S. W. 60, 64. But if the reason there given that "an oral charge merely falls upon the ear, and the agency of the wrongdoer in inflicting injury comes to an end when his utterance has died on the ear, but not so with the written or printed charge, which may pass from hand to hand indefinitely and may renew its youth, so to speak, as a defamation as long as the libel itself remains in existence, and hatch a new crop of slanders, to be blown hither and yon, like thistledown, at every sight of the libel, so that a printed slander, when published, takes a wider and more mischievous range

than mere oral defamation, and is more reprehensible in the eye of the law (Cooley on Torts [2d Ed.] 240; Odgers on Lib. and Sl. [2d Ed.] 3; Dexter v. Spear, 4 Mason, 115 [Fed. Cas. No. 3,897])"—is the basis of the distinction, such distinction does not exist here, for the inference here is that no one except the person paying the freight bill ever saw the publication. If it be true, as often held, that a slander only exists in the ear of the hearer (*Diener v. Publishing Co.*, 230 Mo. 613, 629, 132 S. W. 1143), and a libel in the apprehension of the reader, then it is significant that the only reader of this alleged libel was not called as a witness in the case.

Our conclusion is that the court did not err in sustaining the demurrer, and the judgment will be affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

#### HILL v. DILLON et al.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

#### 1. BILLS AND NOTES (§ 497\*) — BONA FIDE HOLDER—BURDEN OF PROOF.

Negotiable Instruments Law (Rev. St. 1909, § 10022) defines a holder in due course, and section 10025 provides that the title of a person who negotiates an instrument is defective when he has obtained it, or any signature thereto, by fraud, duress, force, fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under circumstances amounting to fraud. Section 10029 declares that every holder is deemed prima facie a holder in due course, but, when it is shown that the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he or some one under whom he claims acquired title as a holder in due course. *Held* that, when, in an action by an indorsee of a note, it is shown that the title of the payee was defective because the instrument was obtained by fraud, the burden is then shifted to the plaintiff to prove that he acquired the title as to the holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.\*]

#### 2. BILLS AND NOTES (§ 537\*)—ACTION BY INDORSEE—BONA FIDE HOLDER—QUESTION FOR JURY.

Where, in an action on a note by an indorsee, defendants introduced evidence that the execution of the note was obtained by fraud, and plaintiff offered uncontradicted evidence that he was a holder in due course, such evidence created an issue of fact which was exclusively for the jury, notwithstanding the only evidence on the question whether plaintiff was a holder in due course was that introduced by plaintiff, and all of it tended to establish the affirmative of the issue, subject to the right of the court to set aside the verdict, if clearly against the weight of the evidence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.\*]

#### 3. CORPORATIONS (§ 116\*)—EXECUTION—FAILURE OF CONSIDERATION.

Where defendants executed a note for the price of corporate stock, purchased from plain-

tiff's assignor, and it appeared that the corporation owned title in fee to ten acres of land, together with a mining lease on a much larger tract and a mining plant, all of which were subject to incumbrances of a deed of trust, but defendants knew just what property the corporation owned and knew of the incumbrances and did not exact or receive any warranty in connection with the deal, the fact that the properties owned by the corporation did not prove to be as valuable as defendants expected, and that the company's operations were unprofitable, did not show a failure of consideration for the notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. § 116.\*]

#### 4. BILLS AND NOTES (§ 497\*)—NEGOTIATION—HOLDER IN DUE COURSE—NEGOTIABLE INSTRUMENTS—BURDEN OF PROOF—FAILURE OF CONSIDERATION.

Rev. St. 1909, § 10029, provides that every holder is deemed prima facie a holder in due course, and, when it is shown that the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he or some one under whom he claims acquired title as holder in due course. *Held*, that mere want or failure of consideration, not coupled with a negotiation of the note in breach of faith, or under such circumstances as will amount to fraud, does not constitute a defective title and is therefore insufficient to change the burden of proof in such section.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.\*]

#### 5. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action on a note by an indorsee, the answer charged fraudulent representations by the payee "in conjunction with other parties" not named, but did not charge that plaintiff made any of such representations, and there was no evidence that plaintiff acted in conjunction with the payee or any one else in inducing defendants to execute the notes, or in any wise assisted in making the deal, the notes were not given in such a manner as to connect plaintiff with the fraud, and an instruction that if the jury found for defendants on the question of fraudulent representation, and believed that plaintiff, before the assignment of the note to him, knew of the fraud "or" acted in conjunction with the payee and others in inducing defendants to execute the notes, they should find for defendants was erroneous as unsupported by the proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

#### 6. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction not justified by any evidence in the case should be refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

#### 7. CORPORATIONS (§ 121\*)—SALE OF STOCK—PURCHASE—MONEY NOTE — ACTION BY INDORSEE—EVIDENCE—RELEVANCY.

In an action by an indorsee on a note given by defendants for the price of stock in a mining corporation, evidence of a third person that he bought some stock in the company through the influence of two persons, one of whom represented to him that the mine was a paying one, in connection with other evidence that such person was connected with the payee of the note sued on, but not tending to show that plaintiff had any connection therewith or knowledge of any alleged fraud on defendants

in the sale of the stock to them, was inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by Edward C. Hill against T. J. Dillon and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Edgar P. Mann, of Springfield, and William B. Skinner, of Mt. Vernon, for appellant. J. B. McGuffin, of Aurora, George Pepperdine, of Springfield, and H. H. Bloss, of Aurora, for respondents.

SPENCER, Special Judge. This is the second appeal of this case. The opinion on the former appeal is reported in 151 Mo. App. 86, 131 S. W. 728. The action is on a negotiable promissory note and brought by an indorsee against the makers. The petition is in the usual form. The answer consists: First. Of a general denial. Second. Of an admission of the execution of the note and of the indorsement, with a specific denial that the plaintiff is a purchaser for value before maturity, it being alleged that the assignment of the note to plaintiff was without consideration and to enable the payee to recover the amount of the note and prevent defendants from setting up the defenses later mentioned; that the note is held in secret trust by plaintiff for the payee, who is charged to be the real party in interest. The charge that the assignment was colorable, and that plaintiff holds the note in secret trust for the payee, is not supported by any evidence. Third. It is alleged that the execution of the note was procured by certain fraudulent representations and acts by the payee, Hart, and others who are not named. These representations and acts are set out in detail. They are discussed in the former opinion and need not be repeated here. Fourth. The answer charges that the consideration of the note was certain mining stock in a corporation; that the value of the stock was dependent on the value of a mining lease belonging to the corporation and alleged to be its sole and only asset; and that the payee in the note, to induce the purchase of the stock by defendants, falsely and fraudulently represented that the stock was dividend paying stock and extremely valuable, when in fact the stock had no value at all and had never paid a cent of dividend, and the consideration for the giving of the note had utterly failed. For reply plaintiff alleges that he is the holder of the note in due course, stating the facts essential to this relation. The reply then states facts on which it is sought to base a plea of estoppel as against defendants as to the defenses set up in their answer. It was held in the former opinion that the matters pleaded and shown in evidence

do not estop defendants from setting up fraud in the procurement of the note as a defense against payment. This ruling was correct, and it is not necessary to reiterate here the reasons therefor.

The opinion on the former appeal gives somewhat in detail the facts tending to sustain the answer that the execution of the note was procured by fraudulent representations and acts. Reference is made to that opinion for these facts. The evidence on this question was substantially the same at each trial. It was held on the former appeal that the evidence on this question was sufficient to entitle defendants to go to the jury on the question of the note having been procured by fraud. In this opinion we concur.

[1] Appellant contends for the application in this case of the rule that the possession of a negotiable instrument indorsed in blank imports prima facie that the holder acquired it bona fide, for value, in the usual course of business, before maturity, and without notice of any circumstances impeaching its validity; also that plaintiff's evidence tended to prove this situation; and that, as there was no evidence to the contrary, plaintiff was entitled to a peremptory instruction directing a verdict in his favor. In this connection it is urged that the court erred in refusing instruction No. 4, asked by plaintiff, which is as follows: "The court instructs the jury that the instrument sued on in this case is a negotiable promissory note, and the defendants admit in their answer that they executed the same and that it has been assigned to the plaintiff, and in law it is presumed that such note was negotiated with plaintiff before maturity, for value, and without notice of any defense thereto."

The cases cited by appellant on this point arose before the enactment of our Negotiable Instruments Law, while this question must be determined by the provisions of that law. Section 10022, R. S. Mo. 1909, defines a holder in due course as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 10025 provides when the title of a person who negotiates an instrument is defective, and is as follows: "The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negoti-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

ates it in breach of faith, or under such circumstances as amount to a fraud."

Section 10029 locates the burden of proof when defective title is shown, and is as follows: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

Under the plain provisions of these sections, when it was shown that the title of the payee was defective because the instrument was obtained by fraud, then the burden rested on the plaintiff to prove that he acquired the title as holder in due course. This has been previously ruled in this state. *Jobes v. Wilson*, 140 Mo. App. 281, 292, 124 S. W. 548; *Bank v. Hanks*, 142 Mo. App. 110, 125 S. W. 221; *Johnson County Savings Bank v. Mills*, 143 Mo. App. 265, 127 S. W. 425; *Bank v. Dowler*, 163 Mo. App. 65, 145 S. W. 843; *Link v. Jackson*, 164 Mo. App. 195, 147 S. W. 1114. Possibly the opinion in *Reeves v. Letts*, 143 Mo. App. 196, 128 S. W. 246, is to the contrary, but in this case the provisions of the Negotiable Instruments Law were not presented to or mentioned by the court. If this case is in conflict with the cases above cited, it must be held as overruled by *Southwest National Bank v. House*, 157 S. W. 809, decided by the same court, which declares the rule in harmony with the cases above cited. The same construction of these sections has been given by the courts of various other states having a similar statute relating to negotiable instruments. *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 504; *Bank v. Foley*, 54 Misc. Rep. 126, 103 N. Y. Supp. 553; *Packard v. Figliuolo* (Sup.) 114 N. Y. Supp. 753; *Kennedy v. Spilka*, 72 Misc. Rep. 89, 129 N. Y. Supp. 390; *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884; *Singer Mfg. Co. v. Summers*, 143 N. C. 102, 55 S. E. 522; *Am. Natl. Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738; *Cook v. Co.*, 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; *Louis De Jonge & Co. v. Woodport, etc., Co.*, 77 N. J. Law, 233, 72 Atl. 439; *Parsons v. Company*, 80 Conn. 58, 66 Atl. 1024; *Stouffer v. Alford*, 114 Md. 110, 78 Atl. 387; *Wilson v. Kelso*, 115 Md. 162, 80 Atl. 895; *Second Natl. Bank v. Hoffman*, 229 Pa. 429, 78 Atl. 1002; *McKnight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665; *Iowa Natl. Bank v. Carter*, 144 Iowa, 715, 123 N. W. 237; *Arnd v. Aylesworth*, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638; *Cox v. Cline*, 139 Iowa, 128, 117 N. W. 48; *Warren v. Smith*, 35 Utah, 455, 100 Pac. 1069, 136 Am. St. Rep. 1071; *Leavitt v. Thurston*, 38 Utah, 351, 118 Pac. 77; *Cedar Rapids Natl. Bank*

*v. Myhre*, 57 Wash. 596, 107 Pac. 518; *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907; *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302; *Shellenberger v. Nourse*, 20 Idaho, 323, 118 Pac. 508; *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192; *Asbury v. Taube*, 151 Ky. 142, 151 S. W. 372; *Campbell v. Bank*, 137 Ky. 555, 126 S. W. 114; *In re Hill* (D. C.) 187 Fed. 214.

[2] The situation, then, is that the defendants introduced evidence tending to prove that the execution of the note was induced by fraud, and the plaintiff offered evidence, not contradicted, tending to prove that he was a holder in due course. The burden rested on plaintiff to show this under the statute. This created an issue of fact which was exclusively for the jury, notwithstanding the fact that the only evidence on this question was that introduced by plaintiff, and that all of this evidence tended to prove that he was a holder in due course. The decision of this question was solely the province of the jury, and the court, under the decisions in this state, could not invade that field and peremptorily direct a verdict for plaintiff. *Gannon v. Gas Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Link v. Jackson*, 158 Mo. App. 63, 92, 139 S. W. 588; *Dalton v. City*, 173 Mo. 39, 72 S. W. 1068; *First State Bank v. Hammond*, 124 Mo. App. 177, 101 S. W. 677; *McCrosky v. Murray*, 142 Mo. App. 133, 125 S. W. 226; *Hugumin v. Hinds*, 97 Mo. App. 346, 71 S. W. 479; *Kingsbury v. Joseph*, 94 Mo. App. 298, 68 S. W. 93; *Dodd v. Guileffi*, 100 Mo. App. 311, 73 S. W. 304; *Hunter v. Wethington*, 205 Mo. 284, 293, 103 S. W. 543, 12 Ann. Cas. 529; *Johnson v. Grayson*, 230 Mo. 380, 394, 130 S. W. 673.

The case of *Wright Investment Co. v. Friscoe Realty Co.*, 178 Mo. 72-80, 77 S. W. 296, cited by appellant, is not to the contrary. Suit was on a note, and the case arose before the enactment of the Negotiable Instruments Law. Under the rule declared in *Johnson v. McMurry*, 72 Mo. at 282, also cited by appellant, where plaintiff made general proof that he received the paper before due, bona fide and for value, it devolved on the maker to show that the holder had actual notice of the defense urged. This the defendant in the *Wright Case* had failed to do. But the statute has changed this rule. It follows that this point must be determined against the appellant. We deem it proper to state here, however, that any error on the part of the jury in determining a question against the weight of the evidence is within the power of the trial court to correct, and, where the verdict is clearly against the weight of the evidence, the trial court should promptly and fearlessly exercise the power given it by the statutes and set the verdict aside.

It is somewhat difficult to construe the fourth paragraph of the answer, as it seems to blend the allegations of fraud on the part of the payee in falsely representing that the stock was dividend paying stock and ex-

tremely valuable, when in fact it had never paid a dividend and had no value, with the plea that the consideration for the note had utterly failed. But for the instructions given by the court on behalf of defendants, as hereinafter mentioned, a careful consideration of this portion of the answer might not be necessary, but these instructions make this question of considerable importance. We do not find in the record any evidence tending to prove the allegation that the payee represented that said stock was dividend paying stock or had ever paid any dividend, or that the mine had ever paid any profit, so the charge of fraud in this respect entirely failed of proof. This leaves for determination the plea that the consideration for the note utterly failed.

[3] This question of failure of consideration is to be considered entirely apart from any fraudulent representations, and also from any warranty. It is not pretended that the purchasers, who are the makers of the note, exacted or received any warranty in connection with the deal. The evidence shows that defendants bought stock in a corporation, which corporation owned title in fee to ten acres of land, together with a mining lease on a much larger tract, and also owned a mining plant; all of said property being subject to the incumbrance of a deed of trust. The defendants knew just what property the mining corporation owned and knew of the incumbrance by way of deed of trust. They contracted to buy and did in fact acquire certain shares of stock in this corporation. The corporation had the title to the property owned by it in precisely the condition that defendants understood. The question, then, is whether the fact that the properties owned by the corporation did not prove to be of the value the defendants expected, and that the company operations were unprofitable and resulted in the loss of considerable money by defendants and others, is in law a failure of consideration in the sense that same is now being discussed. We think this question should be answered in the negative.

In 9 Cyc. 369, the rule is stated as follows: "On a sale of personal property, it is generally held that, in the absence of fraud or warranty, it is no ground for defeating the action for the price that the article proves so defective in quality as to be worthless." *Sutro v. Rhodes*, 92 Cal. 117, 28 Pac. 98.

*Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496, was a case of the sale of bonds subsequently held to be void because the Legislature had no power to pass the acts authorizing same. Note was given for the purchase price and suit brought thereon. The defense asserted was failure of consideration. The opinion first points out that the questions of fraud and warranty are to be laid out of view, and then uses the following language pertinent to the present case: "Here, also, the plaintiffs in error got exactly what they intended to

buy and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume." To the same effect is *Hunting v. Downer*, 151 Mass. 275, 23 N. E. 832, where the court states the rule as follows: "The mere purchase of worthless stock, and known by the seller to be such, will not exonerate the buyer from paying the price agreed on therefor, where he has obtained that for which he contracted and where no fraud was practiced on him. *Dean v. Caruth*, 108 Mass. 242, 245; *Lambert v. Heath*, 15 Mees. & W. 487; *Lawes v. Purser*, 6 El. & Bl. 930; *Bryant v. Pember*, 45 Vt. 487. Where that which is assumed to be bargained for and sold has no existence, a different principle applies; and for this reason it has been held that the sale of a void patent, or of a license thereunder, would not be consideration for a contract. *Harlow v. Putnam*, 124 Mass. 552, 555."

This statement is not in any wise in conflict with the rule stated in *Brown v. Welden*, 99 Mo. 564, 13 S. W. 342; *Id.*, 27 Mo. App. 251; *Compton v. Parsons*, 76 Mo. 455; *Danforth v. Crookshanks*, 68 Mo. App. 311; or *Murphy v. Gay*, 37 Mo. 535. In these cases there appears either fraud or breach of an express or implied warranty. Most of them are where an article was sold or purchased for a particular purpose known to both parties. In such cases there is an implied warranty of fitness for the purpose intended. *St. Louis Brewing Co. v. McEnroe*, 80 Mo. App. 429; *Aultman v. Hunter*, 82 Mo. App. 632; *Moore v. Koger*, 113 Mo. App. 423, 87 S. W. 602. In 9 Cyc. 371, the rule is stated that, if there is consideration, the fact that it subsequently diminishes in value or becomes of no value at all cannot relieve the promisor from liability on his promise. "Where a party gets all the consideration he voluntarily and intentionally contracts for, he will not be allowed to say that he got no consideration. *Baker v. Roberts* 14 Ind. 552." *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *Bean v. Proseus*, 3 Cal. Unrep. 558, 31 Pac. 49; *Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46.

In an action upon a promissory note given as the price of real or personal property, it is no defense that the value of the property conveyed was inadequate to the amount of the note. 6 Am. & Eng. Ency. of Law (2d Ed.) 695.

In *Worth v. Case*, 42 N. Y. 362, 369, the court states the rule: "If one voluntarily and fairly purchases either real or personal property of another, at a fixed price, and executes his note for the payment of the purchase money, he will not be allowed, when sued thereon, to prove, for the purpose of defeating or reducing the amount of the recov-



ery on the note, that the property in fact was not worth one-half, or one-quarter, or even one-tenth of the amount at which he purchased it." And again in *Earl v. Peck*, 64 N. Y. 596: "Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to a note. It is not necessary that the consideration of a note shall be equal in pecuniary value to the obligation incurred. \* \* \* A note for \$1,000 given for a horse confessedly worth but \$100 cannot be successfully defended in whole or in part on the ground of a want or failure of consideration."

"The value of most considerations, as well as of most promises, is a thing which the law cannot measure; it is not merely a matter of fact but a matter of opinion. If, therefore, the promisor thinks the consideration is equal to the promise in value (i. e., if he is willing to give the promise for the sake of getting the consideration), the consideration will be equal to the promise in value for all the purposes of the contract. From this it is but an easy step to the conclusion that whatever a promisor chooses to accept as the consideration of his promise the law will regard as equal to the promise in value, provided the law can see it has any value." Langdell's *Summary of the Law of Contracts*, 55.

That there was an actual consideration in the present case is beyond question, and that the defendants, eliminating questions of fraudulent representation, got all they contracted for is equally certain. In 6 Am. & Eng. Ency. of Law (2d Ed.) 780, it is stated: "That the rule is almost elementary that, when the promisor gets all he contracts for, he cannot be heard to complain that the consideration was not valuable." In 1 Benjamin on Sales (6th Ed.) p. 542, § 620, the rule is stated as follows: "But there is not a failure of consideration when the buyer has that which he really intended to buy, although the thing bought shall turn out worthless." See, also, 2 Randolph on Commercial Paper, p. 138, § 543; *Weish v. Carter*, 1 Wend. 185, 19 Am. Dec. 473; 9 N. Y. C. L. (L. Ed.) 881. Under these authorities, we are of the opinion that there was not in this case any issue of failure of consideration to be submitted to the jury, independent of fraudulent representation.

The Negotiable Instruments Act, in the sections cited above, fixes the burden of proof where defective title is shown and defines a defective title as being where one obtains the instrument or any signature thereto by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. While, in view of the fact that the present judgment must be reversed and the case remanded for a new trial, it is perhaps not necessary to decide the question, it is at least doubtful whether failure of considera-

tion, and particularly a partial failure, taken alone, constitutes a defective title within the meaning of this act. Section 9999 provides that absence or failure of consideration is a matter of defense as against a person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount, or otherwise. The importance of this is that, if such failure or partial failure of consideration be held to constitute a defective title, then under section 10029, upon showing of such failure or partial failure of consideration, the burden rests on the holder to prove that he is the holder in due course, while, if such failure or partial failure of consideration does not constitute a defective title, the common-law rule would prevail and the burden of proof be different. *Johnson v. McMurry*, 72 Mo. 278; *Bank v. Crow*, 60 N. Y. 85.

In *Cole Banking Co. v. Sinclair*, 34 Utah, 454, 98 Pac. 411, 131 Am. St. Rep. 885, this question was considered, and it was held that a partial failure of consideration as between the parties to a negotiable note was not a defect in title so as to require an indorsee suing thereon to show himself a holder in due course; the burden of showing want of consideration and notice thereof by the indorsee being upon the maker. This was under a Negotiable Instruments Law similar to the Missouri law. The court states the law as follows: "The defense pleaded was not illegal but mere partial failure of consideration. Failure or want of consideration does not constitute a defective title within the meaning of the foregoing provisions. 1 Daniels, Neg. Inst. §§ 814, 817. In the treatise of Eaton & Gilbert on Commercial Paper and the Negotiable Instruments Law, at section 79, in discussing the statutory provision corresponding to section 1611 of our statute, it is said by the authors: 'In the absence of proof of fraud or misappropriation the presumption is that the indorsee of a negotiable bill or note is a bona fide holder for value, and this presumption is not repelled merely by proof that the bill or note, as between the immediate parties, was without consideration, and was made, indorsed, or accepted by one for the sole accommodation of the other. When no other proof is given, the holder is not bound to prove a valuable consideration. \* \* \* It will be noticed that the statute provides that proof of a defective title shifts the burden of proof upon the holder. A title is defective where the instrument is obtained for an illegal consideration. It follows, therefore, that if the consideration be shown to be illegal, as for a gambling debt, an unlawful sale of commodities, or as being tainted with usury, the burden of proof will then rest upon the plaintiff to show that he was a holder in due course; but proof of a want or failure of consideration does not in most jurisdictions operate to shift the burden of proof to the plaintiff.' Cases are cited

by the authors to the effect that the indorsee, in an action by him against the maker, cannot be called on to prove consideration until the defendant has shown that the note was obtained or put in circulation by fraud or undue means, and that proof of want or failure of consideration between a maker and a payee of a promissory note does not change the presumption that one to whom the latter has indorsed and delivered the note is a bona fide holder for value, but the burden of proof is upon the maker."

To the same effect is Ogden, Negotiable Instruments Law, § 319, p. 251, viz.: "Where it is a question of a personal defense, there are two classes of cases: (1) Where the defense shows lack of consideration, or release, or payment of a bill or note. (2) Where the defense shows fraud, duress, or illegality in the inception of the instrument. In the first class it is not so much the question of wrongdoing as merely a question of lack or failure of consideration. The first thing to be proved by the defendant is that the plaintiff had notice of the fact that there was a want of consideration or failure of consideration. He does not prove that there was a failure of consideration but notice, and after that he proves the facts of want or failure of consideration. In the other cases (that is, those of fraud or illegality) the defendant does not prove notice but proves the fraud or illegality itself. And, when the fraud or illegality is proved, the presumption of notice arises without any proof of notice, and the burden of proof is on the plaintiff to prove he did not have notice."

This is not at all in conflict with the point really decided in *Jobes v. Wilson*, decided by this court and reported in 140 Mo. App. 281, 124 S. W. 548. In that case it is apparent that the act of plaintiff's agent, who took the notes with the distinct agreement that certain credits were to be indorsed thereon, but who failed to have these credits indorsed and negotiated the notes without such credits, was at least a breach of faith, and the negotiation under such circumstances amounted to a fraud. This, as we understand it, is all that is decided in the *Jobes* Case. In fact, the court uses this language: "If the statements of defendants as to what was to be done with the notes are to be believed, then it was an act of bad faith, amounting to a fraud, on these defendants, as the term is defined in section 55, to negotiate these notes without placing the credits upon them."

Similar transactions have been held to amount to a breach of faith or a fraud in the following cases: *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 504; *Kennedy v. Spilka*, 72 Misc. Rep. 89, 129 N. Y. Supp. 390; *De Jonge & Co. v. Woodport*, 77 N. J. Law, 233, 72 Atl. 439; *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192; *McKnight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15

Ann. Cas. 665. In our opinion the decision in the *Jobes* Case, *supra*, is correct. We believe that the court in that opinion went too far by way of argument in stating the general rule as to burden of proof in cases of failure of consideration, total or partial.

[4] The two cases cited by the court (*Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192, and *McKnight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. [N. S.] 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665) were cases not only of failure of consideration but, more than that, were cases where the notes had been negotiated in breach of faith and under such circumstances as to amount to fraud, thus making a defective title within the statutory definition thereof. What we mean to hold is that the mere want or failure of consideration, not coupled with a negotiation in breach of faith or under such circumstances as to amount to a fraud, does not constitute a defective title under the statute and therefore does not put in force the rule as to burden of proof declared in section 10029, *supra*. If this section applies to and fixes the burden of proof in all cases of defense, good as against one not a holder in due course, but precluded as against a holder in due course, then the first clause of this section, providing that "every holder, is deemed prima facie to be a holder in due course," becomes an idle jumble of words. It would then mean that every holder is prima facie so deemed unless some defense is shown, and then he must prove himself a holder in due course. Unless a defense is shown, the question whether plaintiff is or is not a holder in due course is of no importance, and therefore this clause of the above section would have no legal effect. But, if the construction we have given above be applied to this section, every part of it has a real meaning and effect. The holder is deemed prima facie one in due course, and this continues and applies in all cases but the one exception made by the statute of a defective title, as defined in section 10025.

The Negotiable Instruments Law, as adopted in this state, was not a new or hastily drawn statute. It had already been enacted by a number of states and had been carefully considered and fully criticised by the bar generally. The subject of want and failure of consideration was in the minds of the authors and was treated in section 9999. It cannot be doubted that, when section 10025 was drawn defining a defective title, these questions pertaining to consideration were duly considered. If it had been the intention to make title defective where there was total or partial want or failure of consideration, this would have been stated with the same clearness of expression that appears throughout the act. The framers of the law knew the various decisions as to the burden of proof and the different rules where defense was fraud or illegality and where it was such want or failure of consideration.

So when it is provided in section 10029 that, where defective title is shown, the burden is on the holder to show that he or some one under whom he claims acquired title as holder in due course, it seems certain that there was meant only a defective title, as defined in the act, and that the statutory rule of burden of proof applies in no other instances.

This court has followed the dictum of *Jobes v. Wilson*, supra, in several cases. In *Bank v. Hanks*, 142 Mo. App. 110, 125 S. W. 221, it again included want of consideration with fraud as being within the meaning of section 10029, supra. However, in this case the defense was fraud and the instruction under discussion when this expression was used was based on fraud alone. Hence this coupling of want of consideration with fraud in stating the rule was unnecessary to the decision of the point involved. But in *Johnson County Savings Bank v. Mills*, 143 Mo. App. 265, 127 S. W. 425, and *Birch Tree State Bank v. Dowler*, 163 Mo. App. 65, 145 S. W. 843, it was decided that, where failure of consideration is shown, the burden is cast upon the holder under section 10029, supra. To this extent we are of the opinion these decisions are erroneous for the reasons above stated, and we shall therefore decline to follow them.

At the request of the defendants, the court gave the following instructions:

(e) "The court instructs the jury that if you believe from the evidence in this case that one Grant Hart, the payee in the note sued on, in conjunction with other persons who were interested in the sale of stock in the Golden Jack Mining Company, for the purpose of securing the execution of the note sued on, falsely and fraudulently represented to the defendants herein the condition of the face of ore in the south drift of the Golden Jack Mine, located about a mile south of Stotts City, Mo., and fraudulently so arranged the stope in the drift in said mine so that the defendants were unable to ascertain for themselves the true extent of ore in the place there or its true ore-bearing qualities, and that defendants were thereby deceived and induced to execute the note sued on, and if you further believe from the evidence after so concealing and misrepresenting the said drift in said mine, if any, said Grant Hart and others, interested in the sale of said stock, falsely represented to the defendants the prospective income from said mine which could be obtained as a result of working on such face of ore, and that by reason of said misrepresentations the defendants were induced to sign the said note, believing them to be true, then the said note is void in the hands of the said Grant Hart; and if you further believe from the evidence that the plaintiff herein, before the assignment of the said note to him, knew of said fraud practiced on defendants, or if you believe from the evidence that the plaintiff act-

ed in conjunction with the said Hart and others in inducing the defendants to execute the note sued on and assisted in making said deal, then he would not be entitled to recover in this case and your verdict should be for the defendants."

(f) "The court instructs the jury that if you believe from the evidence in this case that the consideration for the execution of the note sued on was certain mining stock in the Golden Jack Mining Company, and that at the time of said sale and now said stock was utterly worthless and of no value, and if you further believe from the evidence that the plaintiff herein, prior to the assignment of the note to him, knew that said note was given for such worthless stock, or if you believe from the evidence that the plaintiff assisted one Grant Hart and others in consummating the transactions that induced the defendants to execute the note sued on, then your verdict should be for the defendants."

(h) "The court instructs the jury that if you believe from the evidence that the note sued on was obtained from the defendants by means of fraud practiced on the makers by Grant Hart and others, as defined in other instructions, or that said note was given for worthless stock in the Golden Jack Mining Company, then it devolved upon the plaintiff to prove by the greater weight or preponderance of the evidence that he procured said note before maturity for value, and in good faith, and, unless you so believe from the evidence, your verdict should be for the defendants, or, if you believe from the evidence that plaintiff assisted in consummating said deal as defined in other instructions, then your verdict should be for the defendants."

[5] By instruction "e" it is declared that, in case the jury find for the defendants on the question of fraudulent representation, then if they believe from the evidence that the plaintiff, before the assignment of the note to him, knew of the fraud practiced on defendants, or if they believe from the evidence that the plaintiff acted in conjunction with the said Hart (payee) and others in inducing the defendants to execute the notes sued on and assigned in making the deal, the verdict should be for the defendants. This instruction should not have been given. The answer charges fraudulent representation by the payee Hart "in conjunction with other parties" not named and does not charge that the plaintiff made any of these representations. It is at least doubtful whether such pleading is sufficient to authorize this instruction. A careful reading of the record warrants the statement that there is no evidence tending to prove that the plaintiff acted in conjunction with the said payee or any one else in inducing the defendants to execute the note sued on, or in any wise assisted in making said deal in such a manner as to make plaintiff a party to the fraud

or connect him therewith. For this reason the instruction is erroneous as not being based upon the evidence.

[6] Instruction "f" is erroneous: First, because, under the rules heretofore stated upon the question of failure of consideration, the instruction does not properly declare the law on that question; and, second, because, as in instruction "e," there is no evidence to warrant the latter part of the instruction authorizing a verdict for the defendants if the jury believe that plaintiff assisted the payee and others in consummating the transaction that induced the defendants to execute the note.

We have not quoted instruction "g," but under the present ruling it is incorrect to the extent that it declares on the question of failure of consideration.

Instruction "h" tells the jury that, if the note was obtained by means of fraud, the burden is on plaintiff to prove that he procured the note before maturity for value and in good faith. It is erroneous in that it also tells the jury that, if it is found that the note was given for worthless stock in the mining company, the same burden of proof devolves upon the plaintiff. As already stated, there is no question of failure of consideration in this case separate and apart from the question of fraud, and the mere fact that the stock may have been worthless from the standpoint of value does not constitute a defense, and the question whether or not the stock was worthless should not have been submitted to the jury as an issue for determination by them, nor should that body have been told that the fact that the stock was worthless in itself cast upon the plaintiff the burden of proof stated. The instruction is also erroneous in that it tells the jury that, if they believe that plaintiff assisted in consummating said deal, the verdict should be for the defendants. This for the reason that there is no evidence in the case that plaintiff did so assist, and further because the instruction submits to the jury the question of assistance by plaintiff in consummating the deal without regard to the character of that assistance or the situation or knowledge of the plaintiff in rendering same. It might very well be that one could assist in some degree and in some manner in consummating a deal by which some of the parties perpetrated a fraud and yet be entirely ignorant of the fraud and not negligent in being so ignorant. Plaintiff's participation in the fraud, if any was shown by the evidence, must have been a guilty participation in some degree before the instruction would be warranted.

[7] The court, over the objection of appellant, permitted the witness Wakefield to testify that he bought some stock in the company through the influence of Messrs.

Loy and Hutler, and also on an engineer's report he had; that Loy represented to him that it was a paying mine, etc. The evidence connects Loy with Hart, the payee of the note, in the transaction with defendants, but Wakefield's purchase of stock was entirely separate and apart from the purchase by defendants, being a different transaction at a different time, and this evidence should not have been admitted. It is not shown that these representations were intended to be or were in fact communicated to the defendants.

For the errors above noted, the judgment in this case must be reversed, and the cause remanded for a new trial, and it is so ordered.

ROBERTSON, P. J., and STURGIS, J.,  
concur. FARRINGTON, J., not sitting.

### WILT v. COUGHLIN.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913.)

#### 1. APPEAL AND ERROR (§ 933\*)—REVIEW—ORDER SETTING ASIDE VERDICT.

In deciding, on defendant's appeal from the refusal to set aside an order granting plaintiff a new trial, that the court erred in refusing to take the case from the jury, the facts should be considered in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. § 933.\*]

#### 2. APPEAL AND ERROR (§ 977\*) — REVIEW — CORRECTING MISTAKE OF LAW.

The appellate court should reverse an order sustaining a motion for a new trial, made through a mistake in construing the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

#### 3. LANDLORD AND TENANT (§ 150\*)—DUTY TO REPAIR.

In the absence of a covenant to repair, the landlord is not liable in damages for failure to keep the premises in repair during the tenant's possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536, 538, 544-548, 555, 556; Dec. Dig. § 150.\*]

#### 4. LANDLORD AND TENANT (§ 125\*)—DUTY TO REPAIR—IMPLIED COVENANT.

There is no implied covenant by the landlord that the premises are in good repair when let; the landlord only being liable for his acts of misfeasance.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 441-443; Dec. Dig. § 125.\*]

#### 5. LANDLORD AND TENANT (§ 162\*)—DEFECTS IN PREMISES—HIDDEN DANGERS.

A landlord is liable for injuries proximately resulting from hidden dangers on the leased premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 629; Dec. Dig. § 162.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**6. LANDLORD AND TENANT (§ 169\*)—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE—TERMS OF CONTRACT.**

Evidence, in an action by a tenant for injuries to his horse by falling into a cesspool in the front yard, held to show that the parties did not contemplate that that part of the premises would be used by the tenant to run horses on.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. § 169.\*]

**7. NEGLIGENCE (§ 58\*)—PROXIMATE CAUSE.**

Plaintiff, in an action for consequential damages resulting from negligence, must show that such injuries would naturally and probably result from the negligent act and should have been foreseen by defendant as likely to result therefrom.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 71; Dec. Dig. § 58.\*]

**8. LANDLORD AND TENANT (§ 166\*)—DEFECTS IN PREMISES—LIABILITY OF LANDLORD.**

Where a tenant's horse was kept in the barn lot some 60 or 70 feet in the rear of the house upon the landlord's premises, and the landlord's contract did not contemplate that it should be kept in the front yard, the landlord was not liable for injury to the horse by falling into a cesspool, covered by boards and earth, in the front yard, the existence of which the tenant knew.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 647-655, 657-660; Dec. Dig. § 166.\*]

**9. NEGLIGENCE (§ 29\*)—USE OF PROPERTY.**

The owner of uninclosed land need not make it safe for pasturage and is not liable for injuries to stray cattle by falling into excavations thereon.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 41; Dec. Dig. § 29.\*]

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by Clinton Wilt against Margaret Coughlin. A new trial was granted after verdict and judgment for defendant, and, from the refusal to vacate the order, defendant appeals. Reversed and remanded, with directions to enter judgment on the verdict.

Wright Bros., of Springfield, for appellant.

FARRINGTON, J. This action was instituted in a justice's court, where the plaintiff prevailed. On trial anew in the circuit court, the defendant was given the verdict. Plaintiff, however, was successful in having his motion for a new trial sustained and in obtaining an order setting aside the judgment which had been rendered on the verdict. The appeal by defendant is from the refusal of the trial court to set aside its order granting a new trial.

The reason specified by the trial judge for granting plaintiff a new trial was that the verdict was against the instructions of the court and the weight of the evidence. At the close of the plaintiff's evidence, defendant requested and the court refused to give an instruction in the nature of a demurrer to the evidence, and at the close of all the evi-

dence the court likewise refused defendant's request for a directed verdict.

[1] As we are of the opinion that the trial court erred in refusing to take the case from the jury, it will be necessary to consider the facts in the light most favorable to the plaintiff.

The plaintiff in April, 1908, rented of the defendant a cottage fronting east on Campbell street, which runs north and south in the city of Springfield. On the rear end of the lot, which was about 50 feet in width, was a barn some 40 feet in length and 16 feet in width, the length of the barn running north and south. This barn was located 60 or 70 feet back of the rear end of the cottage. Some outhouses covered the remainder of the width of the lot. The record does not show the existence of any opening directly between the barn or barn lot and the front yard where the cottage stood. Plaintiff testified that he and his wife rented this cottage, and that soon after doing so he spoke to the defendant about keeping his horses there, and that she informed him it would be all right if he so desired and would fix the barn at his own expense.

An alley runs along the outside of this lot back to the barn and barn lot. Dividing the yard from the alley, from the front of the yard back to the barn or barn lot, is a fence. On the side of the house, located some 40 to 60 feet from the barn and barn lot, was a cesspool which had been covered by pine boards, on top of which was earth. The cesspool was made when the house was completed and had been finished only a short time when plaintiff moved in the house. Plaintiff admits knowing the cesspool was there but said he did not know the material used in covering the same.

On the 6th day of July, 1910, while plaintiff was residing at this place, he was awakened by hearing a noise in the side or front yard and on making an examination found that one of his horses had broken through the top of the cesspool and fallen in. After several hours work plaintiff and others succeeded in getting the horse out. The testimony is convincing that the animal thereafter was of little value, owing to the injuries received by the fall into the cesspool. The evidence shows that the planks which covered the cesspool showed deterioration and rot. It is unquestioned that the horse got on top of the cesspool and that the covering was of insufficient strength to withstand his weight. Plaintiff charges the defendant with maintaining the cesspool in this condition with knowledge of its dangerous character, or that defendant by the exercise of ordinary care and prudence could have known its dangerous character.

Plaintiff testified that the night before the occurrence he went to the barn and saw that his horses (this one in particular) were securely fastened in their stalls and in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stable. How this horse which was injured escaped from the stable and came to the cesspool no witness attempts to explain. Plaintiff, supported by the testimony of the defendant, states positively that at no time during the tenancy had the front yard been used by animals for grazing or to be in. The nearest part of the cesspool to the alley, along which plaintiff took his horses to and from the barn, was several feet therefrom; besides, there was a fence between the cesspool and the alley. The front yard had no fence dividing it from the street. The only fence mentioned in the record is that running from the street along the alley back to the barn, and this fence divided the alley from the front and side yard in which the cesspool stood. There is no testimony as to the existence of any gate or passageway from the barn lot to the front or side yard. Nor is there any testimony that any horses or stock of any kind had ever been permitted to be in the front or side yard where the cesspool was situated. No guard or fence was built around the cesspool so as to prevent persons or animals walking thereon. So far as the record shows, the only way this horse could have reached the place where the cesspool stood was to go down the alley to the street and come back into the front yard, or to go over some neighboring property and then into the front yard.

[2] Under this state of facts we see no liability on the part of the defendant for this accident. And since the trial court in sustaining the motion for a new trial did so through a mistake in construing the law, it is our duty to reverse its order. *Barr v. Hays*, 155 S. W. 1095.

[3-5] The action is founded on a tort, not on an express covenant to repair or to keep the premises in repair during the tenancy on the part of the landlord. The law is well settled in this state that, in the absence of a covenant to repair, the landlord cannot be held liable in damages for failure to keep the premises in repair while in the tenant's possession. Nor is there an implied covenant that the premises are in good repair when they are let; the landlord being liable only for acts of misfeasance. *Roberts v. Coffey*, 100 Mo. App. loc. cit. 503, 74 S. W. 886, and cases cited; *Graff v. Brewing Co.*, 130 Mo. App. 618, 109 S. W. 1044, and cases cited; *Marcheck v. Klute*, 133 Mo. App. 280, 113 S. W. 654, and cases cited; *Korach v. Loeffel*, 168 Mo. App. 414, 151 S. W. 790, and cases cited. The landlord, however, would be liable for injuries to the tenant or his property by reason of hidden dangers, provided the hidden danger in a given case is such that the injury which ensues by reason of its existence is the natural and probable consequence of allowing such dangerous condition to exist. And this is the turning point in the case at bar.

[6] The evidence clearly shows, giving the plaintiff the full benefit of all its weight and

all inferences reasonably deducible, that it was never within the contemplation of the parties to the rental contract that that portion of the premises in which the cesspool stood would be subjected to the weight of a horse or that that part of the premises would be used by the tenant for horses to run on. Had the cesspool been located in the barn lot where horses could reasonably be expected to be kept, or had some member of the plaintiff's family in walking over the cesspool been injured by the breaking of the plank covering, a different case would be presented.

[7] The rule is well stated in the case of *Christy v. Hughes*, 24 Mo. App. 275. In that case a demurrer was sustained on a stronger showing than that made by the plaintiff in this record because the hogs which got under the house were running at large and were in a place where they had stayed and had ranged for some time, whereas in the present case the plaintiff testified he never allowed the horses to be in the front yard. The decision of that case, as summarized in the syllabus, is as follows: "In the action for consequential damages resulting from the negligence of the defendant, it devolves on the plaintiff to show that there was such connection between the negligent act and the injury as to bring it within the reasonable contemplation of the actor that such injury would naturally and probably result from such act, and such as ought to have been foreseen by the defendant as likely to flow from his act." To the same effect are the cases of *Boone v. Railway Co.*, 20 Mo. App. 232, and *Gilliland v. Railroad*, 19 Mo. App. 411, where the same question is discussed.

In the case of *Fuchs v. City of St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136, this language is used: "It is not negligence not to take precautionary measures to prevent an injury which, if taken, would have prevented it, when the injury could not reasonably have been anticipated and would not, except under exceptional circumstances, have happened. If the accident was possible, yet, according to ordinary and usual experience, not probable, it is not negligence not to take precautionary steps to forestall it."

Again in the case of *Hoag & Alger v. Railroad*, 85 Pa. 293, 27 Am. Rep. 653, which has been cited with approval by our courts, the following holding is announced: "Where it is alleged that an injury arose from negligence, the question of the proximate cause is to be decided by the jury upon all the facts of the case; but where the facts are undisputed, and the intervening agency is manifest, it is not error for the court to withhold the evidence from the jury. In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

The rule is thus declared in Am. & Eng. Ency. Law. vol. 8, p. 601: "An individual, however, is not presumed to contemplate the coincidence of events having no probable or natural connection in the mind and which cannot by prudence, circumspection, and ordinary thoughtfulness be foreseen as likely to happen in consequence of the act in which he is engaged."

Thompson in his work on Negligence, vol. 1, § 956, states the rule in these words: "In taking care to use his own property so as not to injure his neighbor, one is not bound to look beyond the natural and probable consequences of the act he is about to perform. Thus, if a man, in clearing his uninclosed land of timber, in a new country, sets a tree on fire and then leaves it to burn down and fall, he will not be liable to pay damages if it fall on his neighbor's horse, happening to stray there."

The case of *Teis v. Smuggler Mining Co.*, 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893 (opinion by Judge John F. Philips), reviews many decisions and text-writers on the subject of proximate and remote causes and the interposition of independent forces and agencies. The logic of that opinion is unanswerable and declares the correct principles of law, and the reader who desires to examine this subject in greater detail than is attempted here would do well to read that case.

The case of *Marcheck v. Klute*, *supra*, turns on the question of the duty of the landlord to keep the floor safe where the chute was located for the use to which it was put in that case, namely, as a place for the tenant's children to play. In the course of the opinion it is said: "Defendants were under no duty to keep the floor safe for their use in that manner."

So, in the present case, there was no legal duty upon the defendant to keep the front or side yard and the top of the cesspool safe to guard against the use to which the yard happened to be put by plaintiff's horse.

[8] It is within the knowledge of every one that front yards in cities are not to be used as stable lots and places in which live stock will be expected to roam. The evidence of the plaintiff wholly fails to account for the manner in which the horse reached the cesspool. That plaintiff did not expect the horse to be in the yard is shown by his testimony that he never let the horses in the front yard, and that on the night before the horse was injured he went to the barn about 9 o'clock and saw that this particular horse was securely fastened in the stable. Under this state of facts, the landlord owed the tenant no greater duty concerning this horse than he owed every other horse owner in the city of Springfield whose horse might have

gotten away and strayed into the yard where this cesspool was located, because it was not contemplated by either of the parties at any time that the place where the cesspool was located would be put to any such use.

[9] The law is well settled in this and many other jurisdictions that the owner of uninclosed land is under no obligation to make it safe for pasturage, and, if stock stray upon it and sustain injuries by falling in a well or other excavation, there is no liability resting on the landowner for such loss. *Hughes v. Railroad*, 66 Mo. 325; *Turner v. Thomas*, 71 Mo. 506; *Peek v. Western Union Tel. Co.*, 159 Mo. App. 148, 140 S. W. 638; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, 3 Am. St. Rep. 557; *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668; *Grindley v. McKechnie*, 163 Mass. 494, 40 N. E. 764; *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478.

The evidence in this case is that the cesspool was not situated close enough to the alley to make the use of the alley, in an ordinarily prudent manner, dangerous; besides, the undisputed evidence is that between the cesspool and the alley there was a fence. Thompson on Negligence, vol. 1, § 945, states the general doctrines applicable to the subject in hand, saying, among other things: "The owner or occupier of land is under no obligation to make it safe for the benefit of the owners of domestic animals which are permitted to run at large, and this irrespective of the question whether the rule of law in the particular jurisdiction requires the owners of animals to restrain them, or whether it permits them to run at large and requires the owners of cultivated fields to fence their cultivations." The author just quoted also gives the two exceptions to this rule, one of which is that, if it is an attractive nuisance, he must pay damages, and the other is that, if it is near enough to a pathway or highway so that a person or animal lawfully using such highway might tumble in, the owner would be liable. The facts as stated in this opinion fall to bring this case within either exception.

At the close of the evidence the court should have sustained defendant's motion for a directed verdict. As the case was put to the jury and they found for the defendant, it was error to disturb their finding, and the judgment first rendered was the proper one in this case.

It is therefore ordered that this cause be remanded, and that the trial court set aside its order granting plaintiff a new trial and enter a judgment on the verdict.

ROBERTSON, P. J., and STURGIS, J., concur.

**GUTHERIDGE et al. v. GUTHERIDGE.**

(Court of Civil Appeals of Texas, Amarillo.  
Nov. 8, 1913. On Motion for Re-  
hearing, Dec. 13, 1913.)

**1. HOMESTEAD (§ 181\*)—ABANDONMENT—EVIDENCE.**

In an action by a woman to set aside her former husband's conveyance of the community homestead, the court's finding that she did not abandon her homestead, but merely left her husband temporarily to earn a living for herself and her minor child, *held* supported by the evidence.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 351-353; Dec. Dig. § 181.\*]

**2. HUSBAND AND WIFE (§ 267\*)—COMMUNITY PROPERTY—EFFECT OF CONVEYANCE BY HUSBAND.**

Where a husband conveyed one-half of the community property of himself and wife to their infant child, the rights of the parties upon the death of the child intestate and without issue, are the same as if no conveyance had been made.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929-938; Dec. Dig. § 267.\*]

**3. PARTITION (§ 55\*)—PETITION.**

Under the direct provisions of Rev. Civ. St. 1911, art. 6097, subd. 3, a petition for statutory partition is insufficient when not giving an estimate of the value of the premises.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 148-159, 182; Dec. Dig. § 55.\*]

**4. PARTITION (§ 34\*)—STATUTORY PARTITION—EFFECT.**

Rev. Civ. St. 1911, art. 6097, providing a statutory mode of partition, is not exclusive and does not deprive the courts of their equitable power of partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 88, 90; Dec. Dig. § 34.\*]

**5. PARTITION (§ 55\*)—PROCEEDINGS—PETITION.**

A petition for equitable partition need not state the estimated value of the property.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 148-159, 182; Dec. Dig. § 55.\*]

**6. APPEAL AND ERROR (§ 882\*)—PERSONS ENTITLED TO ALLEGE ERROR.**

Where defendants by their answer sought partition of the land in suit, they cannot on appeal attack their own pleadings, as insufficient to warrant partition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**7. PARTITION (§ 63\*)—PROCEEDINGS—EVIDENCE—SUFFICIENCY.**

In a proceeding for the partition of real estate, the question of value should govern more than the item of quantity, and a judgment rendered without any evidence of value cannot be supported.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 183-185; Dec. Dig. § 63.\*]

**8. APPEAL AND ERROR (§ 1172\*)—DETERMINATION—REVERSAL IN PART.**

Under rule 62a for Courts of Civil Appeals (149 S. W. 2), providing that, if it should appear that an error committed by the trial court affects only a part of the controversy and that the issues are severable, the judgment shall be reversed only in part, the appellate court may, in an action by a woman to set aside her former husband's deeds to their community property, reverse only that part of the judgment

which erroneously granted partition without evidence of the value of the land.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4555-4561; Dec. Dig. § 1172.\*]

**9. HUSBAND AND WIFE (§ 249\*)—COMMUNITY PROPERTY—WHAT CONSTITUTES.**

Property acquired by a husband before his wife secured a divorce is community property, even if at the time of the acquisition she was living apart from him because obliged to do so to make her own living.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 887, 889-892; Dec. Dig. § 249.\*]

On Motion for Rehearing.

**10. HUSBAND AND WIFE (§ 267\*)—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND.**

A conveyance by a husband of the community property of himself and wife is good as to his interest in the property and should not be canceled at the suit of the wife except as to her share.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929-938; Dec. Dig. § 267.\*]

**11. JUDGMENT (§ 252\*)—CONFORMITY TO PLEADING—RELIEF.**

If defendant prays for relief and shows himself entitled thereto by the evidence, the court may grant it notwithstanding the pleadings of the plaintiff do not request it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.\*]

Appeal from District Court, Collingsworth County; D. E. Decker, Judge.

Action by Alice Guthridge against R. W. Guthridge and others. From a judgment for plaintiff, defendants appeal. Affirmed in part, and in part reversed and remanded.

See, also, 159 S. W. 452.

R. H. Templeton, of Wellington, and Crudgington & Works, of Amarillo, for appellants. J. L. Lackey, of Wellington, and Presler & Thorne, of Memphis, for appellee.

HALL, J. Alice Guthridge, formerly the wife of R. W. Guthridge, of Green county, Okl., instituted this suit against R. W. Guthridge (her divorced husband), C. B. Boverie, and J. M. Poff, residents of Texas, for the cancellation of certain deeds and title to the N. E.  $\frac{1}{4}$  of section No. 28, block No. 15, H. & G. N. Ry. Co. survey in Collingsworth county, Tex. The allegations of the petition, in substance, are: That plaintiff was formerly the wife of R. W. Guthridge, and Lawrence Guthridge, a son, was born of that wedlock. That plaintiff and her said husband were separated in August, 1908. That they owned as community property the N. W.  $\frac{1}{4}$  of section 32, block 15, and the N. E.  $\frac{1}{4}$  of section 28, block 15, of the H. & G. N. Ry. Co. surveys in Collingsworth county, Tex. That on September 21, 1910, her said husband conveyed the east  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of said section 28 to their infant son, Lawrence, and at the same time conveyed the W.  $\frac{1}{2}$  of said  $\frac{1}{4}$  to Lee Brown. That Lee Brown thereafter conveyed said W.  $\frac{1}{2}$  to C. B. Boverie, and afterwards C.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



B. Boverie conveyed the land to J. M. Poff, and later her said husband conveyed the entire N. E.  $\frac{1}{4}$  of said section 28 to the said Boverie, who in turn again conveyed the same to J. M. Poff. That on the 3d day of January, 1911, appellee obtained a decree of divorce from her husband in the district court of Kingfisher county, Okl., and that said judgment decreed to her the custody of the infant son, Lawrence, and that said son soon thereafter died. It is alleged that the deeds above mentioned were all made for the purpose of defrauding plaintiff, and that the grantees thereunder took with notice of her rights, and prayed that she be decreed to have said quarter section with damages and for an injunction.

Each of the defendants answered separately, the substance of R. W. Gutheridge's special answer being as follows: That the said quarter section was the community property of himself and wife. That in the spring of 1908 they abandoned the land and never again resided thereon. That they separated in 1908 and never again lived together as husband and wife, at which separation appellee abandoned him and moved to the state of Oklahoma, and has so resided in said state continuously, and now so resides in said state. That in January, 1911, she obtained a decree of divorce. That during the time plaintiff and defendant lived together they contracted community debts, which he was unable to pay, and he sold the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of said section 28 to pay said indebtedness. That he had no other property out of which said debts could be paid. That in 1909 he removed to Gray county, Tex., and acquired a new homestead, which he had occupied since said date and which he was occupying prior to and at the time he sold said N. E.  $\frac{1}{4}$  of section 28 to defendant Brown, and prior to said sale had made and filed a written designation of his homestead, stating the same to be in Pampa, Gray county, Tex. That he sold the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  while his wife was separated from him and residing in another state, with which to pay community debts, and conveyed the E.  $\frac{1}{2}$  of said quarter to his son, Lawrence, who had since died, and that he and plaintiff were the only heirs of the said Lawrence. Since the death of his said son, he had again conveyed the entire N. E.  $\frac{1}{4}$  to the said Boverie, and so had parted with every interest of every kind and character in said quarter and disclaimed any interest in the land in controversy. That his said home in Pampa was acquired during the marriage and was subject to partition. That the N. E.  $\frac{1}{4}$  of section 32, referred to by appellee, was purchased and vendor's lien notes given therefor, and that by reason of his wife abandoning him he was unable to pay therefor, and foreclosure was had in the district court of Collingsworth county, under which he lost said land and

the money theretofore paid by him. His prayer is as follows: "Wherefore defendant prays judgment of the court that plaintiff take nothing by this suit except a partition of his land in Gray county, Tex., and that all interest in said land be perfected in the present owners of the same, that the W.  $\frac{1}{2}$  be perfected in J. M. Poff and the E.  $\frac{1}{2}$  be partitioned between C. B. Boverie and plaintiff, and for all further relief, both special and general, in law and in equity, that he may be entitled to under the law."

Defendants Boverie and Poff, by special answer set up that they were innocent purchasers without notice, and in addition thereto substantially the facts plead by R. W. Gutheridge. The prayer as contained in the answer of Poff is as follows: "Wherefore defendant prays that plaintiff take nothing by this suit, and that said W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of section 28, block 15, in said Collingsworth county, Tex., be decreed to him free from all claims of plaintiff; that he go hence without day with his costs and for damages and for rent of said land for the year 1912, and for such other and further relief, special and general in law and in equity, as he may be entitled to." The prayer of C. B. Boverie is as follows: "Wherefore defendant prays judgment of the court that plaintiff take nothing by this suit as to the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 28, block 15, and that he have his costs in this behalf expended; that the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 28, block 15, in said Collingsworth county, Tex., be partitioned between plaintiff and this defendant; that appraisers be appointed by the court to appraise and divide the said E.  $\frac{1}{2}$  equally, according to value, between this defendant and plaintiff; and that each be placed in possession of his part within 30 days from date of partition; and that, if the court should hold that deeds from R. W. Gutheridge to Lee Brown and Lawrence Gutheridge were invalid for any cause, the court have the entire N. E.  $\frac{1}{4}$  of section 28, block 15, partitioned according to the respective interests of claimants to same; and that the same be duly and legally partitioned; and that all equities involved in the suit and premises be adjusted in this suit; and for all other and further orders and relief, both special and general, in law and in equity, as each may be entitled to, and in duty bound this defendant will ever pray."

The court's findings of fact and conclusions of law are in substance as follows:

First. That the land in controversy is the community property of plaintiff and her former husband and is their homestead. That it has never been abandoned as a homestead, but that plaintiff was forced to leave the same temporarily in order to secure work for the support of herself and infant son, and that she left with the intention of returning at any time appellant Gutheridge

would provide her with a living, and so notified him when she went away.

Second. That appellee did not leave appellant Gutheridge with the intention of separation, but only for the purpose of securing work, and never knew that he regarded her leaving as a separation until she was notified by his attorney that he was going to sue her for a divorce.

Third. That he did file suit in the district court of Collingsworth county, for a divorce and division of property, and when the court convened dismissed the same at his own cost.

Fourth. That plaintiff had never abandoned the land as her homestead, and the personal effects which she had were there on the land when she left and were thereafter carried away by her mother, who lived near, for the purpose of taking care of the same during her absence.

Fifth. That defendant R. W. Gutheridge utterly failed to support his family in any way or manner for several months before his wife went away to her work. That she was compelled to work and pay all the family expenses for several months prior to that time.

Sixth. That none of the deeds made by R. W. Gutheridge to any of the defendants, and none of the deeds made by said defendants to each other, purporting to convey or attempting to convey the land, were made in good faith for valuable consideration, but that all of said deeds were made with full knowledge by said parties of appellee's claim and right in the premises and that appellee had possession of said land and was paying taxes and interest thereon during that time.

Seventh. That at the time of plaintiff and defendant R. W. Gutheridge's separation, they owned and possessed other property which was community property, and which he disposed of and gave none of the proceeds to plaintiff or their son, and he also owned and held other property in Gray county, Tex.

Eighth. That the community property disposed of by said appellant Gutheridge, and the other community property held by him in Gray county, Tex., exceeded in value what would be his part in the land in controversy. That appellee has had to care for and pay all the expenses incident to raising their said infant son since and before their separation, and that said child died some time in the year 1912, and that appellee was forced to pay the doctor's bills and all funeral expenses incident to the sickness and death of said child, amounting to something over \$200. That plaintiff sued defendant Gutheridge for divorce in the state of Oklahoma and was decreed a divorce, together with the care and custody of their said child, and that such decree was entered after the said R. W. Gutheridge had conveyed all the lands in this controversy, and that it was not nec-

essary for a party to be an actual bona fide resident, inhabitant of Oklahoma in order to institute divorce proceedings in that state, but only necessary that they reside in the state for 12 months.

Based upon said findings of fact, the court concluded as a matter of law that plaintiff ought to recover the land in controversy as her part of the community estate of herself and R. W. Gutheridge, and that all deeds made by Gutheridge or the other defendants herein, attempting to convey said land, ought to be canceled and held for naught, and plaintiff quieted in her title thereby. The judgment of the trial court is rendered in accordance with the findings and conclusions outlined above.

[1] The appellant's brief submits the case under a multitude of assignments and propositions, the majority of which go to the sufficiency of the evidence to sustain the court's findings of fact and conclusions of law. We have read the statement of facts and think that the evidence is sufficient to sustain all of the court's findings, except perhaps the latter part of the eighth, in which the court finds that the property in Gray county, held by R. W. Gutheridge, exceeded in value what would be his part of the land in controversy. It is not necessary for us to set out the facts in detail, or even in substance; but the following excerpts from the testimony of the plaintiff will serve to show that the court's findings, with the exception above noted, are amply sustained: "I did not know that myself and husband had separated until his attorney wrote me, asking me if I would file a suit for divorce, over there at Enid. I had left our home (the land in question) temporarily prior to that time and had gone to Chillicothe, Tex., where my husband and I lived for about six months. We did not acquire any home there. He was in the insurance business. I came back up to our home in the fall. I think that was in 1907. He came back in the summer. When he returned here in the fall, he went out to my mother's place close to where we lived in Collingsworth county, just a fence between us. At the time he left me in Chillicothe, he made no provisions for me to live—no money for any groceries. We had been living in a rented house there. He did not pay the house rent nor any of the grocery bills. I paid it. I did some sewing down there. Went from there to Vernon and picked cotton for two months. When I left there, I shipped my household goods to Memphis and paid the freight on them and went back up to my mother's place in this county. When I arrived there, my husband had gone. My father got my things from Memphis for me. I remained at my mother's about six months—perhaps not so long—and went away again. I returned there in the fall and left there the 1st of February, at which time my husband was there. He

knew I was going to leave and did not seem to care. I told my reason I was going to leave was because I would have to go and make a living. He refused to work; and I had to go to work and make the living. I went from there to Shamrock, Tex., where I took the train. My husband took me to Shamrock to the train. I told him at that time when he got something to live on to let me know and I would come back any time he wanted me to; that I was simply going away to make a living. I wrote him that I had reached Enid all right, but I never heard from him until through his lawyer, offering to send me money to get a divorce over there. I never received any letter from my husband, but I replied to his attorney, stating that I did not care for a divorce, but if Mr. Guthridge wanted one to go ahead. After that I was cited to appear here in a divorce proceeding and came back to court. My husband did not appear, and the suit was dismissed. I saw him about a week before court, but he made no offer for me to come back and live with him. He just asked me to compromise with him on the property. He wanted to divide the land in halves. He did not want to give the baby anything at all and wanted me to support it. I have never received any proceeds from the sale of the land. I have not lived with my husband since February, 1908, when I left him at Shamrock, because I have not had the opportunity. I have never lived in the house on the land in controversy since we went to Chillicothe, but I have had it occupied. I leased the land to my father one year. I believe he made two crops on it, he and my brother. I have had the use of the land all the time since I left here and have the use of it now. I have people there tending it, and they have been ordered off a time or two, but they still hold it."

Without quoting further from the evidence, we will state that the record abundantly sustains the court in his finding that the defendants Boverie and Poff were not innocent purchasers, and also that the conveyances of the property in question were made with the fraudulent intent alleged. The questions which we will consider specifically are raised by the following propositions:

[2] "There being no effort on appellee's part, either in her pleadings or proof, to void the deed from R. W. Guthridge to Lawrence Guthridge, and said Lawrence Guthridge having died intestate, under ten years of age, the court erred fundamentally in holding that title to the E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , section 28, did not vest in equal halves in his parents, and those holding under them." This proposition has no merit. The transfer of the estate to the minor, and the subsequent death of the minor, left the matter in the same condition as it was before, so far as the rights of the parties in this litigation are concerned.

[3] Under the twenty-eighth assignment of error, which, is that the court erred in holding and in making an accounting between R. W. Guthridge and Alice Guthridge, because there were no pleadings in the case warranting the same nor in the prayer therefor, it is urged that there being no allegations of value of the community property now in the hands of R. W. Guthridge, nor of amounts received by him from that alleged to have been appropriated, and no proof offered as to any of these essential points, the court fundamentally erred in undertaking to partition such properties and adjust community rights herein. An inspection of the pleadings briefly set out above, together with the prayer, shows that the suit as originally instituted by plaintiff was not a partition suit brought either under the statute or as an equitable proceeding, but that the defendants, by their pleadings, endeavored to convert it into a suit for partition under the statute. There was a prayer for the appointment of commissioners, etc. Plaintiff seems to have acquiesced in this, but from some cause the purpose of going into partition of the property under the statute was abandoned, since the record fails to show the appointment of commissioners, the issuance of any writ of partition, or any report by commissioners. If appellants had persisted in their original purpose of having a partition of the property under the statute, their pleadings were manifestly insufficient under article 6097, R. S. 1911, subd. 3, which requires that a petition in such proceeding shall estimate the value of the premises.

[4, 5] It is held in this state that the giving of the remedy by statute has never been deemed to take away or in any degree abridge the original inherent powers of the court in an equitable proceeding for that purpose to partition real estate. The statute simply prescribes a procedure which parties may adopt if they see proper, but it is not obligatory. Our courts exercising the powers of courts of chancery may proceed to administer the relief upon the principles of equity, as fully and completely as if the proceedings had been brought and prosecuted under the statute. *Grassmeyer v. Beeson*, 18 Tex. 753, 70 Am. Dec. 309; *Ellis v. Rhone*, 17 Tex. 131; *Ross v. Armstrong*, 25 Tex. Supp. 355, 78 Am. Dec. 574; *Payne v. Benham*, 16 Tex. 364. We have investigated the question as fully as the authorities at hand would permit and have failed to find any case or any text-writer holding that it was necessary in a bill in equity to allege the value of the property sought to be partitioned.

[6] Besides, complaint made in this court by appellants is directed to a defect, if held to be one, in their own pleadings. They sought the partition, took the initiative, and, if the record is insufficient to sustain the court, appellant should not be heard to complain.

[7] A careful perusal of the statement of

facts, however, fails to disclose any evidence of value, and according to *Parker v. Cockrell et al.*, 31 S. W. 221, the question of value should govern more than the item of quantity in making a partition of real estate. Appellant's assignment, therefore, to the effect that there is no evidence supporting the court's judgment in partitioning the property between R. W. Guthridge and his wife, must be sustained.

[8, 9] Rule 62a for Courts of Civil Appeals (149 S. W. 2) provides that if it should appear to this court that the error committed by the trial court affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

We therefore affirm the judgment of the trial court in canceling the deeds mentioned in the judgment and divesting C. B. Boverie, Lee Brown, and J. M. Poff, of any interest in the said N. E.  $\frac{1}{4}$  of section 28, block 15, H. & G. N. Ry. Co.; but the portion of said judgment which attempts to partition said quarter section between R. W. Guthridge and appellee herein is reversed and remanded for the want of testimony to support it, with instructions to the trial court to ascertain the value of all of said property and to partition the same between R. W. Guthridge and appellee, Alice Guthridge, in accordance with article 4634, R. S. 1911, and in this connection we hold that the trial court was correct in his finding that all of said property was community property. *Young v. Young*, 23 S. W. 83; *Huntsman v. Huntsman*, 147 S. W. 351; *Franks v. Franks*, 138 S. W. 1110.

Affirmed in part, and reversed and remanded in part.

#### On Motion for Rehearing.

[10] After reviewing the record again, we have concluded that we were in error in canceling the deeds except in so far as they purported to convey the interest of appellee in the property. We think they had the effect of conveying whatever right R. W. Guthridge may have had, subject to the right of appellee, to a partition in this action. R. W. Guthridge certainly could not transfer the interest of appellee and to which she may be entitled, under the facts developed upon another trial. To that extent our original opinion is reformed.

[11] Appellants contend that, because the pleadings of the appellee did not authorize the court to decree a partition, none should have been made. If either party prays for relief and shows himself entitled thereto by the evidence, the court may grant it, notwithstanding the pleadings of the opposite party do not ask it. This record shows that the court, as well as the litigants, treated it during the trial as a partition suit. However, as held in our original opinion, the val-

ue of the property was not alleged, nor was the Pampa property described.

The motion for rehearing is overruled, except as hereinbefore stated.

#### FAHEY v. BENEDETTI et al.

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 26, 1913. Rehearing Denied  
Dec. 20, 1913.)

#### 1. APPEAL AND ERROR (§ 743\*)—ASSIGNMENT OF ERROR—REVIEW.

An assignment of error that the court erred in directing a verdict on the ground that the evidence was sufficiently conflicting to go to the jury will not be considered on appeal, where the assignment does not refer to the paragraphs of the motion for new trial in which the questions were presented to the trial court, and the statement does not contain such reference, and the motion contains no reference to the ground urged in the assignment, and the assignment is followed by propositions casting no light on the matter and by a statement failing to comply with the rules.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2999, 3011; Dec. Dig. § 743.\*]

#### 2. VENDOR AND PURCHASER (§ 315\*)—CONTRACTS—EVIDENCE.

In an action by a vendor for the price, evidence held to show performance by the vendor, and that, out of the payment made by the purchaser to the holder of the deed in escrow, taxes on the land and incumbrances were to be paid, so that the purchaser would acquire a good title, authorizing a recovery.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 928-931; Dec. Dig. § 315.\*]

#### 3. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS—REVIEW.

An assignment of error, which attacks the judgment as unsupported by the evidence, will not be considered where no statement is made under the assignment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 4. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS—REVIEW.

An assignment that the court erred in overruling the special exception of defendant to plaintiff's failure to allege a contract in writing will not be considered, where no statement is submitted and the court on appeal does not know to what ruling complaint is made.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 5. FRAUDS, STATUTE OF (§ 150\*)—DEMURRER—GROUNDS.

Where the petition did not show that a contract for the sale of real estate was oral, an exception to the petition for failure to allege a contract in writing was properly overruled.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 360-362; Dec. Dig. § 150.\*]

#### 6. SPECIFIC PERFORMANCE (§ 114\*)—SALE OF REAL ESTATE—PERFORMANCE.

A petition, in an action for the failure of a purchaser of real estate to perform his part of the contract, which alleges the execution by the vendor of a deed to the premises and delivery thereof in escrow for delivery on conditions specified to the purchaser, and the delivery to the escrow holder by the purchaser of a check for delivery to the vendor on specified conditions, and which avers that the vendor removed to other premises after a sale of her personality at a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sacrifice, in reliance on the contract, and a delivery of the possession of the premises to the purchaser and his refusal to take possession and pay the money, alleges such performance by the vendor as will entitle him to specific performance, even if the contract was not in writing.

[Ed. Nota.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.\*]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by Mollie C. Benedetti against D. Fahey and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

John W. Campell, of Galveston, for appellant. Maco & Minor Stewart, J. E. Quaid, Homer Jones, and Louis Lobit, all of Galveston, and C. R. Edwards, of San Antonio, for appellees.

MOURSUND, J. Mollie C. Benedetti sued David Fahey, J. L. Boddeker, and J. E. Boddeker, the last two being partners under the firm name of J. L. Boddeker & Co., alleging that about March, 1912, Fahey purchased from her a lot in the city of Galveston; that she delivered the deed to J. L. Boddeker & Co. to be delivered to Fahey, which was done, and Fahey, as consideration for said deed, executed and delivered to Boddeker & Co., his check for \$2,500, drawn on Ed. McCarthy & Co., Bankers, which check was received by said Boddeker & Co. in trust for plaintiff to be delivered to her; that Fahey stopped payment of the check, and refuses to pay for the property; that by reason of the premises Fahey is indebted to plaintiff in the sum of \$2,500, and plaintiff tenders him possession of the premises as she has heretofore done; that as Boddeker & Co. refuse to deliver the check they are made parties to this suit; that it was understood and agreed between plaintiff and Fahey that the taxes and incumbrances against the property sold should be paid out of the \$2,500 by Boddeker & Co., and the remainder was to be paid by them to plaintiff; that plaintiff sold her furniture and effects at a sacrifice, rented other property, removed to such other property such of her effects as remained unsold, all with Fahey's knowledge, and delivered to Fahey possession of the property sold him; that Fahey's refusal to pay the money and take possession of the property was for the sole purpose of acquiring for himself the property at less than \$2,500, and was done willfully and maliciously for the purpose of harassing plaintiff; that plaintiff is about to lose her property by reason of the incumbrance against same, and, being aged, she suffered mental anguish and distress of mind to such extent as to impair her health. Plaintiff prayed for judgment for \$2,500, the amount of the check, for \$10,000 actual damages and \$10,000 exemplary damages, and that the

contract of sale be specifically performed, and for costs and general relief.

Fahey answered by general demurrer; a special exception that plaintiff in effect sues for specific performance of a contract to convey real estate, and there is no allegation of a contract signed by Fahey, or of such mutuality among the parties, as would entitle plaintiff to specific performance, and also because the terms and provisions of the contract are not alleged; a general denial; a special answer to the effect that if he bought the property it was with the understanding that the title should be perfect and be satisfactory to and approved by his attorney and the property vacated by plaintiff and delivered to Fahey, and that the title was imperfect and not approved by his attorney, there being at the time an incumbrance by mortgage for more than \$2,000, as well as a lien for taxes, both of which liens were not released at the time of the alleged delivery of the property and the check, and in addition said property was the homestead of plaintiff, who was a married woman, incapable of selling same without her husband joining in the sale, and her husband did not join therein, and the property was not delivered to Fahey; a further special answer that the check was not delivered to Boddeker & Co. as plaintiff's agents, but merely to provide a way for Fahey's attorney to close the sale during Fahey's absence, he then being about to absent himself from the city for an indefinite time, and at the time plaintiff was in possession of the property and no rights in the check were intended to be vested in her unless Fahey's attorney should direct the same to be cashed or delivered to plaintiff; and further answering Fahey alleged that, if he ever bought said property, plaintiff so delayed in the delivery thereof and made accusations against Fahey of forcing her to make a sale to him at much less than the value of the property, that Fahey on account thereof, and because of the mortgages and tax liens, and because the title was not satisfactory to his attorney, declined to accept the property and demanded the return of his check, and it would be unjust to him to require him to pay for said property. He prayed that such sale, if any there was, be set aside, and the check canceled.

The court instructed a verdict for plaintiff for \$2,500, with interest from March 1, 1912, at the rate of 6 per cent. per annum, out of which was to be returned to Fahey \$106.63, taxes, and \$2,109.37, the amount of the mortgage debt, and that title to the property be divested out of plaintiff and vested in Fahey. A judgment was entered upon this verdict, which provided for the payment of taxes and the mortgage debt by the clerk of the court out of the \$2,500 when the same should be collected under execution, and that upon payment of the judgment the clerk should deliver Fahey the check, also that the judg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—57

ment should be satisfied upon the filing by Fahey of receipts showing the payment of the taxes and the mortgage debt and upon his paying the remainder of the judgment to the clerk together with the costs, and it was further ordered that J. L. Boddeker and J. E. Boddeker be dismissed from the case, and that they recover of Fahey all costs incurred by them. Fahey appealed.

[1] By the first assignment of error it is contended that the court erred in instructing a verdict for plaintiff, three grounds being urged, each being a contention that in a certain particular the evidence was sufficiently conflicting to go to the jury. The assignment does not refer to the paragraphs of the motion for new trial in which the questions were presented to the trial court for revision, nor does the statement contain such reference, and upon examination of the motion we find no reference to the last ground urged in the assignment of error as a reason why the verdict should not have been instructed for plaintiff. The assignment is followed by three propositions, all of which are mere abstract propositions of law, casting no light upon the matter under investigation. These propositions are followed by a statement which fails to comply with the rules, as it consists of appellant's conclusions concerning what the testimony shows, interspersed with arguments. Reference is incidentally made to the fact that the testimony of Fahey and that of plaintiff and J. L. Boddeker is set out in the brief, and we find the same in a "Statement of Material Facts," wherein appellant devotes 12 pages of the brief to a statement of all the testimony deemed material by him. No reference is made to the page or pages of the preliminary statement on which the matter bearing upon this assignment is to be found. In fact, we are left to search the entire preliminary statement to see whether any merit exists in any of the contentions attempted to be made by the assignment. Each issue raised by the assignment should have been presented by an appropriate proposition, and supported by a statement of the evidence relating to that particular issue. The assignment, not being briefed in accordance with the rules, should not be considered. We are, however, of the opinion that there is no merit in the two contentions which could have been presented under this assignment.

[2] We do not consider the evidence conflicting upon the issue whether the amounts due for taxes and incumbrance were to be paid out of the \$2,500 to be paid by Fahey. Fahey testified he had no idea the money was to be paid out of his check, that he did not look at it in that way at all, and never paid any attention to it, that all he wanted to know was that the property was straight, and all he wanted Boddeker to do was to be guided by his attorney. His testimony is evasive when asked to state what occurred in Boddeker's office with respect to paying

off the mortgage and tax liens out of the check, while Boddeker's testimony is clear and explicit, and the facts show beyond dispute that it was contemplated by all parties that the charges against the property should be paid out of the \$2,500 to be paid by Fahey. He, as well as the other parties, knew that plaintiff had no way of paying such charges except out of the price received for her home. Fahey made his check payable to the Boddekers, instead of to plaintiff. It was undisputed that the Boddekers were stakeholders for the parties, intrusted by each with certain duties to be performed. For Fahey they were to see that not only the amounts due for taxes and incumbrance were paid, but also the amount due for the abstract of title. Fahey told Boddeker to get an abstract of title and deliver the same to his attorney, which was done. This is not disputed by Fahey. Why did he order the abstract of title? If plaintiff was unable to procure same, how was she expected to pay for same unless out of the proceeds of the sale? Why was the check made payable to the Boddekers if these charges were not to be paid out of same? No reason is given, and it is clear, even without the testimony of Boddeker, that the understanding was that the charges were to be paid by Boddeker out of the proceeds of the check, and Boddeker at once made out his checks and had them ready to close up matters as soon as plaintiff should move from the premises. The facts also show beyond dispute that Fahey's attorney had stipulated what must be done to have the title made satisfactory to him, and that nothing remained to be done except to pay off the taxes and furnish receipt and pay off the incumbrance of which he had himself drawn the release, and he knew and acquiesced in leaving it to the Boddekers to make such payments. He left a memorandum with them of the amounts to be paid to satisfy the mortgage debt. Further, it does not appear that plaintiff was to vacate the premises within any certain time, nor that she delayed unduly, nor that Fahey was in any way prejudiced by such delay as took place; that the Boddekers at his request nailed on the house upon the premises a "For Rent" sign, and it does not appear that any one wanting to rent was prevented from doing so by reason of plaintiff's slow removal therefrom.

[3] The second and third assignments also attack the judgment as unsupported by the evidence, but no statement of any kind is made under either of them, and they will not be considered.

[4] The fourth assignment reads as follows: "The court erred in overruling the special exception of defendant to plaintiff's failure to allege a contract in writing, because the plaintiff must, before being allowed to have contract specifically performed, show that it is of such character as entitled her to relief sought." No statement is submitted

under this assignment, and we do not know whether complaint is sought to be made of the overruling of the special exception hereinbefore stated in setting out defendant's pleadings, or a similar special exception urged in a so-called "First Supplemental Answer." The assignment should not be considered.

[5] However, the petition does not disclose that the contract was verbal; hence the exception was properly overruled. *Thomas v. Hammond*, 47 Tex. 42. *Lewis v. Alexander*, 51 Tex. 578; *Robb v. Traction Co.*, 82 Tex. 392, 18 S. W. 707; *Land Co. v. Dooley*, 33 Tex. Civ. App. 636, 77 S. W. 1030.

[6] Besides, the petition alleged such a performance on the part of plaintiff as would entitle her to have specific performance required of Fahey. *Tinsley v. Miles*, 28 S. W. 1000; *Showalter v. McDonnell*, 83 Tex. 158, 18 S. W. 491; *Fulton v. Robinson*, 55 Tex. 401.

The judgment is affirmed.

#### E. R. & D. C. KOLP v. BRAZER.

(Court of Civil Appeals of Texas. Amarillo. Nov. 15, 1913. On Motion for Rehearing, Dec. 13, 1913.)

#### 1. PRINCIPAL AND AGENT (§ 123\*)—AUTHORITY OF AGENT—EVIDENCE.

In an action for broker's commissions on the sale of feedstuff for defendants under a contract between plaintiff and defendants' agent, evidence held to warrant a finding that such agent was acting for defendants in the premises and that he acted within his authority in writing certain letters on defendants' behalf to plaintiff and arranging for the payment of commissions for the sale of the material.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 420-429; Dec. Dig. § 123.\*]

#### 2. EVIDENCE (§ 185\*)—BEST AND SECONDARY—NOTICE TO PRODUCE.

Where plaintiff gave defendants notice to produce the original letters written by plaintiff to them and defendants excused the failure to produce the letters and papers called for on the ground that the mass was so great that it would take considerable time to find them, etc., plaintiff was properly permitted to introduce carbon copies of the letters as secondary evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 642-660; Dec. Dig. § 185.\*]

#### 3. EVIDENCE (§ 168\*)—BEST AND SECONDARY.

Plaintiff was employed by the manager of defendants' St. Louis office to sell defendants' feedstuff on commission. Defendants closed such office, and all papers, correspondence, etc., in connection therewith, were turned over to it by the former manager. On sales being made, he was in the habit of confirming the same—sending a copy to defendants and one to plaintiff. Held, that such confirmations were, in effect, acceptances of the contracts as made and of the proposed purchasers, and that the ex-manager was properly permitted to testify that he sent letters of confirmation of sales to the purchaser on receipt of telegrams from plaintiff that he had made sales to them.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 558; Dec. Dig. § 168.\*]

#### 4. EVIDENCE (§ 243\*)—BEST AND SECONDARY—LETTERS—CARBON COPIES.

The letters of confirmation were acts and declarations of defendants through their agent and manager, and were admissible as such to bind them.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 908-915; Dec. Dig. § 243.\*]

#### 5. EVIDENCE (§ 471\*)—OPINIONS—STATEMENT OF FACT.

In an action for broker's commissions, a statement of a witness that plaintiff sold certain parties was not objectionable as an opinion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

#### 6. DEPOSITIONS (§ 107\*)—OBJECTIONS TO ANSWER—RESPONSIVENESS—TIME OF TAKING.

Objections that answers to questions in a deposition are not responsive must be taken by exception before announcement of ready for trial.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 309-319; Dec. Dig. § 107.\*]

#### 7. BROKERS (§ 54\*)—SALE OF GOODS—RIGHT TO COMMISSIONS—PURCHASER READY, WILLING, AND ABLE TO BUY.

In an action for broker's commissions in the sale of feedstuff manufactured by defendants, plaintiff was not required to prove that his customers were ready, willing, and able to buy under the terms proposed, where defendants on being notified of the sales wrote letters to the purchasers and to plaintiff confirming the same.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.\*]

#### 8. BROKERS (§ 86\*)—COMMISSIONS—ACTION.

Where, in an action for broker's commissions in the sale of feedstuff manufactured by defendants, plaintiff testified that he made the various contracts in question for the sale of the cars of material, and such fact was not rebutted by defendants, except by general statement that they knew nothing of it, and it was also shown that the sales were confirmed by defendants' managing agent, and notice sent to the purchasers—with copies to plaintiff and defendants—such proof established a prima facie case, and plaintiff was not bound to prove by each of the purchasers that he had made the contract with them.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

Appeal from Tarrant County Court; Charles T. Prewett, Judge.

Action by Wm. P. Brazier against E. R. & D. C. Kolp. Judgment for plaintiff, and defendants appeal. Affirmed on rehearing.

Flournoy, Smith & Storer, of Ft. Worth, for appellants. Baskin, Dodge & Eastus, of Ft. Worth, for appellee.

HUFF, C. J. On October 25, 1913, we rendered a decision in this case, reversing and remanding it. Appellee has filed a motion for rehearing and called to our attention errors that we are now persuaded we committed in our former opinion, in applying the law to the facts of the case; we therefore grant the motion for rehearing and file this opinion as our conclusion of the law governing the case. We may be permitted to state, partly in justification of our former opinion, that appellee did not brief the case, and we considered the case alone

from the brief of appellants and the examination of the record and authorities which we were able to make at the time.

Wm. P. Brazer, appellee, sued E. R. & D. C. Kolp, the appellants, in the county court of Tarrant county, for \$404 for brokerage commission, for the sale of 202 cars of bran, at \$2 per car, alleged to have been sold by appellee for the account of appellants during the months of June and July, 1910.

[1] We overrule the propositions presented under the first, second, and third assignments of error, which assail the action of the court in overruling appellant's special charge to the jury, directing peremptorily a verdict for appellants. The contract in this case was executed by correspondence between Louis J. Jones, the agent and manager for appellants at their St. Louis office, and the appellee. In pursuance to such contract, appellee contracted to sell 202 car loads of the feedstuff handled by appellants, and for which, under the contract, he was to receive \$2 per car. Appellants assert as a proposition that the burden was on the plaintiff, appellee herein, to prove that Jones was appellants' agent and acting within the scope of his authority, and that the letters in question should be established as the writing of appellants and appellee. It appears from bills of exception that the signatures to the letters from appellants were typewritten and the letters from appellee were carbon copies. Appellants filed a plea of non est factum in the usual form. We think the jury had ample evidence to justify them in finding that Jones was acting for appellants and had the authority to do so, and that he was acting within the scope of his authority. The appellee testified he wrote the original letters of the carbon copies and sent them by due course of mail to appellants at their office in St. Louis, and that he got the replies thereto by due course of mail. Jones testified he wrote such letters for appellants, acting for them as their agent and manager, giving the substance thereof; and, further, that he turned over the books and correspondence to the appellants. He also testifies that he sent to appellants a copy of such letters when received. The trial court appends as a qualification to the bill of exceptions the following: "Notice was given by plaintiff to defendants, to produce the original letters. Defendant E. R. Kolp testified that Louis J. Jones had authority to write the letter signed E. R. & D. C. Kolp, and authority to make the brokerage arrangements to pay the \$2 a car and to pay for all telegrams as recited in the correspondence." E. R. Kolp excused himself from searching through his letters and papers, for the correspondence in question, on the ground that the mass and bulk of the papers were so great that it would take considerable time to find them, etc. The court submitted to the jury the question of Jones' authority and

the question as to whether the contract was so entered into. We think there is sufficient evidence to sustain the findings of the jury on that point. *Feagan v. Barton-Park Mfg. Co.*, 42 Tex. Civ. App. 373, 93 S. W. 1076.

[2] The fourth assignment, to the effect that there was error in permitting appellee to read in evidence the carbon copies of letters because not the best evidence, will be overruled. We think from the above statement of the facts it will be seen appellee used sufficient diligence to obtain the originals, and, upon his failure to do so, had the right to resort to secondary evidence, and that there was no abuse of discretion on the part of the trial court in permitting the carbon copies to be read in evidence. *McDonald v. Hanks*, 52 Tex. Civ. App. 140, 113 S. W. 604. The execution of the letters and copies was established, if not by direct testimony, circumstantial.

[3, 4] The fifth and sixth assignments are overruled. Jones was permitted to testify that he sent letters of confirmation of sales to the purchaser upon the receipt of telegrams from appellee that he had made sales to them. All papers, correspondence, etc., in connection with the St. Louis office, were turned over to appellants by Jones, and they were given proper notice to produce them upon the trial. He also sent a carbon copy of each letter for confirmation, one to appellants and one to appellees. The carbon copies sent to appellees were introduced in evidence, over the objection of appellants, to the effect that such letters were not the best evidence. The confirmations of the sales as made by appellants were in effect acceptances of the contracts as made and of the proposed purchasers. The carbon copies were acts and declarations of appellants through their agent and manager, and were therefore admissible as such, and would bind them. We do not think it was necessary in this case to obtain the original letters to prove that appellants had accepted the purchasers of the contracts as made. When they notified appellee and the sales so made by him were confirmed, we think that the declaration and acts, in so far as appellee was concerned, were original testimony.

[5, 6] The seventh assignment is overruled. The statement of the witness that appellee sold certain parties is not, as we understand the connection in which it is used, a mere opinion of the witness. The objection to the answers of the witness that it is not responsive to the question must be taken by exception on that ground before announcement for trial. There is no exception to the answer because not responsive, shown to have been made before announcement of ready for trial. This exception appears to have been made during the trial. However, we think the answer responsive.

[7] It is insisted under the eighth assignment that appellee should prove that the pur-



chasers were ready, willing, and able to buy under the terms proposed. This rule does not apply where the principal accepts the purchaser and the contract is consummated. Where the appellants wrote letters confirming the sale to the purchasers and also to the appellee, the broker, we think it would be held that he had earned his commission. He furnished a purchaser acceptable to appellants, and nothing further was required of him. *Watkins Land Mortgage Co. v. Thetford*, 43 Tex. Civ. App. 536, 96 S. W. 72; *Albritton v. Bank*, 38 Tex. Civ. App. 616, 86 S. W. 646; *Conkling v. Krakauer*, 70 Tex. 735, 11 S. W. 117; *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345.

[8] The testimony is sufficient to support the finding of the jury that appellee sold the number of cars of bran to the proposed purchasers named in the exhibit to the petition, for the price and on the terms named, and that he immediately reported the sales as made to appellant's St. Louis office, and that appellants, through their agent and manager, Jones, confirmed such sales by letters to the proposed purchasers, and also by letter to appellee, and that appellants, as principal, received a copy of such confirmation. The evidence also shows that appellee made out in accordance with the contract a full report of the sales as made and duly transmitted the same in regular course of mail to appellants. This evidence, at least, made a prima facie case. If appellee did not make the contract of sale with the proposed purchasers, the burden shifted on appellants to show it. We do not believe it incumbent on appellee to prove by each of the purchasers that he had made the contract with them. He swears that he did make it, and when that fact is not rebutted by appellants, except by the general statement that they knew nothing of it, we think the jury entitled to find such sales were made from the facts so proven—at least the verdict has testimony supporting it. If the contracts were made, as contended, and as established by the verdict, appellants could have enforced specific performance or could have recovered damages for the breach of same. When such is the case, the broker has earned his commission, and a sale is effected in so far as he can do so. The delivery and other details were for the appellants. *Moss & Raley v. Wren*, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847. We therefore overrule the eighth and ninth assignments of error.

All other assignments are overruled.

We think there was sufficient evidence to support the finding of the jury that Jones was the agent and manager of appellants in employing appellee and in confirming the sales made by appellee, and that he was acting at the time within the scope of his authority. Having concluded that we were in error in our former opinion, we grant the

appellee's motion for rehearing and also overrule appellants' motion to reverse and render.

The judgment of the lower court is affirmed.

#### On Motion for Rehearing.

It is asserted that the court misunderstood the facts in the record, and that Jones was not in the employment of the appellants, as shown by the facts in the record. Jones swears he was in the employment of appellants until August 1, 1910, and that during the months of June and July the appellee Brazer reported sales by wire to the St. Louis office, of which he was then in charge, and during those months Jones sent out confirmations of the sales to the purchasers and mailed a copy to the appellee, and one copy to appellants' office in Oklahoma City, and one to their office in Ft. Worth. E. R. Kolp swore the contract expired with Jones June 15, 1910, and there is a written contract between Jones and appellants which shows it was to continue until June 15, 1910. Kolp admits by his testimony that Jones remained in the St. Louis office for a month and 15 days after that date in charge of the office, but says he had no authority to do any business. On the 3d day of August following, appellants wrote from their Ft. Worth office to the appellee Brazer that they had closed their St. Louis office, and that the business theretofore transacted from that office would be divided between the Oklahoma City and Wichita offices, and the affairs of the St. Louis office would be wound up from Ft. Worth, and "if there are any communications regarding which you desire to make would be glad to hear from you." They further say they will quote for shipment from Wichita and hope a nice business may result. The testimony of Brazer and Sullivan show that on June 30, 1910, appellee rendered appellants a statement of the sale of 152 cars of bran, giving the names of the parties to whom sold, date sold, and price, and on July 30, 1910, a like report of the sale of 50 cars. Appellants were notified to produce the originals. From the record it appears they were not so produced, and carbon copies, which appellee produced, were introduced in evidence. After these reports, appellant notified appellee on August 3, 1910, that they had closed their office at St. Louis and would quote shipments thereafter from Wichita and solicited further business. We think this testimony shows, not only that Jones was the agent of appellant when he entered into the contract with Brazer, but also when Brazer made and reported the sales. If the testimony of Brazer, Jones, and Sullivan is true, these sales were made and reported to appellants. In their letters they recognize the fact that Brazer had been making sales for them from their St. Louis office. These acts of Jones and Brazer they do not disaffirm, but instead notified Brazer

they expected to continue business with him from their Wichita office and expressed the hope for a nice business. At any rate, the jury believed Brazer, Jones, and Sullivan and accepted their testimony and disregarded that of E. R. Kolp.

Counsel contends that the original letters and telegrams were attached to the depositions of Brazer as Exhibit 5. This is a statement by attorneys, but the record in this case does not disclose that fact. The record shows in this case that copies of confirmations of the sales are set out in Exhibit 3 to the deposition, and Exhibit 3 covers 16 pages of the statement of facts and the confirmation of the sales purport to be addressed to the respective purchasers to whom Brazer says he sold, confirming the sale. If Jones is to be believed, he sent these confirmations to the purchasers—a copy to Brazer and a copy to appellants at Oklahoma City, and a copy to them at Ft. Worth. Brazer testified these are the copies he received. Kolp says he never got any such reports of confirmations. The jury accepted the testimony of Jones, Brazer, and Sullivan. We think therefore the evidence sufficient to show Jones was the agent of appellants, and that he, in acting for appellants, confirmed the sales; also, notifying appellee that the sale was confirmed. This was the act of appellants, and as such was admissible as the acts and declarations made by them and substantially admitting the sale.

We have been severely taken to task for stating that E. R. Kolp excused himself from searching through his letters and correspondence in question on the ground that the mass and bulk was so great that it would take considerable time to find them. In speaking of the correspondence between the appellants and Jones, E. R. Kolp says: "I do not know where some of that correspondence is. I did not have any occasion to look for it. \* \* \* I read the depositions in which he said he sent us copies of the correspondence. I have not looked for copies of that correspondence. The reason I did not was that it was not necessary. I did not think it was needed. There is a mass of stuff that comes there. \* \* \* You could not have a building large enough to keep all these copies from four or five offices. Whenever he made a sale of bran, he was supposed to send us an account of it." The trial court qualified the bill of exceptions taken to the admission of this evidence, that appellants were given notice to produce all letters, papers, and correspondence in relation to the transaction. Jones testifies the notices of sales were sent appellants and were sent through June and July. Brazer testifies that these were notices of confirmation of the sales received by him from appellants. The record does not show any other sales made by Brazer. The correspondence,

as well as Kolp's testimony, in several places, shows that he knew Brazer was making the sales. The jury accepted the testimony offered by appellee and rejected Kolp's testimony. We do not think we have treated appellants unfairly in the record, but have gone over it carefully several times. We think we have correctly quoted the record or its effect and those facts which support the findings of the jury, and, but for the seeming disposition on the part of counsel to attribute to us oversight in examining the record, we would not have filed this additional finding.

The motion of the appellants is overruled.

#### WESTERN UNION TELEGRAPH CO. v. WALCK et ux.

(Court of Civil Appeals of Texas. Amarillo. Nov. 29, 1913. Rehearing Denied Dec. 20, 1913.)

#### 1. RELEASE (§ 58\*)—FRAUD—QUESTION FOR JURY.

In an action against a telegraph company for injuries to a wife falling over a guy wire and stob in a public street, defended on the ground that the wife and her husband had released all claims, evidence held to justify the submission to the jury of the issue whether the release in form including the company, was procured by fraud.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.\*]

#### 2. RELEASE (§ 17\*)—FRAUD—EFFECT.

A telegraph company, when sued for injuries to a pedestrian falling over a guy wire in a public street, relied on a release reciting that the pedestrian and her husband released from liability a railroad company and all persons or companies. The preliminary negotiations for a settlement were had between a claim agent of the railroad company and the husband and wife, who believed that the claim agent represented only the railroad company. The claim agent, with knowledge of that fact, failed to disclose the stipulation releasing other companies as well, and the husband and wife in reliance on his representations signed the instrument without reading it. Held, that the claim agent was guilty of fraud excusing the husband and wife from their failure to read the instrument, and the telegraph company could not rely thereon to defeat an action by them for the injuries.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.\*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by George F. Walck and wife against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Veale & Davidson, of Amarillo, for appellant. B. T. Miller and Barrett & Jones, all of Amarillo, for appellees.

HENDRICKS, J. The appellees, Geo. F. Walck and wife, Ellen Walck, sued the Western Union Telegraph Company for injuries alleged to have been sustained by the wife at Des Moines, N. M., on account of falling over a guy wire attached to one of

appellant's telegraph poles and a "stob" in a public road or street, while traveling from her home at night to said town. The result of the fall, on account of pregnancy, produced a miscarriage and premature birth of a child, and consequent suffering and weakness. The matter of the injury, the negligence of the telegraph company and its original liability, aside from the matter of a release, are not seriously at issue upon this appeal. The question principally involved arises upon the following release, executed by the appellees, as a determination of their rights, and we omit certain notations and statements upon the release which we do not think are germane to the discussion.

"In consideration of the sum of two hundred fifty and no/100 dollars (\$250.00) to me in hand paid by the Colorado & Southern Railway Company, receipt whereof is hereby acknowledged, I, do hereby fully and forever compromise and settle with and release and discharge said railway company and all railway companies whose lines are operated by or in connection with the said the Colorado & Southern Railway Company, or which are a part of the system of the said company, and any and all persons or companies of every description, who, or which, may have contributed in any manner by any act or omission, from any and all claims, demands or causes of action which now exist, or may hereafter arise, by reason of any and all personal injuries, of whatever character or description, sustained by me on or about the 9th day of December, 1911, at or near Des Moines, state of New Mexico, while walking along street or road I struck a guy wire to a telegraph pole and fell to ground. At the time of said accident I was pregnant and the blow resulted in premature birth of child which lived about two hours. Also for all expenses incurred by reason of the said accident and also for loss of services and companionship of my said wife, Nora Ellen Walck.

**"Bill for Voucher.**

"Meaning and intending hereby to discharge and hereby discharging said companies and persons and each of them from any and all demands and claims as fully as if said injuries, whether present or future, were all described herein in detail.

"I have read and fully understand the foregoing instrument and agree to same and hereto affix my hand at Des Moines, N. M., this third day of February, A. D., 1912, as my free and voluntary act and deed. Nora Ellen Walck. [Seal.] George F. Walck. [Seal.]

"Correct. Calculations correct. [Signed] W. F. Dobeckl. [Signed] E. H. Doolittle, Claim Agent. [Signed] J. H. Bradbury.

"Approved: [Signed] J. D. Welsh, General Superintendent.

"Approved: [Signed] S. G. Arscott, for Vice President.

"The above account has been examined, found correct and is hereby approved for payment. [Signed] J. H. Bradbury, General Auditor.

"Witnesses to signatures: J. M. Kimmel, address, Des Moines, N. M.; C. J. Niehous, address, ———.

"Received February 3rd, 1912, from the Colorado & Southern Railway Company, in full payment of above account. Two hundred and fifty and no/100 dollars. \$250.00. Note: The receipt to this voucher must be dated.

"Voucher is made, or when signed by another."

It is noted that in literal language the Western Union Telegraph Company is not a party to the instrument, but claims to be embraced in the following language: "Any and all persons or companies of every description, who, or which, may have contributed in any manner by any act or omission"—which, connected with the releasing and discharging clause of the instrument, provide for its exoneration from damages. This release was attacked by the appellees on the ground of fraud, alleging that the same was void: "Because at the time of and before same was signed, the Colorado & Southern agents and servants who procured such instrument as was signed procured same by representing that the said railway had nothing to do with the said wire or telegraph line; that they were not liable in any way to him; that the railway had sold its interest in the said telegraph line, and that they would give him \$250 as a donation or gift, and that same would not interfere in any way with his real claim against the Western Union Telegraph Company (against) whom said servants said he could recover; \* \* \* that the said paper was signed late at night while said wife was in bed sick, and in no condition to, and when she did not and could not, read or understand said release, and plaintiff himself had no glasses, and was unable to read at night, and did not read and could not read said instrument but relied on said servant's and agent's representations; \* \* \* and that said instrument was signed with the specific understanding and assurance that it would not interfere with said plaintiff's cause of action." Appellees further alleged that "the parties who procured said instrument undertook to tell plaintiff the substance and form of same, and assured him that it was as above set out," and with the further allegation that plaintiff and his wife believed the representations made and relied upon same when the instrument was executed.

The fifth assignment of error, which we think is the first one material in this record which we should notice, is that the court erred on account of the submission of the eighth paragraph of his main charge to the

jury, complained of by three propositions as follows:

(1) That the charge "directs the jury that they may find for the plaintiffs on a state of facts not proven on the trial of the case."

"(2) The failure of the claim agent Niehous to acquaint appellees with the fact that the effect of the release was to discharge the appellant, and the fact that appellees signed the release in question without knowledge of its true contents, effect, and import would not be sufficient to avoid the release.

"(3) In the absence of proof that plaintiff was prevented from reading the release, or that it was misread to him, it was error for the court, in the eighth paragraph to allow the jury to find against the release; it being on its face a full and complete satisfaction of plaintiff's damages and a release of all persons and corporations."

The following is the paragraph of the charge complained of: "On the other hand, if you believe from the evidence that C. J. Niehous, the claim agent of the Colorado & Southern Railway Company, represented to plaintiffs that the said railway company was not liable to them, but that any claim they might have was against the defendant, Western Union Telegraph Co., and that the said receipt and release contract, signed by them, would not interfere in any way with their cause of action, if any, against defendant telegraph company; and you believe further that the \$250 mentioned in said contract of release was a mere gratuity or gift from said railway company and said Niehous, and not a settlement of the case; and you further believe from the evidence that the plaintiffs believed said representations to be true, and that they in good faith received and accepted said sum as a gift or gratuity and not as a settlement and satisfaction of any damages or losses which they may have sustained by reason of the accident in question; and you further believe that said Niehous paid over to plaintiffs the money, and procured from them the said release, and that in so doing he represented to them that said release was merely a receipt for the money; and you further believe that they accepted said money and signed said receipt and release without knowledge, on their part, of the true contents, effect, and import of the same, and that said Niehous purposely withheld and concealed from plaintiffs that said instrument purported and had the effect of releasing any claim for damages they may have had against the Western Union Telegraph Company—then, if you so find and believe from the evidence, the said release will not operate as an acquittance to said telegraph company, and would not deprive plaintiffs of the right to recover in this case, if you believe they are entitled to recover under the evidence and the law given you elsewhere in this charge."

The evidence discloses that prior to the execution of the release, preliminary nego-

tiations with reference to settlement had been made between the parties, the claim agent Niehous having been in Des Moines three or four days prior to the execution of the release, for the purpose of investigating the matter, that upon his last visit, immediately prior to the execution of the release, appellees, Walck and wife, had offered to accept \$400 in settlement of their claim against the Colorado & Southern Railway Company, and that at this time said claim agent representing the said railway company, offered the sum of \$250, which was rejected. We conclude that at no time during the negotiations did appellees Walck know that the claim agent Niehous was in any manner representing the Western Union Telegraph Company, but believed that he was representing solely and exclusively the Colorado & Southern Railway Company. We find that the appellees inquired of this claim agent, at the time of the last visit that the latter made to Des Moines for the purpose of settling the claim prior to the execution of the instrument, if the Western Union Telegraph Company was concerned in the matter of settlement, and that said Niehous answered that he did not know. We find that the appellees did not have any knowledge of the true contents, effect, and import of said instrument at the time of its execution. Niehous says: "They asked me whether the Western Union was concerned. I told them I did not know, and I did not at that time," but "before I went to Des Moines [the last time when he made the settlement] I learned that the Western Union was concerned." Again he said: "I never said anything about the Western Union being concerned in the release. They were once talking about the Western Union, and I told them I did not know about it." He further says, meaning at the time of the settlement: "It was not necessary for me to mention the Western Union. I did not purposely leave out the Western Union. *It just happened* that nothing was said about it." He claims that the night the release was made he said nothing to the appellees, except that he informed them that the release was a full release for the accident and the injury. He also says that appellees understood the release, and we presume and find that this is the manner this witness claims they understood it: "I did not say 'against all companies' [meaning, of course, that he did not inform them that it was a release against all companies]. I said, 'Do you understand that you are through with this matter, and that this releases for this accident entirely?'" Of course the question is naturally suggested, With whom and with what companies the appellees had finished their negotiations? As stated, these people had been dealing with him as the agent of the Colorado & Southern, and not as a representative of the Western Union. They had asked him if

the Western Union was concerned in settlement, and he had informed them that they were not. Unless they had some other knowledge from another source, not apparent in this record, we do not understand how it could be urged that this witness imparted any information, especially with reference to the Western Union Telegraph Company, and we find that the communications which he claims he actually made are in the nature of suppression and deceit. He knew that they were dealing with him as the agent of the railway; even according to his own testimony he had acquired information before the night of the settlement that the Western Union was directly interested, and upon paying them cash in the sum of \$250 upon that particular occasion, he immediately drew upon the Western Union for the full amount, evidently for reimbursement. We think this witness was mistaken when he says that it was not necessary for him to mention the Western Union when this release was executed, and that "it just happened" that nothing was said about the matter, and that a consistent course to exclude information with reference to the real beneficiary of this release and of this settlement, for the purpose of obtaining a settlement of this character from these people, was in reality practiced by this claim agent. We find that he informed the appellees he was a lawyer, and that he informed them that he knew that the Colorado & Southern was not liable for any damages with reference to the guy wire over which the woman stumbled, and further informed them that their ground of action was against the Western Union, and that he understood the situation because he was an attorney. On the night of the execution of the release, a smoky lantern was the light afforded for that purpose. In accordance with the verdict of the jury and the testimony of the appellees, by which we are bound, we find that the appellees did not read this release upon this occasion, and that neither Walck nor his wife knew that the language purporting to release their claim for damages "against all companies" was contained in said instrument. We also conclude: That upon this particular night this claim agent improperly suppressed the fact to these people that the Western Union Telegraph Company was interested in said settlement, and further find that they would not have signed the same if they believed that it purported to settle their claim against that company. The 30th of January, at the time the appellees demanded \$400 and \$250 was offered, was the date of the principal negotiations between the agent and the appellees, and on February 1, 1912, immediately following, Mrs. Walck dictated the following letter, written by her husband, however signed in her name, and which was an attempted offer of acceptance of the \$250, the proposition previously rejected by them:

"Des Moines, N. M. Feb. 1, 1912. Mr. C. J. Niehaus, 827 Cooper Building, Denver, Colo. —Kind Sir: As I am not getting my health here as fast as I ought to and I will have to be taken away from here at once to a lower altitude, and have to be treated there by a good doctor for my hips as I am getting weaker and the circulation is not right in my lower limbs; I have come to think that I will better take the \$250.00. Now this is small for my suffering and the loss of my baby, and it will take nearly all of it to pay our debts here for we must pay our doctor. I have been since the night of the 9th of December, 1911, until now not able to do anything, and have been in pain most of the time. Please let us know just when you will be here. I think the C. & S. R. R. Co. ought to furnish us tickets to Shattuck, Okla. I am, Very Respectfully, Mrs. Nora Ellen Walck, Des Moines, N. M." That the agent Niehaus received said letter on the morning of the 3d of February, arriving at Des Moines, N. M., at 11 o'clock at night, said settlement having been effectuated between 11 and 12—about 30 minutes being consumed for that purpose—and that upon the particular occasion Mrs. Walck, who in this record was at least acting as the agent of her husband, with reference to some of the negotiations and the writing of said letter, was in bed and in a weakened condition.

[1, 2] The appellant's first proposition leveled at the charge of the court, quoted by us, complaining that it was a submission to find for the plaintiff on a state of facts not proven on the trial of the cause, is not sustained by the record; and the second proposition, that the failure of the claim agent to acquaint appellees with the true contents of the release would not be sufficient to avoid said release, is a singling out by appellant of one particular phase of the evidence, which, with other evidence in the case, we think is sufficient to sustain the verdict of the jury as to the voidability of said instrument; and, as to the third proposition, that in the absence of proof that plaintiff was prevented from reading the release, or that it was misread to him, the court erred in its submission of said charge to the jury, we think that the line of authorities apply that (although we should assume that the most of the acts and representations were made just a few days prior to the execution of the release) the appellees had the right to rely upon the statements of the claim agent, and if they did not read the release, were thrown off their guard, believing that it was solely a settlement with the Colorado & Southern Railway Company, and that the Western Union was not concerned in it. Even if most of the representations were made on the 30th of January, upon which appellees relied, the appellant's agent knew at the time he received the letter on the 3d of February, accepting the \$250 proposition, that

these people believed that they were accepting a proposition with the Colorado & Southern Railway Company, and with no other company, and his conduct, at the time the release was executed, relative to the suppression of material facts, connected with the statements made by him and the negotiations which had transpired between them prior to that time, indicate a case of fraud, which, we are inclined to think, even if there were some opportunity afforded to the appellee to read the release at the time it was executed, was calculated to throw the appellee off his guard, and it does not lie in the mouth of appellant to say, "You should have read the release, and if you did not do so, you are bound by its contents."

The case of *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 809, decided by the Supreme Court of this state, speaking through Justice Stayton, was one involving a transaction whereby Corbett agreed that Labbe should have the use of 1,000 "picked" ewes for the period of three years, and under this agreement 1,000 ewes were delivered. The trial court instructed the jury as follows: "The jury are further instructed that if the defendant Labbe knew of the diseased condition of said sheep when he received them, under said contract, or by the use of ordinary care and diligence could have known of their diseased condition, then they are further instructed that such diseased condition of said animals, or subsequent loss therefrom, is no defense in this action to the plaintiff's demand, and you will find for the plaintiff." The appellant assigned this charge as error. The Supreme Court, in commenting on this charge complained of and given by the trial court, used the following language: "This charge is assigned as error, in that it makes the appellant liable, although the jury may have believed that the appellee made the misrepresentations alleged to have been made by him, if by the exercise of ordinary care and diligence the appellant might have ascertained that the representations were not true. \* \* \*" In this case the real diseased condition of the sheep was known by appellee when the same were delivered, and the appellant, with his agents, in person received the sheep, and it seems that some of the agents who were with him at that time knew of the diseased condition, but that appellant did not. The Supreme Court said, "The misrepresentation alleged to have been made was one material in character, and, if made, calculated to prevent an examination by the appellant for himself to ascertain the true condition of the sheep, and it related to a matter of which the appellee, from his own statement, had actual knowledge," and quoting from the English case of *Railway Company v. Kisch*, L. R. 2, H. L. 120, Justice Stayton continues: "When once it is established that there has been any fraudulent misrepresentation by which

a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated that which is untrue \* \* \* for the purpose of driving me into a contract, cannot accuse me of want of caution, because I relied implicitly upon your fairness and honesty.'" The appellees, Walck and wife, said that they relied on the statements made by Mr. Niehous, and the husband said that Niehous "acted very friendly with him." Justice Stayton concluded that such a charge, under the evidence in that case, to the effect that if a man receiving the sheep could have known of their diseased condition by the use of ordinary care, in view of the fraud and misrepresentation, was error, and upon that and another ground reversed the cause. In this case the jury having found the fraudulent representations, and the fact that the appellees relied upon the same, we are inclined to think and so hold that appellant is not in a position to complain of the verdict of this jury, and believe that a clear cause of fraud was made out against appellant.

In this connection, the ninth assignment of error is a complaint because the court refused to give in charge to the jury a requested instruction, to the effect that if the jury find that the witness Niehous presented to plaintiff and his wife the release in evidence, and they had the opportunity to read the provisions of said release and knew or could have known by the exercise of ordinary care the contents of said instrument, and knew or could have known by the exercise of such care that they were releasing all other companies and persons who might have been connected with the placing of the guy wire in question, and further believed that no deception was practiced by Niehous against plaintiffs to find for the defendant company. If no deception was practiced by Niehous against the man and his wife, of course they could not recover in any event, and the question of fraud, we take it, was amply submitted to the jury, at least as against the objections we find in this brief leveled at the charge of the court. If there were fraud in the transaction, which the jury found, we believe that a sufficient analogy exists between this case and the *Labbe-Corbett Case* for its application to this record, and in holding that the other elements of the special charge submitted by appellant, with reference to the opportunity to read the release and the matter of appellees' negligence in not reading the same, were inappropriate to this case. That part of the special charge is, in substance, the same as the court gave, discussed in the *Labbe-Corbett Case*, and which Justice Stayton condemned as improper. Again, the Supreme Court has said: "The defendant in error claims that Mrs. Conn was guilty of negligence in signing the

deed of trust without reading it, and therefore the court ought not to reform the instrument according to her testimony. If the failure to read the instrument was unexplained, and there was no reasonable excuse for it, this proposition would be correct, but, when the party is misled by the fraudulent representation of the other party, and caused, by confidence in such person and his representations, to sign the instrument without reading it, this does not constitute such negligence as will deprive the maker of the instrument of equitable relief from the consequences of the fraudulent representation. *Chatham v. Jones*, 69 Tex. 744 [7 S. W. 600]. *Conn v. Hagan*, 93 Tex. 338-339, 55 S. W. 323.

Appellant asserts that certain representations were made beforehand, and if those were not repeated or made at the time of the execution of the instrument, and if they had the opportunity to read the same, there could be no recovery. In view of the previous negotiations, when the letter was dictated by Mrs. Walck and written by her husband, and received by Niehous and accepted by him, which appellant insists was done in discussing another phase of the case, the settlement and release are bound to have been based, and their minds met, upon what had transpired, and the Western Union was excluded between these parties from all negotiations, and with reference to which the claim agent had full knowledge. Confining this opinion to questions distinctly raised, and not considering questions outside of the scope of the assignments and propositions made by appellant, and having attempted to carefully consider this record and all the assignments of the appellant, and believing that the cause should be affirmed, we overrule all other assignments not discussed by us; the previous discussion, we believe, sufficiently concluding the material assignments of appellant.

Affirmed.

#### MIXON v. WALLIS et al.

(Court of Civil Appeals of Texas. San Antonio. Nov. 26, 1913. Rehearing Denied Dec. 20, 1913.)

#### 1. JUDGMENT (§ 199\*)—NOTWITHSTANDING VERDICT—GROUNDS.

Judgment non obstante veredicto is permissible only when there is undisputed evidence, outside of the facts found by the jury, on which a verdict should have been directed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

#### 2. TRESPASS TO TRY TITLE (§ 41\*)—EVIDENCE OF TITLE—SUFFICIENCY.

In trespass to try title, wherein an intervener and the defendants B. claimed under the ten-year limitation by virtue of the fact that their ancestor had had the adverse possession of a part of the land continuously for ten years before the suit and had cultivated during that time five or six acres, evidence held not to show that the ancestor had conveyed to defendant M.

160 acres including the land improved, so as to preclude the intervener and the certain defendants from asserting title to 160 acres by virtue of the ancestor's improvements and possession.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

#### 3. ADVERSE POSSESSION (§ 107\*)—BOUNDARIES—STATUTORY PROVISIONS.

Rev. Civ. St. 1911, art. 5676, providing that adverse possession shall be construed to embrace not more than 160 acres, including the improvements, or the number of acres actually inclosed, should the same exceed 160 acres, does not give a possessor 160 acres in separate parcels to be selected by him or any one else, but contemplates that he shall receive 160 acres in a body designated by the court, and one cannot acquire a parcel in one corner of a survey and another parcel in another corner; the total aggregating 160 acres.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 624; Dec. Dig. § 107.\*]

#### 4. DEEDS (§ 8\*)—ADVERSE POSSESSION—PURCHASER—RIGHTS ACQUIRED.

The location of land claimed by adverse possession within Rev. Civ. St. 1911, art. 5676, providing that adverse possession shall be construed to embrace not more than 160 acres including the improvements, is fixed to a certain extent, and a purchaser from the possessor must take notice of that fact, and of the fact that he acquires no title unless he purchases the land whose location is so fixed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 13-18, 408-412; Dec. Dig. § 8.\*]

#### 5. ADVERSE POSSESSION (§ 107\*)—TITLE ACQUIRED—CONVEYANCES.

Where a third person acquiring title by adverse possession to 160 acres in a survey claimed by plaintiff did not acquire any title to the particular 160 acres claimed by defendant under a supposed conveyance from the third person, and defendant surrendered to plaintiff, plaintiff was not prejudiced by the supposed conveyance, and he could not appropriate the land acquired by the third person.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 624; Dec. Dig. § 107.\*]

#### 6. COURTS (§ 107\*)—DECISIONS—WITHDRAWAL OF OPINIONS—EFFECT.

Where an appellate court withdraws an opinion, it should, in deference to the court's wishes, be treated as if never rendered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 360; Dec. Dig. § 107.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Suit in trespass to try title by Lockhart H. Wallis against Mrs. C. Bonin and others in which Ira Mixon intervened. From a judgment for plaintiff, the intervener appeals. Reformed and affirmed.

See, also, 146 S. W. 651.

F. F. & E. T. Chew, of Houston, for appellant. Baker, Botts, Parker & Garwood and Atkinson & Atkinson, all of Houston, for appellee.

**MOURSUND, J.** This is a suit in trespass to try title, instituted by appellee Wallis against Mrs. C. Bonin and her husband, T. R. Bonin. Masterson Irrigation Company, Geo. D. Childress, H. Yoakum, H. J. Miller, W. G. Richbourg, K. C. Barkley, J. F. McQueen, Thos. B. Mitchell, R. B. Cheshire, adminis-

trator, H. Masterson, Ingham S. Roberts, D. H. Hardy, the firm of Hardy & Roberts, W. L. Thompson, and Wm. Metzler to recover the Andrew Lawson one-third league of land. Ira Mixon intervened, complaining of plaintiff and all defendants except Bonin and wife, claiming the land in controversy, pleading the ten-year statute of limitation in support of his title, and praying judgment against all of said parties for the title and possession of the land, and further praying that, if his plea for the recovery of the entire tract be not sustained, then that he be allowed to recover 160 acres thereof, to include his improvements, and to be surveyed off for him under the direction of the court. Bonin and wife pleaded not guilty the ten-year statute of limitation, and prayed that if Mrs. Bonin's title to the entire tract be not sustained, then that 160 acres including her improvements be surveyed under the direction of the court and set aside to her.

All parties took part in the impaneling of the jury, but, after the pleadings were read, all defendants except Bonin and wife withdrew their defenses and admitted that Wallis had title, while Bonin and wife and Ira Mixon admitted that plaintiff had record title to the land, but claimed 160 acres of the land in controversy under their plea of limitation of ten years. Thereupon the case was submitted upon the following special issues:

"Question 1. Do you find, or do you not, that C. Mixon had 'peaceable' and 'adverse' possession of any part of the Andrew Lawson one-third of a league, cultivating, using, or enjoying the same for 10 years continuously before the date of the filing of this suit, which was on the 14th day of January, 1910?" To which the jury answered: "We find he did."

"Question 2. If you answer the foregoing question in the affirmative, you will then answer the following question: How many acres do you find that he so had in possession inclosed, cultivating, using, and enjoying the same?" To which the jury answered: "We find he had five or six acres."

"Question 3. Do you find, or do you not find, that Mixon recognized the right of Lopez to the barn and the lot or inclosure around it and held the same from the time Lopez left until the time of his (Mixon's) death, under the permission given him by Lopez or by Converse who was the agent for Richards, the owner, and that Mixon recognized the right of Lopez or Richards to the barn, which was a part of the land?" To which the jury answered: "We find he did not."

Upon these findings the court, upon motion of Wallis, entered judgment that the Bonins and Mixon recover of Wallis six acres upon which their improvements are situated, to be surveyed off and partitioned to them; that Wallis recover of all defendants and the intervenor Mixon all of the land except said six acres; that plaintiff might have a writ

of possession for the land awarded him at any time after 60 days from date of the judgment, and that all defendants and the intervenor recover of plaintiff all costs. An appeal from this judgment taken by Mixon and the Bonins was dismissed by the El Paso Court of Civil Appeals because the judgment was not final on account of its failure to dispose of the issue between the intervenor and the defendants other than the Bonins. See 148 S. W. 651. On August 9, 1912, on motion of Wallis, judgment was entered *nunc pro tunc*, which disposed of the issue between the intervenor and the Bonins as against the other defendants. Appeal was perfected by Mixon and the Bonins. The court granted the motion of plaintiff Wallis for a judgment in his favor notwithstanding the verdict, on the ground that the undisputed evidence showed that C. Mixon, former husband of Mrs. Bonin and father of Ira Mixon, had, about seven years prior to the trial of the cause, conveyed to William Metzler 160 acres out of the Andrew Lawson survey and had placed Metzler in possession thereof, which was still held by Metzler, who had improvements thereon. The theory adopted by the court was that by reason of the facts so found C. Mixon had applied his claim to the 160 acres held by Metzler and had exhausted his claim to the Lawson survey.

[1] By various assignments the appellants question the right of the court to enter judgment for plaintiff for all the land except six acres, and contend that judgment should have been entered for appellants for 160 acres to include their improvements. It is not denied that the findings of the jury are such as to warrant and require a judgment in favor of Ira Mixon and the Bonins for 160 acres of land, unless the facts are such as to justify a judgment non obstante veredicto under the theory adopted by the court. It is only when there is undisputed evidence outside of the facts found by the jury, by reason of which a judgment should have been instructed in favor of the party in whose favor judgment was rendered, that a judgment non obstante veredicto can be upheld. *Fant v. Sullivan*, 152 S. W. 515.

[2] It becomes necessary therefore to investigate the evidence to see whether it was of such a character as to justify the court in ignoring the findings of the jury and render judgment contrary thereto. Plaintiff on one side and the intervenor and the Bonins on the other stubbornly fought out the issues submitted to the jury, and it appears that the intervenor put defendant Metzler upon the witness stand for the purpose of showing that C. Mixon had claimed the entire tract of land, and, after denying such to be the fact, he finally admitted it to be true. Incidentally, he testified that he built his first improvements on the land with C. Mixon's permission, about eight years before the trial, and, being asked to state whether or not he had a contract to buy the land



from Mixon, he said: "Yes, we had a kind of contract. As to its being a written contract, will say there was something made, but I don't know what went with it. I have tried to find it and can't find it. It was before the time of that controversy out there between Childress and Mr. Wallis, and Yoakum and Cheshire and all the rest of them; that was about two years before that." Upon being asked whether he ever paid Mixon anything on the contract, he replied: "No, sir; I never did pay him anything on it." On cross-examination he testified: "One hundred and sixty acres I bought from Mr. Mixon, that is what I bargained for. I went into possession of it, and am in possession of it now under my purchase from him; I thought I was going there and getting the land, and it would be all right, and I went to work. It has been about seven years ago that I bought this 160 acres of land from him. We made a kind of a contract on it. I went into possession and got 160 acres with his permission. I didn't build on it, but I put a fence on it and farmed there, and I am there now. I later built on it. I have been building on it now, and my house is there now. I claim that 160 acres by virtue of my contract with Mr. Mixon. Then after that, two years after that, why they came and they claimed it, I mean Mr. Childress, Cheshire, and that crowd, and they went. I got a deed from them, a piece of a deed. Wallis never did come to me; yes, Wallis came and claimed it. Wallis never said anything to me about it; Mr. Majors was the man that came to my house several times. I went into possession of this 160 acres seven years ago. I put a fence on it, and farmed on it, and after that I went to building on it. \* \* \* I know the lines of my 160 acres that this man let me have; Mr. Cheshire and one or two more marked it off for me. As to whether or not Mr. Mixon also marked it off, he was with us, and I went into possession of it under my purchase from Mr. Mixon, I thought I was getting that land. That is the instrument, the instrument that I was talking about, that I say I lost. It is gone, and I don't know what went with it. That is the contract he gave me; I don't know what went with it; I did not give any notes for it."

We copy from his testimony, on redirect examination, the following: "That 160 acres I have got was marked off. It is south, both south and west. It does not take in this barn, and don't take in this land and those two acres over there. I said it ran south and west. Take the 160 acres, it crossed the road. With reference to these improvements here that I have just testified about, this 22 acres that is fenced in out there and this barn and garden, etc., with reference to that, my 160 acres Mr. Mixon sold to me

is south, south of that. It don't come up here at all, not quite; I couldn't say how close. It is on the south side, and then it runs east and west. (Witness marks off the 160 acres on the map.) He (Mr. Mixon) was with us, Mr. Cheshire and others, when we marked it off." Again: "Mr. Wallis didn't come down to my house with Mr. Mixon; he didn't. It was Mr. Majors that came with Mr. Mixon. Mr. Majors is a very large fellow. He is right back there in the courtroom now. He is Mr. Wallis' father-in-law I think. Mr. Mixon and Mr. Majors, they came to my house on Sunday, I think it was, one Sunday morning. They came to me about me signing up a little paper. I don't know what that was; I couldn't tell you, Mr. Mixon read it for me. My 160 acres don't include these improvements here; it has nothing to do with that." The witness also testified that he had only lived on the Lawson survey a little over two years; that he rented to two or three years from Mr. Mitchell.

Majors testified Metzler told him that he got the land from Childress.

Ira Mixon testified he knew it to be a fact that his father sold some land to Metzler, but did not know where the deed was. The Andrew Lawson survey contains 1,476 acres, the east and west lines being 1,500 varas long, while the north and south lines are 5,555.5 varas long. The portions of land inclosed by C. Mixon are situated in the northwest corner of the survey.

We do not think the evidence is such as to warrant the trial court in holding as a matter of law that Mixon parted with the title to 160 acres of the land to Metzler. The testimony of Ira Mixon, an 18 year old boy, relating to a transaction occurring when he was about 10 years old, to the effect that his father sold some land to Metzler cannot establish a conveyance in the face of Metzler's testimony that he only had a "kind of a contract" with C. Mixon. That there was a contract of some kind is undisputed, it is true; but the nature of the contract is vague and uncertain, and the conclusion is irresistible that it was abandoned. Nothing was paid by Metzler, no notes were given, and he rented from Mitchell and bought from Childress, after which his land was for the first time designated. It is uncontradicted that Metzler told Majors he bought from Childress. In addition, Metzler filed no answer to the pleadings of intervenor, but merely pleaded not guilty in answer to plaintiff's petition. He did not ask that he be given anything on the theory that whatever rights Mixon acquired by limitation passed to him. When Childress and others admitted plaintiff's title, Metzler did likewise. In the absence of any evidence of the terms of the contract, and with Metzler's own words contradicting his statement

that he was holding under the contract with Mixon, together with his utter failure to show that he ever paid any consideration, or complied with any provision of the contract, but on the contrary purchased from another whose title he considered better, we fail to see how it can be said that the evidence was undisputed to the effect that Mixon parted with the title to 160 acres of land to Metzler. Without any issue being made by the pleadings or submitted to the jury as to Metzler's rights by reason of the contract, the court held that plaintiff, because Metzler admitted plaintiff's title to be good, should receive Mixon's land, and that without tendering the price agreed to be paid Mixon by Metzler or inquiring what conditions Metzler had to fulfill and whether he had fulfilled them. Certainly, Metzler himself could never have asked for specific performance by Mixon without showing the existence of a contract, and what the contract was, and that he had complied with or tendered compliances with the condition imposed upon him thereby. When sued by Mixon's sole heir for the entire survey, and thus notified that such heir claims all the land, Metzler does not set up his contract and tender compliance with its terms, but fails to answer, which strengthens the conclusion so strongly presented by the evidence that Metzler, having purchased from Childress and procured a deed, abandoned his contract with Mixon. It is clear the facts were not such as to justify a judgment non obstante veredicto.

Had the title to the land claimed by Metzler been in C. Mixon at the time of the contract between them, under the pleading and evidence in this case the court would have been authorized to instruct a verdict against Metzler in favor of intervenor.

[3] Appellants make the further contention that, even had the facts indisputably shown a conveyance by C. Mixon to Metzler of the 160 acres claimed by Metzler, still Mixon's heirs would be entitled to recover 160 acres because the land claimed by Metzler did not include the improvements made by Mixon; that, as Mixon under the law could only acquire title to 160 acres by virtue of his improvements to include the land on which the improvements were made, he never acquired title to the 160 acres claimed by Metzler, which lies in the southern part of the survey, and does not include any part of the improvements. Article 5676, Revised Statutes 1911, reads as follows: "The peaceable and adverse possession contemplated in the preceding article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually inclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held

under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be coextensive with the boundaries specified in such instrument." This statute does not give the possessor 160 acres in separate parcels to be selected by him or by any one else, but contemplates that he shall receive 160 acres in a body, and the same cannot be arbitrarily designated by him nor by the owner of the remainder of the survey, but must be designated by the court. *Louisiana & Texas Lumber Co. v. Kennedy*, 103 Tex. 297, 126 S. W. 1110; *L. & T. Lumber Co. v. Stewart*, 130 S. W. 199. Mixon could not acquire title to 6 acres in the northwest corner of the survey, and 154 acres in a separate parcel in the southwest corner of the survey.

[4, 5] As Mixon never acquired any title to the 160 acres claimed by Metzler, it follows that Metzler would have acquired no title under a conveyance by Mixon had one been made. Therefore, had such a conveyance been made, plaintiff would not have been prejudiced thereby, but would in a suit have recovered the land from Metzler. It is impossible to see why plaintiff, upon the theory that such a conveyance was made, should be permitted to avenge Metzler's supposed wrongs by appropriating the land claimed by Metzler and also that claimed by Mixon. We fail to see how plaintiff can rely upon the doctrine that a purchaser from a co-owner should be protected by setting apart to him the particular tract bought by him if it can be done without injury to the other co-owners. The interest acquired under the statute cited is not undivided in the same sense as would be land acquired under a conveyance calling for an undivided 160 acres in a larger survey. The location of Mixon's land is fixed to a certain extent, and purchasers must take notice of such fact, and of the fact that they acquire no title unless they buy the land whose location is so fixed. Besides, in this case, as Metzler has surrendered to plaintiff, the latter is in no way prejudiced by the supposed conveyance to Metzler, and loses nothing by reason thereof. Why should he be permitted to complain of injustice to Metzler? In the case of *Snow v. Starr*, 75 Tex. 418, 12 S. W. 673, the possessor had improvements partly on sections 3 and 1, and it was held that, although his improvements were partly on section 1, he could not hold said section after conveying section 3, if he claimed section 3 and acquired same by limitation, as by such possession he could only acquire 640 acres, and by making the conveyances he exhausted the title acquired by his possession. His recovery was therefore limited to 9 acres, the amount actually improved on section 1. In the case of *Titel v. Garland*, 85 S. W. 406, it was held that where the possessor had in-

closed portions of two surveys in one inclosure, and in a suit involving one of the surveys had unsuccessfully claimed title to 160 acres by virtue of his possession, he could not afterwards, in a suit involving the other survey, claim 160 acres out of same by virtue of such possession. The case was decided upon this point alone. The Supreme Court granted a writ of error and affirmed the judgment (99 Tex. 201, 87 S. W. 1152) upon a different ground from the one actuating the Court of Civil Appeals, and stated that it was unnecessary to decide whether the Court of Civil Appeals was correct as to the effect to be given to the claim made by the possessor in the first case. From the granting of the writ it appears the Supreme Court doubted whether the assertion of the unsuccessful claim precluded the possessor from recovering.

The facts in the cases just discussed are very different from those in this case. Mixon had no possession or improvements upon which he could base a claim to the 160 acres claimed by Metzler. It could not have been set apart to him by a court, and his assertion of a claim to it by contracting to sell it, or even a sale of it, could not have divested the title to the 160 acres to which he had title. Metzler would simply have had his remedy upon such warranty as Mixon might have given.

[8] We are of the opinion that judgment should have been entered upon the verdict, awarding Ira Mixon and the Bonins 160 acres of land, to include the 6 acres upon which the improvements were made by C. Mixon, as found by the jury. All assignments of error are sustained. Upon entering judgment *nunc pro tunc*, the trial court, in his conclusions of law, expressed the opinion herein announced by us, but was deterred from entering judgment in accordance therewith by reason of certain statements made by the El Paso Court of Civil Appeals in its opinion reversing and remanding the case, which opinion was withdrawn upon discovery of the fact that the judgment was not final. When an appellate court withdraws an opinion, it should, in deference to the court's wishes, be treated as if never rendered.

The judgment will be reformed so as to award plaintiff all of the tract sued for by him except 160 acres to include the 5 or 6 acres of which C. Mixon had possession as found by the jury, which 160 acres is awarded to Ira Mixon and the Bonins, and is to be designated and set apart to them by the commissioners named in the judgment of the trial court. In the matter of costs, the judgment will remain as rendered by the trial court. As so reformed the judgment will be affirmed.

Judgment reformed and affirmed.

# J. M. RADFORD GROCERY CO. et al. v. OWENS et al.

(Court of Civil Appeals of Texas. Amarillo. Nov. 22, 1913.)

## 1. INJUNCTION (§ 115\*)—PROCESS—AMENDMENT OF PETITION.

Plaintiff sued defendants to restrain the execution sale of his interest in a firm composed of himself and another, and, after a temporary restraining order was issued, an amended petition was filed by plaintiff and another composing such firm by which they were substituted as plaintiffs, after which a permanent injunction was granted by default. *Held*, that the court did not have jurisdiction to grant the permanent injunction, where there was no citation or notice to defendants after the filing of the substituted petition and no answer filed thereafter or appearance otherwise made by defendants.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 221, 222; Dec. Dig. § 115.\*]

## 2. PARTNERSHIP (§ 220\*)—ENJOINING LEVY—INTEREST IN PARTNERSHIP PROPERTY.

Under Rev. Civ. St. 1911, art. 3743, providing that a levy upon the interest of a partner in partnership property is made by levying a notice with one or more of the partners or a clerk of the firm, a partnership cannot maintain a suit to enjoin the levy of execution upon the interest of a partner, though it would result in suspending the partnership business, since such levy would work no change in possession of the property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 446-465, 467-469; Dec. Dig. § 220.\*]

## 3. EXECUTION (§ 172\*)—INJUNCTION—JURISDICTION.

In a suit to restrain an execution on account of fraud in obtaining the judgment, the writ should be made returnable, under the statute, to the court in which the judgment was rendered.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. § 172.\*]

## 4. APPEAL AND ERROR (§ 758\*)—FUNDAMENTAL ERROR—PRESENTATION BELOW.

The Supreme Court will notice as fundamental error the rendition of a judgment for plaintiffs on a substituted petition, when defendants had not been cited and had not filed an answer or otherwise appeared.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8093; Dec. Dig. § 758.\*]

Error to Foard County Court; T. W. Station, Judge.

Suit by R. T. Owens and another against the J. M. Radford Grocery Company and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

See, also, 159 S. W. 453.

A. H. Kirby, of Ft. Worth, and R. W. Haynie, of Abilene, for plaintiffs in error. R. S. Houssels and J. Shirley Cook, both of Vernon, for defendants in error.

HENDRICKS, J. R. T. Owens instituted this suit by original petition and application for injunction against the sheriff of Foard County, Tex., and the J. M. Radford Grocery Company, a corporation with its principal

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

place of business in Taylor county, Tex., to restrain the sale, under execution, of Owens' partnership interest in the partnership property of Owens & Beaty, a firm composed of D. P. Beaty and R. T. Owens, doing business as a mercantile partnership in said Foard county, Tex. The suit was instituted in the county court of Foard county, Tex., and the county judge awarded a temporary restraining order, and thereafter the Radford Grocery Company filed its plea of privilege to be sued in Taylor county, Tex., further averring that the writ of injunction should be returned to the county court of Taylor county, in which court judgment against the said Owens, upon which this execution was issued, was rendered. Thereafter, by a first amended original petition and with a continuation of the prayer for the writ of injunction, D. P. Beaty and R. T. Owens, composing the firm of Owens & Beaty, were substituted as parties plaintiff in said petition for injunction, and the county court of Foard county entered final judgment and perpetuated the temporary order against the Radford Grocery Company and the said sheriff of Foard county, restraining the sale, under execution, of said Owens' interest in the partnership property.

No citation or any notice to the Radford Grocery Company or the sheriff of Foard county appear in the transcript, and the amended cause of action mentioned both. There does not appear in the transcript any answer filed by either of the parties defendant, or any appearance, by any method, of said defendants in court, with reference to said cause of action. It is to be noted that the plea of privilege of the Radford Grocery Company is addressed to the original petition of the said Owens and not to any petition in which Owens & Beaty, as constituting a partnership, are parties plaintiff.

[1] It is clear that the county court, upon this substituted petition, with the substituted parties plaintiff composing the partnership of Beaty & Owens, could not render a judgment in their favor perpetuating the temporary restraining order without the Radford Grocery Company and the sheriff of Foard county having been notified of said suit or making an appearance in court in some manner in answer to said new cause of action, and this judgment will necessarily have to be reversed upon that ground.

[2] Plaintiffs in error raise the question in this court that the county court of Foard county erred in assuming jurisdiction in this case for the reason that the injunction was to restrain the enforcement of a judgment of the county court of Taylor county, and that said latter county and not Foard county had jurisdiction of said matter. They raise the further question that, when an execution is issued out of the county court of one county, an injunction, restraining the enforcement of said execution, is returnable to and triable

in the court from which the execution issued, and that no other court has jurisdiction to determine said matter, citing the statute and numerous cases on that subject in our state; and the affirmative and negative of these questions are the only matters briefed by the parties in this cause. The original petition filed by Owens, as well as the amended petition by Owens & Beaty, contain allegations of fraud leveled at the judgment, addressed more specifically to occurrences at a certain day of a certain term of the court, and an alleged showing that, although the cause was tried, no final judgment was rendered by the judge at that term of the court, and pointing to an alleged fraudulent entry of judgment upon the trial docket, which was not carried into the minutes of the court and never approved by the trial judge. There is no allegation, however, that a final judgment was not entered at a subsequent term of the court, but the plaintiffs allege that, if such judgment was made and entered at such subsequent term, the judgment debtor, Owens, had no notice of the rendition of said judgment. In the amended petition, in which the members composing the partnership became the parties plaintiff, and in whose favor the judgment perpetuating the injunction was rendered without notice, there appear the following allegations in substance: That Owens & Beaty were a mercantile firm, and that the stock of goods on hand at the time of the filing of this suit and of the levy by the sheriff was of the reasonable value of \$1,000; that said firm was and is indebted to numerous creditors for the purchase of merchandise in the sum of not less than \$1,500; that the evidences of indebtedness due the firm and collectible will not exceed \$200; that, upon an adjustment of the personal accounts due the firm by each of the partners, the said Owens (the judgment debtor in this instance) will be due the said firm not less than \$700; "that, if the said business is now suspended and the partnership dissolved, a large amount of said business and trade will be destroyed and a large amount of the notes, claims, and accounts will be rendered uncollectible, and the said Beaty will thereby be rendered unable to dispose of said goods at a price that will enable him to pay the creditors of said firm and pay his personal claims against said firm; that if said business is now closed the assets of the firm will be wholly insufficient to pay the indebtedness now due by said firm;" that the plaintiff R. T. Owens, "has no present interest in and to the stock of goods levied upon as aforesaid."

Although not briefed, we may presume that the pleader in this instance is attempting to place the status of this case within the rule enunciated by Justice Wheeler in the case of *Rogers v. Nichols*, 20 Tex. 719-728, decided in 1858, in which cause the facts disclosed that the sheriff levying upon the partnership property of one of the partners for his indi-

vidual indebtedness actually seized said property and was proceeding to sell the same when enjoined by other parties who had been partners with him in said business, which is not alleged in this cause, and the Supreme Court held that: "If the plaintiff's lien (the other partners) was reserved bona fide, and if, as they allege, the partnership effects were not sufficient to satisfy partnership debts, and the other partner would have, upon a final adjustment of the accounts, no interest in the partnership effects, the sale by the sheriff ought to be restrained." In that case the partner and judgment debtor, Davis, had contracted to purchase the interest of the other partners, who sought the injunction and who retained a lien upon the property to secure them against the liabilities of the firm, and no distinction was made by Judge Wheeler, and there may not be any between this contractual lien and the ordinary equitable lien of the partner to subject property for that purpose in applying a principle for the right of injunction. However, in studying the underlying reason permitting the writ of injunction in that cause, we note the fact, as stated above, that the sheriff had taken possession of the partnership property in that instance; and Judge Wheeler, continuing, following Judge Storey, says: "If the debtor partner will have, upon final settlement, no interest in the partnership funds, and if the other partners have a lien upon the funds not only for the debts of the partnership but for the balance ultimately due to them, the sale may most materially affect their interests"—and, following with the real reason why it will affect their interests, it is said: "It may be very difficult to follow the property into the hands of the various vendees; and the lien of the other partners may be displaced or other equities arise by intermediate bona fide sales of the property to purchasers without notice; and the partners may have to sustain all the chances of supervening insolvencies of the immediate vendees."

It would be useless for us to attempt to review numerous decisions of the courts of other states upon this question, except to say that it seems to have been held both ways, but from our investigation we believe that in all the cases there has been an actual seizure of the partnership property by the officer, when the injunction is granted; and we are unable to find any decision either affirming or denying the right of injunction under a statute similar to ours, originally passed in 1875: "A levy upon the interest of a partner in partnership property is made by leaving a notice with one or more of the partners, or with a clerk of the partnership." Article 3743, Revised Civil Statutes 1911. The Supreme Court of this state, in the case of *Middlebrook v. Zapp*, 79 Tex. 321, 15 S. W. 258, in commenting upon this provision, says that it was the intention of the Legislature "not only to provide that manner of levying

upon such interests but to exclude any other," and further says: "The object of the statute was to protect the interests of the partner or partners, who are not defendants in the execution, and the provision is eminently wise and just." Judge Willson, in the case of *Howell Bros. v. Jones & Owen*, 3 Willson, Civ. Cas. Ct. App. § 208, involving a levy upon partnership property for an individual debt of one of the partners, said; "The property remains in the actual possession of the firm and is never in fact in the possession of the officer. When the officer sells it under the execution, he does not deliver it to the purchaser, as in ordinary cases of the sale of personal property under execution. The purchaser becomes the legal owner of whatever interest the execution debtor may have in the same, and he is left to ascertain and adjust that interest with the other partners and with the creditors of the partnership." In view of this statute, passed subsequently to the rendition of Judge Wheeler's decision, and the evident purposes of the same, as Justice Gaines says, to protect the interests of the partners who are not defendants in the execution, we hold that the injunction by the partnership in this cause is improper, even upon proper notice and the appearance of the other parties to the case. Our discussion and holding in this matter is on account of reversing and remanding the cause, as a matter of direction to the lower court. We are unable to see the injury alleged by the defendants in error in this matter, as there can be no change of possession of this property, and if Owens has no interest he is necessarily uninjured, also the partnership and the other partner. The laboring oar for the ascertainment of this interest, after the sale of the property under execution, if the sale should be made, is as much upon the purchaser at execution sale as upon the other partner. We place no legal value upon the allegation as to the suspension of the partnership business for the reason that, in every sale of a partner's interest in partnership property under this statute, a dissolution of the partnership necessarily follows; and hence in every case an allegation of that character as an asserted equity, for the benefit of the other partners, which would always occur, would necessarily suspend the sale under execution, although the statute was followed. Of course we are not attempting to anticipate in every respect the course that this proceeding should take in the trial court, but believed it incumbent, in view of another trial, to settle the question of injunction by the partnership, as applied to this case.

[3] It inevitably follows that if there is an attempted reinstatement of the preceding petition, or one of a similar nature, by Owens individually, for the purpose of restraining this execution, on account of the lack of judgment, or on account of fraud in obtaining the same, in the county court of Taylor

county, Tex., the writ in this cause should be returnable under the statute to that court in which the judgment was rendered.

[4] The matter of the judgment obtained in favor of the partners, Owens and Beaty, upon an amended cause of action, although not briefed, is required to be noticed by us as fundamental error. No such judgment, without notice or appearance by the defendants, could have been rendered.

Reversed and remanded.

HALL, J., not sitting.

**INTERNATIONAL & G. N. R. CO. v.  
BOLES.**

(Court of Civil Appeals of Texas. Austin.  
Nov. 19, 1913. Rehearing Denied  
Dec. 17, 1913.)

**1. AGRICULTURE (§ 8\*)—WEEDS ON RIGHT OF WAY—PENAL STATUTES—CONSTRUCTION.**

Rev. Civ. St. 1911, arts. 6601, 6602, prohibiting railroad companies from permitting Johnson grass to mature on the right of way, and imposing a penalty in favor of contiguous landowners for its violation, is penal, and should be strictly construed.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 8.\*]

**2. AGRICULTURE (§ 8\*)—INJURY TO ADJOINING LAND—GROWTH OF JOHNSON GRASS—"CONTIGUOUS" LAND.**

Land which was separated from a railroad right of way only by a parallel public road, which was condemned, from the landowner was "contiguous" to the right of way within Rev. Civ. St. 1911, art. 6602, permitting one owning land contiguous to the right of way of a railroad company which has permitted Johnson grass to mature on its land to recover a certain sum and actual damages; the fee of the public road still remaining in the landowner.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 8.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1495-1497.]

**3. EMINENT DOMAIN (§ 317\*)—OWNERSHIP OF FEE.**

A county, condemning land for a public highway, only acquired an easement therein; the fee remaining in the original owner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834-840; Dec. Dig. § 317.\*]

Appeal from Milam County Court; John Watson, Judge.

Action by George E. Boles against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Chambers & Baskin, of Cameron, Doremus, Butler & Henderson, of Bryan, and Wilson, Dabney & King, of Houston, for appellant. E. A. Camp, of Rockdale, for appellee.

RICE, J. The appellee in 1912 was the owner of a 63-acre tract of land, over the south end of which ran a 60-foot public road, leading from Rockdale to Thorndale, in said county, which had been previously condemned by the county for a public road. The International & Great Northern Railway

Company's right of way ran immediately south of said public road and parallel therewith. The north line of the right of way was fenced, and appellee's inclosure extended to the north line of said public road, and ran parallel with the right of way fence, leaving said public road between his inclosure and the railway right of way. The proof shows, and the court found, that during the months of April, May, June, July, and August of said year said railway company permitted Johnson grass to go to seed upon its right of way, from which it was transferred to plaintiff's land, and he had been put to considerable expense and trouble to prevent it from spreading and going to seed thereon, and this suit was brought by him to recover damages against the railway company therefor. The case was tried by the court without a jury, resulting in a judgment in favor of appellee for the sum of \$101, the amount he had been compelled to expend in an endeavor to protect his land from the encroachments of said grass, from which judgment appellant has prosecuted this appeal.

[1-2] The defense was based on the contention that said tract of land was not contiguous to appellant's right of way, and therefore he had no right to recover under the Johnson grass statute (articles 6601, 6602, Rev. Stat. 1911). We think it is true, as contended by appellant, that this statute, being penal in its nature, should be strictly construed; but when such construction is applied to the facts of this case, we think it falls within the letter of the statute, and that the two tracts of land are contiguous in contemplation of law. The statute (article 6601) makes it unlawful for any railway company doing business in this state to permit any Johnson grass to mature or go to seed upon its right of way; and the succeeding article (6602) provides that if it shall appear, upon the suit of any person owning, leasing, or controlling land contiguous to the right of way of such railway, that such company has permitted any Johnson grass to mature or go to seed upon its right of way, such person so suing shall recover from such company the sum of \$25, and any additional sum as he may have been damaged by reason of such company's permitting said grass to mature or go to seed upon its right of way, provided such owner shall not recover in the event he permits Johnson grass to mature or go to seed upon his own land.

[3] The field notes of appellee's tract of land called for the railroad right of way; and, notwithstanding the county had condemned this strip of land for public road purposes, it only acquired an easement therein; the fee remaining in appellee. See 37 Cyc. 200 to 208, inclusive; Clutter v. Davis, 25 Tex. Civ. App. 532, 62 S. W. 1107; O'Neal v. City of Sherman, 77 Tex. 182, 14 S. W. 31, 19 Am. St. Rep. 743; State v. Travis County, 85 Tex. 435, 21 S. W. 1029; Elliott on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Roads and Streets, p. 522. In 37 Cyc., supra, it is said: "The laying out of a highway gives to the public a mere right of passage, and the owner of the soil is not thereby divested of his title to the land." See, also, Lewis on Eminent Domain, § 589. And upon a discontinuance of the highway, the soil and the freehold revert to the owner of the land. *Mitchell v. Bass*, 28 Tex. 380; *Elliott on Roads & Streets*, pp. 670, 871. This being true, the county in this case merely possessed the right of easement over said public road, but appellee owned the title thereto, for which reason, in the present case, his land extended, in the literal sense, to the right of way of said railway company, and was absolutely contiguous thereto in the meaning of this statute, for which reason the case must be affirmed.

The writer, however, speaking for himself only, is also inclined to the view that appellee's tract of land in contemplation of this statute was contiguous to appellant's right of way, irrespective of whether or not he owned the fee to the scrip of land over which this public road ran. While it is true, as contended by appellant, that in its literal sense the word "contiguous" means adjacent, touching, near, adjoining, etc., still in a broader sense, the one in which the word was probably used in the statute, appellee's tract was contiguous to the railway right of way, since it was only separated therefrom by the public road. This law must be construed with reference to the purpose the Legislature evidently had in view in its enactment, that of protecting land lying along or adjacent to railroad tracks from being injured by reason of the spread of Johnson grass, which might be permitted to mature on the right of ways. Throughout the agricultural districts of this state prior to the enactment of the statute in question, railway companies had been the cause of Johnson grass spreading to adjacent tracts of land, through which they ran, to the detriment of the landowners. This statute was intended to remedy this growing evil by requiring them, under penalty, to prevent such grass from going to seed upon their right of ways, and this purpose must be considered in construing it. Surely it must have been intended to protect those who came within the spirit, as well as within the letter, of the statute.

The question arises, Who are contiguous landowners within the meaning of the law? In order for plaintiff to be damaged, must his tract actually abut on the right of way, or can the statute be so extended in its application as to reach and protect those whose tracts would abut except for an intervening public road? I think so. A public road, in my opinion, is not such a contiguous tract of land as would prevent the application of the statute, because such public road would need no such protection. It could not be thus injured, and therefore it was not the intention of the Legislature to protect it from the spread of such grass; but the tract of

land upon which it abuts was the subject of its protecting care. Is this tract contiguous in the sense in which the word is used? Is it not in fact the next or adjoining tract? Certainly, it is so in the sense that no other tract intervenes. Suppose a river or a creek flowed between the railway and the land in question, instead of a public road, could it be urged, with any degree of plausibility, that a farm so situated was not contiguous to the right of way, simply because so separated? Just as much damage or injury would be occasioned from the grass in the one instance as in the other. It is a matter of common knowledge, I take it, that Johnson grass seed can be carried by the wind, or otherwise across streams, roadways, and even over adjoining tracts of land. A 60-foot roadway would not prevent the spread of this grass on the abutting tract, if it were allowed to mature and go to seed upon the adjoining right of way, because it might be carried by the wind across such road. We think the Legislature, in using the expression "contiguous land," must have intended to protect all tracts that would be actually contiguous to the railway right of way, were it not for such roadway, street, stream, etc.

The cardinal rule in construing a statute is to arrive at the intention of the lawmakers in its enactment (*Suth. Stat. Const.* § 234); and this intent must be sought in the language of the statute (*Id.* § 237). And in arriving at the meaning of a particular word, we may consider the whole statute, as well as the purpose of the law. Chancellor Kent has well said: "In the exposition of a statute the intention of the lawmakers will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion."

Our Revised Statutes provide: "That the rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes; but that said statutes shall constitute the law of this state respecting the subjects to which they relate; and the provisions thereof shall be liberally construed with the view to effect their objects and promote justice." *R. S.* 1911, p. 1719, sec. 3.

In *New Orleans Water Works Co. v. Ernst* (C. C.) 32 Fed. 5, 6, it was held that a person whose property was separated from a river only by a street or public highway was a contiguous person within the meaning of the law. And in *Board of Supervisors v. Blacker*, 92 Mich. 646, 52 N. W. 951, 16 L. R. A. 432, it was held that, notwithstanding the constitutional provision to the effect that each representative district shall consist of convenient and contiguous territory, two

counties separated by a large body of water were convenient and contiguous in contemplation of law.

Again, in *Vogel v. Little Rock*, 54 Ark. 335, 15 S. W. 836, where it was sought to annex the village of Argenta to the city of Little Rock, which was separated therefrom by the Arkansas river, the application being resisted on the ground that the same was not contiguous to the city, since it was separated therefrom by a navigable stream, it was held that the territory was contiguous within the meaning of section 922 of Mansf. Dig., authorizing municipal corporations to annex contiguous territory lying in the same county.

If the fact that the title to the roadway was not in the appellee in the present instance would defeat his right of recovery, then it seems it would result in bringing about a condition of things as I think not contemplated by the lawmakers in the enactment of this statute. Doubtless throughout this state miles of county roads parallel one side or the other of the various lines of railway traversing the state; and if the respective counties through which these roads extend should hold title by deed or otherwise to said public highways, then, under the construction contended for by appellant, we would have the anomalous condition of landowners on the one side of such railways being protected from the encroachments of Johnson grass permitted to mature and go to seed on their right of ways, while those on the opposite side would be left unprotected. This, in my opinion, was never contemplated; but, on the contrary the statute, I believe, was intended to operate so as to protect contiguous landowners on both sides of such railway right of ways, notwithstanding such tracts might abut upon a public road, intervening between them and said railways; and for this additional reason, outside of the one heretofore expressed, I think that the proper disposition has been made of this case, but the decision herein is based alone on the reasons first assigned. On account, however, of the importance of the question involved, I have considered it not improper to give expression to the above views entertained by me.

Judgment affirmed.

#### INTERNATIONAL & G. N. R. CO. v. WALTERS.

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 5, 1913. On Motion for Rehearing  
Dec. 17, 1913.)

#### 1. APPEAL AND ERROR (§ 773\*)—DISMISSAL— DELAY IN FILING BRIEFS.

The record on appeal was filed with the clerk of the Court of Civil Appeals on July 30, 1912, and the cause was set for October 8th but at appellee's request was postponed until October 15th. A typewritten copy of appellant's

brief was delivered to appellee's counsel on September 25th and printed copies two days later. The brief covered only a few questions, chiefly questions of fact, and it was not alleged that appellee did not have sufficient time to brief the case after receiving the copy of appellant's brief. *Held*, in view of the postponement granted, that appellee's motion to dismiss the appeal for delay in filing of briefs would be denied.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

#### 2. MASTER AND SERVANT (§ 296\*)—ACTION FOR INJURIES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a car repairer's action for personal injuries, where it appeared that defendant's employé on the engine which struck him saw him on the track while the engine was 12 feet away a charge that, if such employé saw and realized the danger, it was his duty to use all reasonable means that a person of ordinary prudence would have used under the circumstances to prevent injury, and that, if his failure to do so was the proximate cause of the injury, plaintiff could recover, was not without support in the evidence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

#### 3. MASTER AND SERVANT (§ 289\*)—ACTION FOR INJURIES—QUESTION FOR JURY—DISCOVERED PERIL.

On evidence, in a car repairer's action for personal injuries, *held*, that it was for the jury to say whether defendant's employé, on the engine which struck plaintiff, exercised ordinary care to prevent the injury, and, if they did not, whether such care could have averted the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 4. NEGLIGENCE (§ 59\*)—"PROXIMATE CAUSE."

An injury which could not have been foreseen or reasonably anticipated as the natural and probable result of a negligent act is not proximately caused by such act.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 72; Dec. Dig. § 59.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

#### 5. MASTER AND SERVANT (§ 248\*)—ACTION FOR INJURIES—DISCOVERED PERIL.

Where a car repairer riding cars on a side track jumped therefrom in anticipation of injury and ran in front of an engine on a parallel track, and where there was no evidence that the engineer and fireman knew that he was riding cars on the side track, nor that they could or would by ordinary care foresee that he would run in front of the engine, they could not anticipate probable injury to him until it became apparent that he was nearing the track without knowing of the engine's approach.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 801-804; Dec. Dig. § 248.\*]

#### 6. MASTER AND SERVANT (§§ 295, 296\*)—AC- TION FOR INJURIES—INSTRUCTIONS—CON- TRIBUTORY NEGLIGENCE AND ASSUMED RISK.

When plaintiff seeks a recovery upon the issue of discovered peril as well as upon other theories, charges on contributory negligence and assumed risk should be limited to be considered only upon the other theories, as such defenses cannot be urged to defeat liability arising by reason of discovered peril.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1168-1179, 1180-1194; Dec. Dig. §§ 295, 296.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## On Motion for Rehearing.

## 7. MASTER AND SERVANT (§ 286\*)—ACTION FOR INJURIES—QUESTION FOR JURY.

In a car repairer's action for injuries by being struck by an engine, *held*, on the evidence, that the question whether the engineer saw plaintiff on the side of the car from which he jumped and ran in front of the engine was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Action by Frank Walters against the International & Great Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wilson, Dabney & King, of Houston, for appellant.

MOURSUND, J. Frank S. Walters filed this suit against T. J. Freeman, receiver, and afterwards, the receivership having terminated, the International & Great Northern Railway Company, the purchaser of the properties at the receiver's sale, was made a party to the suit.

Plaintiff alleged that on September 16, 1909, he was in the employ of Freeman, receiver, as an inspector and car repairer in his yards at Spring; that it was his duty to inspect cars received in said yards for defects, and the air hose connected therewith, and to repair such defects when he could and couple up the air hose, and in the discharge of his duty it often became necessary for him to hang onto the side of cars while they were in motion in said yard; that on said date a number of cars were standing on a siding, and certain employes were in charge of an engine attached to other cars which they were backing into the siding, where the others stood, for the purpose of coupling them together, and it became plaintiff's duty to inspect said cars and the air hose and to couple up the air hose, and to this end he was riding on the ladder, on the side of one of the cars attached to the engine, as was usual and customary under such circumstances; that upon the moving cars approaching the stationary ones the speed thereof was not reduced, as he expected would be done and as should have been done, but rather increased, and it became manifest to him that the moving cars would strike the others with unusual force, and being thereby put in danger, and fearing for his safety, he jumped to the ground and undertook to cross another track running parallel with the one on which the cars were moving and eight or ten feet distant therefrom, when he was struck by the engine which had been detached from the said cars and run upon the said track, and which was being run at an unusual, dangerous, and excessive rate of speed,

to wit, more than six miles an hour, in express violation of the orders and rules of defendant, and was thereby knocked down and injured, the injuries being set out in detail. He further alleged: "That the proximate cause of the injury of plaintiff, as aforesaid, was the negligence and carelessness of defendant receiver, and those of his servants and employes in charge of the said engine, in this, that they ran the said cars into the said siding to be brought in contact with the stationary ones thereon, or when they knew, or in the exercise of ordinary care would have known, that they would probably come in contact with said cars, without the engine being connected therewith so as to control their movement and make it possible for the cars to come together without undue and unnecessary force, and without endangering the safety of those of defendant's employes whose duties required them to be upon and about the said cars, and ran the said cars into the said siding with the engine detached therefrom at an excessive and unnecessary speed, in violation of the said rules and orders, well knowing, or in the exercise of ordinary care would have known, that the moving cars would thereby be caused to strike upon the stationary ones with undue and unnecessary force, which would endanger the safety of those employes whose duties required them to be upon and about the said cars; and in this, that the said employes in charge of the engine gave no warning of the movements of the said engine into and upon the said siding by ringing the bell or blowing the whistle, or in other manner, as was their duty to do, and kept no lookout ahead of the engine, as was their duty to do, and ran the engine at an unusual, dangerous, and excessive rate of speed, in violation of the orders and rules of defendant as aforesaid, and that, had they sounded the whistle and rung the bell or given other adequate warning, plaintiff would have been advised of the approach of said engine and have avoided contract therewith, or, if they had kept a reasonable lookout ahead of said engine, they would have discovered plaintiff in time to have avoided striking him by warning him of the approach of the engine, or by stopping the same, or slacking the speed thereof, or had they run the said engine at the usual and proper rate of speed, he would not have been injured; and in this, that those in charge of the said engine saw plaintiff and realized the danger of his being struck by the said engine in time to have avoided striking him, by the reasonable use of all the means at their command, both by giving warning and by stopping the said engine or slacking the speed thereof, but to use such means they wholly failed; and plaintiff says that he was in the exercise of ordinary care in leaving the said car and in undertaking to cross over the adjacent track under the at-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

tending circumstances, and that his injury was without fault or neglect on his part."

We quote from appellant's brief its statement of defendant's pleadings, viz.: "Defendant, International & Great Northern Railway Company, replied, first, by general denial, and second, by a plea of contributory negligence on the part of the plaintiff in general terms and by a plea that plaintiff, in riding on the side of the moving cars, was not acting in furtherance of or in the discharge of any duty of the defendant but was acting in violation of the rules, whereby he assumed all dangers resulting from his said action in riding on the moving cars; that if plaintiff, in so riding, was in the discharge of his duty, then the injuries complained of by plaintiff resulted from risks and dangers which were ordinarily incident to the service in which he was engaged, and which he had assumed; that the risks and dangers in getting upon said moving cars, as well as the danger of jumping from said cars or crossing the adjoining track of defendant, were obvious and open to the plaintiff, and known to him and were assumed by him; that plaintiff's injuries were directly caused or contributed to by his own negligence in riding upon said moving cars and in alighting therefrom and in undertaking to cross the track of defendant in front of the approaching engine; that the engine which struck the plaintiff was open to the view of plaintiff, and if plaintiff had exercised his sense of sight and hearing, or undertaken to do so, could wholly have avoided being hurt; that both plaintiff and T. J. Freeman, receiver, at the time of the accident, were engaged in interstate and international commerce, and that the liability, if any, to plaintiff was governed by the laws of the United States, and that under these laws plaintiff was injured through risks and dangers, if any, which he had assumed; that the risk of riding upon said moving train, as well as the risk of jumping from same or of crossing the adjoining track of defendant, were risks which, under the law, plaintiff assumed, and for which he could not hold the defendant liable."

The trial resulted in a verdict and judgment for plaintiff for \$7,500.

[1] Appellee has filed a motion to dismiss the appeal because briefs were not filed in the trial court nor in this court until September 26, 1913. The record was filed with the clerk of the Court of Civil Appeals of the First district on July 30, 1912, and the case, having been transferred to this court, was set for submission on October 8, 1913, but at the request of counsel for appellee the submission was postponed until October 15th. It appears that a typewritten copy of the brief was delivered by counsel for appellant to counsel for appellee about 11 o'clock a. m. on September 25, 1913, and on the morning of the next day two printed copies were delivered to said counsel for appellee: On Sep-

tember 29th appellee's motion to dismiss the appeal was filed. It is not alleged in the motion that appellee's counsel did not have sufficient time to brief the case after receiving the copy of appellant's brief. The brief covers only a few questions, the most important being questions of fact, and it is apparent that it could have been answered by devoting a few days to the task; in fact, appellee's counsel admitted in argument on the motion that it could be done in 12 hours if everything else was laid aside and attention given solely to the preparation of such reply.

Following the decision of the Supreme Court in the case of *S. A. & A. P. Ry. Co. v. Holden*, 93 Tex. 211, 54 S. W. 751, our courts have frequently refused to dismiss appeals where the time left appellee was amply sufficient in which to answer appellant's brief. Counsel for appellee, in an argument on the motion filed since the submission was taken, insists that his statement concerning briefing the case in 12 hours should not be made the test as to whether the appeal should be dismissed. Certainly it would be exceedingly unfair to require counsel for appellee to brief a case in the least time in which it could possibly be done, when counsel for appellant has taken over a year's time. When appellant's briefs are not filed within sufficient time, appellee will be given the benefit of every doubt, and it must be evident from the nature of the brief that ample time has been afforded appellee to answer such brief, otherwise the appeal should be dismissed. While appellee had only 12 days in which to answer from the time he received the typewritten copy of the brief, yet, having asked and obtained a postponement of the submission for one week, such additional time should be considered in passing upon this motion, and, it not being alleged in the motion that appellee was injured or that he did not have ample time in which to answer appellant's brief, we overrule the motion to dismiss the appeal.

Before taking up the assignments of error, we will make a brief statement of the facts bearing upon the issues submitted to the jury.

Plaintiff was a car inspector and repairer at Spring station and junction point, at which there were switching yards containing nine side tracks. A train had come in, and the engine crew and switchmen of same were busy "kicking" cars into a number of the side tracks for the purpose of carrying the train forward to Houston with such additional cars as ought to be switched into it. The cars were being "kicked" from a curved lead track into the different side tracks. A number of cars were standing on track No. 1, not more than 200 yards from the lead track, from which the switching was being done, and, as nine cars were "kicked" into track No. 1 to be added to the stationary train, plaintiff mounted the side of one of the cars

to ride down to where the stationary cars were, for the purpose of inspecting the cars which were being added to said train, so that the train could go to Houston. The rules of the company forbade the riding of cars through the yards by car inspectors, but the men frequently rode them for their convenience and to get through their work promptly. Plaintiff rode the cars upon this occasion to save himself a walk of less than 200 yards. At the time plaintiff mounted the cars the engine was not visible to him, being hid by the curve of the cars. There is no evidence that the engineer or fireman, or any other member of the train crew, saw plaintiff mount the cars, and neither the engineer nor fireman knew he had gotten on the side of the cars until after plaintiff was injured. After "kicking" the string of cars into track No. 1, the engine was run back on track No. 2, distant about 10 feet from No. 1, for the purpose of going after water and oil. The engineer was looking down the track in the direction he was going, watching for signals from the swing brakeman, W. W. Tucker, who was on the rear of the tender. He could have seen plaintiff on the side of the cars going down track No. 1 had he looked that way, but testified he did not do so on account of having his attention fixed down the track on which he was moving. Plaintiff concluded that the cars he was riding upon had been "kicked" with too much force and, fearing they would collide with such force as to subject him to danger, jumped off and ran diagonally across track No. 2 immediately in front of the engine, with his side toward the engine, and without looking to see whether the engine was coming on that track or not. He did not see the engine until he was on the track and the engine within about two or three feet of him. In fact, he did not know the engine had been detached from the cars he was riding. He heard no whistle or bell and saw the engine only in time to say that he saw it before it struck him. He testified the noise of the engine must have caused him to turn his head. He simply did not expect the engine to be back on that track and therefore did not look for it. He knew that engines were likely to be moved through the yards at any time, sometimes going back for water or oil or for other purposes. He also testified that the practice was to ring the bell when engines were moving to and fro in the yards. The evidence was conflicting as to whether the bell was rung upon this occasion. The rules of the company required the bell to be rung when the engine started but did not require the ringing to be kept up in the yards nor that the whistle be blown.

Plaintiff testified the cars he jumped from were moving at the rate of about six miles an hour, and that the engine must have been going 20 miles an hour when it struck him. He based this estimate on the fact that the

engine cut loose from the cars "kicked" into track No. 1 in time to strike him as he was running across track 2. As a matter of fact, plaintiff testified he did not know that the engine ever ran into switch track No. 1, and the testimony of the engineer and the two Tuckers, who were on the tender of the engine at the time plaintiff was injured, shows that the engine slowed down on the lead track, and the cars were "kicked" into track 1, but the engine did not stop at all, as the Tuckers threw the switch for track 2, and the engine without stopping moved into said track; the Tuckers jumping on the engine.

The engineer and the Tuckers testified the engine was moving at the rate of four or five miles an hour. The cars were "kicked" up-grade and in fact did not come in contact with the stationary cars with any undue force. As the engine backed up track 2, the Tuckers were on the tender to keep a lookout; W. W. Tucker being on the same side as the engineer (that is, the side next to the kicked cars), while J. J. Tucker was on the other side, as was the fireman. Both of the Tuckers saw plaintiff hanging on the string of cars and saw him when he got off the cars and started across toward track 2. W. W. Tucker's testimony is not very clear, but, taking it most favorably towards plaintiff, it appears that when about 12 feet distant from plaintiff he saw that plaintiff was going to get on track 2 but did not give the stop signal until within about 5 feet of plaintiff, which was just at the time his brother called to plaintiff. At one place he states that plaintiff was about 5 feet from the engine "at the time he was about to mount the track"; at another place he gives the distance as 12 feet when plaintiff attempted to get on the track, and as 5 feet when he actually was on the track, and that he was about the center of the track when J. J. Tucker called to him and the witness gave the stop signal.

J. J. Tucker testified that the cars on which plaintiff was riding were going at the rate of about three miles an hour; that four or five feet before the engine got to plaintiff he jumped off and ran angling to the north; that as plaintiff entered track 2 witness called to him, "Look out, fellow, what in the hell do you mean?" that plaintiff was about four or five feet from the engine; that he glanced around and started to jump, at which time the engine hit him. He testified that he did not know plaintiff was going to enter track 2 until he did so, and that he immediately hallooed to him, and W. W. Tucker gave a violent stop signal, which was obeyed; the engine going about an engine's length before it stopped, which was about 62 feet.

Plaintiff testified he was running across the track as fast as he could when he was struck. W. W. Tucker said plaintiff was moving at a speed just out of a walk, what he would call a trot.

Of the cars to be inspected by plaintiff

some were destined to points beyond the state.

[2, 3] By the first assignment of error complaint is made because the court instructed the jury, if they believed the Tuckers saw plaintiff and realized the danger to which he was being exposed of being struck by the engine, then it was their duty to use all reasonable means at their command that persons of ordinary prudence would have used, under the circumstances, to prevent injury to plaintiff; and if the jury believed they failed to use such means, and that such failure was the proximate cause of the injury to plaintiff, then to return a verdict for plaintiff. The contention is that there is no evidence to support the submission of said issue. In view of W. W. Tucker's testimony, we think the evidence justified the submission of the issue. If he saw plaintiff about to enter track 2, while the engine was 12 feet distant from plaintiff, then his brother also saw him under the same circumstances, and the jury could find that they should have at once called to plaintiff and given a stop signal instead of waiting until he had stepped on the track. From the evidence it appears that a heavy engine cannot be stopped in less distance than that testified to in this case, namely, about 62 feet, so it is not made to appear that a stop signal alone would have availed anything; but, as the engine was going slowly, the extra distance might have been of much avail if plaintiff had been warned by the Tuckers as he was about to step on the track. In considering this matter we of course must view the evidence most favorably to appellee and must necessarily discard the testimony of J. J. Tucker as to the position of plaintiff when he called to him and accept that of W. W. Tucker as to the distance from the engine when he first saw that plaintiff was about to step upon the track. It follows that, if J. J. Tucker saw plaintiff all the time, he also saw him about to step on the track when 12 feet distant from the engine, and it was for the jury to say, in view of all the circumstances, whether said J. J. Tucker and W. W. Tucker exercised ordinary care to use all the means in their power to prevent the injury, and, if they did not exercise such care, whether by exercising the same they could have averted the injury. We overrule the assignment.

[4, 5] By assignment No. 2 another complaint is made of the charge; the portion objected to being copied in the assignment and being very long. After requiring the finding of various matters, descriptive of how plaintiff came to be injured, as alleged by him, the court added the following: "And you believe 'kicking' the cars into the siding at the rate of speed at which they were 'kicked' would have caused a person of ordinary prudence, situated as plaintiff was, to jump from the car for fear

of injury and to run across said track, under the circumstances he claims he did, and believe that those in charge of the engine knew of plaintiff's position on the car, and of his probable ignorance of the approach of the engine, if he was ignorant thereof, or in the exercise of ordinary care would have known thereof and would, in the exercise of such care, have foreseen that plaintiff, under the circumstances, would probably jump from the car and run across the track, and in so doing would be exposed to the danger of being struck by the engine, and believe that those in charge of the engine, in the exercise of ordinary care, should and could have rung the bell or blown the whistle or given other warning to plaintiff of the approach of the engine, and that, had either been done, he would have been advised of the approach thereof and avoided contact therewith, and you believe they failed to do either to warn him, and believe such failure, if any, was negligence, and that such negligence was the proximate cause of the injury of plaintiff, you will return a verdict for plaintiff; but, unless you so find, you will return a verdict for defendant." The objection made to this charge is that it submits various matters concerning which there is no evidence, and that the issue whether failure to blow the whistle or ring the bell was the proximate cause is made dependent upon contingencies of an uncertain character dependent upon actions of plaintiff not to be anticipated or foreseen. There is no evidence that the persons in charge of the engine, viz., the engineer and fireman, who were the only persons who could give signals by means of whistle or bell, knew that plaintiff was riding the cars until after he was injured; nor is there any evidence that they knew he was probably ignorant of the approach of the engine, nor that they could or would, in the exercise of ordinary care, have foreseen that plaintiff would jump from the cars which in fact did not collide violently with the stationary ones, nor that, if he did jump off, he would run across track 2 instead of staying between the two tracks. If it should be contended that the Tuckers were partially in charge of the engine and saw plaintiff on the cars, then the fact remains that they could not reasonably anticipate that plaintiff would become apprehensive without cause and jump from the cars, and that he was ignorant of the approach of the engine and would run across right in front of the same instead of staying between the two tracks. An injury which could not have been foreseen or reasonably anticipated as the natural and probable result of a negligent act is not proximately caused by such act. At the time when the appellee claims the employes of appellant should have given warning by ringing the bell or blowing the whistle, there were no facts or circumstances known to them which would cause them

to reasonably anticipate that the failure to ring the bell or blow the whistle would cause injury to appellee or any one else. Under the facts they could not anticipate injury to appellee as probable until it became apparent that he was verging upon track 2 in a manner indicating that he did not know of the existence of the engine on said track. *T. & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Kreigh v. Westinghouse C. K. & Co.*, 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684; *Railway v. Reiden*, 48 Tex. Civ. App. 401, 107 S. W. 661; *Pullman Co. v. Caviness*, 53 Tex. Civ. App. 540, 116 S. W. 412; *Railway v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *Railway v. Welch*, 100 Tex. 118, 94 S. W. 333. We sustain the assignment.

The third assignment relates to the sufficiency of the evidence, while the fifth complains of the verdict as excessive. In view of another trial, we will not go into the matters raised by these assignments.

There is no merit in the fourth assignment of error complaining of the charge on contributory negligence under the federal Employers' Liability Act of 1908, and the same is overruled.

[8] Assignment No. 6 is overruled. The court did not err in refusing to give the charge on assumed risk. In view of the fact that the issue of discovered peril was in the case, it would have been improper to have given the charge in question, which applied to the whole case. When plaintiff seeks a recovery upon the issue of discovered peril as well as upon other theories, charges on contributory negligence and assumed risk should be limited to be considered only upon the other theories, as such defenses cannot be urged to defeat liability arising by reason of discovered peril. *Railway v. Finn* (Civ. App.) 107 S. W. 94; s. c., 101 Tex. 511, 109 S. W. 918; *Kelley v. Railway*, 101 S. W. 1166; *Railway v. Scarborough*, 104 S. W. 408.

The judgment is reversed, and the cause remanded.

On Motion for Rehearing.

MOURSUND, J. [7] We have carefully considered appellee's motion for rehearing and conclude that the evidence is sufficient for the jury to find that the engineer, notwithstanding his denial, did see appellee on the side of the car. However, we are still of the opinion that the evidence did not justify the submission of the issue whether those in charge of the engine should have given signals by bell or whistle. There were no facts charging them with notice that appellee did not know the engine was on the other track, nor that appellee would probably jump from the cars, and, if so, that he would run across in front of the engine instead of remaining between the tracks.

The motion is overruled.

# NUNN v. PADGITT BROS. et al.

(Court of Civil Appeals of Texas. Dallas.  
Nov. 22, 1913. Rehearing Denied  
Dec. 20, 1913.)

## 1. CHATTEL MORTGAGES (§§ 220-222, 225\*)—CONVERSION BY MORTGAGOR.

While a chattel mortgagor in possession may sell the property in recognition of the mortgagee's right, a sale in denial of such right would be a conversion by the mortgagor and also by the purchaser if he persisted in denying mortgagee's right.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470; Dec. Dig. §§ 220-222, 225.\*]

## 2. TROVER AND CONVERSION (§ 11\*)—OWNERSHIP OF PROPERTY.

Since one who buys personalty must ascertain the ownership thereof at his peril, his possession in denial of the real owner's right if the seller had no authority to sell is a conversion of the property.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 95-98; Dec. Dig. § 11.\*]

## 3. CHATTEL MORTGAGES (§§ 220-222\*)—SALE OF PROPERTY—CONVERSION BY MORTGAGOR.

Where the mortgagee of chattels sold the mortgage notes to plaintiff and subsequently purchased the mortgaged property, he became in effect a mortgagor in possession as to plaintiff; and hence his subsequent sale of the property in denial of plaintiff's rights was a conversion.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470; Dec. Dig. §§ 220-222.\*]

## 4. CHATTEL MORTGAGES (§ 225\*)—RECORDING—EFFECT BETWEEN PARTIES.

That a chattel mortgagor denied, when he sold property covered by a recorded chattel mortgage, that the property was incumbered would not be a defense to the right of the mortgagee to sue the purchaser of the property for its conversion by the denial of such mortgagee's rights.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470; Dec. Dig. § 225.\*]

## 5. CHATTEL MORTGAGES (§ 225\*)—RECORDING—EFFECT AS TO PURCHASERS.

The fact that the county clerk advised purchasers of property covered by a recorded chattel mortgage that the property was not mortgaged would not prevent the purchasers from being liable to the mortgagee for its conversion.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470; Dec. Dig. § 225.\*]

## 6. CHATTEL MORTGAGES (§ 225\*)—PURCHASE OF MORTGAGED PROPERTY—CONVERSION BY PURCHASER.

That defendant agreed to advance money with which to purchase property covered by a recorded chattel mortgage only on condition that mortgagors should first convey to her that she might convey to her son and in that method give her what she considered greater security for the money advanced would not prevent defendant's purchase from being a conversion of the property as to mortgagee.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470; Dec. Dig. § 225.\*]

## 7. CHATTEL MORTGAGES (§ 170\*)—CONVERSION OF PROPERTY.

Whoever with actual or constructive notice of the chattel mortgage is directly or in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

directly the instrumentality through which a conversion of mortgaged property is brought about is liable for the conversion.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 306; Dec. Dig. § 170.\*]

**8. CHATTEL MORTGAGES (§ 204\*)—RECORDING OF MORTGAGE—PERSONS AFFECTED—PURCHASER OF MORTGAGED NOTES.**

Rev. Civ. St. 1911, art. 5661, provides that all persons shall be charged with notice of a chattel mortgage duly registered "and of the rights of the mortgagee, his assignee or representative thereunder," and article 5659 provides for discharging of mortgage by acknowledging satisfaction of the debt upon the registry book. *Held*, that the failure of the purchaser of chattel mortgage notes to have the assignment of the notes to him recorded would not prevent persons purchasing the property from being charged by the registration with notice of the mortgage and of his rights thereunder.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 451; Dec. Dig. § 204.\*]

**9. CHATTEL MORTGAGES (§ 225\*)—RIGHTS OF ASSIGNEE—CONVERSION OF PROPERTY.**

An assignee of notes secured by a recorded chattel mortgage was not negligent in permitting the property to remain in the possession of one who he knew had purchased it from the mortgagor, so as to prevent him from recovering for its conversion by sale, in view of Rev. Civ. St. 1911, art. 5665, making chattel mortgages void against subsequent purchasers, etc., unless registered, where the property remains in mortgagor's possession.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 468-470; Dec. Dig. § 225.\*]

**10. CHATTEL MORTGAGES (§ 229\*)—CONVERSION OF PROPERTY—ACTIONS—AMOUNT OF RECOVERY**

Where the value of property covered by a recorded chattel mortgage exceeds the amount of the debt, the judgment, in an action by a mortgagee for conversion, should be for the debt and, if the debt exceeds the value of the property, should be for such value.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 479-483; Dec. Dig. § 229.\*]

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by W. G. Nunn against Padgett Bros. and others. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

Wood & Wood, of Dallas, for appellant. Alex F. Welsberg, J. Hart Willis, and Spence, Knight, Baker & Harris, all of Dallas, for appellees.

RASBURY, J. Appellant sued appellees for the value of certain personal property alleged to have been converted by appellees and upon which appellant, at the time of such conversion, had a mortgage lien properly registered to secure an indebtedness due him. The appellees in effect urged as a defense to the suit that they used proper diligence to ascertain the existence of the lien and failed to do so, and hence were innocent purchasers, and further that they never took actual possession of the property; and hence there was no conversion of same.

It appears from the evidence in substance that J. M. Mullins and Davis McMackin were partners in business under the firm name of Dallas Electrical Construction Company in the city of Dallas. W. G. Nunn, of Ladonia, Tex., an acquaintance of some years of both Mullins and McMackin, upon their request, indorsed their note for \$100 in order to enable them to negotiate same at bank, which was done. Nunn, as indorser, was later compelled to pay same by reason of the default of Mullins and McMackin. Subsequent to the circumstances related above, Mullins sold McMackin his interest in the Dallas Electrical Construction Company. In payment of part or all of the purchase price, Mullins accepted McMackin's 18 promissory notes, each for \$75, secured in payment by chattel mortgage on the property, for the value of which this suit was brought. The mortgage was registered as directed by statute, and recites the transaction to be for the purposes we have just stated, and subrogates by its terms all purchasers of the notes to the benefits of the mortgage. After the sale by Mullins to McMackin, in order to enable Mullins to borrow \$500 from the Guaranty State Bank & Trust Company, Nunn signed a note for that amount jointly with Mullins. The bank accepted the note. To secure the bank in the payment of the \$500 note and Nunn in his indorsement thereof, as well as the repayment to him of the amount paid out on the \$100 note, Mullins transferred the 18 McMackin notes to the bank. McMackin paid off sufficient of the mortgage notes to reduce the \$500 note to \$271, when payments ceased. Thereupon Nunn was compelled to take over the balance, which he did, and whereupon the bank transferred him the unpaid mortgage notes. Nunn attempted to collect the amount due him by Mullins and McMackin but was unable to do so. In the meanwhile, for some reason and in manner not made clear by the record, Mullins repurchased from McMackin the business of the Dallas Electrical Construction Company and operated same for about one month, when he sold a portion of the tools, implements, etc., to one of the appellees, Mrs. Amelia Wunderlich; such portion being covered by the mortgage securing the payment of the 18 notes given by McMackin to Mullins, transferred by Mullins to the bank and by the bank transferred to Nunn. Mrs. Wunderlich paid \$260 for the property sold her by Mullins, and the transfer was by bill of sale warranting title free of liens, etc. On the same day she purchased the property, Mrs. Wunderlich, in consideration of the note of Frank Courtney and Emil Wunderlich, her son, for \$260, due one year from date with 8 per cent. interest; conveyed the same property to them and as security for payment of the note retained a lien or mortgage against the property so conveyed. By

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the terms of the conveyance Courtney and Wunderlich are required to remove the property to 126 Bryan street, to keep it insured with loss payable to Mrs. Wunderlich, not to remove same from its location without her consent, and to keep same in good condition and repair, and provided for the usual conditions of forfeiture and seizure in case of default in payment of the note, etc. Before buying the property, both Mrs. Wunderlich and her attorney inquired particularly of Mullins, who was then in possession of the property by virtue of his repurchase from McMackin, if there was any lien or incumbrance against the property and if any other person had any interest therein, and he assured them that no liens existed and he was sole owner thereof. Mrs. Wunderlich and her son, Emil Wunderlich, testified that they inquired of the county clerk concerning a mortgage against the property, and that they were informed none was of record. The same parties also testified that, while Mrs. Wunderlich took a conveyance from Mullins to herself and in turn conveyed to Emil Wunderlich and Frank Courtney, she was not in fact buying the property for her own use but for her son and Courtney and took such method, under advice of counsel, as the best plan of securing herself in the payment of the money advanced to them, which was in fact only a loan. Appellant, Nunn, before filing suit, attempted to locate the mortgaged property, but was unable to do so. It was developed upon trial of the case that same was in possession of Emil Wunderlich in storage. The witness Boettiger testified the same was of the value of \$295. Mrs. Wunderlich paid Mullins \$260 therefor. Nunn's debt after this suit was filed was reduced to \$274.16 by payments received from some bankrupt proceeding, presumably against either McMackin or Mullins. The essentials of the facts here stated are undisputed. Upon trial before jury there was a verdict against appellant followed by judgment, from which he has appealed.

The appellant has filed two assignments of error; the first attacking the charge of the court, and the second challenging the sufficiency of the evidence to sustain the verdict and judgment. We think the criticism of the charge by appellant correct, but we forego a discussion thereof for the reason that we think the cause should be reversed and judgment here rendered for appellant on the grounds urged in the second assignment.

[1, 2] As applicable to the undisputed facts in this case, it was said in *Western Mortgage & Investment Co., Ltd., v. Shelton*, 8 Tex. Civ. App. 550, 29 S. W. 494, quoting from an eminent authority (Cooley's Second Ed. on Torts, 527): "When the mortgagor of chattels is left in possession, he has not only such a special property as will enable him to maintain trover against a wrongdoer, but he has

also, in his right of redemption, a property which is or may be valuable, and which he may lawfully sell in recognition of the right of the mortgagee. Such a sale is therefore no conversion of the mortgagee's interest, but a sale in denial of the mortgagee's right would be a conversion in him, and perhaps in the purchaser also. It would certainly be a conversion in the purchaser if he took the property on a purchase of the whole interest and persisted in a denial of the mortgagee's right afterwards." Also: "One who buys property must, at his peril, ascertain the ownership; and, if he buys of one who has no authority to sell, his taking possession in denial of the owner's right is a conversion." See, also, *McCown et al. v. Kitchen*, 52 S. W. 801; *Scaling v. First National Bank, etc.*, 39 Tex. Civ. App. 154, 87 S. W. 715; *Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co.*, 129 S. W. 1161.

[3] Mullins, by his sale of the notes to Nunn, became, after his purchase of the property from McMackin, in effect a mortgagor in possession and had no right of course to sell in denial of the mortgage, and the result under the cases cited and the undisputed evidence is that either Mrs. Wunderlich or Emil Wunderlich, her son, and Frank Courtney bought and held before and upon trial the mortgaged property in denial of Nunn's mortgage.

[4] Incidental to a discussion of the question of who in fact converted the property, we divert long enough to say that the denial by Mullins of the existence of the mortgage is without force as a defense to Nunn's right to recover in case of conversion. To hold that mortgages registered under statutory direction can be ignored by third persons upon the assurance of those in possession of the property that such mortgages do not in fact exist would be to utterly destroy the very purpose of the requirement instead of sustaining it.

[5] Nor do we think that the testimony of Mrs. Wunderlich and her son that the county clerk advised them that there was no mortgage upon the property entitled to any weight. We do not deny the truth of the testimony. Such information, we conclude, was given at the county clerk's office. The information was incorrect, however, since the mortgage was in fact registered there and an inspection of the record would have shown as much. We do not understand that it is the right of the public to rely upon the clerk as to what the records of his office do or do not disclose, but that it is the right of the public to inspect such records and themselves ascertain their contents, and that the public will be bound by the records alone as they actually exist. We then come to the question of whether appellee Mrs. Wunderlich (her son and Courtney not being parties to the suit) under the evidence bought the property, and, if she did, whether it was in

recognition or denial of the mortgage, and, if she did not purchase the property, whether the facts stated in law constitute conversion. That she did not buy or encumber the property in recognition of the mortgage is not denied.

[6] To establish that she did not do so in denial thereof, so as to constitute conversion, the claim is made that the form of conveyance to her was not what it purported to be, to wit, a sale, but simply a vehicle to give Mrs. Wunderlich security of greater dignity and was unaccompanied by actual physical asportation of the property. Waiving any question of Mrs. Wunderlich's right to deny, in an equitable proceeding, her own solemn declaration that she was the owner of the property, we nevertheless believe the proposition unsound. Mrs. Wunderlich agreed to advance the money with which to purchase the property only on condition that Mullins first conveyed it to her that she might in turn convey it to her son and Courtney and by such method secure what she considered security of a greater dignity for the money she was advancing, but which, however considered, is but what our statute denominates a chattel mortgage; and it was by her direction and with her knowledge that the property was so purchased and encumbered and then delivered to her son and Courtney. To hold that such acts do not establish conversion would, in our opinion, result in great injustice to parties acquiring evidences of debt secured by chattel mortgages duly registered. As illustrative of the point, second mortgages would and could acquire the dignity of first mortgages, since it is here urged exactly that Mrs. Wunderlich is in effect but a mortgagee, and to which we agree.

[7] The true rule, it seems to us, is that whosoever directly or indirectly is the instrumentality through which the conversion is accomplished is liable for the conversion, when such conversion is made with either actual or constructive notice of the pre-existing debt and mortgage. Constructive notice in this proceeding is not denied, and, that being true, appellee took the property as her own or as security for her debt at her peril, and, if by such taking it was lost or destroyed, she is liable for the value thereof. We are not to be understood, of course, as holding that second mortgages cannot be accepted without constituting conversion, but that such second mortgagor cannot under guise of a purchase sell to another, who in turn wastes or destroys same, and then defend, in a suit for conversion, on the ground that he was but a second mortgagor and, not having actually laid hands on the property, is not liable. But it is further urged that, Mrs. Wunderlich having bought the property or loaned money thereon in good faith, she should be protected for the reason

that Nunn was negligent in not placing upon the record an assignment of the notes, so as to give Mrs. Wunderlich notice thereof, and in permitting Mullins to remain in possession thereof after repurchasing same from McMackin. We have said that, while Mrs. Wunderlich may have acted in good faith in the purchase of the property or in loaning money thereon, she did so subject to or with full knowledge of the prior mortgage, whichever theory of the transaction may be adopted.

[8] Nor does the failure of Nunn to place upon the record an assignment of the notes affect the notice imported by the registration of the mortgage. Article 5661, R. S. 1911, provides that, when chattel mortgages are registered as was the one in this controversy, "all persons shall be thereby charged with notice thereof, and of the rights of the mortgagee, his assignee or representative thereunder." Article 5659, R. S. 1911, provides that the only way by which satisfaction of mortgages may be entered of record, and as corollary relied upon by those subsequently dealing with the property, is by acknowledging satisfaction of the debt upon the book containing the registry of the mortgage. No such satisfaction was shown on trial in this controversy.

[9] In like manner do we think the claim that Nunn was negligent in permitting the property to remain in possession of Mullins untenable. Even though he was aware that the title to the property had passed back into the possession of Mullins, there was no legal right in Nunn to prevent it, since Mullins had the right to purchase and McMackin the right to sell subject to the existing lien. The statutory provisions relating to chattel mortgages contemplate the existence of valid and enforceable mortgages where the property is permitted to remain in the possession of the mortgagor and directs that in all such cases the mortgage shall be void against creditors, subsequent purchasers, and mortgagees or lienholders, unless such mortgage or lien shall be registered in the manner provided by the other provisions of the act. Article 5655, R. S. 1911. As we have said, the mortgage in this controversy was so registered.

[10] The undisputed evidence shows the value of the property converted by Mrs. Wunderlich to be \$295. Nunn's debt is undisputed and is \$274.16. The rule is that, when the converted property exceeds the amount of the debt, the judgment shall be for the debt, and, when the debt exceeds the value of the property, it shall be for such value. In the application of that rule the judgment of the trial court is reversed, and judgment here rendered for appellant against Mrs. Wunderlich for the amount of his debt.

Reversed and rendered.



## CRANDALL v. SCOTT et al.

(Court of Civil Appeals of Texas. Amarillo.  
Dec. 6, 1913.)

## 1. MONOPOLIES (§ 12\*) — VALIDITY — ANTI-TRUST LAW—"TRUST."

The Anti-Trust Act (Rev. Civ. St. 1911, art. 7796) defines a "trust" as a combination of capital, skill, or acts by two or more persons, or association of persons, to create or carry out restrictions in the free pursuit of any legal business, or to abstain from engaging in or continuing business. Plaintiff and two other concerns, who conducted a moving picture business in the town, made an agreement by which the others gave notes to plaintiff in consideration of plaintiff stopping business and agreeing that no showhouse except the two owned by the makers should open in the town before a certain time, and that if a showhouse of a certain standard should open within the time and run for six months, all of the notes maturing after the opening of the house should be void, and that if a showhouse should open and run for less than such period, the notes should be void for the time it was conducted. *Held*, that the contract was in violation of the Anti-Trust Act and void.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7116-7119, 7822.]

## 2. MONOPOLIES (§ 12\*)—ILLEGAL CONTRACTS—ANTI-TRUST STATUTES.

A combination in violation of the anti-trust statute (Rev. Civ. St. 1911, art. 7796) is void, irrespective of the common-law distinction between restrictions on trade which are reasonable and those which are unreasonable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.\*]

## 3. APPEAL AND ERROR (§ 173\*) — PRESENTATION BELOW.

Notwithstanding failure of defendants' pleadings to attack the validity of the contract, under which the notes sued on were executed, the appellate court will consider the validity of the contract, where it is apparent upon the record that it is void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

Error to Potter County Court; W. M. Jeter, Judge.

Action by Percy Crandall against C. R. Scott and others. Judgment for defendants, and plaintiff brings error. Affirmed.

S. E. Fish, of Amarillo, for plaintiff in error. Hugh L. Umphres, of Amarillo, for defendants in error.

**HENDRICKS, J.** The plaintiff in error, Percy Crandall, sued in the county court of Potter county, Tex., the defendants in error, C. R. Scott, W. G. Underwood, and J. W. McQueen, on 10 promissory notes, executed by the defendants in error, in favor of the plaintiff in error, and which were a part of and based upon the following contract:

"State of Texas, County of Potter. This memorandum of an agreement this day entered into by and between Percy Crandall, party of the first part, and J. W. McQueen, C. R. Scott and W. G. Underwood, parties of the second part, witnesseth, that parties of

the second part agree to pay party of the first part \$25.00 per month for each and every month between now and the 1st day of March, 1912, as evidenced by their fifteen promissory notes, each for the sum of \$25.00, due at intervals of one month, and payable to the order of party of the first part, this day executed by parties of the second part; and, that party of the first part in consideration thereof warrants to the parties of the second part that no show business besides the Majestic, the Deandi and the Grand shall open in Amarillo, Potter county, Texas, before March 1st, 1912, and that if a showhouse; other than the above mentioned three does open in said Amarillo within said time, the floor space of which equals 2860 square feet, the assets and expense of installation of which equals \$1000.00, and which runs as a showhouse steadily for a period of six months, then all said notes maturing after the opening of said showhouse shall become null and void, and be canceled thereby. That party of the first part further agrees that should a showhouse of the same, less or more assets and expense of installation and floor space or the Grand Opera House open in vaudeville and picture within said Amarillo within said time, and run less than six months, then that for all the time such last-named shows shall so run, the notes covering that period shall be null and void and canceled thereby. Parties of the second part agree that neither of them will be directly or indirectly interested in the opening or running nor will they encourage the opening or running of any showhouse other than the three above named in said Amarillo within said time, and it is mutually agreed and understood that if they do either, then that such occurrence will in no wise invalidate any of said notes, nor in any wise relieve any party thereto from liability thereon. Signed in duplicate this — day of Nov. 1910. Percy Crandall, Party of the First Part. W. G. Underwood, C. R. Scott, J. W. McQueen, Parties of the Second Part."

It will be seen that the contract is somewhat ambiguous upon the face of it, wherein it reads that "the party of the first part \* \* \* warrants to the parties of the second part that no showhouse besides the Majestic, the Deandi and the Grand shall open in Amarillo, Potter County, Texas, before March 1st, 1912"—ambiguous for the reason that from the pleadings and the evidence in the case it was evidently the intention of the contract that the Grand should not open nor continue open to the period named, but, on the other hand, should be closed. We make this explanation for the reason that this ambiguity is eliminated from the case by the pleadings of both parties, as well as the undisputed evidence in the case. The cause was tried in the county court without the assistance of a jury and judg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment rendered against the notes as obligations; upon what specific ground, however, we are not advised.

Among other grounds of resistance in this court to a reversal of this cause, the defendants in error assert the proposition that the contract between the parties, and set out herein, is in violation of what is commonly called the "Anti-Trust Statute" of the state. At the time of the execution of this contract and of the notes by Crandall, the plaintiff in error, the defendants in error, Underwood, Scott, and McQueen, were the proprietors of a moving picture show in Amarillo, Tex., known and designated as the Majestic, and at the same time one Charles Stolp was the proprietor of another moving picture show, known as the "Deandi." The plaintiff in error, Crandall, was the owner and conducted a moving picture show in said city, designated as the "Texas Grand," which were the three places of amusement of that character at that time in said city.

C. R. Scott, one of the defendants in error, testified as follows: "About the 14th day of November, 1910, the contract introduced in evidence was entered into by those signing the same. At the same time a similar contract was made between Percy Crandall on one part and Charles H. Stolp (the owner of the Deandi) on the other part. Each of the contracting parties in the two contracts knew of the two contracts, and Stolp knew of our contract that has been introduced, and the Majestic and Deandi people had joined their efforts to get Percy Crandall to close his show, the consummation of their efforts being that he did close on the basis set forth in said contracts with the Majestic and the Deandi, and the said Underwood McQueen and myself executed the notes previously introduced in evidence and shown to be signed by us in pursuance of the contract introduced in evidence in this suit so as to close Mr. Crandall's place. \* \* \* After the execution of these instruments, the Texas Grand, Mr. Crandall's show, closed and remained closed, and for several months there were no other showhouses running in Amarillo in vaudeville or moving pictures, except the Majestic, run by the defendants in this suit, and the Deandi, run by Mr. Stolp. During this time as the notes became due they were paid off." The witness then testified in regard to the opening and establishment of another moving picture show in Amarillo as a defense with reference to another provision of the contract, which we think unnecessary to mention or discuss.

The testimony of Scott, relating to these matters, is undisputed, and it is to be particularly noted that the joinder of the efforts of the proprietors of the Majestic and the Deandi and the consummation of said co-operation produced the contract and the notes in question.

[1] The particular provisions of the anti-

trust statute which we think applicable to the propositions involved are as follows: "A 'trust' is a combination of capital, skill or acts by two or more persons, firms \* \* \* or association of persons, or either two or more of them for either, any and all of the following purposes: First. \* \* \* To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state. \* \* \* Seventh. To abstain from engaging in or continuing business, \* \* \* partially or entirely within the state of Texas, or any portion thereof." Rev. Civ. St. 1911, art. 7796.

The case of *Gates v. Hooper*, decided by the Supreme Court of this state, 90 Tex. 563, 39 S. W. 1079, in a case where a merchant sold to another his stock of goods and good will, agreeing to abstain from the same business in the same town for a certain period of time, held that, "in order to constitute a trust within the meaning of the statute," the combination of capital, skill, or acts by two or more means a union or association of such persons and the united co-operation of such agencies. In that case the mere sale by one party of his business and good will to another party for a valuable consideration, where the seller agreed to abstain from business in a certain town for a certain period of time, was not such union and co-operation as constituted a "combination" within the purview of the Anti-Trust Act. The abstention from business necessarily resulted from the sale of the "good will"; otherwise the transfer of the "good will" would have been nugatory; or, as the Supreme Court put it, "The seller was, by the terms of the contract, restrained from doing the thing which, if done, would have defeated in part the effectiveness of the sale." However, in this case, we have a different character of contract and different acts, more far-reaching in their consequences, manifested here. It is noted, first, that there are three rival businesses in Amarillo; two of them joined together to put the third out of business and a consummation of their efforts results in the execution of the notes, the abstention from business, a warrant upon the part of one of the parties that no "showhouse" besides the Majestic and the Deandi shall open in Amarillo before a certain time; and further agree that if a showhouse of certain standard should open in said Amarillo within said time and run as such steadily for a period of six months, then all of said notes maturing after the installation and opening of said showhouse shall become null and void, and, agreeing further, that if a "showhouse of the same, less or more assets and expenses of installation and floor space or the Grand Opera House, open in vaudeville and pictures within said Amarillo within said time and run less than six months," then for the period of time conducted the notes covering the same period are void. It is noted that the other parties agree that

neither of them will be directly or indirectly interested in the establishment of any showhouse other than the Majestic and the Deandi within the period of time named, and if they should become so interested they would not be relieved from liability on the notes.

In this cause the proprietors of the Majestic and the Deandi, "joined their efforts to get Crandall to close his show," and as a consummation of their efforts the contracts were made and Crandall did close upon the "basis set forth in said contracts with the Majestic and the Deandi," as the undisputed evidence of the witness declares. We are drawn to the conclusion that the "combination" existed within the denouncement of the statute, "to create restrictions in the full pursuit of any business \* \* \* permitted by the law of the state," and also the "combination" existed for the purpose to obtain Crandall to "abstain from engaging in or continuing business" in a "portion" of the state.

[2] When the "combination" exists within the contemplation of the law, the Supreme Court has said (Texas & Pac. Ry. Co. v. Lawson, 89 Tex. 400, 34 S. W. 920) that "the statute ignores the common-law distinction between restrictions which are reasonable and those which are not," and "it relieves the courts of determining whether, in a particular case, any effect will be given such a contract by declaring that it 'shall be absolutely void, and not enforceable, either in law or in equity.'" The statute further says, "for each and every day that such violation shall be committed or continued a punishment accrues," and hence we think that when the representatives of the different moving picture shows got together and acted and Crandall agreed to stay out of business for a certain period, the acts of combination were committed; and when Crandall warranted that no other "showhouse" of a certain standard would be opened within a certain time and agreed to close and stay out of business for a certain time, which he in reality agreed to do under the contract, and the others agreed that they would not enlarge their own business, or be interested in any manner in the opening or establishment of any other moving picture show in Amarillo, the union and co-operation continued. It might be said that the contract in a sense did not prohibit their going into a new business, and if they did, they would have to pay the notes, and though they contracted not to open another show, if they should by themselves, or in partnership with others, open a business, they would be estopped to deny the notes, because they could not open or be interested in opening a showhouse of the standard mentioned in the contract, and then plead it and take advantage of their own wrong. Crandall did not take chances, but inserted it in the contract, which was a continuing one, and each agreed in the future to stay out of the busi-

ness to a certain period of time, on the one side by not opening another in Amarillo, and Crandall to abstain entirely for the same period; and we are not concerned with results, whether beneficial or prejudicial. See the case of Comer v. Burton Lingo & Co. et al., 24 Tex. Civ. App. 251, 58 S. W. 969, where the proprietors of three lumber companies purchased a fourth, the latter abstaining from the lumber business for a certain period, where Judge Templeton held upon the pleadings the acts were unlawful, and said, "Such combination required the union of the acts and of part of the capital of the appellees [the purchasing lumber dealers], and if the purpose of the combination was to create or carry out restrictions, \* \* \* in the free pursuit of the business \* \* \* it was unlawful." It is true in that case that all the lumber dealers expressly became parties to the contract to eliminate the fourth from competition, and upon the pleadings the court held the contract in violation of other provisions of the anti-trust statute, additional to the one we quoted from the opinion of that court; however upon analysis of the opinion in that cause, it is quite analogous to the record here.

[3] It is contended here that the pleadings of defendant do not raise the point; but if that be true, it is so prominently apparent upon the record that it is a void contract, we are required to pass upon it—the very right of the cause is dependent upon it—and we think the judgment of the lower court should be affirmed; and it is so ordered.

Affirmed.

#### CONTINENTAL LUMBER & TIE CO. v. MILLER.

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 25, 1913. Rehearing Denied  
Nov. 29, 1913.)

#### 1. ACCOUNT, ACTION ON (§ 13\*)—VERIFIED ACCOUNTS—DEFENSES.

Under Rev. St. 1911, art. 8712, providing that when an action is founded upon an open account supported by affidavit it shall be taken as prima facie evidence, unless the party resisting the claim thereon shall file a written denial under oath, stating that the account is not just or true "in whole or in part," and if in part only stating the items and particulars which are unjust, and that when he fails to file such affidavit he shall not be permitted to deny the account or any item therein, where defendant's denial alleged that the account was not just, correct, and true, that it was not due, and that defendant did not owe it or any item thereof, this was a sufficient denial; since the statute only requires a definite denial of that part of the account which defendant considers is not just or true, and where the account is denied in whole every item thereof is put in issue.

[Ed. Note.—For other cases, see Account Action on, Cent. Dig. §§ 38-40; Dec. Dig. § 13.\*]

2. ESTOPPEL (§ 107\*)—PLEADING—NECESSITY.  
In an action for the price of lumber, plaintiff could not insist that defendant by asking

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

damages for the breach of the contract in his answer was estopped to disaffirm the contract, where plaintiff's pleadings based the claim of estoppel only on defendant's examination and acceptance of the lumber.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 297; Dec. Dig. § 107.\*]

### 3. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action for the price of lumber which defendant claimed to have rejected because of its defective quality and quantity, where defendant pleaded and his evidence showed that during the negotiations looking to the adjustment of the controversy he thought the matter had been settled and so used a small quantity of the lumber, but that upon learning his mistake he immediately notified plaintiff that he would pay therefor, an instruction that defendant would not have the right to accept the lumber in part and reject it in part, but that he was required either to accept or reject it as a whole, and that if he had an opportunity to and did inspect the lumber after its arrival he should then determine whether he would accept or reject it as an entirety, was properly refused, as it was on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

### 4. SALES (§ 178\*)—ACCEPTANCE—WHAT CONSTITUTES.

Where a purchaser of lumber refused to accept it because of its defective quality and quantity, but during the negotiations looking to an adjustment of the controversy he thought the matter had been settled and used a small quantity of the lumber which, upon learning of his mistake he offered to pay for, this was not necessarily an acceptance of the lumber.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 451-455; Dec. Dig. § 178.\*]

### 5. CUSTOMS AND USAGES (§ 8\*)—EVIDENCE—ADMISSIBILITY.

In an action for the price of lumber which defendant claimed to have rejected, evidence as to a custom among lumbermen to the effect that when a purchaser discovered that lumber delivered was not up to grade he should make out a claim of the amount and forward it to the shipper, and pending the settlement between the shipper and purchaser hold the lumber subject to the shipper's order, was not inadmissible on the ground that the custom was in contravention of law; since, under the circumstances mentioned, a purchaser might lawfully decline to receive the lumber and hold the shipment subject to the shipper's order.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 8-10; Dec. Dig. § 8.\*]

Appeal from Tarrant County Court; Chas. T. Prewett, Judge.

Action by the Continental Lumber & Tie Company against P. H. Miller. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 145 S. W. 735.

Lattimore, Cummings, Doyle & Bouldin, of Ft. Worth, for appellant. Goree & Turner, of Ft. Worth, for appellee.

SPEER, J. The Continental Lumber & Tie Company sued P. H. Miller upon an itemized verified account to recover the sum of \$656.14 due for two cars of lumber sold and delivered by plaintiff to the defendant and in the alternative to recover the reasonable

market value of such lumber. The defendant denied under oath the account sued on and pleaded specially that the shipment of lumber was not of the character, quality, and quantity bargained for, and that the orders given by him contained the express provision that, in case of any disagreement between the parties in respect to the lumber shipped, the same was to be held by the purchaser subject to an inspection by some officer or person sent by the Yellow Pine Manufacturers' Association, whose decision should be final; that he notified the plaintiff of his refusal to accept the lumber, called for an inspector according to the contract; but that his request had at all times been refused, and he has at all times since held the lumber subject to plaintiff's order. The plea contains some further allegations which will be noticed in connection with the assignments of appellant. The case was submitted to a jury, and the verdict and judgment were in favor of defendant, and the plaintiff has appealed.

The case has been once before appealed to this court and will be found reported in 145 S. W. 735.

[1] Appellant's first complaint is that the court erred in not sustaining its special exception urged against appellee's answer denying the verified account, because it failed to deny that such account "is just or true in whole or in part," as required by the statute. Rev. Civ. St. 1911, art. 3712. Appellee's denial was as follows: "And defendant now here says that said account is not just, correct, and true, and that the same is not due, and that the defendant does not owe the same, or any item of the same, and this the defendant is ready to verify." This was sufficient. It is a denial of appellant's account in toto. *Hensley v. Degener*, 25 S. W. 1130. The contention of appellant is for pure literalism. The evident purpose of the statute was to require only a definite denial of that part of the account which was not considered by the defendant to be just or true and where, as here, the account is denied in whole, every item thereof is put in issue.

[2] It is next complained that the court erred in not peremptorily instructing a verdict for appellant. The instruction was claimed, first, because the undisputed evidence and the record show that appellee had elected in his original answer to affirm the contract of sale which formed the basis of appellant's suit by asking for damages for breach thereof, and was therefore estopped to disaffirm the contract, as he was attempting to do on this trial. This contention is without merit, however, since no such plea of estoppel was interposed by appellant; the plea going only to the extent of alleging appellee's examination and acceptance of the lumber in the first place. The instruction was claimed next upon the ground that the undisputed testimony shows that appellee

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

after having unloaded and inspected the lumber, received and accepted the same, and was therefore estopped, as pleaded by appellant, to say that the lumber was not of the character, quantity, and quality contracted for. The facts with respect to an acceptance, however, were not undisputed, nor such as to require the giving of a summary instruction upon the theory that appellee had accepted the lumber as being in compliance with the terms of his order. The trial court very clearly submitted this question to the jury, telling them that, if they believed the grade and quality of the two cars of lumber were substantially the same as the grade and quality of the lumber ordered, they would find for the plaintiff for the full amount sued for, and furthermore, if they believed from the evidence that the character of lumber ordered was not shipped, but that lumber of a different grade and quality was shipped, and that the same was received by the appellee and accepted by him, they would find for appellant for the reasonable market value of the lumber so received and accepted, together with interest thereon, and that the question of acceptance was one to be determined by them under all the facts and circumstances surrounding the transaction. Neither was the summary instruction called for upon the theory suggested in the fourth assignment, to the effect that appellee failed to notify appellant within a reasonable time that he had rejected the lumber.

[3, 4] Appellant's special charge No. 8 was properly refused, because under the facts of this case it would have been on the weight of the evidence. It contained the following language: "You are instructed that the defendant would not have the right to accept said lumber in part and reject it in part, but that the defendant was either required to accept or reject the lumber shipped as a whole, and if you believe from the evidence in this case that the defendant had an opportunity to and did inspect said lumber after its arrival, and that he then would (should) determine whether he would accept or reject the same as an entirety." Appellee pleaded, and his evidence showed, that during the negotiations looking to an adjustment of the controversy with appellant, he thought the matter had been settled, and so used a small quantity of the lumber, amounting in value to about the sum of \$4, but that upon learning his mistake he immediately notified appellant that he would pay for the lumber used by allowing it as a credit on the unloading charges which had been made against appellant. This, under the circumstances, did not necessarily show an acceptance of the lumber; but the explanation was entirely reasonable and tended to negative the intention to accept. Special charge No. 6 contained the same vice.

[5] The witness Darnell testified to a custom amongst lumbermen to the effect that,

when a purchaser discovers upon inspection that the lumber delivered is not up to grade, the universal custom is to make out a claim of the account and forward it to the shipper; pending the settlement between the shipper and the purchaser, the lumber is held subject to the order of the shipper. Appellant objected to this evidence on the ground that such custom was in contravention of the law of the country with reference to the sale of personal property. It is not apparent how such custom is in contravention of any law. Under the circumstances detailed by the witness, a purchaser might lawfully decline to receive the lumber and hold the shipment subject to the shipper's order. The proposition submitted under the assignment raising this question, however, again asserts that the purchaser in such a case must reject or accept the property as a whole, and, if he retains and uses a portion of it, he is estopped to deny that he accepted the whole. We have already disposed of this contention. There was a further objection to this witness' testimony upon the ground that the pleadings as to custom were not sufficient. But there was a plea of custom sufficient we think at least to admit a portion of the witness' testimony, and there is no specific objection to a particular part which would not be within the pleas.

The eighth assignment complains of error in permitting the witness Faust to testify as to the general custom among lumbermen as it affected this controversy. But what we have said upon the ruling last discussed will also dispose of this assignment.

The evidence justifies the verdict and supports the judgment. There is no error in the record, and the judgment is affirmed.

#### EDWARDS et al. v. DENNINGTON.

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 29, 1918.)

#### 1. JUSTICES OF THE PEACE (§ 44\*)—JURISDICTION—AMOUNT IN CONTROVERSY—AMENDMENT.

Plaintiff sued to cancel his note for \$65, secured by a chattel mortgage on property valued at more than \$200, and given as a premium for a hail insurance policy, on the ground that it had been obtained by fraud, and, after defendant pleaded a judgment obtained against him on such note for \$76, he sought to recover damages in the amount of such judgment. *Held*, that plaintiff's cause of action was to be construed as one for damages to the amount of the judgment, which was within the original jurisdiction of the justice's court, and that, even if the value of the mortgaged property put the original suit beyond the jurisdiction of the justice's court, his reply to the plea was in the nature of an amendment bringing himself within such jurisdiction.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 157-172; Dec. Dig. § 44.\*]

#### 2. JUDGMENT (§ 713\*)—CONCLUSIVENESS—MATTERS CONCLUDED.

Judgment against plaintiff on his note to the amount of \$76 was conclusive as against

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—59

his right to recover for damages to that extent on the ground of fraud in obtaining the note, since, if he had a cause of action for deceit, it could have been interposed and have availed as a defense in the suit on the note.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.\*]

Appeal from Haskell County Court; A. J. Smith, Judge.

Action by G. E. Dennington against H. H. Edwards and others, with cross-action by defendants. Judgment for plaintiff, and defendants appeal. Reversed and rendered for defendant.

Alexander, Power & Ridgway, of Ft. Worth, for appellants. H. G. McConnell, of Haskell, Gordon B. McGuire, of Dallas, and C. B. Long, of Haskell, for appellee.

SPEER, J. G. E. Dennington brought this suit in the justice court of precinct No. 1, Haskell county, against H. H. Edwards, Hallstorm Underwriters, and L. G. Ocheltree, charging that they had fraudulently obtained from him a certain promissory note dated May 6, 1912, for the sum of \$65.40 as a premium for a policy of hailstorm insurance, agreeing that the policy should be guaranteed by a certain company, when in truth a different policy had been delivered to him. He sought the cancellation of the note; but, upon the defendants answering by plea of res adjudicata that a judgment had been obtained against him on such note in the county court of Tarrant county for civil cases, he prayed to be allowed his damages in the amount of such judgment. The case was tried in the justice court and afterward appealed to the county court, where judgment was finally rendered in favor of the plaintiff for \$76.40. There was a cross-action pleaded by the defendants, but this was decided against them, and no complaint is made as to this portion of the judgment, though they do appeal from the money judgment in plaintiff's favor.

[1] It is first contended that the justice and county courts were without jurisdiction to determine this suit, since it was alleged by appellants, and supported by appellee's admission in open court, that the note for the cancellation of which the suit was instituted was secured by a chattel mortgage on property of value more than \$200. We rule against this contention, however, since we construe appellee's cause of action, as interpreted by his final pleadings, to be one for damages for the fraud in which the measure of his recovery is laid at the amount of the judgment, which was within the original jurisdiction of the justice court. So that, if, under the authorities, as indicated in *Stricklin v. Arrington & Carter*, 141 S. W. 189, the value of the mortgaged property, rather than of the debt secured by it, determines the amount in controversy, and appellee's petition as originally filed was beyond the juris-

diction of the justice court, still he would have the undoubted right to put himself within the jurisdiction by an amendment, which, in effect, he did in reply to appellant's plea of res adjudicata.

[2] The next question presented arises upon the plea of res adjudicata. It appears to be undisputed that suit was instituted in the county court of Tarrant county for civil cases against appellee upon the identical note which he sought in this suit to cancel; that, though he was duly cited, he made default in that suit, and judgment was accordingly entered against him. This we take it to be conclusive of his rights in this suit. It is a well-established rule that the judgment in a former action upon the same claim or demand concludes the parties as to every matter which was offered and received to defeat the claim or demand, as well also as to every other matter which might have been offered for that purpose. *City of Houston v. Walsh*, 27 Tex. Civ. App. 121, 66 S. W. 106; *Nichols v. Dibrell*, 61 Tex. 539; *Henderson v. Terry*, 62 Tex. 281; *Wilson v. Cook*, 91 S. W. 236. It cannot be denied that, if appellee had such a cause of action for deceit as would sustain his claim for damages in this suit, the same could have been interposed and would have availed him as a defense in the suit instituted in Tarrant county. Such cause of action and defense were necessarily concluded by that judgment. The trial court before whom this plea was tried should have sustained the same, and, for his error in not doing so, the judgment is reversed, and judgment here rendered for appellants.

Reversed and rendered.

#### RECORD CO. v. POPPLEWELL.

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 8, 1913.)

APPEAL AND ERROR (§ 773\*)—DISPOSITION—AFFIRMANCE—RULE OF COURT.

Rule 42 for Courts of Civil Appeals (142 S. W. xiv) provides that, where appellant files no briefs, appellee, before the call of the case, may file a brief as required of appellant, shaping his proposition so as to show the correctness of the judgment, which the court may regard as a correct presentation of the case, without examining the record further than to see that the judgment is one that can be affirmed upon the case as presented by appellee. Plaintiff sued a newspaper to recover \$400 damages for the wrongful deprivation of a paper route, which suit was consolidated with one by defendant for \$125 for papers furnished, the real contention being whether defendant was bound to furnish papers at a price named in a contract with the carrier whom plaintiff succeeded, and, on charges within the pleadings, a verdict such as a jury was authorized to find was returned for plaintiff, and for defendant for \$62.50, and defendant appealed but filed no briefs. *Heid*, on plaintiff's brief under the rule, that under its express terms judgment would be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Tarrant County Court; Chas. T. Prewitt, Judge.

Action by J. M. Popplewell, Jr., against the Record Company, with counterclaim by defendant. Judgment for plaintiff on his claim and for defendant as to part of its claim, and defendant appeals. Affirmed.

Bryan & Spoonts, of Ft. Worth, for appellant. J. W. Stitt, of Ft. Worth, for appellee.

SPEER, J. J. M. Popplewell, Jr., instituted a suit against the Record Company, a corporation publishing a daily newspaper in Ft. Worth, to recover the sum of \$400 damages for wrongfully having deprived him of a paper route in the city of Ft. Worth, and the suit was consolidated with one instituted by the Record Company against Popplewell in the justice court and appealed to the county court to recover \$125 balance due for papers furnished him. Popplewell had judgment on his claim for \$370, and the Record Company recovered judgment on its claim for \$62.50, and the latter has appealed.

Appellant has filed no briefs in the case, and we would therefore dismiss the appeal for want of prosecution but for the fact that appellee has filed his brief under rule 42 (142 S. W. xiv), in which he prays that the judgment be affirmed. The trial judge thus presented the case to the jury: "In this case you are instructed that if you believe from the evidence that defendant failed to furnish plaintiff with papers according to the contract entered into between plaintiff and defendant, thereby causing plaintiff to lose the use and benefits of said route, then you will find for the plaintiff for the reasonable market value, if any, of said route at the time plaintiff lost said route, with 6 per cent. interest from March 25, 1912, and, unless you find that the defendant failed to furnish said papers according to the terms of said contract, you will find for the defendant as to plaintiff's cause of action. As to defendant's cause of action, gentlemen of the jury, you are instructed that, if you believe from the evidence that defendant in said cause, Popplewell, received the papers sued for in said cause under the original contract, then you will find for the Record Company against the said Popplewell for such amount, if any, as you may find that the said Popplewell owes the Record for said papers, and, unless you find that said papers were received by the said Popplewell under the original contract, you will find for the said Popplewell as to the Record's cause of action."

The real dispute between the parties arose over the contention that the Record was under obligation to furnish to Popplewell papers at a price named in a prior contract with another carrier whose route Popplewell had purchased. Popplewell admitted an in-

debtedness of \$62.50 which was in accordance with the price fixed in such original contract, and it appears from the verdict that the jury held with his contention that the papers were furnished under that contract. The charges quoted appear to be within the pleadings and evidence, and the verdict returned is such a one as the jury were authorized to find. We think the "judgment is one that can be affirmed upon the view of the case as presented by appellee," in accordance with rule 42, and it is accordingly ordered that such judgment be affirmed.

Affirmed.

## YOUNG MEN'S CHRISTIAN ASS'N OF DALLAS v. SCHOW BROS.

(Court of Civil Appeals of Texas. Ft. Worth. Dec. 6, 1913.)

### 1. ESTOPPEL (§ 107\*)—PLEADING AS DEFENSE—NECESSITY.

In an action for the price of goods sold, where the only pleading in the justice court was a verified account and no further pleading was filed on the appeal to the county court, as permitted by statute, an instruction, authorizing a recovery if defendant by acts or words, or both, led plaintiff to believe that the purchaser was defendant's agent, with authority to make such purchases for it, was erroneous, since the issue presented was one of estoppel, and plaintiffs could not avail themselves of the benefits of the estoppel unless they specially pleaded it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 297; Dec. Dig. § 107.\*]

### 2. JUSTICES OF THE PEACE (§ 174\*)—APPEALS TO COUNTY COURT—PLEADING.

Rev. Civ. St. art. 759, providing that when a case is removed by certiorari from the justice court to the county court, plaintiff may plead new matter not constituting a new cause of action, also applies on appeals from the justice court to the county court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

### 3. JUSTICES OF THE PEACE (§ 90\*)—PLEADING—NECESSITY.

Pleadings are as essential to make an issue in the justice court as in a court of record.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 306; Dec. Dig. § 90.\*]

Appeal from Bosque County Court; P. S. Hale, Judge.

Action by Schow Bros. against the Young Men's Christian Association of Dallas. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

J. L. Goggans, of Dallas, for appellant. James M. Robertson, of Meridian, for appellees.

DUNKLIN, J. In a suit by Schow Bros. against the Young Men's Christian Association of Dallas, a private corporation, plaintiffs recovered a judgment, from which the defendant has appealed.

The suit originated in the justice court,

later appealed to the county court, and was upon a verified account for merchandise charged to the defendant. The merchandise shown in the account consisted of groceries furnished by plaintiffs for the use of the members of the defendant association during their encampment near the town of Clifton, in Bosque county. The evidence is sufficient to show that at the request of the defendant's secretary plaintiffs furnished a price list of the goods, in reply to plaintiffs' letter to the defendant soliciting the account for such supplies. The evidence further shows that later A. A. Allen called up plaintiffs over the telephone and ordered the goods for and on behalf of the defendant, stating, in effect, that he was authorized by the defendant so to do. The goods were furnished in obedience to this request. The evidence further shows that defendant entered into a written contract with Allen, whereby the latter contracted and agreed to board the boys during the encampment and to furnish all supplies necessary therefor, for a fixed sum. But this contract was not known to the plaintiffs at the time the goods were furnished for which a recovery was allowed. Whether or not Allen was defendant's agent, authorized by it to purchase the goods upon defendant's account, was an issue sharply controverted by the defendant, and properly submitted in the court's charge.

[1] The court further instructed the jury, in effect, that the defendant would be bound by the acts of Allen in the purchase of the goods, if, by acts or words, or both, they led plaintiffs to believe that Allen was their agent, with authority to make such purchases for the defendant, and that such acts or words of the defendant were reasonably calculated to induce the plaintiffs to so believe, and that, acting upon such belief, they were induced to sell the goods upon the credit of the defendant. One of the grounds upon which the instruction last noted is assailed is that there was no pleading to warrant it. The only pleading by plaintiffs shown in the transcript from the justice court to the county court consists of the verified account, and it does not appear from the record that any other pleading than that was filed by plaintiffs in the county court after the case was appealed to that court.

[2] By article 759, Revised Civil Statutes 1911, it is provided that when a case is removed by certiorari from the justice court to the county court, the plaintiff may plead new matter which does not constitute a new cause of action, provided such pleading be in writing and filed in the cause, and this article of the statute applies also in cases of appeal from the justice court to the county court. *Slover v. McCormick Harvesting Machine Co.*, 12 Tex. Civ. App. 446, 34 S. W. 1055, and cases there cited.

[3] Pleadings are as essential to make an issue in the justice court as in a court of record. *Moore v. Jordan*, 67 Tex. 394, 3 S. W. 317; *Maass v. Solinsky*, 67 Tex. 290, 3 S. W. 289. The issue presented by the instruction now under consideration was one of estoppel. In other words, essentially it is that the defendant, having held out Allen as its agent, and thereby induced the plaintiffs to believe that he was its authorized agent to purchase the goods, is now estopped to deny that he was such agent, even though as a matter of fact no such agency existed. It is well settled by the authorities that in order for plaintiffs to avail themselves of the benefits of this rule, it was necessary for them to specially plead such estoppel. *Swayne v. Insurance Co.*, 49 S. W. 518; *Wolf v. Galbraith*, 39 Tex. Civ. App. 351, 87 S. W. 390.

From the foregoing conclusions it follows that the court erred in giving the instruction last noted, and for this error the judgment must be reversed and the cause remanded. All other assignments of error have been duly considered and are overruled.

Reversed and remanded.

GULF, C. & S. F. RY. CO. v. DAVIS et ux.  
(Court of Civil Appeals of Texas. Ft. Worth.  
June 23, 1913. Rehearing Denied  
Nov. 15, 1913.)

1. CARRIERS (§ 316\*)—CARRIAGE OF PASSENGERS—PRESUMPTION—RES IPSA LOQUITUR.

In an action by a female passenger who fell while alighting from a railroad train owing to her dress catching upon something, where there was no showing that it caught on any screw or projection upon the platform, the doctrine of *res ipsa loquitur* cannot be relied on to raise an inference of negligence, because it would be basing inference on inference; the first inference being that by reason of the fall there must have been some obstruction, and the second that the defendant was negligent in failing to discover and remove the projection.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.\*]

2. CARRIERS (§ 318\*)—CARRIAGE OF PASSENGERS—ACTIONS.

In an action against a railway company for injuries received by a passenger who fell while alighting from a car, a judgment in favor of the passenger cannot be upheld, where the testimony showed that the accident was as reasonably attributable to a nonactionable cause as to the company's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

3. CARRIERS (§ 316\*)—CARRIAGE OF PASSENGERS—DUTY OF CARE.

While it is the duty of a railroad company to exercise a high degree of care to furnish and maintain suitable cars and platforms upon which passengers may move with safety, it is not an insurer in this respect, and one injured upon a car platform has the burden of proving the company's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.\*]



Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by L. C. Davis and wife against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

See, also, 139 S. W. 874.

Terry, Cavin & Mills, of Galveston, Brown & Lockett, of Cleburne, and Lee & Lomax, of Ft. Worth, for appellant. J. B. Haynes, W. Poindexter, and Walker & Baker, all of Cleburne, for appellees.

CONNER, C. J. This appeal is from a judgment in appellees' favor for the sum of \$12,500 as damages for personal injuries alleged to have been received by Mrs. Davis while she was a passenger on one of appellant's trains on the 16th day of January, 1909. A number of assignments of error relating to the rulings of the court on the instruction and rejection of evidence and to special charges given and refused have been presented, but, in the view that we have taken of the case, it will not be necessary for us to determine them. The vital question, as we conclude, is whether there is any evidence in support of the issue of negligence upon which the case was submitted.

Several grounds of negligence were alleged. All but one, however, were excluded from the consideration of the jury by the court's charge, and of this no complaint is made, so that in our statement of the case we will confine ourselves to the issue of negligence submitted. It was alleged, in substance, that on the evening of the day stated Mrs. L. C. Davis took passage at Cleburne, Tex., upon one of appellant's passenger trains for the purpose of being transported to her home in Alvarado. Mrs. Davis without dispute paid the customary railroad fare and became a passenger. She thus alleges the manner of her injury: "And when said passenger train reached the defendant's passenger station in Alvarado, Johnson county, Tex., and had stopped at said station for the purpose of allowing passengers to disembark from said train, and from the coach in which she was riding, the plaintiff in the exercise of due care arose from her seat in said coach and passed out of the usual and regular door to said coach onto the platform thereof, and while she was attempting to pass down the steps of said coach from the platform, the lower and back portion of her dress and skirts caught upon one or more nails, screws, bolts, or other projection negligently allowed and permitted by the defendant to protrude above the surface of said platform, or to be attached to said coach, and the back part of her dress and skirts being thus caught and fastened by said projection, nails, screws, or bolts, caused the front and lower part of her dress and skirts to pull and jerk her feet from under her, and caused her to fall and to be thrown down

said steps from near the top thereof to the lower part of said steps, and the stool placed beneath the lower step and on the ground, and as a direct and proximate result thereof severely and permanently injured her." And thus charges the issue of negligence upon which the case was submitted: "That the defendant was guilty of negligence in allowing and permitting said nails, screws, bolts, or other projections to thus stand up and protrude above the surface of said platform or other part of said coach near the door and platform of said coach, and was guilty of negligence in permitting the same to remain in such condition."

Mrs. Davis testified that when the station of Alvarado was called she got up and started out, and got to the edge of the platform to make her first step, when her dress caught behind on something and jerked her feet from under her and threw her forward to the ground, from which she suffered injuries as related in her testimony. She said: "I do not know what my dress caught on; it caught on the platform somewhere. The skirt just jerked me and jerked my feet out from under me." She further testified that the obstruction tore her dress, which was exhibited before the jury, and which was thus described by her: "No one has worn this dress since that night. Prior to the time I fell from the train there was no holes in this dress. It is torn now crossways at the bottom of the placket and towards the left side. This tear is about eight inches to the left side of the placket; the tear extending from the bottom of the placket to the left. The hole at the bottom of the skirt is just over the hem and is about six inches in length and extends to the hem. Then it is torn slightly at the left side and not quite so much to the right. It is a hole your fist could slip through easily."

Other than the evidence of appellee quoted, there is none that corroborates her theory of the fall, save the testimony of Silas Bankston, who testified: That he was present and within some eight or ten feet of Mrs. Davis when she fell. That "when I first saw Mrs. Davis she was standing out on the platform between the coaches and started down; she took one step and started to take another one and fell. Her dress was pulled behind, and she fell. \* \* \* Her dress swung right backwards from where she was getting off. I just happened to be noticing her dress. It drew in front of her and about her shoe tops." The brakeman, however, at the foot of the steps, a bus driver standing near, and some four or five other persons, also near by, either passengers or waiting on appellee to take passage, all deny seeing a screw, nail, or other thing upon the platform on which appellee's dress could have caught. These witnesses all believed themselves in position in which to have seen had there been anything of the kind. One or more of them testified specifically that they

thought they would have seen it had there been a projection, and all also denied that they observed or heard any tearing of appellee's dress, or any drawing of the dress from behind immediately preceding the fall; one witness giving it as her opinion that appellee either fell in a fit or voluntarily. All other observers save one thought her fall was with design.

Adopting, however, in deference to the verdict of the jury, appellee's own account of her fall, there yet remains the vital issue of whether appellant or its servants were guilty of negligence in permitting the platform or steps of the car in question to be in the condition alleged. Other than the mere fact that appellee's dress caught on "something," there is nothing in the evidence from which to draw an inference of negligence. The evidence shows that appellant's car inspectors at Cleburne inspected the car during the day preceding the occurrence; that the car was also inspected by the brakemen on the way to Dallas shortly afterwards, and yet later after the arrival of the car at Dallas, and yet again with particularity on the day after at Cleburne, when appellant's inspectors at that place were informed that appellee claimed to have been thrown by catching her dress on a screw or other thing on the platform. On none of these occasions was a defect or obstruction found as shown in the evidence. It is not contended that such inspectors were incompetent and that appellant was guilty of negligence in their employment or retention; nor is it contended that there is any evidence, save the mere fact that appellee's dress caught, that indicates carelessness on the part of any of appellant's inspectors, or of an insufficient inspection; nor is it contended that the inspections were not with sufficient frequency, nor that the car was old and worn, or defective in construction, and that appellant was guilty of negligence in this respect. Then in what respect was appellant negligent? The allegation, as will be seen from the quotation made, is that appellant was guilty of negligence in "permitting said nail, screws, bolts, or other projection to thus stand up and protrude above the surface of the platform or other part of said coach near the door, and was guilty of negligence in permitting the same to remain in such condition." But what proves it? As seen, inspection was made before the car was started on its way to Alvarado, and no screw, bolt, or other projection was apparent. The evidence shows that screws in the platform of like cars sometimes work out, but nothing is here shown when, if at all, the raised screw or other projection first protruded above the platform. For aught that appears in the evidence, it may have been but a moment before appellee appeared on the platform. It cannot be reasonably said that the brakeman or other employes were guilty of negligence in failing to discover the elevated screw when neither the appellee nor any of

the descending or ascending passengers and other observers were able to observe it before or after the fall. None of them testified that he or she saw, tripped over, had clothing caught on, or otherwise discovered a protruding screw, or other thing upon which a dress could have caught. On the submission it was suggested in argument that appellee's dress may have extracted the screw, thus accounting for the failure of the witnesses to see it; but this is a mere conjecture. No loose screw was found on the ground or other place afterwards, nor does any witness indicate that there was a vacant hole in the platform. In brief, as stated, there is nothing in the evidence, which we have carefully considered, upon which to found the conclusion that appellant was guilty of negligence in the respect alleged by appellee, except the isolated fact that appellee's dress caught upon something and that she was thereby caused to fall.

[1] Numerous cases might be cited where an inference of negligence has been held to be justified from the very nature of the defect causing an injury, but this principle—that of *res ipsa loquitur*—has no proper application here. The defect, the cause of the fall in the instance before us, is not shown with any degree of certainty. That there was a loose screw or other projection on the platform of the car in question is a mere inference from the fact that appellee's dress caught, and to proceed yet further in the course of reasoning, and infer negligence in permitting the screw or projection to be there, seems to be adding presumption upon presumption, which the law never permits.

[2] One of the passenger witnesses, Baxter Walton, testified that he was in the middle of the platform and about three feet behind appellee and in position to have seen her dress if it caught anything as she got off; there being nothing to obstruct his view. He not only denied seeing any obstruction, but further testified that "another boy came out there where I was after I had gotten out there, and stood kinder behind me on the same platform that I was on. I don't know when he came out there, but he was standing there after she fell. I noticed him before any other passengers came along. I know he did not come up the steps and get on the train after the lady fell." Baxter Walton denied that he, himself, stepped on appellee's dress, but, so far as we can tell from the record "the boy" was not called as a witness. It is possible that either the boy or some other person not observed inadvertently stepped upon appellee's dress, and thus tore it and threw her. This, of course, is but a mere conjecture that will not be indulged by the law, but is given merely as illustrating that appellee's testimony accounting for her fall is not inconsistent with causes of her fall other than that of a projecting screw. And the rule undoubtedly is that, where the testimony shows that an accident is as reason-

ably attributable to a nonactionable cause as to one that is, the law will not uphold a conclusion in the nature of a mere guess in favor of the latter.

[3] While it was appellant's duty to exercise a very high degree of care to furnish and maintain suitable cars and platforms upon which passengers could move with safety, it was not an insurer in this respect, and the burden of proof rested on appellee to show such a state of circumstances as affords a reasonable conclusion of negligence as alleged. It is not sufficient for a plaintiff to show that the defendant may have been guilty of negligence; the evidence must point out that he was.

We conclude that in this appellee has wholly failed, and that such failure entitles appellant to judgment. *Texas & P. Coal Co. v. Kowsikowski*, 118 S. W. 829, s. c. 103 Tex. 173, 125 S. W. 3; *St. Louis, S. F. & T. Ry. Co. v. Cason*, 129 S. W. 397. Such being our conclusion, and it further appearing that this case had been twice tried and fully developed, we think in the interest of all parties that the litigation should be brought to an end. It is, accordingly, ordered that the judgment be reversed and here rendered for appellant.

Reversed and rendered for appellant.

#### COODY v. SHAWVER et al

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 8, 1913. Rehearing Denied  
Dec. 18, 1913.)

#### 1. PLEADING (§ 301\*)—VERIFICATION—VERIFICATION BY ATTORNEY.

The fact that a pleading was verified by a party before one of his attorneys in the case was not ground for sustaining a special exception thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 314, 318, 892-897, 904-906; Dec. Dig. § 301.\*]

#### 2. PARTNERSHIP (§ 213\*)—ALLEGATIONS—RELATION.

The mere allegation in the petition of joint ownership of the mules sought to be recovered was not equivalent to an allegation of partnership as to the mules.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 408, 409; Dec. Dig. § 213.\*]

#### 3. REPLEVIN (§ 8\*)—ISSUES.

In an action by two persons to recover mules, or their value, which were claimed to have been converted by defendant, the questions whether plaintiffs were partners, and whether one plaintiff had paid the other for his interest therein, were immaterial.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 45-68; Dec. Dig. § 8.\*]

#### 4. PARTNERSHIP (§ 218\*)—EXISTENCE OF RELATION—SUBMISSION OF ISSUE.

In an action to recover possession of mules claimed to have been converted by defendant or their value, whether defendant was the partner of plaintiff need not be submitted; the evidence not tending to show a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 426-428; Dec. Dig. § 218.\*]

#### 5. PARTNERSHIP (§ 20\*)—EXISTENCE OF RELATION.

An agreement that one of the parties thereto would furnish the money to purchase horses would not of itself constitute a partnership between the parties.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. § 20.\*]

#### 6. PARTNERSHIP (§ 218\*)—INSTRUCTIONS—DEFINING TERMS.

A requested instruction submitting the issue of partnership was defective for not stating to the jury what would constitute a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 426-428; Dec. Dig. § 218.\*]

#### 7. PARTNERSHIP (§ 218\*)—EXISTENCE OF RELATION.

An instruction, that if the purchase of horses by plaintiff was under an agreement by which defendant was to have a third interest therein upon paying to plaintiff a third of the price without fixing a time for payment, unless he paid such third within a reasonable time he would not be a partner in the stock, was not erroneous on the ground that it authorized the finding that failure to pay defendant's part of the price would dissolve the partnership, though a partnership had been consummated.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 426-428; Dec. Dig. § 218.\*]

Appeal from Knox County Court; J. H. Milam, Judge.

Action by G. H. Shawver and another against C. H. Coody. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jas. A. Stephens, of Benjamin, for appellant. D. J. Brookreson, of Benjamin, and Robert Cole, of Crowell, for appellees.

DUNKLIN, J. G. H. and J. A. Shawver instituted this suit against Henry Coody to recover possession of three mules and one horse, or, in the alternative, the value thereof, also for \$250, the value of two mules alleged to have been converted by the defendant; title to all of said stock being claimed by the plaintiffs. Judgment was recovered by plaintiffs, and the defendant has appealed.

The animals in controversy originally belonged to a herd of 37 head of horses and mules purchased at public sale; plaintiff G. H. Shawver furnishing the purchase money therefor, and defendant Coody bidding in the stock and taking and holding possession thereof for quite a long period of time. According to the testimony of plaintiff, G. H. Shawver, he agreed with Coody prior to the purchase that he (Shawver) would furnish the purchase money, and after the purchase Coody and plaintiff J. A. Shawver might each become the owner of a one-third interest in the stock upon payment of one-third of the purchase price, but that Coody had never paid, or offered to pay, such consideration, and had refused to turn over to the plaintiffs the stock in controversy. According to Coody's testimony, prior to the auction sale noted, plaintiff G. H. Shawver had agreed unconditionally that, if he (Coody)

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

would bid in the herd, G. H. Shawver would furnish the purchase money, and that the two plaintiffs and Coody would become partners and own the stock in equal shares, and that J. A. Shawver and Coody should each owe to G. H. Shawver one-third of the purchase price of the stock. The difference in these two versions of the terms of the agreement was the only controverted issue upon the trial.

[1] The allegation contained in Coody's answer of a partnership formed between the two plaintiffs and himself for the ownership and management of the herd was specially denied by plaintiffs in their supplemental petition, and this pleading was verified by plaintiffs before one of their attorneys who acted as notary public in taking the affidavit. Defendant's special exception to this pleading on the ground that the attorney was not a proper official to take the affidavit was correctly overruled. *Ryburn v. Moore*, 72 Tex. 85, 10 S. W. 393; *Kosminsky v. Raymond*, 20 Tex. Civ. App. 702, 51 S. W. 51.

[2, 3] G. H. Shawver, after testifying that his brother, J. A. Shawver, owned an interest in the horses in question and that defendant did not own any interest in them, was asked by defendant's counsel if J. A. Shawver had ever paid to witness any part of the purchase money for the herd. Plaintiffs objected to this question on the ground that defendant had not by answer denied under oath allegations in plaintiffs' petition that the two plaintiffs owned the horses as partners. This objection was sustained, and this ruling is made the basis of the second assignment of error. While the petition claimed a joint ownership of the horses in plaintiffs, there was no allegation of a partnership between them, nor of any fact that would constitute a partnership. Evidently the allegation of joint ownership was construed by the court as equivalent to an allegation of partnership in the plaintiffs in such ownership, which was incorrect. However, the issue of whether or not the plaintiffs were partners in the ownership of the horses was immaterial, and it was also immaterial whether or not J. A. Shawver had paid his brother for his interest in the horses. Accordingly, the second assignment of error is overruled.

[4] Appellant complains of the refusal of two special instructions requested by him upon the issue of partnership between himself and the plaintiffs. Whether or not the defendant was a partner of plaintiffs was an immaterial issue. His contention, that plaintiff G. H. Shawver agreed unconditionally that as soon as the herd was purchased defendant should become the owner of a one-third interest therein and should thereafter pay one-third of the purchase price, was submitted to the jury in the court's charge, together with an instruction that, if that contention was sustained by the evidence, a verdict should be returned in the

defendant's favor. In order to establish the alleged partnership between the plaintiffs and the defendant, it would have been necessary for the defendant to show, not only that he acquired an interest in the stock, but also further facts necessary to constitute a partnership. The charge given by the court was therefore more favorable to the defendant than the two requested instructions last noted.

[5, 6] Furthermore, one of the requested instructions was erroneous, in that it contained the proposition that, if it was agreed between the parties that G. H. Shawver would furnish the money to purchase the horses, that agreement alone would constitute a partnership between them, and the other requested instruction submitted the issue of partnership with no guide to the jury for the purpose of determining what would constitute a partnership. Hence the assignments complaining of the refusal of the requested instructions are overruled.

[7] Complaint is also made of an instruction given by the court, in effect, that if the purchase of the stock was made under an agreement whereby defendant was to have a one-third interest in the stock provided he would pay to G. H. Shawver one-third of the purchase price and no time fixed for such payment, the defendant would have a reasonable time to pay the same, and, unless he paid the same within a reasonable time, he would not be a partner with the plaintiffs in the stock. The criticism of the instruction is that by the instruction the jury were authorized to find that, although a partnership had been in all things consummated, the defendant's failure to pay his portion of the purchase price would dissolve the partnership. By the very terms of the instruction the acquisition of an interest in the property by the defendant was made to depend upon the payment by the defendant of one-third of the purchase price. In other words, the agreement submitted was merely one giving the defendant an option to become the owner of an undivided one-third interest in the stock, and, according to the defendant's own testimony, he never paid nor offered to pay any part of the purchase price. For this reason there is no merit in the assignment.

Another paragraph of the court's charge is criticised as being upon the weight of the evidence in assuming that the stock in question belonged to the plaintiffs; but, when considered in connection with other instructions contained in the charge clearly submitting that issue as a disputed issue, it is altogether improbable that the jury interpreted the charge in the manner suggested in the assignment.

There is no merit in appellant's seventh assignment complaining of an instruction permitting a finding in plaintiffs' favor of compensation for the use of certain animals claimed by the plaintiffs and used by the de-

fendant, since it appears from the verdict of the jury that no such allowance was made. We are of the opinion further that the evidence was ample to support the verdict.

By another assignment it is insisted that the judgment should be reversed because the court failed to prepare a correct statement of facts. In answer to this assignment, it is sufficient to say that a statement of facts prepared by the judge and duly certified appears in the record, and that appellant has not attempted in any manner to point out wherein the statement of facts is defective, neither has he submitted any motion to strike it from the record.

The judgment is affirmed.

### GILLISPIE v. AMBROSE et al.

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 1, 1913.)

#### 1. LANDLORD AND TENANT (§ 223\*)—CLAIMS ARISING OUT OF THE SAME TRANSACTION.

Under Rev. Civ. St. 1911, art. 1330, providing that the preceding article, which provides that, if plaintiff's cause of action be a claim for unliquidated or uncertain damages founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff, and, if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant, shall not be so construed as to prohibit the defendant from pleading in set-off any counterclaim founded on a cause of action arising out of, incident to, or connected with plaintiff's cause of action, in a landlord's action to recover rent and compensation for the use of farming implements and mules, the defendant could set up as a counterclaim a breach of warranty of two horses which he agreed to buy from the landlord in part consideration for the lease, since this claim arose out of plaintiff's cause of action.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 885-893; Dec. Dig. § 223.\*]

#### 2. PLEADING (§ 228\*)—EXCEPTION TO PLEADING GOOD IN PART.

An exception to five counts in a petition of reconvention was properly overruled where one of the counts stated a proper counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. § 228.\*]

#### 3. PLEADING (§ 228\*)—DEMURRER—OPERATION AND EFFECT OF DECISION ON DEMURRER.

An exception of misjoinder of causes of action is properly addressed to the entire pleading, and, if sustained, the entire pleading is stricken out, leaving it optional with the pleader to select such portions of the plea as he may see fit, and the court cannot make this selection for him; and hence an exception to five counts in a plea of reconvention for misjoinder, by which it was proposed to strike out such counts and permit three other counts to remain, was properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 584-590; Dec. Dig. § 228.\*]

#### 4. APPEAL AND ERROR (§ 732\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

In a landlord's action for rent and for compensation for the use of farming implements and mules, in which the tenant filed a plea of reconvention for breach of warranty and to recover

damages for torts, an assignment of error that the court erred in overruling plaintiff's motion for a new trial because the jury allowed the full amount claimed by defendant's plea, except the sum claimed as damages for the breach of warranty, was too general to require consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3022-3024; Dec. Dig. § 732.\*]

#### 5. TRIAL (§ 250\*)—INSTRUCTIONS—CONFORMITY TO PLEADINGS AND EVIDENCE.

Where, under a plea of reconvention alleging that defendant had falsely and maliciously declared that defendant was a dishonest person, owed plaintiff money that he would not pay, and for which she held a lien on his cotton, by reason of which acts defendant was unable to market his cotton in the town of A., where he was accustomed to sell his crops, and had been suspected by his neighbors and others of being dishonest, lost their respect, and suffered withal humiliation, there was neither allegation nor evidence of the amount of pecuniary loss resulting from defendant's inability to market his crop, the claim set up should not have been submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-536; Dec. Dig. § 250.\*]

#### 6. APPEAL AND ERROR (§ 1140\*)—CURE OF ERROR BY REMITTITUR.

Where defendant, under a plea of reconvention in a number of counts claiming in the aggregate \$196.50, obtained a verdict of \$136.50, indicating that the jury allowed a portion of a claim of \$70, which under the pleadings and evidence should not have been submitted, the judgment would be reversed unless defendant filed a remittitur of the whole \$70.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

Appeal from Jones County Court; Joe C. Randel, Judge.

Action by Mrs. Jerome Gillispie against J. W. Ambrose and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, unless plaintiff files remittitur.

H. H. Sagebiel, of Ganado, and W. S. Pope, of Anson, for appellant. Brooks & Brooks, of Anson, and Davenport & Davenport, of Stamford, for appellees.

DUNKLIN, J. J. W. Ambrose and Guy Ambrose rented land from Mrs. Jerome Gillispie, who instituted this suit against them to recover several items claimed to be due for rents and for the use of farming implements and mules. But the suit was dismissed as to the defendant Guy Ambrose. J. W. Ambrose, in addition to a general denial, filed a plea in reconvention in which he sought to recover for certain labor performed for the plaintiff and in which he further sought to recover damages, the nature of which will hereinafter be noted. Judgment was rendered upon the verdict of a jury denying plaintiff any recovery and awarding defendant a recovery against the plaintiff for \$136.50, from which plaintiff has appealed.

The land was rented for two years, as shown by two leases, which were in writing, and one of them contained the stipulation

that defendant would purchase from the plaintiff two horses and would pay plaintiff for one of them \$100 and for the other \$135. This agreement to purchase the horses was one of the considerations for the lease to the defendant.

In the fourth count of defendant's plea in reconvention it was alleged that plaintiff warranted those two horses to be in sound condition and of certain ages, but that they were both unsound and older than represented, and that by reason of those misrepresentations they were worth \$60 less than the price which defendant agreed to pay, and he sought to recover of plaintiff that sum as damages. By the fifth count in the plea damages were claimed in the sum of \$17.60 as the value of certain feed stuffs which it was alleged belonged to the defendant and were wrongfully taken from his barns during his absence by plaintiff's agent. By the sixth count in the plea it was alleged that plaintiff, through her agents, caused his arrest and prosecution on a charge that he had unlawfully used two of her mules without her consent; that he had been duly acquitted of the charge upon trial; that the prosecution of him by the plaintiff was malicious and without probable cause; and that he was damaged thereby in the sum of \$15, the fee which he was forced to expend in the employment of an attorney to represent him, and in the further sum of \$5, loss of time in attending court. By the seventh and eighth counts in the plea it was alleged that defendant had falsely and maliciously published and declared that defendant was a dishonest person, was owing plaintiff money that he would not pay, that he was due her rent for which she held a lien upon the cotton grown upon the premises by the defendant, and that by reason of such acts on the part of the plaintiff he was unable to market his cotton in the town of Anson, where he was accustomed to sell his crops, and had been suspected by his neighbors and others of being dishonest, had lost their respect and esteem, and had suffered mental humiliation and harassment by reason of such charges, all to his damage in the sum of \$70, for which he prayed judgment.

[1, 2] Plaintiff addressed an exception to those five counts in the petition collectively, which was overruled. By the first assignment of error complaint is made of that ruling. By the first proposition it is insisted that the damages claimed and to which the exception is addressed are for tort and breach of covenant, which cannot be pleaded and set off against plaintiff's claim, which is a certain demand. By the second proposition it is insisted that, if plaintiff's demand be unliquidated, defendant's counterclaims cannot be offset because they constitute unliquidated demands and are founded upon alleged torts. As noted already, the claim made in the fourth count in the plea in reconvention was for damages growing

out of an alleged breach of warranty of the condition and ages of the two horses which he had agreed to buy from the plaintiff in part consideration for the lease of the land. This claim arose out of the plaintiff's cause of action, and hence was a legitimate counterclaim to plaintiff's suit. Revised Civil Statutes, art. 1330. The exception now under discussion having been addressed to this claim, together with four other counterclaims mentioned above, collectively, and being in effect a general demurrer to all five of those claims, was properly overruled. This conclusion renders it unnecessary to determine whether or not the other counterclaim could properly be considered, if special exceptions had been addressed to each one separately.

[3] Another special exception was addressed to the five counts in the plea of reconvention above noted upon the ground that the claims there asserted sounded in tort and were improperly joined to the claims made in the first, second, and third counts in the plea which arose from contractual relations. By this exception it was proposed to permit the claims set out in the first, second, and third counts to remain and to strike out the remainder of the counts. As we understand the rule, an exception of misjoinder of causes of action is properly addressed to the entire pleading, and, if the exception is sustained, the entire pleading is stricken out, thus leaving it optional with the pleader to select such portions of the plea as he may see fit to urge, and it is not the province of the court to make this selection for him. Furthermore, as noted already, the claim made in the fourth count of the plea was a proper counterclaim.

A general demurrer was addressed to the entire plea in reconvention, and by different assignments it is insisted that upon such demurrer certain counts in the plea should have been stricken out. These assignments are overruled for the reason that at all events some of the counts were proper, and it was not the duty of the trial court to carve the demurrer into separate parts and apply it to the different items and to sustain it as to some counts and overrule it as to others. The proposition presented by the general demurrer was that the entire plea should be stricken out, and to have sustained this clearly would have been error for the reasons already noted.

[4] By the fifth assignment it is contended that the court erred in overruling plaintiff's motion for a new trial because the jury allowed the full amount claimed by the plea in reconvention except the sum of \$60 claimed as damages for a breach of warranty in the sale of the two horses above mentioned. This is the only reason assigned for the contention that the verdict was contrary to the law and the evidence and is too general to merit consideration.

We are unable to say that the jury allowed the defendant a recovery for attorney's fees

in defending him in the criminal prosecution noted above and for the \$5 claimed for loss of time in attending court. Hence the sixth assignment of error, in effect that the trial court erred in overruling the motion for new trial because those two items were allowed by the jury, is overruled.

[5, 6] The aggregate of all the items claimed by the defendant in his plea of reconvention was \$196.50. By the verdict the defendant was allowed a total of \$136.50, thus indicating that they allowed at least a portion of the claim of \$70 made in the seventh and eighth counts of the plea for the alleged publication of false reports concerning the appellant. The only false statement alleged to have been made by the plaintiff and upon which the claim for damages in these two counts was predicated consisted of an assertion by the plaintiff that defendant was indebted to her for rents, and that for such indebtedness she held a lien upon the cotton grown upon the farm by the tenant, and the only predicate for damages claimed as a result of such false statement was that the defendant could not market his crop in the town of Anson, and that he sustained feelings of humiliation and was suspected of dishonesty by his neighbors on account of such charges. The amount of pecuniary loss resulting from his inability to market his cotton in the town of Anson was neither alleged in the plea nor supported by any testimony. Such being the record, the court should not have submitted to the jury the claim last noted. Accordingly appellant's seventh assignment of error to the trial court's refusal of the motion for new trial is sustained, and, because this claim was allowed, in part, at least, the judgment will be reversed and the cause remanded, unless appellee shall within ten days from the rendition of this decision file a remittitur of \$70, the full amount of the claim last referred to. If such remittitur is filed within the period indicated, the judgment will be so reformed as to be in favor of appellee for \$66.50 only and in all other respects affirmed, otherwise the judgment will be reversed and the cause remanded for another trial. In either event the costs of appeal are taxed against the appellee.

#### IVY v. PUGH et al.

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 8, 1913.)

##### 1. ESTOPPEL (§ 37\*)—PROPERTY SUBJECT—AFTER-ACQUIRED PROPERTY—CROPS.

A chattel mortgage upon property not in existence may become operative if the property covered subsequently comes into the possession of the mortgagor, on the equitable principle of estoppel, rather than on the principle that the execution of the mortgage then creates a valid lien upon the thing mortgaged.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 91-98; Dec. Dig. § 37.\*]

##### 2. VENDOR AND PURCHASER (§ 54\*)—REMEDIES OF VENDOR—LIEN.

A vendor of real estate retains the superior title until the purchase money is paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. § 54.\*]

##### 3. CHATTEL MORTGAGES (§ 138\*)—LIEN—PRIORITY.

Rev. Civ. St. 1911, art. 5475, gives to a landlord a preference lien upon the crops raised for any rent and for money and supplies furnished to the tenant in making a crop. A purchaser in possession of land, subject to a vendor's lien in favor of the plaintiff, on November 23, 1911, executed to defendant a chattel mortgage on cotton to be raised the next year on the land, and thereafter on March 26, 1912, before any crop had been planted, conveyed to plaintiff, and the same day entered into a rental contract with plaintiff for the lands. Held that, though a chattel mortgage upon property not in existence may become operative if the property subsequently comes into the possession of the mortgagor, yet that, as the mortgagor never acquired any but a qualified interest in the crop, the landlord's lien thereon was superior to that of the mortgagee.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228-236; Dec. Dig. § 138.\*]

Appeal from Parker County Court; T. F. Temple, Judge.

Action by W. T. Ivy against H. R. Pugh, J. M. Hart, and another. Judgment for defendant Hart, and plaintiff appeals. Reversed and judgment rendered for plaintiff against defendant Hart.

R. L. Stennis, of Weatherford, for appellant. Preston Martin, of Weatherford, for appellee.

SPEER, J. This suit was instituted by W. T. Ivy against H. R. Pugh, J. W. Light, and J. M. Hart, alleging that the defendant Hart had wrongfully converted to his own use certain cotton upon which plaintiff as landlord held a valid lien as against Pugh and Light, his tenants. Hart pleaded that he took the cotton under a mortgage lien which was prior in law to plaintiff's lien. The honorable county judge before whom the case was tried made the following findings of fact, which we adopt:

"1. I find that on the 10th day of September, 1909, the defendant H. R. Pugh purchased 70 acres of land from one H. Burns in Parker county, Tex., and the said H. R. Pugh with his family has resided upon said 70 acres of land since said purchase.

"2. About the same time the defendant J. W. Light purchased a small farm of about 70 acres, situated near the said farm of H. R. Pugh, and since said purchase has resided with his family on said farm.

"3. On the 1st day of July, 1910, the said H. R. Pugh and J. W. Light purchased from F. M. Copps 70 acres of land joining said farms of H. R. Pugh and J. W. Light for the consideration of \$1,400. That the title to said 70 acres was then in F. M. Copps, by agreement of all parties, the conveyance was made by deed direct from F. M. Copps to H. R. Pugh and J. W. Light, and the total con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sideration was to be paid by H. R. Pugh and J. W. Light to plaintiff, he having advanced the entire purchase price, and was evidenced by seven vendor's lien notes executed by H. R. Pugh and J. W. Light in the sum of \$200 each and payable to plaintiff, and to secure said notes a vendor's lien was expressly retained in said deed, and said deed was duly recorded in the deed records of Parker county on the 12th day of July, 1910.

"4. On the 23d day of November, 1911, the said H. R. Pugh was indebted to the defendant J. M. Hart in the sum of \$385.10, and on said date executed and delivered to said J. M. Hart his note in writing for said sum of \$385.10 due October 1, 1912, with interest from date at the rate of 10 per cent. per annum, and on said 23d day of November, 1911, the said H. R. Pugh by his chattel mortgage in writing conveyed to said J. M. Hart the following described property: 'My first eight bales of cotton raised next year, 1912, raised on my farm nine and one-half miles from Weatherford on Toto Road, said eight bales to weigh five hundred pounds and to be free from all other liens, said cotton to be raised in the field north of the house. I am to plant thirty acres and work in a farmer-like way.' Said mortgage provides that it is given to secure said note for \$385.10 and to cover any and all other amounts that the said Pugh then owes and might thereafter become indebted to and owe the said J. M. Hart, such as book accounts, etc., and said mortgage was on the 23d day of November, 1911, duly filed for record in the office of the county clerk of Parker county, Tex., and was on said date filed on the chattel mortgage records for said county.

"5. The said J. M. Hart after the 23d day of November, 1911, and on faith of said mortgage, sold supplies to said H. R. Pugh in the sum of \$49.05 and received payment thereon in the sum of \$11.70, and at the institution of this suit there was due on said account a balance of \$37.35.

"6. At the institution of this suit the said H. R. Pugh was indebted to the said J. M. Hart in said sum of \$385.10 with interest thereon at the rate of 10 per cent. per annum, on the 23d day of November, 1911, and the additional sum of \$37.35, balance on said account.

"7. On the 26th day of March, 1912, the said H. R. Pugh and J. W. Light on good faith by their deed in writing conveyed to the plaintiff the 70 acres of land which had been conveyed to them by said F. M. Copps as aforesaid, and said conveyance was made in consideration of the cancellation and surrender by plaintiff to said Pugh and Light of said seven vendor's lien notes then held by plaintiff in the sum of \$200 each with all interest due thereon. The amount due by said Pugh and Light on said notes to plaintiff was the full value of said seventy acres of land. The wife of said J. W. Light joined her husband in said deed, and said deed

signed and duly acknowledged by said Pugh and Light and the wife of Light was on said 26th day of March, 1912, delivered to plaintiff with the understanding that, if plaintiff desired, the wife of Pugh would come in thereafter and sign and acknowledge the deed; and thereafter on the 28th day of September, 1912, the wife of said Pugh signed and duly acknowledged said deed when same was presented to her for her signature by plaintiff, and said deed was duly recorded in the records of Parker county on said 28th day of September, 1912. On said 26th day of March, 1912, the wife of Pugh was prevented by sickness from coming to town and joining in the execution of said deed, but then fully approved of said conveyance for said consideration.

"8. On the 26th day of March and immediately after the delivery of said deed by said Pugh and Light to plaintiff, the said Pugh and Light and plaintiff entered into a rental contract in writing, whereby the plaintiff, in consideration of the sum of \$144.50 to be paid by said Pugh and Light, rented and leased the said 70 acres to said Pugh and Light for and during the term beginning on the 26th day of March, 1912, and ending on the 31st day of December, 1912, and at the same time the said Pugh and Light executed and delivered to plaintiff their joint note for the sum of \$144.50 of date March 26, 1912, and payable to plaintiff on the 1st day of November, 1912, in the sum of \$144.50, with interest from maturity at the rate of 10 per cent. per annum, and providing for 10 per cent. as attorney's fees, if collected by suit or placed in the hands of an attorney for collection, and by the terms of said rental contract it was expressly agreed that plaintiff should have his preference landlord's lien as provided by the statutes to secure his rent, and in said rental contract plaintiff gave to Pugh and Light an option of buying back said 70 acres of land upon certain conditions any time prior to January 1, 1913, which option was forfeited.

"9. The said J. M. Hart had no notice of the sale of said land by Pugh and Light to plaintiff until after the first four bales had been gathered by Pugh from the said field north of his house and had been brought to market, and of said account advanced by said Hart to said Pugh after the execution of said mortgage as aforesaid the sum of \$18 had been so advanced after the 26th day of March, 1912.

"10. The said 70 acres of land was rented by plaintiff to said Pugh and Light jointly, but the said Pugh by agreement with Light worked and cultivated the north half of said tract and the said Light by agreement with said Pugh worked and cultivated the south half of said tract, during the year 1912, but the plaintiff had nothing to do with said agreement between Pugh and Light.

"11. During the year 1912, said Pugh rais-



ed and gathered from the north half of said 70 acres six bales of cotton, all of which was of the value of \$300, and all of which was appropriated by said Hart and applied by him on said indebtedness due him by said Pugh, and all of said six bales of cotton were gathered from the field on which said Pugh had given said Hart a mortgage as aforesaid.

"12. On the 26th day of March, 1912, when said Pugh and Light conveyed said 70 acres of land to plaintiff, no crop had been planted on said land, and all cotton grown on said land during the year 1912 was planted after the execution and delivery by said Pugh and Light to plaintiff of said deed on the 26th day of March, 1912.

"13. No part of the rents due by said Pugh and Light have been paid, but defendant J. W. Light tendered to plaintiff, Ivy, one-half of the amount of the rental note sued on prior to trial in justice court upon condition that he be released from further liability on the note.

"14. This suit was instituted in less than 30 days after the removal of the first three bales of cotton from the Ivy premises and before the last three bales had been removed.

"15. In the field north of the house referred to in said mortgage there was one patch of cotton of about 18 acres directly north of the house, and another patch of 20 acres in the same field northwest from the house, and the eight bales of cotton taken by J. M. Hart were gathered from this 20-acre patch, six bales off the Ivy land, and two bales of the home tract of Pugh, purchased by him from Burns; but all the cotton was grown in one inclosure or fence north of the house, though in two patches.

"16. This suit was instituted by plaintiff, W. T. Ivy, in the justice court of precinct No. 1 in this county against the defendants H. R. Pugh and J. W. Light, for rents on said 70-acre tract of land, known as the Ivy tract, for the year 1912 in the sum of \$144.50 and interest and attorney's fees as evidenced by said rent note and for a foreclosure of his landlord's lien on all cotton grown by said Pugh and Light on said land during the year 1912, and against the defendant J. M. Hart; the plaintiff alleging that said J. M. Hart had converted to his own use and benefit part of said crop and was setting up some sort of claim or lien against all of said crop, and prayed for judgment on said rent note and for foreclosure of his landlord's lien and for judgment against said Hart for such part of said crop as had been converted by said Hart, and for judgment declaring said landlord's lien to be superior to the mortgage lien of said J. M. Hart. The pleadings of the plaintiff in said justice court and in this court were oral."

Upon these facts the trial court held that the mortgage lien of the defendant Hart on

the six bales of cotton gathered by Pugh from the north half of the plaintiff's 70-acre tract was superior to plaintiff's landlord's lien. The plaintiff has appealed.

We think the holding of the trial judge was error.

[1] It is well settled in this state that a chattel mortgage executed upon property at the time not in existence may become operative if the property covered subsequently comes into the possession of the mortgagor. This, however, is not upon the ground that the execution of such instrument creates at the time a valid lien upon the thing mortgaged, for in the supposed case the thing mortgaged is not in existence, and necessarily there can be no lien against it. It is rather upon the equitable principle of estoppel, or, as it is sometimes expressed, that the subsequent acquisition of the property feeds the mortgage.

[2] It is equally well settled, under the peculiar rule of decision in this state, that the vendor of real estate retains the superior title until the purchase money is paid.

[3] Bearing in mind these rules of decision, we hold that appellant's landlord's lien is superior to appellee Hart's mortgage lien. Appellee's mortgage lien became effective upon the planting and growing by defendant Pugh of the crop embraced in its terms, but it was effective only to the extent of the interest owned by said Pugh in the crops. Pugh could in no event convey a greater title than he had, which, under the operation of our landlord's lien act (Revised Statutes 1911, art. 5475), was one subject to the lien of the landlord for rents. In other words, he never acquired an absolute title to the property previously mortgaged, but only a qualified title. So that the mortgage in the very nature of things could only operate upon the limited ownership of the mortgagor. See *Neblett v. Barron* (No. 6,236) 160 S. W. 1167, not yet officially reported. The principle which controls us is illustrated in the case of *New Orleans & O. Ry. Co. v. Melien*, 12 Wall. 362, 20 L. Ed. 434, holding that a mortgage by a railroad company covering all its future acquired property attaches only to such interest therein as the company acquires, subject to any liens under which it comes into the company's possession. A contrary conclusion upon facts very similar has been reached by the Supreme Court of Alabama (*Hamilton v. Maas*, 77 Ala. 283), but the decision in that case appears to be based in part upon a statute which is not before us, and furthermore proceeds upon the theories that the purchaser of lands not paid for is the owner thereof, and that the mortgagee of chattels takes the legal title thereto, which theories are not in consonance with the decisions of this state.

The judgment of the county court is reversed, and upon the facts stated judgment is here rendered in favor of appellant

against appellee J. M. Hart for the amount of his debt against defendants Pugh and Light; that amount being less than the established value of the property converted.

Reversed and rendered.

**BURNS & BELL v. LOWE et al.**

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 22, 1913.)

**1. GARNISHMENT (§ 105\*)—GARNISHING CREDITORS—RIGHTS.**

Garnishing creditors occupy no better position with reference to the fund garnished than did their debtors at the service of the writ.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 216; Dec. Dig. § 105.\*]

**2. GARNISHMENT (§ 108\*)—BANK DEPOSIT—OWNERSHIP OF FUND.**

L., being indebted for rent, delivered to his wife \$113, the proceeds of his crops, with instructions to pay it to the landlord. She instead deposited the amount in a bank to her credit and later drew against the fund in favor of the landlord a check for a larger amount, containing the \$113. After delivery of the check, but before it was paid, the account in the bank was garnished in suit against L. Held that, to the extent of the \$113 so deposited, the rights of the landlord were superior to those of the garnishing creditor, though the check be not regarded as an equitable assignment of so much of the funds to the wife.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 220-226; Dec. Dig. § 108.\*]

**3. PARENT AND CHILD (§ 9\*)—EMANCIPATION.**

A father may make a valid gift to his minor son in the absence of complaint by an existing creditor that the gift is fraudulent, whether the son has been emancipated or not.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 74, 111-135; Dec. Dig. § 9.\*]

Appeal from District Court, Mitchell County; W. W. Beall, Judge.

Garnishment proceeding by Burns & Bell against C. C. Lowe and others. Decree for defendants, and the plaintiffs appeal. Affirmed.

L. W. Sandusky and C. H. Earnest, both of Colorado, Tex., for appellants. Royall G. Smith, of Colorado, Tex., for appellees.

**SPEER, J.** This is a garnishment suit wherein Burns & Bell, judgment creditors of C. C. Lowe, sought to hold City National Bank as garnishee; the fund in controversy being a deposit of \$408.36 in the name of Mrs. Belle Lowe and the sum of \$10 in the name of Ruel Lowe. The bank answered, disclosing these deposits, but alleging that the one was the separate property of said Belle Lowe and the other the individual property of said Ruel Lowe, and otherwise denying any indebtedness or liability to C. C. Lowe. The answer was traversed by the plaintiffs, and on the issues thus presented a trial was had before a jury resulting in a verdict and judgment against the plaintiffs, and they have appealed.

On the trial the court instructed as fol-

lows: "The uncontroverted evidence in this case shows that the rent item of \$113 included in said \$363 check was included in the deposit of Belle Lowe in the City National Bank of Colorado, Tex., and was paid out by said bank cashing said check. As to this item I charge you that the same was the property of W. L. Lowe, though deposited in said bank by Belle Lowe among other funds deposited in her name and was not subject to the garnishment herein, and as to this item the plaintiffs would not be entitled to recover." It is complained that this charge is erroneous because the item of \$113 was community property of defendant C. C. Lowe and his wife, Belle Lowe, at the time of the service of the writ and was therefore subject to appellant's demand. The facts, however, appear to be undisputed that C. C. Lowe was indebted to W. L. Lowe, his landlord, for rents and delivered this sum of money, the proceeds of farm products grown by him, to his wife, with instructions to deliver the same to W. L. Lowe. Mrs. Lowe deposited this sum in the bank because she did not care to keep that amount of money around the place and gave to W. L. Lowe her check for \$363, covering this and other items of indebtedness. It is undisputed that this check was drawn by Mrs. Lowe and accepted by W. L. Lowe prior to the service on defendant bank of the writ of garnishment, though the bank had not paid or accepted for payment the check.

[1] In this state of the evidence there was no error in the charge quoted, since appellants, as garnishing creditors, could occupy no better position with reference to the fund than did their debtor at the time of the service of the writ.

[2] Equity will not aid the statutory remedy of a garnishment, and, even though it should be held that the drawing of the check was not an assignment pro tanto of the funds of Mrs. Lowe in the bank in the sense that the bank could be sued on the same prior to acceptance, still as between C. C. Lowe and W. L. Lowe, and necessarily between appellants and W. L. Lowe, since appellants take the place of C. C. Lowe, the rights of W. L. Lowe are superior and the bank would not be liable to the writ. *Neely v. Grayson County Nat. Bank*, 25 Tex. Civ. App. 513, 61 S. W. 559; *N. Y. Life Insurance Co. v. Patterson*, 35 Tex. Civ. App. 447, 80 S. W. 1058.

[3] The remaining assignments in effect attack the sufficiency of the evidence to support the verdict finding that the deposits belonged, respectively, to Mrs. Lowe and Ruel Lowe. The evidence, we think, abundantly supports the conclusion that the small item of \$10 to the credit of Ruel Lowe was a gift by the father to the son for minor services, and it is immaterial whether the son had been emancipated by the father or not.

At all events, the father could make a valid gift even to his minor son, in the absence of a complaint by an existing creditor that such gift was fraudulent and void. There is no such complaint in this case. The evidence furthermore supports Mrs. Lowe's contention that the deposit in her name was a fund paid to her by her husband in repayment of borrowed money, the proceeds of an inheritance from her father.

There is no error in the judgment, and it is affirmed.

#### ZIMMERMANN et al. v. BAUGH.

(Court of Civil Appeals of Texas. San Antonio. Dec. 17, 1913.)

#### 1. TRIAL (§ 139\*)—QUESTIONS FOR JURY—DIRECTED VERDICT.

The court should not direct a verdict on an issue of fact unless the evidence shows that reasonable men could not draw a different conclusion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

#### 2. ADVERSE POSSESSION (§ 115\*)—ACTIONS—EVIDENCE.

In trespass to try title, where plaintiff claimed under a prescriptive title, evidence held to raise a question for the jury and not to warrant a directed verdict in plaintiff's favor.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.\*]

#### 3. EVIDENCE (§ 213\*)—ADMISSIONS—TITLE.

In trespass to try title, evidence that plaintiff offered to purchase a deed from defendants to the property is inadmissible, for that fact will not affect plaintiff's title, being a mere attempt to remove a possible cloud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745-751, 753; Dec. Dig. § 213.\*]

Error to District Court, Bexar County; A. W. Seeligson, Judge.

Action by W. Pauline Baugh against Bridget Zimmermann and others. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

See, also, 160 S. W. 593.

Don A. Bliss, of San Antonio, for plaintiffs in error. Augustus McCloskey and Alex C. Bullitt, both of San Antonio, for defendant in error.

CARL, J. The defendant in error, Mrs. W. Pauline Baugh, brought this suit in trespass to try title against plaintiffs in error, Mrs. Bridget Zimmermann, Florence, and Minnie Zimmermann, the land in controversy being a small triangular piece out of what is designated as the north part of lot 7 in block 18, New City block 525, in the city of San Antonio, Bexar county, Tex., and is more fully described by metes and bounds in plaintiff's (defendant in error's) petition. The plaintiff below asserted title in herself under the three, five, and ten years' statutes of limitation, but relied in the proof on the ten

years' statute. Plaintiffs in error answered by the usual plea of "not guilty," and relied on a record title to the land, which it was admitted was regular, from the city of San Antonio down to and including them.

[1, 2] At the conclusion of the testimony, the court instructed the jury to return a verdict in favor of Mrs. Baugh, the plaintiff there, which was accordingly done. Whether the court was correct in so instructing the jury is the issue before this court. If the evidence is such that reasonable minds would not differ as to the facts established, the court was correct in giving the instruction.

Let us, then, see what the evidence is. Mrs. W. Pauline Baugh, the plaintiff below, testified that she had owned lot 5, block 18, N. C. B. 525, twenty-seven years; that she inherited it from the Kelleys in 1885, and they had bought the property from Elliston. She says: "I meant this part in controversy—this part was all fenced and is fenced now, and has been ever since I came to San Antonio, which was in 1877." Her evidence is, further: That she had had the property fenced in with lot 5 twenty-eight years and had kept it rented out; the part in controversy being used as a passageway for her tenants in going to and coming from Chestnut street. "That fence I had was up there until two years ago. It had been repaired from time to time. It was standing up there until Mrs. Zimmermann changed the line. Q. Do you know who lived on that little piece of ground that inclosed the red triangle (the land in controversy)? A. Well, there was a man by the name of Pieper. He didn't live on it; he rented it out. I do not know who had it prior to that; I do not know who his tenants were. They have had tenants there about 28 years, I presume." The witness, upon redirect examination, said she had reference to the large triangle, but not the land in dispute, which she said she and those under whom she held had had fenced since 1877 when she came to San Antonio.

J. W. Houston, who was called by defendant in error, said he had lived in San Antonio 34 years and had known this property all his life. He says: "I remember well the location of the fence of that property with reference to the streets. \* \* \* I know there was a fence in there through to what we called McGowan's. The fence did not take in the little triangle (property in controversy). The little triangle wasn't there then; Baugh's fence didn't fence in any triangle. It came to the point of the triangle and stopped at the triangle, and the triangle extended about three or four feet from the south fence of the Baugh property. No sir, the south fence was not a little longer, the north fence was the longer; and, when this south fence came down, it struck a little triangle, just a little nose of a property that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

came in there just like the point of the triangle."

J. R. Studer, for plaintiffs in error, said that he had resided near the property for close to 20 years. He says that Pieper fenced the entire block 7. "I don't know who built that cross-fence. There was a closet built back there somewhere. My father-in-law (Pieper) had it done. There was no fence which included that when it was built 16 to 18 years ago. When that closet was built, the fence did not come right along the side of Chestnut street. It was open—most of the years there was nothing at all. I don't remember any more whether when the fence was put up across there they tore down any portion of the old fence that I have said fenced in the entire lot 7. I patched it up so much I got disgusted. \* \* \* I don't know when the fence running across was built so as to cut off this little piece (in controversy). Whoever did that did it without my knowing anything about it. When I first knew of it was maybe six or eight years ago." Studer says that 16 or 18 years ago the land in controversy was open, and he also says that the north corner of the land in dispute is in the same place it has always been and has not been changed. "I knew that the land in controversy was inside my father-in-law's fence at the time I first knew it (about twenty years). There was not any cross-fence there just prior to that time. It was fenced at the time he (Pieper) bought it." So the state of the evidence is that Mrs. Baugh says her fence was up there until about two or three years ago, when it was knocked down. Houston says this little triangle was out, not fenced at all when he can first remember, and he is 34 years old. Studer says Mrs. Baugh's fence was not there when Pieper bought the property about 20 years ago, and that Pieper built a closet on the property in controversy about 18 years ago. He says further that it was under fence before Pieper bought it.

We think the condition of the evidence was such that reasonable minds might honestly differ, and that the court erred in refusing to submit the case to the jury. *Choate v. Railway*, 90 Tex. 88, 36 S. W. 247, 37 S. W. 319; *Mustain v. Stokes*, 90 Tex. 358, 38 S. W. 758. "It is only when it is so clearly established from the undisputed testimony as to admit of no other reasonable hypothesis or conclusion that either a fact essential to plaintiff's action is not proven, or one which is a complete defense has been shown, that it becomes the duty of the court to instruct a verdict for the defendant." *Southern Pacific Ry. Co. v. Winton*, 27 Tex. Civ. App. 514, 66 S. W. 483, and cases cited. The possession and use by Mrs. Baugh is not so conclusively shown as to take the case from the jury.

[3] It is a matter of no consequence that

Mrs. Baugh may have offered \$35 for a deed from the plaintiffs in error to this property. Citizens have a right to clear their titles of those things which would hinder a sale, and, if they have title to the property, a mere attempt to remove clouds therefrom would not affect the title they already have. This court so held in *Cuellar v. Dewitt*, 5 Tex. Civ. App. 568, 24 S. W. 671, and has recently reaffirmed the same doctrine.

Since we have concluded to reverse the judgment, it is not necessary to pass on any other questions raised.

The judgment is reversed, and the cause remanded.

CLEGG et al. v. ROSCOE LUMBER CO.  
(Court of Civil Appeals of Texas. Amarillo.  
Dec. 13, 1913.)

1. LIMITATION OF ACTIONS (§ 123\*)—TOLLING STATUTES—PENDING ACTION.

The pendency of an action will prevent the running of limitations, though the petition be bad on general demurrer, and is not amended until after the period of limitation has elapsed; and the fact that when plaintiff corporation filed an action on the notes sued on, it was not legally entitled to sue under Rev. Civ. St. 1911, art. 7399, because it had not paid its franchise tax, would not cause the action to be barred by the four-year limitation, though before an amended petition was filed showing compliance with the statute more than four years had elapsed since maturity of the last note.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 539; Dec. Dig. § 123.\*]

2. ABATEMENT AND REVIVAL (§ 22\*)—PLEA IN ABATEMENT—RIGHT TO SUE.

The fact that plaintiff corporation had not paid its franchise tax, so that it was not entitled to maintain an action under Rev. St. art. 7399, could only be urged by a plea in abatement.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 148-156; Dec. Dig. § 22.\*]

Appeal from Potter County Court; W. M. Jeter, Judge.

Suit by the Roscoe Lumber Company against Mida Clegg and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Cooper, Merrill & Lumpkin, of Amarillo, for appellants. Gustavus & Jackson, of Amarillo, for appellee.

HALL, J. This suit was filed in the county court of Dallas county, July 14, 1910, by appellee lumber company, praying recovery upon three notes in the sum of \$100 each, dated October 1, 1907, and payable February 1, 1908, October 1, 1908, and February 1, 1909, respectively, bearing interest at 8 per cent. per annum from date, and stipulating for the usual 10 per cent. attorney's fees. Appellants, Mida Clegg and Mrs. Emma Tydeman, being residents of Potter county, filed their pleas of privilege in Dallas county in

September, 1910, which were sustained, and the case transferred to Potter county. On February 3, 1912, the defendants filed their first amended original answer in the county court of Potter county, amending their original answer, alleging that the appellee corporation had forfeited its right to do business in Texas on the 2d day of July, 1909, by failing to comply with chapter 3, Revised Statutes of 1911, in the payment of the franchise tax due to the state, as required by said chapter, and that the Secretary of State, in accordance with the provisions of said law, had duly forfeited the plaintiff's permit to do business in the state, and, under article 7399 of said statute, plaintiff was denied the right to sue defendants. The appellee corporation filed no other pleading than the original petition and a supplemental petition (which was filed July 14, 1910, in which it alleged that Mida Clegg had married J. T. Harrison, and prayed that citation issue to her and her husband), until it filed its amended supplemental petition in the county court of Potter county, styled "Plaintiffs' Second Supplemental Petition," which was filed March 29, 1913, alleging, in reply to the defenses it exposed by appellants, that on the 24th day of June, 1911, it had paid to the Secretary of State all franchise taxes, interest, and penalties due under the law, and had restored its corporate standing within the state, and on the same day it filed an amended original petition, in which was sought a recovery against Mrs. Mida Clegg and Mrs. Emma Tydeman, a feme sole, declaring upon the notes as in its original petition, and stating the same cause of action, with the exception of admitting a credit of \$35 paid on June 23, 1908. To this last petition the appellants filed an amended answer, pleading by special exception: First, that the cause of action was barred by the statute of four-year limitation; second, pleading affirmatively the four-year limitation as a bar by reason of the failure of appellee to file any cause of action at a time when it was authorized, under the law, to maintain a suit for affirmative relief, within the period of four years; and, further in bar of appellee's right to recover, it was alleged that said cause of action was barred by the statute of four-year limitation in that appellee had no right to maintain the cause at the time when the suit was brought, and that the first pleading filed, after it had reinstated its corporate privileges, was more than four years after the cause of action had matured. The facts are that the suit as originally filed was against Mida Clegg and Mrs. Emma Tydeman, both alleged to be feme soles. On the same day a supplemental petition was filed, alleging the marriage of Mida Clegg with J. T. Harrison, making him a party. Appellee's petition, filed on March 29, 1913, merely alleged the death of J. T. Harrison, and Mrs. Harrison (née Mida

Clegg), being then a widow, pleaded the same cause of action as before. The judgment was against both Mrs. Harrison and Mrs. Tydeman.

[1] The sole question raised by the assignments is one of limitation. It is true, as contended by appellants, that the appellee's right to sue at the time its original petition was filed is denied by article 7399, Revised Statutes, supra, and it is further true that, before its amended pleading was filed, showing compliance with that act, more than four years had elapsed since the maturity of the last note sued upon, but it appears that appellee had paid its franchise tax on June 24, 1911, within less than 12 months from the filing of the original suit and within less than four years from the date of the maturity of the first note. The amended petition did not allege the fact that appellee had obtained permission to do business in Texas, and revived its right to sue by complying with the law, until more than four years after the cause of action had accrued. It has been frequently held in this state that a suit will prevent the running of the statute of limitation, although the petition be bad on general demurrer, and is not amended until after the period of limitation has elapsed. *Killebrew v. Stockdale*, 51 Tex. 529; *Tarkinton v. Broussard*, 51 Tex. 550; *I. & G. N. R. R. Co. v. Irvine*, 64 Tex. 529.

[2] The fact that appellee had not paid its franchise tax could be reached only by plea in abatement. *Harvey v. Provident Ins. Co.*, 156 S. W. 1127. In *Frazier v. Waco Building Ass'n*, 25 Tex. Civ. App. 476, 61 S. W. 132, in which writ of error was denied by the Supreme Court, *Fisher, C. J.*, said: "There was no error in the court's overruling the amended motion for a new trial on the grounds claimed in appellants' eighth assignment of error. The right of appellee to bring and maintain the suit because it had not paid its franchise tax should have been raised before judgment, and came too late when first presented by the motion for new trial. Further, we are also of the opinion that the subsequent payment of the tax related back and revived whatever rights the appellant had at the time the suit was instituted." Appellants' assignment are disposed of by what is here said; and the judgment of the trial court is affirmed.

#### H. O. WOOTEN GROCER CO. v. SMITH et al.

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 1, 1913.)

#### HUSBAND AND WIFE (§ 268\*) — COMMUNITY PROPERTY—SEPARATE DEBTS.

Where a husband and wife to secure notes executed by them, the proceeds of which were not used for the benefit of the wife's separate estate, and upon which she was therefore a surety, executed a deed of trust to land, in which

the wife owned an undivided one-half interest as her separate estate, the other one-half interest being community property, and the husband thereafter to secure a note executed by him executed a second deed of trust, the right of plaintiff owning the debts secured by both deeds to have the wife's interest first sold and applied to the payment of the debt secured by the first deed, in order that the husband's interest might be available for the payment of the debt secured by the second deed, was a mere equity and not a legal right, and was subordinate to the wife's equity which entitled her to have the husband's interest sold and applied to the debt secured by the first deed before resorting to her interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 953-967; Dec. Dig. § 268.\*]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by the H. O. Wooten Grocer Company against R. D. Smith and others. From a judgment for plaintiff for insufficient relief, it appeals. Affirmed.

Kirby & Davidson, of Abilene, and Theodore Mack, of Ft. Worth, for appellant. Eugene De Bogory and J. M. Wagstaff, both of Abilene, for appellees.

SPEER, J. This suit was instituted by H. O. Wooten Grocer Company, a corporation, against R. D. Smith, his wife, T. E. Smith, and R. G. Patton and F. G. Alexander, trustees in certain deeds of trust, to recover against the defendant R. D. Smith as maker of two promissory notes and against him and his wife for a foreclosure. The action was dismissed as to the trustees, and as to the other defendants resulted in a partial recovery by the Wooten Grocer Company, and that company has appealed.

The findings of fact upon which the appeal is predicated are as follows:

"I. The court finds that on December 1, 1905, the defendant R. D. Smith and his wife, T. E. Smith, executed and delivered to the American Freehold Land Mortgage Company of London, Limited, a series of certain notes, the following of which are unpaid, to wit: Principal notes Nos. 5, 6, 7, 8, 9, and 10, for the sum of \$300 each, all dated December 1, 1905, executed by said R. D. Smith and T. E. Smith, payable as aforesaid on the 1st day of January, 1911, 1912, 1913, 1914, 1915, and 1916, respectively, after date, all bearing interest from date until paid at the rate of 8 per cent. per annum from maturity, payable annually, and interest from maturity at 10 per cent. per annum, the interest being payable annually on the 1st day of January of each year, and providing for the usual accelerative maturity clause and default in the payment of interest, and providing for 10 per cent. attorney's fees. Also the following interest notes: No. 7 for \$96; No. 8 for \$72; No. 9 for \$48; No. 10 for \$24—executed by said parties aforesaid, and payable to said mortgage company aforesaid on the 1st day of Jan-

uary, 1913, 1914, 1915, and 1916, respectively, after date, and providing for interest after maturity at the rate of 10 per cent. per annum and 10 per cent. attorney's fees, all of which notes are now owned by the plaintiffs herein, and that to secure said notes said R. D. Smith and wife, T. E. Smith, on said December 1, 1905, executed and delivered their certain deed of trust upon all of the property involved in this suit to secure said notes; said deed of trust having the following provision in same, to wit: 'The money advanced in and secured by this deed of trust is furnished us in part for the purpose of taking up and extending the time of payment of three certain promissory notes executed by R. D. Smith and T. E. Smith, payable to the order of the Abilene Trust Company as follows: One for \$500.00 due December 1, 1905, one for \$500.00 due December 1, 1906, and one for \$1,000.00 due December 1, 1907, all of said notes dated November 10, 1904, and secured by a deed of trust on the land hereby conveyed in favor of K. K. Legett, trustee, which is recorded in volume 8, pp. 538-541, of the Deed Records of Jones county, Texas, and the American Freehold Land Mortgage Company of London, Limited, the beneficiary herein, is hereby specially subrogated to and continued in all the rights, legal and equitable, conferred by said notes and the deed of trust lien securing same.' This deed of trust was duly acknowledged and duly filed for record in Jones county on December 5, 1905, and duly recorded, and all the rights thereunder are now owned and held by plaintiff.

"II. That prior to and at the time of the giving of the deed of trust last mentioned an undivided one-half of the property in controversy was owned by the said Mrs. T. E. Smith as her separate property, and the other undivided one-half of the property in controversy was community property, and the record title of same was in the name of said R. D. Smith, and there was no other outstanding lien against any of said property.

"III. The notes mentioned in finding No. I are now due and unpaid by reason of the election of the holder under the terms thereof, and they are a valid and subsisting indebtedness secured by said lien.

IV. That on January 2, 1911, the said R. D. Smith executed and delivered to the plaintiff the following note and deed of trust, to wit: 'Abilene, Texas, Jan. 2, 1911. \$3,668.45. On or before January 1, 1912, after date for value received I promise to pay to the H. O. Wooten Grocer Company, or order, \$3,668.45 at Abilene, Texas, to bear interest at the rate of eight per cent. per annum from date, and further hereby agree that, if this note is not paid when due, to pay all costs necessary for collection, including ten per cent. attorney's fees. [Signed]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

R. D. Smith. Due January 1, 1912.' Deed of trust was executed by said R. D. Smith against all of the property in controversy conveying the same to F. G. Alexander, trustee, to secure the plaintiff as beneficiary in the payment of said note last mentioned. The said deed of trust was duly acknowledged and filed for record on January 3, 1911, and duly recorded in the records of Jones county, Texas.

"V. The court finds that at the time the said last-mentioned note was given the defendant R. D. Smith was owing the plaintiff the sum covered by said note, and that the same was past due, and that the said note and deed of trust was given in consideration of the extension of time evidenced by said note, to wit, one year.

"VI. The court finds that none of the proceeds of the first note and deed of trust were spent for the benefit of the separate estate of Mrs. T. E. Smith, but that all of same were used originally by the said R. D. Smith for the purpose of engaging in the mercantile business at Delk and Hawley, Texas.

"VII. That at the time the last note and mortgage mentioned in these findings were given the said R. D. Smith was insolvent, and has been insolvent at all times thereafter, but that the plaintiff had no notice of such insolvency whatever until after the giving of said last-mentioned note and mortgage.

"VIII. The court finds that the defendant R. D. Smith acquired his undivided one-half of the property in controversy through the following deed, to wit: 'A deed from R. D. Moore to the defendant R. D. Smith, dated October 7, 1897, and recorded in volume 9, page 344, of the Deed Records of Jones county, Texas, reciting a consideration of \$857.00 paid and five notes for \$428.57 each, due January 1, 1899, 1900, 1901, and 1902, and 1903, respectively, duly acknowledged, and conveys an undivided one-half interest in the property in controversy.' And that the vendor's lien notes mentioned in said deed were afterwards released of record to the said R. D. Smith by the assignee of said payee of said note, Sarah J. Moore, and payment being acknowledged; but how or in what manner the same were paid the evidence in this case fails to disclose.

"IX. That the time the said last-mentioned note for \$3,668.45 was given to the plaintiff by the defendant R. D. Smith the plaintiff, up to and including the time, had no actual notice of any right, claim, or title to any of said lands in, to, and by the said Mrs. T. E. Smith other than whatever constructive notice he may have been charged with by reason of the deed being upon record in Jones county.

"X. Prior to the giving of the first mortgage by R. D. Smith and T. E. Smith the deed conveying to her an undivided one-half of the property in controversy was of record in Jones county, Texas, and there being a recitation in said deed that said property

was her own separate interest, and estate, and as a gift from her aunt Sarah J. Moore.

"XI. It was agreed by the parties to the case and the court finds that R. D. Moore was the common source of title, and that R. D. Moore conveyed an undivided one-half of the property in controversy to Sarah J. Moore, and she in turn conveyed the same to Mrs. T. E. Smith, and that the said R. D. Moore conveyed the other one-half to the defendant R. D. Smith."

Upon these facts, which we adopt, the trial court properly rendered judgment personally against appellee R. D. Smith for the amount due on both notes, together with a foreclosure of its deed of trust lien on the property described; as against both defendants subject to the provision that the undivided one-half interest of appellee R. D. Smith shall be first sold, and the proceeds applied to the payment of the amount due on the note first given, with the surplus, if any, to be returned to said appellee, and, if said one-half interest should not sell for enough to satisfy said note, then the undivided one-half interest of the appellee T. E. Smith in the land shall be sold, and the proceeds applied to the payment and satisfaction of any balance due on said indebtedness, with the surplus, if any, to be returned to her. The gist of appellant's contention is that the court erred in not holding, as a matter of law, that the interest of appellee T. E. Smith in the land should first be sold to satisfy its demand on the first mortgage note, to the end, of course, that appellee R. D. Smith's interest in the land could be subjected to the payment of the second mortgage. This is not a legal right of appellant's, but at most is only an equity which it seeks to have enforced, but over against it, and in our opinion exceeding it, is the equity of Mrs. Smith to have the community property of R. D. Smith and herself first sold to satisfy the debt for which her separate property at best is only bound as surety.

The decision in *James v. Jacques*, 26 Tex. 320, 82 Am. Dec. 613, is very much in point, and the language of that opinion peculiarly apt in the present controversy. It is there said: "The true controversy here is between James and Mrs. Shehan, and we are of opinion that James cannot claim the right to have the respective liens so adjusted as to subject the lots which were community property to the Belger judgment (a second lien), and the piece of land called the Rincon, which is Mrs. Shehan's separate property, to the lien of the deed of trust, or to the payment of the debt to Vance (a first lien). Mrs. Shehan is shown to be a surety for her husband in the note to Vance. Her separate property is in no way liable to the judgment in favor of Belger. It is true her separate property is liable to the debt of Vance, but only in connection with community property, which ought first to be exhausted. In this state of case to adjust the liens of Vance and

Belger in such way as to make the separate property of Mrs. Shehan liable to the whole of the Vance debt is to deprive her of a right viz., to have the community property first made subject to that debt, and would be the same thing in the end as to make her separate property liable to the judgment of Belger."

So here to sustain appellant's contention would be the same thing in the end as to make Mrs. Smith's separate property liable to the second debt and mortgage of her husband, a thing to which she is in no manner bound either by contract or estoppel. It would be a strange equity that would thus take one person's property for the payment of another's debt.

There is no error in the judgment, and it is affirmed.

#### HOWELL v. CITY OF SWEETWATER.

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 15, 1913. Rehearing Denied  
Dec. 13, 1913.)

##### 1. APPEAL AND ERROR (§ 518\*)—RECORD—ANSWER—PLEADING NOT CALLED TO ATTENTION OF TRIAL COURT.

Where an appeal was taken from an order granting a preliminary injunction, and defendant's answer was not filed until 10 days after the writ was granted, or shown ever to have been called to the court's attention, and no motion was made to vacate the writ, the answer was not properly in the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 623\*) — ABATEMENT OF NUISANCES — DANGEROUS BUILDINGS—RIGHTS OF CITIES.

Rev. Civ. St. 1911, art. 844, authorizes cities to abate nuisances, and to define what shall be nuisances. Article 856 provides that whenever in the opinion of the city council a building is liable to fall and endanger persons or property, the council may order the owner to remove it; that in addition the council shall have power to remove the same at the expense of the city and assess the expense to the landowner. Article 965 also authorizes the removal of wooden buildings for prevention of fire, etc. *Held*, that where an old building in a city was so dilapidated that it was likely to fall and was composed of such combustible material as to render it dangerous to the public by reason of the probability of its burning and of its proximity to other buildings, the city could order its removal by resolution of the council.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1371-1374, 1383, 1384; Dec. Dig. § 623.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 623\*)—ABATEMENT OF NUISANCE—EQUITY JURISDICTION.

Where the owner of a dilapidated wooden building was ordered by resolution of the city council to remove it, but refused to do so, and was proceeding to remodel and improve it for a stable, which rendered it more dangerous and more liable to take fire, within the city fire limits, the city was authorized to invoke the aid of equity to restrain the contemplated improvements and to require the removal of the building as a nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1371-1374, 1383, 1384; Dec. Dig. § 623.\*]

Appeal from District Court, Nolan County; W. W. Beall, Judge.

Suit by City of Sweetwater against G. B. Howell. Judgment for complainant, and defendant appeals. Affirmed.

Ed. J. Hamner, of Sweetwater, for appellant. Beall & Spencer and A. W. Christian, all of Sweetwater, for appellee.

DUNKLIN, J. G. B. Howell has appealed from an order made by the judge of the district court in chambers, granting a temporary writ of injunction, which restrained the defendant from constructing certain improvements of a building owned by him, and also from using the same as a place to conduct a livery business.

[1] The suit was instituted by the City of Sweetwater, and the building is situated in the City of Sweetwater. The writ was granted upon an ex parte hearing of the plaintiff's petition, which was duly verified by the mayor of the city. Some 10 days subsequent to the issuance of the writ of injunction the defendant filed an answer to the petition, which appears in the record of this court. No proceeding was instituted by the defendant in the district court for a vacation of the writ, and it does not appear that the answer filed was ever brought to the attention of the judge who granted the writ. Nor has appellant filed any brief in this court. The answer has no proper place in the record and cannot be considered, as we must determine the merits of the appeal upon the allegations of the petition alone; hence appellee's motion to strike the answer from the record is sustained. *Wynn v. Edmonson Land & Cattle Co.*, 150 S. W. 310.

According to the allegations in the petition the building in question is a wooden one known as the old opera house, which was built several years ago, and is constructed of very inflammable material. In recent years it has been used for no other purpose than an auditorium, and that, too, infrequently, and the flooring and timbers supporting the same, which constituted the most substantial part of the building, have been removed, thus rendering it unstable and liable to fall down and injure persons in its immediate vicinity. The post office building is situated on the adjoining lot, and on the opposite side of the street there are several buildings, one of them being the First Presbyterian Church, and the others stores of merchandise and dwellings.

The city is incorporated under the general laws of the state, and has by ordinance duly passed established certain fire limits within which wooden buildings are not allowed to be constructed or repaired, and the building in question is situated within those limits. On March 6, 1913, a short time after the building was found to be on fire and the fire extinguished, the city council, by res-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



olution duly passed, ordered Barrow & Sons, who then owned the building, to remove the same. A copy of the resolution is made a part of the petition, but the reason given in this resolution for the removal of the building is that the building is "liable to fall down and endanger persons or property." At the date the ordinance was passed defendant was the owner of the lot, but not the owner of the house; later he bought the house, and now owns it, as well as the lot upon which it is situated. By the terms of the resolution last referred to, Barrow & Sons were ordered to move the building within 10 days after service upon them of a copy of the resolution, with the further notice that in the event the order was not obeyed, the building would be removed at the expense of the city, which expense would thereafter be taxed against the owner of the building, in accordance with the provisions of the ordinance relating to unsafe and dangerous buildings, and which ordinance further provides that a failure of such owner to remove the house after notice given would be deemed a misdemeanor, punishable by fine; Barrow & Sons having failed to obey the order, and the defendant having purchased the building, tore up and removed the flooring and sills, leaving the building vacant from roof to ground with no support other than the outside walls upon which rests a large, cumbersome, and dangerous roof of old and combustible material. This work by the defendant was, preparatory to his purpose, publicly announced of using the building as a livery stable, wherein would be kept horses, vehicles, and stock feed, thus increasing the dangers of a destruction of the building by fire. Upon information of such purpose on the part of the defendant, the duly authorized representatives of the city at once gave notice to the defendant that the building had been condemned by the city, and he would not be permitted to operate a livery stable therein. Thereafter the city council passed a resolution requiring the defendant to desist from so occupying the building, and ordering him to take down and remove the building within 10 days after service upon him of a copy of the resolution, and further notifying him that in the event of his failure to obey said order, then the city council would remove the building and assess the expense of such removal against the lot upon which the building was located, in accordance with the provisions of its ordinance relating to unsafe and dangerous buildings, and, according to which ordinance, defendant's failure to obey the order would be a misdemeanor punishable by fine. This resolution was dated July 5, 1913, and a copy of it is made a part of the petition. The reason assigned in the resolution for the order to Howell to remove the building was that the building "is liable to fall down and endanger persons or property." A copy of the resolution was immediately served upon the defendant, at which time

the defendant stated that the order would not be obeyed, that the building would remain, and that he would proceed to occupy it and use it as a livery stable, as he had previously planned.

According to further allegations in the petition the city council of plaintiff has, by ordinances, declared buildings likely to cause fire to be nuisances, and has by resolution condemned the defendant's building as such nuisance. The petition contains this further allegation: "Plaintiff shows to the court that said old building has at all times past been exceedingly dangerous as a fire trap and firebrand, endangering not only the property in the immediate vicinity thereof, but the city at large, because of its dimensions, the very great amount of combustible material in it would make and constitute a fire and conflagration of such magnitude, intensity, and heat as under ordinary circumstances, and especially should the usual and ordinary winds of this country be blowing at such time that a fire might exist therein, to endanger the entire town, especially that portion thereof situated windward therefrom; that to place and operate a livery stable in said old building with the usual and ordinary forage, feed, implements, equipments, and supplies of a livery stable, would increase such danger possibly fourfold to the danger now existing of said vacant or unoccupied building." Notwithstanding due notice to the defendant of the proceedings so taken by plaintiff condemning said building and ordering the same removed, the defendant at night removed from his barn, heretofore occupied by him as a livery stable, some of his horses and vehicles into the building in question, and has publicly announced his purpose to disobey the order of the city council, and to improve and repair the building as he saw fit and to operate a livery business therein, and that nothing would deter him from this purpose except that he be placed in jail and kept there.

By another paragraph in the petition it is alleged that the use of the building as a livery stable would create a public nuisance by reason of offensive odors and gases arising from the rubbish accumulating therein, attracting flies, and becoming offensive to the citizens of the town.

It was further alleged in the petition that at the time the suit was filed the plaintiff could not legally remove the building by reason of the fact that the 10 days' notice given to the defendant to remove the same, in accordance with the resolution aforesaid and ordinances adopted by the city, had not expired, and that unless defendant was restrained from so doing, he would complete his proposed repairs of the building.

[2] By Revised Civil Statutes 1911, the city council of a city incorporated under the general laws are invested with the following powers:

"To abate and remove nuisances and to

punish the authors thereof by penalties, fine and imprisonment, and to define and declare what shall be nuisances and authorize and direct the summary abatement thereof." See article 844.

"To abate all nuisances which may injure or affect the public health or comfort in any manner they may deem expedient." See article 845.

"Whenever, in the opinion of the city council, any building, fence, shed, awning or any erection of any kind or any part thereof is liable to fall down and endanger persons or property, they may order any owner or agent of the same, or any owner or occupant of the premises on which such building, shed, awning, or other erection stands or to which it is attached, to take down and remove the same, or any part thereof, within such time as they may direct; and to punish by fine and imprisonment, or either, any neglect, failure or refusal to comply therewith. The city council shall, in addition, have the power to remove the same at the expense of the city, on account of the owner of the property or premises, and assess the expenses on the land on which it stood or to which it was attached, and shall, by ordinance, provide for such assessment, the mode and manner of giving notice and the means of recovering any such expenses." See article 856.

"The city council, for the purpose of guarding against the calamities of fire, may prohibit the erection, building, placing, moving or repairing of wooden buildings within such limits within said city as they may designate and prescribe; and may within said limits prohibit the moving or putting up of any wooden building from without said limits, and may also prohibit the removal of any wooden building from one place to another within said limits, and may direct, require and prescribe that all buildings within the limits so designated and prescribed, as aforesaid, shall be made or constructed of fireproof materials, and to prohibit the rebuilding or repairing of wooden buildings within the fire limits when the same shall have been damaged to the extent of fifty per cent. of the value thereof, and may prescribe the manner of ascertaining such damage; may declare all the dilapidated buildings to be nuisances and direct the same to be repaired, removed or abated in such manner as they shall prescribe and direct; to declare all wooden buildings in the fire limits which they deem dangerous to contiguous buildings, or in causing or promoting fires, to be nuisances, and require and cause the same to be removed in such manner as they shall prescribe." See article 965.

We are of the opinion that the instability of the building rendering it likely to fall and thereby endanger human life, and the fact that it is a wooden building of such combustible material as to render it dangerous

to the public by reason of the probability of its burning and of its proximity to other buildings, together with the further fact that the location of the building was within the first limits which had been duly established by the city council by ordinance, furnished a sufficient predicate under the statutes for the order passed by the council condemning the building and ordering its removal.

[3] We are of opinion, further, that it was proper for the plaintiff to invoke the aid of a court of equity by injunction to enforce such right. See *City of Belton v. Hotel Co.*, 33 S. W. 297; *City of Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 108; 28 Cyc. 259.

The foregoing conclusion renders it unnecessary to determine the sufficiency, for the relief sought, of the further allegations that the use of the property for purposes of a livery stable would necessarily create a public nuisance by reason of the congregation of flies around the premises and the odors which would arise, both of which results would inevitably follow from such use of the premises.

For the foregoing reasons, the judgment is affirmed.

#### COLLIN COUNTY NAT. BANK et al. v. McCALL HARDWARE CO.

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 15, 1913. On Motion for Rehearing, Dec. 13, 1913.)

#### EXECUTION (§ 172\*)—VACATION—SERVICE—EQUITABLE RELIEF.

In a suit to enjoin the execution of a judgment on the ground that there was no sufficient service on which to base it, complainant cannot recover in the absence of proof that it had a valid defense to the cause of action on which the judgment was based.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 519-539; Dec. Dig. § 172.\*]

Appeal from District Court, Montague County; C. F. Spencer, Judge.

Suit by the McCall Hardware Company against the Collin County National Bank and others. Judgment for complainant, and defendants appeal. Reversed and remanded.

Chambers & Cook, of Montague, for appellants. W. T. Russell, of Nocona, for appellee.

CONNER, C. J. This is an appeal from a judgment of the district court of Montague county enjoining the execution of a judgment of the justice court of precinct No. 1, Collin county, in favor of appellant and against the McCall Hardware Company, doing business in Montague county, and against the Collin County Grain Company for the sum of \$77.18.

The ground of attack is that there has never been any service of citation which would give the justice court referred to ju-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

isdiction over the persons of W. A. McCall and C. McCall, who alone compose the partnership doing business under the firm name of McCall Hardware Company.

The appellee firm offered in evidence a citation and constable's return of the justice court which is clearly insufficient to authorize the judgment, and C. McCall, one member of the firm, testified to the effect that he had never been served with a citation to answer the suit in the justice court, so far as he could remember.

We are of the opinion that the court erred as assigned in giving the peremptory instruction to the jury to find for appellees. It is true that, this being a direct attack, the judgment of the justice court may be shown to be void for want of any service of a sufficient citation, but in the case before us the justice court judgment recites that all parties defendant had been duly cited to answer the plaintiff's demand without referring to the citation upon which the recital rested. The judgment, therefore, is not void on its face, nor can it be said to be void on the face of the record as a whole, for it is only when the judgment is silent as to the fact of service that the inference may be indulged that the judgment rests upon a defective citation found in the record. See *Treadway v. Eastburn*, 57 Tex. 209; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457; *Earnest v. Glaser*, 32 Tex. Civ. App. 378, 74 S. W. 605; *Martin v. Burns Walker & Co.*, 80 Tex. 676, 16 S. W. 1072; *Foust v. Warren*, 72 S. W. 404. The burden of proof rested upon appellees to affirmatively show the alleged want of service of citation, and this in our opinion was not so conclusively shown as to authorize the court to take the issue away from the jury. As we have seen, the mere production from the record of the justice court of an insufficient citation did not conclusively prove the want of service alleged, and there was no evidence that the defective citations offered by appellees were the only ones issued from the justice court. The evidence is likewise wholly silent as to whether service of citation had been had upon W. A. McCall, the other member of the appellee firm and who did not testify. The court therefore erred in giving the peremptory instruction.

For yet another reason we think the judgment of the district court must be reversed as appellant urges. There is no evidence whatever that the appellee firm has a defense to the cause of action upon which the judgment of the justice court was based. They so alleged in their petition for injunction, doubtless recognizing that this was a material allegation; and, if the allegations relating to their defense were material, evidence in support thereof was likewise material for reasons heretofore given and which need not be here repeated. See *Foust v. Warren*, *supra*; *Chambers v. Gallup*, 30 Tex.

Civ. App. 424, 70 S. W. 1009; *Rumfield v. Neal*, 46 S. W. 262; *Delaware Ins. Co. v. Hutto*, 159 S. W. 73.

We conclude that the judgment should be reversed, and the cause remanded, and it is so ordered.

#### On Motion for Rehearing.

On the motion for rehearing our attention has been called to the fact that appellant in its original answer admitted that the judgment in controversy was based upon the defective citations offered in evidence. This fact had been noticed upon original consideration, but we overlooked the fact that appellant's general denial, part of the same answer, was a qualified one. In our original opinion we proceeded upon the theory that the service upon which the judgment rested had been put in issue by the general denial, notwithstanding the admission in the special answer; but, as stated, we find the general denial qualified in such way as to give effect to the admission in appellant's answer. We therefore were in error in reversing the judgment on the ground that the evidence of a want of service failed to justify the peremptory instruction. This, however, we think is immaterial in view of the second ground upon which the reversal of the judgment was predicated as to the necessity of appellee firm showing that they had a valid defense to the judgment, as announced in our original opinion. We see no reason to change the conclusion there announced.

The motion for rehearing is accordingly overruled.

LATTIMORE et al. v. PUCKETT & WEAR.  
(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 18, 1913. Rehearing Denied Dec. 6,  
1913.)

#### 1. CONTRACTS (§ 175\*)—TERMS—EVIDENCE.

Evidence as to terms of a contract for construction of a dam across a creek, to form a fishpond, held sufficient to sustain a finding that it did not require the contractor to build a foundation of such depth and nature as to prevent the water escaping below it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. § 175.\*]

#### 2. TRIAL (§ 260\*)—REQUEST FOR INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

Refusal of a requested instruction may not be complained of; the matter being substantially covered both in affirmative and negative form, by another requested instruction, which was given, and by the general charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 3. TRIAL (§ 219\*)—INSTRUCTIONS—DEFINING WORDS.

The court need not define to the jury the meaning of the words "would hold water" in a contract for construction of a dam; they being of common use and easily understood.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 489; Dec. Dig. § 219.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**4. APPEAL AND ERROR (§ 1033\*)—HARMLESS ERROR—INSTRUCTIONS—ERROR FAVORABLE TO PARTY COMPLAINING.**

The burden of proof of the defense of failure of consideration, in an action on a note, being on defendants, failure to so instruct was not prejudicial to them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**5. TRIAL (§ 75\*)—OBJECTIONS TO EVIDENCE—WAIVER.**

Plaintiff, in an action involving the question whether he had constructed a dam according to contract, having testified, without objection, that the soil in the bottom of the basin of the proposed pond would not hold water, and that by reason thereof, and not through any defect in the dam, the water escaped, and this being pertinent to the issue, it was not error to permit another witness to testify to the same condition of the soil, and that by reason of the lack of rain other lakes and tanks were dry.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 171-182, 252; Dec. Dig. § 75.\*]

Appeal from Tarrant County Court; Chas. T. Prewitt, Judge.

Action by Puckett & Wear against O. S. Lattimore and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lattimore, Cummings, Doyle & Bouldin, of Ft. Worth, for appellants. McCart & Bowlin, of Ft. Worth, for appellees.

**DUNKLIN, J.** In the trial court judgment was rendered in favor of Puckett & Wear, plaintiffs, against O. S. Lattimore, A. J. Lawrence, and J. E. Cummings, defendants, upon a promissory note executed by the defendants in plaintiffs' favor, and the defendants have appealed.

[1] The consideration for the note was plaintiffs' contract to construct a dam of concrete across a ravine, which dam was designed by the defendants to impound water from rainfall for the purpose of forming a fishpond. The dam was constructed, but the water which accumulated after each rain in the basin above the dam escaped through the bottom of the basin and ran out below the dam. The evidence shows without controversy that the water did not percolate through the dam. Plaintiffs' contract to construct the dam was in parol, but the evidence shows without controversy that they agreed to build a dam that would hold water. The principal controverted issue upon the trial was whether plaintiffs agreed, as contended by defendants, to build a dam upon a foundation of such depth and construction that the water collecting in the basin above the dam would be held there and not permitted to escape below the dam, or whether the extent of plaintiffs' obligation was, as contended by them, that they would construct a dam through which water would not percolate and which would not be carried away by the pressure of water accumulating in the basin above.

By different assignments appellants insist

that the evidence conclusively established their contention upon the issue above stated, and for that reason the trial court erred in failing to set aside the verdict of the jury upon their motion for a new trial. Notwithstanding the evidence of appellants tended strongly to support their construction of appellees' contract, the testimony of appellee Puckett was in accord with plaintiffs' contention as above stated. In addition to that testimony of Puckett, it was further shown that, after the dam had been finished and it had been demonstrated that the water collecting in the basin above the dam would seep out, appellants paid \$75 of the agreed consideration for the construction of the dam, and executed a note for the balance and later renewed that note, which renewal is the note in controversy herein. This evidence of appellees was sufficient to support the verdict, and hence the assignments of error now under discussion are overruled.

By another assignment of error the contention is made that the judgment was excessive. This is based upon the statement in appellants' brief that the note stipulated for interest at the rate of 10 per cent. per annum from maturity. But the note found in the statement of facts expressly stipulates for interest from date, and with this stipulation in the note the judgment was not excessive.

[2] By the fourth assignment of error complaint is made of the refusal of a special instruction requested by appellants. This assignment is overruled because another special instruction requested by the appellants was given which presented substantially appellants' defense to the note in an affirmative form, in addition to the same defense presented in a negative form in the court's general charge.

[3] We know of no rule which would require the court to define to the jury the meaning of the words used in plaintiffs' contract to construct a dam that "would hold water," as contended by another assignment, as those terms are words of common use and easily understood by the jury.

[4] Nor do we think that the instruction given in the court's main charge was subject to the criticism made by appellants that it was on the weight of the evidence. The only defense to the note was that of failure of consideration. Clearly the burden was upon the defendants to establish that defense, and, if the court erred in failing to charge the jury upon the burden of proof, it was an error in favor of appellants and not against them, as contended in the tenth assignment of error.

[5] As plaintiffs testified without objection that the soil which constituted the bottom of the basin of the proposed lake would not hold water, and that the water escaped by reason of this condition of the soil and not through any defect in the dam, and as this was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pertinent to the very issue in controversy, there was no error in permitting the witness G. B. Leake to testify to the same condition of the soil and that by reason of the lack of rainfall other lakes and tanks were dry.

We have found no error in the record, and the judgment is affirmed.

PUGH v. WHITSITT & GUERRY et al.  
(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 8, 1913.)

1. MARSHALING ASSETS AND SECURITIES (§ 3\*)  
—EXEMPT PROPERTY.

As a rule the doctrine of marshaling securities will not be applied so as to deprive a debtor, who has not waived his rights thereto, of his homestead or exempt property.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

2. HOMESTEAD (§ 108\*)—LIABILITIES—EXHAUSTION OF OTHER PROPERTY.

A debtor has the equitable right to have a chattel mortgage debt satisfied by a sale of the unexempt property mortgaged before resorting to the sale of the debtor's exempt property.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 167; Dec. Dig. § 108.\*]

3. MARSHALING ASSETS AND SECURITIES (§ 3\*)  
—EXEMPT PROPERTY.

The doctrine of marshaling assets will not be enforced so as to require a creditor, whose mortgage covers exempt and nonexempt property, to first resort to a sale of the exempt property, in order that other creditors not secured by such property may satisfy their claims out of the nonexempt residue, thus destroying the debtor's right to protect the exempt property.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

Appeal from Parker County Court; T. F. Temple, Judge.

Action by Whitsitt & Guerry against C. F. Pugh and another. From a judgment for plaintiffs and an unnamed defendant, the defendant named appeals. Reversed and rendered in part, and affirmed in part.

R. L. Stennis, of Weatherford, for appellant. Hood & Shadle and Preston Martin, all of Weatherford, for appellees.

DUNKLIN, J. Whitsitt & Guerry instituted this suit against C. F. Pugh for debt and foreclosure of a mortgage lien in plaintiffs' favor on certain cotton raised by the defendant during the year 1912. Plaintiffs alleged that the Farmers' Bank of Peaster had a prior mortgage on said cotton, and also on two mules, one wagon, and a cow, to secure a debt owing to it by Pugh, and the bank was made a defendant. Upon the equitable doctrine of marshaling securities plaintiffs prayed that the bank be required to disclose the amount of indebtedness due it by Pugh and secured by the mortgage in its favor, and that that indebtedness be satisfied first out of the proceeds of the sale of the

mules, wagon, and cow, and that the balance of said bank debt, if any, be satisfied out of the sale of the cotton, leaving the remainder of the proceeds of the cotton subject to plaintiffs' debt.

The bank filed an answer, in which it alleged the execution and delivery to it by Pugh of a promissory note and the mortgage as alleged in plaintiffs' petition, and prayed judgment against Pugh for the amount of the debt, together with foreclosure of the mortgage lien upon the property.

Pugh also filed an answer, alleging that he was the head of a family, and claiming the mules, wagon, and cow as exempt from forced sale to pay plaintiffs' debt. He prayed for judgment requiring the satisfaction of the bank's debt first out of the cotton before resort should be had to the mules, wagon, and cow, and that only such balance of the proceeds of the sale of the cotton as might remain after the satisfaction of the bank's debt should be subjected to the payment of the debt he owed the plaintiffs.

In obedience to a peremptory instruction by the trial judge, the jury returned a verdict in favor of the plaintiffs and also in favor of the bank against the defendant for their respective debts and for foreclosure of their respective liens, with direction that for the satisfaction of the judgment in favor of the bank the mules, wagon, and cow should be first sold, and the proceeds applied to the payment of that judgment, that the cotton should then be sold for the purpose of paying any balance that might remain unpaid on the bank's judgment, and that the proceeds of the sale of the cotton should be applied to the payment of the plaintiffs' debt to the exclusion only of such amount as might be required to satisfy the bank's debt after the application thereto of the proceeds of the sale of the mules, wagon, and cow. From a judgment rendered in accordance with this verdict, the defendant Pugh has appealed.

Substantially all the facts alleged in the pleadings, including those upon which defendant Pugh based his plea that the mules, wagon, and cow were exempt from forced sale, were established by the evidence, and the only question presented for our determination is, Did the court err in marshaling the securities as was done by the judgment? Evidently it is immaterial to the bank if the relief prayed for by Pugh is granted, and neither in the trial court nor here has the bank offered any resistance to that relief, thus leaving the question to be solved from the standpoint of the rights of the plaintiffs and defendant Pugh alone.

[1] In 26 Cyc. 933, it is stated in the text that it is held by the great weight of authority that marshaling securities can never be invoked so as to deprive the debtor of his homestead, or other exempt property, by a creditor with respect to whose lien there has been no waiver of such homestead or ex-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

empty property, but that a number of authorities announce a contrary doctrine. This statement in the text seems to be correct. For an extensive collation of authorities upon the subject, in addition to the ones cited in Cyc., see 84 Cent. Dig. title "Marshaling Securities," col. 357; 12 Dec. Dig. title "Marshaling Securities," § 3. The only decision which we have found in our Texas courts bearing upon that question is the case of *Henkel v. Bohnke*, 7 Tex. Civ. App. 16, 28 S. W. 645, in which it was held that, as the practical effect in that case of enforcing the rule for marshaling securities would be to subject the homestead of the debtor to the satisfaction of a debt contrary to the exemption established by our Constitution and statutes, the equitable rule noted would not apply. We concur in the reasoning and conclusion there announced.

[2, 3] Prior to the execution of the mortgage to plaintiffs in this case, as between Pugh and the bank, the former had the equitable right to have the bank debt satisfied first out of the proceeds of the sale of the cotton before resort to the sale of his exempt property for the satisfaction of the bank's debt. *King v. Hapgood Shoe Co.*, 21 Tex. Civ. App. 217, 51 S. W. 532; *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559. Also, see decisions collated in 25 Cent. Dig. under title "Homestead," § 167, beginning in column 2300; and 10 Dec. Dig. title "Homestead," § 108. We are unable to perceive any reason for holding that the equity claimed by plaintiffs under the general rule governing marshaling securities is of superior dignity to the equity in favor of Pugh noted above. If the two equities are of equal dignity, then the one which arose first should prevail over the other, and, as Pugh's equitable right as against the bank to have its demand satisfied first out of the cotton before resort to the other security arose prior to the execution of plaintiff's mortgage, the equity claimed by plaintiffs was subordinate to such equity in favor of Pugh. 1 Pomeroy, Eq. Juris. §§ 413-417; 2 Pomeroy, Eq. Juris. §§ 678, 682, 718.

Accordingly that portion of the trial court's judgment requiring the satisfaction of the bank's debt first out of the proceeds of the sale of the mules, wagon, and cow, and that the balance, if any, remaining unpaid be satisfied out of the sale of the cotton, and applying the balance of the proceeds of the sale of the cotton, if any remaining, to the satisfaction of the plaintiffs' debt, is reversed, and it is here decreed that the cotton be first sold for the purpose of satisfying the bank's debt, and, if the proceeds of such sale be more than sufficient to satisfy that debt, the balance remaining shall be applied to the payment of the plaintiffs' debt, and that the mules, wagon, and cow be sold under the bank's foreclosure in the event only that the proceeds of the sale of the cotton be insufficient to pay the bank's judgment, and,

if sold, the balance of the proceeds remaining after the satisfaction of such unpaid portion of the bank's judgment shall be paid over to the defendant Pugh. In all other respects the judgment is affirmed.

CHICAGO, R. I. & G. RY. CO. v. FLOYD.  
(Court of Civil Appeals of Texas. Amarillo.  
Dec. 6, 1913.)

1. ALTERATION OF INSTRUMENTS (§ 8\*)—FREIGHT—ALTERATION OF BILL OF LADING.

If a bill of lading, when signed by the consignor, was not indorsed "charges guaranteed" but was afterwards altered by adding such words, it would not bind the consignor.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 40-46; Dec. Dig. § 8.\*]

2. CARRIERS (§ 194\*)—FREIGHT—LIABILITY OF CONSIGNOR.

As a rule a consignor with whom a contract of shipment is made is impliedly liable for the freight charges, irrespective of whether he is owner.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 870-872; Dec. Dig. § 194.\*]

3. CARRIERS (§ 194\*)—FREIGHT—LIABILITY FOR CHARGES—CONSIGNOR AS AGENT.

While a consignor is ordinarily liable for the freight charges, if the owner is the real consignor, and the person making the shipment, to the carrier's knowledge, only acts as the consignor's agent, the owner, and not his agent, is liable for the freight charges.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 870-872; Dec. Dig. § 194.\*]

4. PRINCIPAL AND AGENT (§ 136\*)—LIABILITY OF AGENT—KNOWN PRINCIPAL.

An agent is not personally responsible upon a contract made for a known principal.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 447-450, 476-491; Dec. Dig. § 136.\*]

Appeal from Gray County Court; Siler Faulkner, Judge.

Action by the Chicago, Rock Island & Gulf Railway Company against L. O. Floyd and others. From a judgment in favor of defendant named, plaintiff appeals. Affirmed.

Gustavus & Jackson, of Amarillo, and N. H. Lassiter, of Ft. Worth, for appellant. Synnott & Underwood, of Amarillo, for appellee.

HUFF, C. J. The appellant railway company brought suit against L. O. Floyd, the appellee, and D. W. Thomas and S. F. Biggers, in a justice court in Gray county, to recover \$165.58 freight charges on three cars of watermelons alleged to have been shipped by said parties over appellant's line of road from McLean, Tex., to Ft. Worth, Tex. A default judgment was rendered against Biggers and Thomas, and a judgment in favor of L. O. Floyd. The railway company appealed to the county court of Gray county, where a like judgment was rendered, from which appellant prosecutes an appeal to this court. It is alleged in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

substance that L. O. Floyd in October, 1911, delivered to appellant three cars of water-melons to be shipped from McLean, Tex., to Ft. Worth, Tex., consigned to D. W. Thomas, giving the dates when the cars were to be shipped and the freight rate; that Floyd signed the contracts or bills of lading for the transportation of the melons, on which was indorsed, "Charges guaranteed." The freight charges were not prepaid by him. It is alleged the defendants therein, Thomas, Biggers and Floyd, were jointly interested in making the shipment, and that L. O. Floyd, in signing the contracts and bills of lading for the shipment thereof, was acting for and on behalf of D. W. Thomas and S. F. Biggers and was the agent for said parties and of each of them. And all of said defendants were partners in making the shipment and each was liable for the freight and demurrage, and, if appellant was mistaken as to the joint and several liability, then that L. O. Floyd is liable for the freight and demurrage charge. It is further alleged that three cars were transported to Ft. Worth, Tex., and tendered to the consignee and freight charges demanded, which were not paid but refused and the melons left in charge of appellant. It is alleged that they were sold to the best advantage possible, and, after doing so and crediting the amount received, there was left due appellant on the freight and demurrage the sum of \$165.58, the amount sued for. The appellee Floyd pleaded non est factum and denied partnership under oath, setting up specifically that, if the bills have indorsed thereon that Floyd guaranteed the freight charges, then that they had been altered or changed since he signed his name, and further pleads general denial.

There are three bills of lading to three separate cars, dated October 5, 1911, and upon appellant's form introduced in evidence. The bills of lading each show that the cars of melons were received from L. O. Floyd at McLean, Tex., consigned to D. W. Thomas, destination, Ft. Worth, Tex.; and there is indorsed on the face of each bill of lading in the handwriting of appellant's station agent at McLean, T. U. Salmon, "Charges guaranteed." The instruments recite that it is mutually agreed as to each party at any time interested in all or any of said property and of every service to be performed shall be subject to the conditions contained in the contract. L. O. Floyd signed each of the instruments as shipper and T. U. Salmon as authorized agent of the Chicago, Rock Island & Gulf Railway Company. The facts show the freight was not paid, and appellant called upon the consignee, D. W. Thomas, at Ft. Worth, Tex., the destination of the melons, and that he did not pay the same and assigned as a reason for not doing so that he did not have the money. Appellant then carried the cars of melons over

to Dallas and disposed of them and received therefor \$90, and then sued D. W. Thomas, S. F. Biggers, and the appellee Floyd for the sum of \$165.58, the balance due on the freight bills, after crediting the same with the amount obtained from the sale of the melons.

The testimony is practically uncontroverted that L. O. Floyd and Frank Cook raised on appellee's farm part of the melons shipped in the three cars; that previous to loading the cars they sold their melons to Biggers and delivered them to him by hauling them in wagons to the railroad, loading them in the cars; that Biggers also purchased melons from two other parties in the neighborhood and employed Cook to haul and load them into the cars with the melons purchased from Floyd and Cook, which made up the three cars. The testimony further shows that Cook and Floyd were paid for their melons by Biggers, through the bank in the town, and also for their services in hauling and loading the other melons purchased by Biggers. Floyd admitted signing the bills of lading but says that the words "charges guaranteed" were not on the bill when he signed them but were added thereafter. Salmon, the station agent, swears that he wrote the words before Floyd signed the bills and that he (Floyd) stood by and saw him do it. Floyd's testimony is to the effect that he asked Biggers, the purchaser of the melons, to whom he wanted them shipped, and Biggers told him that T. U. Salmon, the station agent, was a partner with him in the melons, and that he would understand to whom and where they should be shipped; that he told Salmon what Biggers had said. This statement was made to Salmon when they were shipping two cars previous to the three in question; that the three cars, for the freight of which suit is brought, were shipped in the same way, and that the station agent, Salmon, knew that they were Biggers' melons. The bills of lading were left with Salmon and no duplicate was given to Floyd, and that he did not know to whom they were shipped and did not know Thomas and had never heard of him previous to that time. He testifies that Salmon directed the loading, and it was done under his direction. He further testified that Salmon told him that he would see that Biggers got the bills of lading, and that he (Floyd) never sent Biggers the bills. There is no testimony in the record showing that Salmon denied the statements made by Floyd on this point, and Floyd's evidence is all there is in the record on the question. The witness had made arrangements with the bank to pay the freight on the melons before he sold to Biggers; after selling nothing more was done by him about any money to pay the freight.

Appellant assigns error on the third paragraph of the court's charge to the jury, which

is as follows: "If you find that said bills of lading were changed without the knowledge and consent of defendant L. O. Floyd, after he executed the same in a material manner, yet the said Floyd would be liable for the payment of the freight and other charges claimed by plaintiff unless plaintiff or its agent at the time of shipment knew that the melons shipped belonged to S. F. Biggers or S. F. Biggers and others; but if at the time of shipment said melons did not belong to defendant Floyd, and he had no interest in the same other than to make delivery thereof on the cars, and plaintiff or its agent knew such fact, then the said Floyd would not be liable merely on account of having delivered such melons for shipment, and as to such issue you will find, if you so believe, for defendant Floyd, unless you find for plaintiff under the preceding paragraph of this charge." In the preceding charge the court had instructed the jury that they would find for the plaintiff for the freight charges on three cars if they believed from the evidence that the words "charges guaranteed" were written in said contract at the time Floyd signed the same. Appellant presents the proposition under this assignment that the charge was erroneous because it in effect instructed the jury that Floyd would not be liable for the freight charges on these melons if the plaintiff's agent knew at the time of the shipment that the melons did not belong to Floyd and that he had no interest in them. Because if he delivered the melons to the railroad company as a shipper of them or agent of the shipper, an implied promise arose that he would pay the charges for their transportation, even though the agent of the railway company knew that he did not own them.

[1] If the bills of lading were not drawn "charges guaranteed" by Floyd when he executed them, and they were afterwards altered, then it would be, in our opinion, a material alteration and would be of no binding effect as to Floyd.

[2] There would be no express agreement to pay the freight, but the liability, if any, would arise upon an implied contract. The rule, as stated in 6 Cyc. p. 500, is: "In general the consignor with whom the contract of shipment is made is liable under the contract for the charges provided for therein. And this liability exists regardless of whether the consignor is the owner and irrespective of the failure of the carrier to collect from the consignee." The case of *Keeling & Field v. Walter Connerly Co.*, 157 S. W. 232, cites this clause in Cyc., and also *Baltimore, Ohio & S. W. Ry. Co. v. New Albany Box & Basket Co.*, 48 Ind. App. 64, 94 N. E. 906, 96 N. E. 28, and *Railway Co. v. Lumber Co.*, 75 N. J. Law, 878, 69 Atl. 168. All the courts, federal and state, in so far as we know, have recognized this as the general rule, and in no court has the above rule been more clearly announced than by the Massa-

chusetts courts. *Wooster v. Tarr*, 8 Allen (Mass.) 270, 85 Am. Dec. 707. Yet that court, in the case of *Union Freight Ry. Co. v. Winkley*, 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398, held substantially that the consignor, who is acting as the agent of the owner of the property, is not liable for the freight charges when the railway company knew, at the time of the shipment, the capacity in which he was acting. In discussing the question that court said: "A consignor of merchandise delivered to a railroad for transportation may be the owner and act for himself or may be an agent for the owner and act for him, and this may or may not be known to the railroad company. In the present case the railroad company knew the name and residence of the consignee." In discussing the question further, that court quoted from the case of *Finn v. Western R. R. Co.*, 112 Mass. 524, 17 Am. Rep. 128, the following: "When carrying goods from seller to purchaser, if there is nothing in the relation of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller; the contract of service is with him; and actions based upon that contract may, if they must not necessarily, be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to deliver and transfer the goods, or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser."

The court, in the *Winkley Case*, supra, commenting upon the above quotation, held that, while that was not a suit for the recovery of freight, yet the principles announced therein would apply, and held that in that state the vendor is presumed to make the contract in his own behalf for the transportation, but that such a presumption was a rebuttable one and may be disproved by evidence, and that the vendee may be held liable as the real principal in the contract. "But, whether the presumption be one way or the other, it is a matter of inference from the particular circumstance of the case, and the question which is always to be considered is the understanding of the parties." It was announced in that case that the court could not hold, as a matter of law, that the consignor made a contract on his own behalf, but there was some evidence that the understanding of all parties was that the consignee should pay the freight. In *Wayland v. Moseley*, 5 Ala. 430, 39 Am. Dec. 335, it is held that the shipper of goods, who is impliedly bound by the bill of lading to pay the freight, may show by



parol an agreement of the owner of the vessel to look to another for payment.

Without the words "charges guaranteed" written on the bill of lading, there is no express agreement on the part of Floyd to pay the freight. His liability at most would be a legal deduction from the fact of the shipment.

[3] While it is the rule in this state that the consignor is liable for the freight charges and that he may sue for injury to the property in his own name, should the title to the property be in another, we yet believe when the owner himself is the consignor, and the shipper is only his agent in the transaction, and that fact is known to the railway, that the owner, as the consignor, is liable for the freight charges, and that his agent should not be held therefor. The facts and circumstances in this case show that the delivery of the melons on board the cars completed the title thereto in Biggers, who bought and paid for them; that he had left instructions with the station agent to whom and where they should be shipped and instructed Floyd to the effect that the agent would understand to whom the shipment should be made, and the agent consigned them to a man appellee had never heard of and did not know. Appellee signed the bills of lading, and without any question the station agent knew he was acting only for Biggers in billing the cars. The appellant alleges in its petition that the appellee acted as the agent for Thomas and Biggers and for each of them.

[4] Ordinarily an agent is not personally responsible upon a contract made for his principal when the principal is known and the contract is for the principal. The consignor is presumed to be liable for the freight and a party at interest, but that presumption may be rebutted like any other. In this case Biggers was known by the station agent to be the owner, and evidently he had instructed him to consign the melons to Thomas at Ft. Worth, which was done. Appellant tried to collect the freight from the consignee, who under the law was the presumed owner of the melons, but could not. Floyd was merely an employé of Biggers and had parted with the title to the melons when they were placed on board the cars. These were all facts from which the jury could infer he in fact was not the consignor. The only thing which would make him liable would be "charges guaranteed" written on the bills of lading. Floyd swore he did not sign the bills with that indorsement thereon, and that it was placed there after he signed it. The jury found his statement true. The effect of this was to make him liable as a guarantor when under the facts he was not liable as a consignor, and therefore it was a material alteration and in effect, so far as he was concerned,

no contract. We believe the charge of the court, under the facts of this case, was correct.

The second and third assignments complain of the action of the court in refusing special charges to the effect, if Floyd executed the bills of lading, he would be liable for the freight charges and the demurrage, whether the phrase "charges guaranteed" was written in the bills of lading before or after their execution. We believe what has been said heretofore will dispose of these assignments, and they will therefore be overruled.

The case, we believe, was correctly submitted to the jury and will therefore be affirmed.

# FIRST STATE BANK OF PARADISE et al. v. WALLACE.

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 25, 1913. Rehearing Denied  
Nov. 22, 1913.)

## 1. INDEMNITY (§ 9\*)—EXTENT — ATTORNEY'S FEE—ACTION ON CONTRACT.

Plaintiff, in an action upon a contract of indemnity whereby defendant had agreed to pay or discharge his debts, was not entitled to be indemnified for an attorney's fee paid by him in defending one of the creditors' suits pending the transaction.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 16, 17; Dec. Dig. § 9.\*]

## 2. INDEMNITY (§ 15\*)—ACTION FOR BREACH— CONDITION PRECEDENT—PAYMENT OF DEBT IN CONTROVERSY.

Plaintiff, while insolvent, transferred his stock of goods, his accounts, and other property to defendant bank in order to discharge and satisfy certain debts included in a list furnished to the bank, and the bank satisfied such creditors and brought about plaintiff's discharge for a less sum than the face value of his debts, so that he was not required to pay anything further to such debtors. *Held*, that the contract to pay plaintiff's debt was a contract of indemnity only, and that plaintiff, to maintain an action for breach thereof, and to recover the difference between the face of the debts and the amounts paid for their discharge, must show that he paid such debts.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-40, 42-47; Dec. Dig. § 15.\*]

Appeal from District Court, Wise County;  
J. W. Patterson, Judge.

Action by J. W. Wallace against the First State Bank of Paradise and others. Judgment for plaintiff, and defendants appeal. Reversed and rendered for defendants.

McMurray & Gettys, of Decatur, for appellant. R. E. Carswell, of Decatur, for appellee.

CONNER, C. J. Appellee instituted this suit, alleging, in substance, that in March, 1912, he conveyed to the First State Bank of Paradise certain merchandise and other property of the aggregate value of \$2,160.30, in consideration for which said bank, acting through its agent, L. W. Clarke, agreed to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pay specified debts due wholesale creditors of plaintiff, aggregating \$1,638.79. It was alleged that, in addition to the indebtedness due the wholesale dealers named, the plaintiff owed the defendant bank \$1,000, upon which was to be credited the difference between the aggregate amount of the property conveyed to the bank and the aggregate amount of the plaintiff's indebtedness (viz., \$450), and that for the balance of said bank debt plaintiff gave a secured note. It was further alleged that Clarke, acting for the defendant bank, specifically agreed to pay the plaintiff's said debts, dollar for dollar, but that, contrary to said agreement, Clarke later secured from said wholesale men acquittances or discharges from said debts against the plaintiff for 33½ cents upon the dollar, and the plaintiff sought to recover the difference between the total amount of his indebtedness and the amount that had in fact been paid as alleged in discharge thereof.

The defendant bank and Clarke answered by general and special exceptions, the general denial, and specially that at the time of the transaction detailed by the plaintiff he was insolvent and indebted in a total amount of some \$3,027.04, including a debt to the bank of \$1,377.20; that the property conveyed to the bank was in fact worth much less than had been estimated in the agreement, and that "said defendant bank, through its said agent, only agreed to take plaintiff's stock of goods and his accounts and satisfy the wholesale men to whom the plaintiff was indebted"; that the plaintiff's assets and liabilities were at the time fully known to and understood by all of the plaintiff's creditors, and that the same were insufficient to pay more than about 50 cents on the dollar; that the purpose of the transaction on the part of all concerned was to settle the plaintiff's debts with such assets as he could produce or give for that purpose, and that their settlement was to be made by Clarke so as to extinguish and relieve plaintiff from the debts; that the transaction was undertaken and carried out with no other intention on the part of the defendants, and that they had in fact fully satisfied all of plaintiff's said wholesale creditors and extinguished the debts owing to them by the plaintiff by the payment of 33½ cents on the dollar.

The trial resulted in a verdict and judgment for plaintiff in the sum of \$783.53, with interest thereon from March 12, 1912, and defendants have appealed.

[1] We think it quite clear that in no event was the plaintiff entitled to recover the \$25 attorney's fees paid by him in defending one of the creditors' suits pending the transaction, as was authorized by the court's charge to which error has been assigned. See *Clark v. Mumford*, 62 Tex. 535; *Turner v. Miller*, 42 Tex. 418, 19 Am. Rep. 47. But, as this error might be cured by requiring a remittitur, we will without its particular

discussion at once go to the controlling question.

That appellee was indebted in the several amounts specified in the answer of the defendants seems not to be disputed. Nor is it disputed that at the date named he conveyed to the defendant bank a stock of merchandise invoicing \$1,560.30 and his equity in the building in which he had been doing business at an agreed value of \$500. The evidence, however, was in conflict on the question of the real value of the property so conveyed and as to the terms of the agreement. Appellee testified that the stock of goods was new and fairly worth the invoice prices at which they had been conveyed, as was also his equity in his store building; that Clarke for the bank had agreed to pay the specified debts in full, dollar for dollar. Clarke, on the contrary, testified to a considerable less value for the property conveyed, and that the agreement was merely that he was "to satisfy" the specified creditors. It is also undisputed that at the time of the transaction under consideration appellee furnished Clarke a list of his creditors, upon which Clarke made the following indorsement: "I am to satisfy the wholesale men. L. W. Clarke, Cashier First State Bank." The court instructed the jury to the effect that, if they found the plaintiff had conveyed the property as he alleged, and that the bank, through its said agent, agreed in consideration therefor that it "would pay off the debts of plaintiff mentioned and set out in his petition, and if you further believe that said defendant bank had failed to fully pay off and discharge all of said debts, then you will find for the plaintiff, and the measure of his damages for such failure to fully pay off and discharge all of said debts (if there was such failure) is the difference between the aggregate amount of plaintiff's said debts and the aggregate amount paid by said defendant thereon," with 6 per cent. interest from the 12th day of March, 1912. The court further charged, in answer to a question on the part of the jury, "that by the term 'pay off and discharge' as used in the main charge given you is meant to pay in full; that is to say, 100 cents on the dollar."

Without reference to several other questions presented by the assignments of error and otherwise suggested by the record, we conclude that the plaintiff's petition is subject to demurrer, and that the court's charges are erroneous as assigned, for the reason that the basis of appellee's recovery as alleged and as submitted in the court's charge is without support under the law of this state. Appellee seems to have based his suit upon the distinction which has been made in numerous decisions between contracts of indemnity against a liability, or for the performance of some specific thing, and contracts to indemnify or save harmless from the consequences of such liability or failure to perform. It is insisted in behalf

of appellee that the obligation of the appellant bank was to pay the specified debts fully, and that, not having done so, the measure of his damages for the breach of the contract was as submitted by the court regardless of the absence of allegation and proof that he had been or would be required to pay anything more or other than had in fact been paid by the defendant in discharge of the debts in controversy. We have examined numerous cases that would seem to support appellee's contention. See *Ham v. Hill*, 29 Mo. 275; *Israel v. Reynolds*, 11 Ill. 218; *Risk et ux. v. Hoffman*, 69 Ind. 137; *Lappen v. Gill*, 129 Mass. 349; *Bolles v. Beach*, 22 N. J. Law, 680, 53 Am. Dec. 263; *Wilson v. Stilwell*, 9 Ohio St. 467, 75 Am. Dec. 477; *Crofoot v. Moore*, 4 Vt. 204; *Malott v. Goff*, 96 Ind. 496; *Stuart v. Worden*, 42 Mich. 154, 3 N. W. 876; *Smart v. Smart*, 24 Hun (N. Y.) 127; *Ross v. Welch*, 77 Mass. (11 Gray) 235; *Clark v. Gamwell*, 125 Mass. 423.

[2] In our state, however, contracts to pay the debt of another are treated as contracts of indemnity only, and it is held that one complaining of the breach of such a contract must, in order to show himself entitled to recover, show that he has paid the debt in controversy. In the case of *Gunst v. Pelham*, 74 Tex. 586, 12 S. W. 233, Pelham sold a certain tract of land to one Johnson, who in consideration therefor promised, among other things, to pay a note executed by Pelham to Murchison & Coleman for the sum of \$1,052, which was secured by a mortgage upon the land. Later Johnson sold the same property to Gunst upon the same terms, and, the note of Murchison & Coleman not having been paid, the holders brought suit thereon against the maker, making Johnson and Gunst parties, to foreclose the mortgage. A decree of foreclosure was rendered, pursuant to which the land was sold and brought but a few dollars more than was necessary to satisfy the judgment. Suit was thereupon instituted by Pelham against Johnson and Gunst for the amount of the Murchison & Coleman note, but our Supreme Court held that exceptions to the petition so stating the facts should have been sustained; the court, in an opinion by Associate Justice Gaines, stating: "Upon the conveyance of the property to Johnson, and Johnson assuming to pay the note secured by the mortgage, the plaintiff acquired no immediate right of action against Johnson upon the promise. The promise was to pay the holders of the note, and not him. As between plaintiff and Johnson, by the agreement Johnson became primarily liable to pay the note; but plaintiff could only acquire a right of action against

him upon the promise by paying the note himself." We have not found where the authority of this decision has been disturbed. On the contrary, it has been cited and followed in a later case by the Court of Civil Appeals for the Fourth District. See *Gregory v. Green*, 133 S. W. 481. Adopting the construction of appellee's allegations and testimony most favorable to him, it in legal effect but amounts to an agreement on the part of the bank to fully discharge the debts specified in the appellee's petition. This was the substance of the agreement if not literally its terms. Appellee's complete discharge was brought about without dispute, and he thereafter was neither required to pay anything nor did there exist any further legal liability on his part with reference to the debts discharged. It would, therefore, so far as shown in the proof before us, seem to be immaterial that the bank brought about the discharge for a less sum than the face value of appellee's debts which the bank promised to pay. Facts of like legal import do not appear in any of the cases hereinabove cited as supporting the court's charge on appellee's measure of damages. As we read them, they merely proceed upon the assumption that a breach of a contract to pay the debt of another prima facie or presumptively left in full force the liability of the original debtor. But none of them seem to go so far as to give a right of recovery where, as here, it affirmatively appears there remains neither debt nor liability. The case of *Ham v. Hill*, 29 Mo. 275, supra, indicates otherwise. There it was said by the Supreme Court of Missouri, in reference to the measure of damages for the alleged breach of a bond to pay the debt of another: "If the plaintiff is entitled to recover, we see no reason why he should not recover the sum due by the bond. Of course, if the bond has been paid in part, or otherwise satisfied, the defendant will be entitled to the benefit of such payment or satisfaction. The presumption is that the plaintiff gave full consideration for the bond, and, if it is not discharged, the defendant should pay the amount of it"—thus indicating that it was at least open to the defendant to show an actual discharge of the debts specified in the bond, and thus, also, perhaps, indicating that there is no necessary conflict between the cases first cited and that of *Gunst v. Pelham*, supra. See, also, 22 Cyc. p. 92.

We conclude that appellee failed to show a right of recovery, and, inasmuch as no other ground of recovery is insisted upon or seems probable, it is ordered that the judgment be reversed and here rendered in favor of appellants.

**LANDERS v. McCUTCHAN.**

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 11, 1913. Rehearing Denied  
Nov. 15, 1913.)

**1. APPEAL AND ERROR (§ 265\*)—RESERVATION OF GROUNDS OF REVIEW.**

Under Rev. Civ. St. 1911, art. 1990, providing that where a special verdict is rendered, or the conclusions of fact filed by the judge are separately stated, the court shall render judgment thereon unless the same be set aside and a new trial granted, where the trial court's conclusions of fact were separately stated, there was no exception to any conclusion of fact, no request for any additional finding, and no finding was attacked on appeal for want of evidence sufficient to support it, and the facts found as a whole sustained the judgment, the judgment should be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. § 265.\*]

**2. FRAUDULENT CONVEYANCES (§ 301\*)—SETTING ASIDE.**

In an execution purchaser's action to recover the title and possession of land which the execution debtor conveyed to defendant prior to the execution sale, a judgment for the purchaser was not erroneous because of the insufficiency of the evidence to show defendant's knowledge of the debtor's indebtedness, or of his intention to defraud his creditors, where the trial court found that the deed to defendant was without consideration and had never been delivered.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 904-907; Dec. Dig. § 301.\*]

**3. APPEAL AND ERROR (§ 265\*)—RESERVATION OF GROUNDS OF REVIEW.**

In an execution purchaser's action to recover the title and possession of land which the execution debtor had conveyed to defendant prior to the execution sale, a judgment for the purchaser, on the ground that the conveyance to defendant was fraudulent as to creditors, was not erroneous, though the evidence showed an equitable title to the property in defendant at all times by reason of his having furnished the consideration for the purchase of the land by the execution debtor, where there was no finding made or requested on the issue of his equitable ownership, and no exception taken to the failure to find.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. § 265.\*]

**4. TRIAL (§ 397\*)—FINDINGS—FAILURE TO FIND—EFFECT.**

In an execution purchaser's action to recover the title and possession of land which the execution debtor conveyed to defendant prior to the execution sale, a finding against defendant on his claim of equitable ownership, based on the claim that he furnished the consideration for the debtor's purchase of the land, would be implied from the judgment against him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.\*]

**5. FRAUDULENT CONVEYANCES (§ 295\*)—SUITS TO SET ASIDE—SUFFICIENCY OF EVIDENCE.**

In an execution purchaser's action to recover the title and possession of land which the execution debtor conveyed to defendant prior to the execution sale, where though defendant testified to a state of facts showing his equitable ownership of the property prior to the judgment and levy, there was evidence tending to show that the debtor at all times improved, offered to sell, and treated the property as his own, that

soon after making the deed he absconded, and that when defendant was asked to transfer the property to the creditors he made no claim of equitable ownership, but indicated a willingness to make such retransfer if the debtor was willing that it should be done, a finding against his claim of equitable ownership was supported by the evidence, as he was an interested witness and the court was not bound to believe him.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 727; Dec. Dig. § 295.\*]

Appeal from District Court, Tarrant County; James W. Swayne, Judge.

Action by J. D. McCutchan against Everett Landers. Judgment for plaintiff, and defendant appeals. Affirmed.

Glendenen, Simmons & Cameron, of Ft. Worth, for appellant. C. M. Templeton, of Ft. Worth, for appellee.

CONNER, C. J. This suit was instituted by the appellee, J. D. McCutchan, against appellant, Everett Landers, to recover the title and possession of lots Nos. 16 and 17, block 143 of North Ft. Worth, Tarrant county. Both parties claimed under O. D. Landers as common source of title. Appellee claimed title by virtue of a sheriff's deed dated August 6, 1912, made by virtue of an order of sale, issued upon a judgment of a district court of Tarrant county against O. D. Landers, for the sum of \$876.80. The appellant claimed under a deed from O. D. Landers to himself, dated November 28, 1911, and also claimed as the equitable owner, arising from the fact, as he alleged, that he furnished the consideration upon which the conveyance to O. D. Landers had been made. Appellee replied with a general denial, and, further, that the deed from O. D. Landers to appellant had been made without consideration, that it in fact had never been delivered to appellant, and that it had been executed by O. D. Landers for the purpose of defrauding his creditors. The trial resulted in a judgment for appellee, and the court filed his conclusions of fact and law.

Appellant insists: First, that the court erred in rendering judgment for the plaintiff, because the evidence is wholly insufficient to show that O. D. Landers was indebted, at the time of the judgment, by virtue of which the sale to appellee was made; second, because the evidence is wholly insufficient to show that the defendant, E. Landers, knew of such indebtedness, if any, at the time that he received the deed to the property; and, third, because "the evidence, and all of the evidence," shows that the superior equitable title to the property in controversy had been at all times in the defendant E. Landers.

[1] In harmony with previous expressions in the opinions of this court we think we would be justified in entirely disregarding the assignments presented. Article 1990 of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Revised Statutes of 1911 provides that: "In all cases where a special verdict of the jury is rendered, or the conclusions of fact filed by the judge are separately stated, the court shall, unless the same be set aside and a new trial granted, render judgment thereon." As already stated, in this case we have the trial court's conclusions of fact separately stated from his conclusions of law; and, under the statute quoted, it is our duty to render judgment upon the facts so found if in law they are sufficient to authorize the judgment, unless, as stated by the statute, they be set aside. The transcript presents no exception below in behalf of Everett Landers to any conclusion of fact filed by the court, nor does it appear that appellant made a request for any additional finding, nor is any one or more of such findings directly attacked before us for want of evidence sufficient to support it; and, the facts found as a whole being such as in our opinion are amply sufficient to sustain the judgment, it follows that the judgment should be affirmed by force of the terms of the article of the statute quoted.

[2] However, we need not rest our final conclusion upon the view just expressed, for we have examined the evidence, and think it sufficient to sustain the trial court's conclusions to the effect that not only was O. D. Landers indebted, as evidenced by the judgment against him, at the time of and prior to the time he made the deed to appellant, E. Landers, but also that said deed was made without consideration, for the purpose of defrauding O. D. Landers' creditors, and had in fact never been delivered to appellant. The findings that the deed from O. D. Landers, under which appellant claims, had been made without consideration and never delivered fully answers appellant's contention herein that the proof fails to show that he knew of O. D. Landers' indebtedness, or of his intent to defraud his creditors.

[3-5] Appellant's final contention must be overruled for the reasons that there is no finding by the trial court on the issue of appellant's equitable ownership of the property in question, no request for a finding upon this issue was made, nor any exception taken to the conclusion because of a failure to find upon the issue. Moreover, a finding adverse to this contention must be implied from the judgment against appellant, and we cannot say that the evidence is wholly insufficient to support such implied conclusion. It is true that appellant testified to a state of facts which would have vested in him the equitable ownership of the property prior to the time of the judgment and levy under which appellee claims, but, he being an interested witness, the court was not compelled to credit him, and there is evidence tending to show that O. D. Landers at all times improved, offered to sell, and otherwise treat-

ed the property as his own, that very soon after O. D. Landers made the deed under which appellant claims, he absconded, and that when soon thereafter appellant was approached in behalf of appellee in an effort to induce a retransfer of the property in question to O. D. Landers' creditors, appellant made no claim of the equitable ownership now asserted, but on the contrary indicated a willingness to make a retransfer in event, after communciation, O. D. Landers was willing that it should be done.

We conclude that the trial court's conclusions of law and fact should be adopted and the judgment affirmed.

### INTERNATIONAL & G. N. RY. CO. v. WALKER.

(Court of Civil Appeals of Texas. San Antonio. Dec. 17, 1913.)

#### 1. APPEAL AND ERROR (§ 882\*)—INVITED ERROR.

In an action against a railroad company, where it set up contributory negligence, and the court charged generally on that issue, its request of a special charge on that issue will not, upon the theory of invited error, preclude it from attacking on appeal the sufficiency of the evidence to warrant any verdict in favor of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

#### 2. RAILROADS (§ 350\*)—CROSSING ACCIDENTS—LOOK AND LISTEN.

The failure of a person to stop, look, and listen before going upon a railroad crossing will not render him guilty of negligence as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

#### 3. RAILROADS (§ 348\*)—CROSSING ACCIDENTS—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for personal injuries received at a crossing, evidence held sufficient to support a judgment for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\*]

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by Ganahl Walker against the International and Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wilson, Dabney & King, of Houston, and Cobbs, Eskridge & Cobbs and Texas Schramm, all of San Antonio, for appellant. Reagan Houston, Perry J. Lewis, and H. C. Carter, all of San Antonio, for appellee.

FLY, C. J. This suit was instituted by appellee to recover damages alleged to have been sustained by him from personal injuries inflicted through the negligence of appellant. It was alleged that appellee was crossing appellant's railroad, in an automobile, in San Antonio, at a public crossing on Woodlawn avenue, a much used highway,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—61

and that appellant failed to give any signals of the approach of the train, and negligently ran into the automobile and injured appellee. Appellant charged contributory negligence upon the part of appellee. A trial by jury resulted in a verdict and judgment in favor of appellee for \$5,000.

[1] There are but three assignments of error, all of them assailing the sufficiency of the evidence to sustain any verdict in favor of appellee, and consequently necessitates a review of the whole testimony, unless appellant has lost the right, as insisted by appellee, to have the testimony reviewed by this court, by reason of having requested charges grouping the facts as to contributory negligence. We do not think that the rule of invited error can be applied to a case like this, where the court had submitted the question of contributory negligence in the general charge, and appellant merely followed it up with a special charge on the same subject. How appellant, who insisted in the lower court that appellee should not recover, because of his contributory negligence, is precluded from raising that question in this court on account of asking a charge on the subject on the trial below does not appear to this court. That seems to be the theory advanced in *Railway v. Smith*, 155 S. W. 361, but it will not be applied in this case. The doctrine of invited error has always been upheld by this court, but none of the opinions of this court cited by appellee goes to the extent of the case above cited. If appellant had contended in the lower court that there was no evidence of contributory negligence, and then had asked a charge embodying that theory, it might be said that the right to raise that question in this court had been lost, but appellant insisted in the trial court that there was contributory negligence on the part of appellee, and can so insist in this court, no matter how many special charges it requested.

[2, 3] The evidence of appellee shows that he was driving an automobile, occupied by him and Mrs. Mamie Turley, eastward on Woodlawn avenue, San Antonio, and as appellee endeavored to cross the track in front of a swiftly moving train, the automobile was struck by the locomotive and injured. It was about 11 a. m. that the accident occurred. Appellee testified that he did not see nor hear the train until he was 10 or 12 feet from the track; that the bushes were so thick near the track that they obstructed his vision so that he could not see the train until sharp, rapid blasts of the whistle were given, when it was so close that he could not stop his automobile. The train was, at the time the blasts were given, 50 or 75 feet from the crossing. No signals had been given before those mentioned. The train was going south; that is, going into

the city of San Antonio. The train was moving rapidly. After trying to stop his car appellee put on speed in an attempt to cross over, finding that he could not stop before reaching the crossing. He testified: "I say when I first saw the train it was 50 or 75 feet away from me, coming towards me very rapidly, and that was when I was about 10 or 12 feet distant from the track, and I chose the course that I thought was safest; if I had continued to try to stop, I knew it was a certainty of getting hit, because I would have been right in the middle of the track, and I was afraid that my car would stop right on the track, and I thought the safer course in the emergency was to try to get out of the way." Appellee did not stop, look, or listen as he approached the crossing. Appellant seems to have been exceeding the rate of speed prescribed by the ordinances of the city of San Antonio, and if the testimony of appellee is to be credited, the statutory signals were not given by appellant on approaching the street crossing.

The jury has found that appellant was guilty of negligence, and that appellee was not guilty of contributory negligence. Whatever may be the rule in the states from which the numerous cases cited by appellant have been selected, it is not the rule in Texas that it is negligence per se for a person not to stop, look, and listen before going upon a railroad crossing. A failure to use such precautions is a matter of fact to be considered by a jury. The overwhelming weight of authority in Texas is to the effect that, in the absence of a statute, the failure of a person approaching a railroad crossing to stop, look, and listen does not render him guilty of contributory negligence as a matter of law. The authorities on the subject are collated in volume 5, *Encyclopedic Dig. Tex. Rep., Title, Crossings*, pp. 731, 732.

The judgment is affirmed.

#### MURGATROYD v. STATE

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

APPEAL AND ERROR (§ 509\*)—RECORD—NOTICE OF APPEAL.

An appeal will be dismissed where the record contains no notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2317; Dec. Dig. § 509.\*]

Appeal from Bexar County Court; J. R. Davis, Judge.

Mrs. Nellie Murgatroyd was convicted of an offense, and she appeals. Dismissed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. The record before us contains no motion for new trial and no notice

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of appeal. Neither does it contain any statement of facts nor any bill of exception.

As the record contains no notice of appeal, the case must be dismissed.

### SHAW v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913. Rehearing Denied Dec. 23, 1913.)

#### 1. HOMICIDE (§ 309\*)—SUDDEN ANGER—FEAR—ADEQUATE CAUSE—MANSLAUGHTER—EVIDENCE.

In a prosecution for homicide, accused's testimony held insufficient to raise the issue of sudden anger or fear aroused by adequate cause, and, the state's evidence indicating a plain case of murder, the court did not err in omitting to charge on manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

#### 2. HOMICIDE (§ 300\*)—INSTRUCTIONS—ISSUES.

Where accused, on returning from a hunting expedition armed with a gun, met decedent on a railroad right of way and there engaged in an altercation with decedent and shot him, the court did not err in omitting to charge that, when accused saw decedent on the railroad right of way, he had the right under the law to arm himself and go and demand an explanation of decedent's prior threats, etc.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

#### 3. HOMICIDE (§ 188\*)—EVIDENCE—PRIOR INCARCERATION OF DECEDENT.

Where, in a prosecution for homicide, there was no offer to prove that, prior to the killing, decedent's wife had informed accused that her husband had served a two-year term in the penitentiary, accused was not entitled to prove such fact by decedent's wife.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 391-397; Dec. Dig. § 188.\*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

Fred Shaw was convicted of murder, and he appeals. Affirmed.

Fred S. Rogers, of Kaufman, for appellant. O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of murder in the first degree, and his punishment assessed at imprisonment in the penitentiary for life.

Appellant earnestly insists that the court erred in failing to submit manslaughter in his charge, and of course this in every case depends upon the evidence adduced. If the evidence presents no "adequate cause," then manslaughter does not arise. The state's evidence would show that deceased lived in a four-room house on Mr. Crittenden's place; he and his wife occupying two rooms of the house, and Nathan Chartley and his wife, Susana, occupied the other two rooms. About one week before appellant killed the deceased, one night Susana Chartley left her home and went to the house occupied by appellant. He returned home with her, when

Nathan Chartley had some words with his wife and appellant. The next morning Mr. Crittenden was informed of the matter, and he went to appellant, so he says, and informed him that he must keep off of his place. Annie McCullough says at the request of Susana Chartley she told appellant "that Susana told me to tell him not to come on Mr. Crittenden's place any more; that Nathan Hicks (deceased) had told Mr. Crittenden that he (appellant) had disturbed the peace." Joe Cleavey testified: That he and deceased worked at the oil mill in Forney. That deceased worked in the daytime and he worked at night. That he had requested deceased to loan him a dollar, and deceased had promised to do so that evening. That when he went to work that evening he saw deceased going down the railroad track towards his home. That appellant was a short distance behind deceased. He (Joe) called to deceased, and requested deceased to meet him at the fence. Deceased turned and started back towards him, and, when he got even with appellant, he heard appellant say, "Nath, you told Mr. Crittenden that I disturbed the peace out on that place and I am going to kill you;" and as deceased turned around appellant fired and killed him. That deceased said nothing and attempted to do nothing. That deceased had his dinner bucket on one arm and his pipe in his right hand.

Appellant testified that Mr. Crittenden had said nothing to him about not coming on the place again, but that Annie McCullough told him that deceased had said he had instructed his (deceased's) wife to leave the house when he (appellant) came out there; that appellant was out there running after Susana Chartley; that if he (appellant) came out there again he (deceased) was going to do him up; and that Mr. Crittenden had said for him to stay away as he was disturbing the peace. He further testified that on the day of the killing he had been hunting, and on his way home came up with deceased on the railroad track, and, to use his own language, the killing occurred under the following circumstances: "Me and Nathan we met up there and when we met up there I spoke to him, says, 'Howdy, Nath.' He says, 'Howdy.' I says: 'Say, Nath, I heard about some remarks you made about what you are going to do to me, and I heard that you went and told Mr. Crittenden that I came out there and disturbed peace. I don't know whether it is so or not. Don't think hard of me. I don't mean no fuss or nothing like that. I don't want to disturb no peace with you,' which I didn't do it. I didn't aim to start no fuss with him or nothing like that. To tell the truth about it, I was half afraid of him because he had already told me himself that he had been to the pen, and he would sooner go again. That is the reason I was a long time about going having a talk with

him. I says, 'If that is so, Nath, I wish you would tell me.' He says, 'Aw, nigger, go ahead.' I started to walk off from him. I says, 'No, I will ask him and see for certain whether he did do this talk.' I says, 'Nath, did you tell Mr. Crittenden that I came out there and disturbed peace?' He said to me, said, 'Let's see.' He says, 'Yes, I want you to stay away from my house.' I says; 'Well, can I not come out there for nothing? That is my own cousin I come out there to see. I ain't bothered you in any way. I don't think you are treating me right talking around and talking about what you are going to do to me, anything that way. I don't think you are treating me right.' Joe Cleavey called him. He turned and started towards Joe. I says: 'Did you tell him that? Did you tell Mr. Crittenden that I came out there and disturbed peace?' He turned around and started back towards me. He says, 'God damn you, don't you like it?' I told him no, and he commenced feeling for his knife or something and started towards me. I backed off from him. He kept coming. I backed out of the track, outside in the dreen we had been cutting there. I backed out of the track. He kept coming. I says, 'Nath, you had better get back.' I told him the second time. I says, 'Get back.' He would not do it. He had his hands in his pocket this way. He was coming out with it and I shot then. He fell with both hands in his pockets. That is the way I left him with his hands in his pocket. I told him the second time to get back."

[1] To take the state's evidence, it is a plain case of murder, and we do not think the defendant's own testimony raises the issue of sudden anger or fear aroused by an adequate cause, and under such circumstances the court committed no error in failing to charge on manslaughter. The court presented the issue of self-defense from apparent danger, as it appeared to defendant, in a clear and lucid manner and in a way not complained of by appellant.

[2] The only other complaint of the charge is that the court erred in failing to tell the jury "that, when defendant saw deceased on the right of way of the railroad, then he had the right under the law to arm himself and go and demand an explanation." This issue was not raised by the testimony. Appellant himself testified that he had been hunting and explained the possession of the gun in that way.

[3] The only ground in the motion for a new trial complains of the action of the court in refusing to permit him to prove by deceased's wife that deceased had served a two-year term in the penitentiary; that he had been sent from Smith county. Appellant does not state that he expected to prove by the witness that she had informed him of that fact prior to the killing. If he had

stated that he had expected to prove by the witness that she had informed him (appellant) of this fact before the killing, it would have been admissible. But it was not an issue in the case whether or not deceased had served a term in the penitentiary. The court permitted appellant to testify that he had been told by deceased himself that he had served a term in the penitentiary, and the state in no way questioned this testimony. Appellant also testified that he had been informed that deceased was a dangerous man, but the witnesses whom he questioned on this point testified that they had never heard of deceased's reputation being that of a dangerous and violent man. The testimony of the wife of deceased that he had been in the penitentiary might tend slightly to support the testimony of appellant that he had been informed by deceased that he had served a term in the penitentiary; but, as the state did not question that fact, it is not such a matter as will call for a reversal of the case.

The judgment is affirmed.

#### CHAPPELL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

#### 1. CRIMINAL LAW (§ 1159\*)—APPEAL—VERDICT—EVIDENCE.

A conviction supported by evidence will not be disturbed on appeal, though other evidence introduced would have authorized an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

#### 2. CRIMINAL LAW (§ 598\*)—CONTINUANCE—ABSENCE OF WITNESSES.

An application for a continuance for absence of witnesses was properly denied for lack of diligence in attempting to procure their attendance, where the first process issued for the only two witnesses who failed to appear was not served upon them because they were not in the county, and the second was issued on the day of trial, though defendant knew that such witnesses had left the county and resided at certain other places in the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.\*]

#### 3. CRIMINAL LAW (§ 942\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A motion for new trial on the ground of newly discovered evidence was properly denied in a criminal case, where it appeared that not only was such evidence impeaching, but that proper diligence had not been exercised to procure it at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.\*]

Appeal from Wood County Court; R. E. Bozeman, Judge.

Sid Chappell was convicted of carrying a pistol, and appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was indicted, tried, and convicted for unlawfully

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



carrying a pistol, and the jury assessed his punishment at the lowest prescribed by law—a fine of \$100.

[1] The evidence by the state was amply sufficient to sustain the conviction. Two witnesses testified positively that appellant had on his person, at the time charged, a pistol. He denied this, and introduced several witnesses, tending to show, and who testified, that he did not have a pistol on this occasion, which was amply sufficient to authorize the jury to acquit him, but this matter was for the lower court and the jury; and, they believing the state's witnesses and not his, this court cannot reverse on that account.

[2] Appellant contends that the court erred in overruling his motion for a continuance. The record shows this state of facts: The indictment against appellant was filed May 7, 1913, in the district court. On the same day the district court entered a proper order transferring the case to the county court. The proper transcript was made out and filed in the county court on May 10th. On the same day the clerk issued the proper *capias*, which was executed on the 12th by the sheriff arresting the appellant, and his then giving bond to appear on July 7th following—the first day of the next term of court. Appellant had no process for any witness issued until June 16th. Then he had it issued for six witnesses. All of these witnesses appeared and testified in the case, except two. When the case was called on July 7th for trial, he then made a motion for a continuance on account of the absence of four of said witnesses, two of them, as the record shows, afterwards appeared and testified in the case, but two did not. The record further, without contradiction, shows that appellant and these two absent witnesses were residents of the same little town in that county, and had been for a long time prior thereto and afterwards. He knew that they were the most important witnesses he had. His motion for continuance shows that their testimony was material. One of these witnesses, Vester Hagler, a married man with a wife and two children, who lived in the same little town that appellant lived in, and appellant knew it, left the town for Ft. Worth, and went to Ft. Worth to his uncle's to obtain employment on June 14th, two days before appellant had his first process for this witness issued, and at the time of the trial he was still in Ft. Worth, and had not returned to his home; that his other witness, Eugene Weeks, who also lived in the said same little town, and had for many years, left there and went to Sanger in Denton county on May 30th, and remained there and was there until after this trial. Appellant had no other process issued for these witnesses, or either of them, to the county of their residence, or to Denton or Tarrant county, where they had respectively

gone, until the very day that his case was called for trial and was tried. These facts affirmatively show such a clear lack of diligence on the part of appellant to in no way entitle him to a continuance on account of these witnesses, or either of them. *Giles v. State*, 148 S. W. 321.

[3] Appellant has but two complaints. One is to the overruling of the motion for continuance above discussed. The other is his claimed newly discovered evidence. He presents the affidavit of a witness by whom he expected to prove newly discovered evidence. The proposed testimony would go solely to impeach one of the state's witnesses. The record also shows no sufficient diligence to discover this testimony, and does not show such diligence as is necessary to entitle him to a new trial on that account, even if the testimony had not been solely for impeachment purposes. No error is shown by the court's overruling the motion for new trial on that account. *Gray v. State*, 144 S. W. 283.

There being no error shown, the judgment is affirmed.

#### MATULA v. STATE.

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

#### 1. CRIMINAL LAW (§ 1020\*)—APPEAL—APPEAL FROM INFERIOR COURT.

Where a criminal prosecution has been appealed from an inferior court to the county court and there dismissed, the appellant may procure a further appeal to the Court of Criminal Appeals in conformity with the law; such cases not being within the statute prohibiting an appeal where the fine assessed in the county court on appeal from an inferior court is less than \$100.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020.\*]

#### 2. CRIMINAL LAW (§ 1017\*)—APPEAL FROM INFERIOR COURT—TRIAL DE NOVO.

Where accused on appeal to the county court from a conviction in the corporation court is deprived of the right to a trial *de novo* to which he is entitled, he may enforce such right by a further appeal to the Court of Criminal Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2572-2576, 2589; Dec. Dig. § 1017.\*]

#### 3. BAIL (§ 68\*)—RECOGNIZANCE—REQUISITES.

Where recognizance on appeal in a criminal case failed to recite one of the causes in statutory form which requires that the appellant abide the judgment of the Court of Criminal Appeals "in this case" the recognizance was insufficient to sustain the appeal.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 286; Dec. Dig. § 68.\*]

Appeal from Ft. Bend County Court; W. I. McFarlane, Judge.

Frank Matula was convicted of using language calculated to provoke a breach of the peace, and he appeals. Dismissed.

C. E. Lane, Asst. Atty. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

DAVIDSON, J. Appellant was convicted for using language calculated to provoke a breach of the peace. The conviction occurred in the corporation court. The case went on appeal to the county court, where it was dismissed on motion of the county attorney. Another appeal bond was given after the first motion was sustained, and to this also a motion to dismiss was interposed and sustained by the court. From this action of the court this appeal is prosecuted.

[1] Where a case has been appealed from an inferior court to the county court and there dismissed, the appellant would have the right to prosecute an appeal in conformity with the law. Cases of this character are not within the purview of the statute which prohibits an appeal where the fine is less than \$100 in the county court when appealed from an inferior court.

[2] If appellant complies with the law he is entitled to a trial de novo, and where he is deprived of that trial he is entitled to an appeal to this court for revision of the action of the court dismissing his appeal in the county court.

[3] The trouble, however, is the recognizance entered into by appellant is not in compliance with the statute, for, among other things, the recognizance fails to recite one of the causes in the statutory form which requires the appellant to abide the judgment of the Court of Criminal Appeals "in this case." The language "in this case" is omitted. This, under a great number of decisions, is held to be insufficient. That language or expression must be employed in the appeal recognizance. We would be inclined, however, if we entertained jurisdiction and tried the case on its merits, to sustain the action of the county court in dismissing the appeal for want of a sufficient bond in the county court to justify the appeal from the county court.

However, the appeal is here dismissed.

#### LEONARD v. STATE.

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

#### APPEAL AND ERROR (§ 695\*)—RECORD—FACTS.

Where the facts are not sent up with the appeal record, an objection that the evidence is insufficient to support a conviction cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. § 695.\*]

Appeal from Johnson County Court; J. B. Haynes, Judge.

George Leonard was convicted of violating the local option law, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant prosecutes this appeal from a conviction for violating the local option law. The only ground of the

motion for new trial is the alleged insufficiency of the evidence to support the conviction. The facts are not before us, not having been sent up with the record. In this condition of the record there is nothing to revise.

The judgment is affirmed.

#### HAMPTON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

#### 1. CRIMINAL LAW (§ 1099\*)—STATEMENT OF FACTS—FILING—TIME.

Where accused was convicted at a term of the county court which adjourned August 16th, and his statement of facts was not filed until September 15th following, it was not filed within the required 20 days after adjournment of the court and could not therefore be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.\*]

#### 2. CRIMINAL LAW (§ 1097\*)—APPEAL—STATEMENT OF FACTS—NECESSITY—INSUFFICIENCY OF EVIDENCE.

Insufficiency of evidence to support a conviction, alleged as a basis for new trial, cannot be reviewed on appeal in the absence of a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.\*]

Appeal from Ft. Bend County Court; W. I. McFarlane, Judge.

Tom Hampton was convicted of aggravated assault on an officer, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for aggravated assault upon an officer:

[1] The court adjourned on the 16th day of August; the statement of facts was filed on the 15th of September. This being a case tried in the county court, the statement of facts to be considered ought to have been filed within 20 days from the adjournment of court. As the statement of facts was filed more than 20 days after adjournment of court, it cannot be considered under the decisions.

[2] The motion for new trial is based on the alleged insufficiency of the evidence. In the absence of the statement of facts, this ground of the motion for new trial cannot be considered.

The judgment is affirmed.

#### JOBE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 3, 1913.)

#### 1. CRIMINAL LAW (§ 507\*)—CORROBORATION.

As regards necessity of corroboration, one was an accomplice to any burglary, from which defendant obtained whisky, he having after the transaction got from defendant, and drunk

some of the whisky, knowing beforehand that the "raid," as he termed it, was to be made, and understanding that the whisky came from it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

## 2. CRIMINAL LAW (§ 1090\*)—REVIEW—NCESSITY OF BILLS OF EXCEPTION.

In the absence of bills of exception, grounds of motion for new trial, remarks of prosecuting officers, application for continuance, and objections to evidence cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. 1090.\*]

## 3. BURGLARY (§ 3\*)—PURPOSE OF BREAKING.

If the wrecking of saloons was for the purpose of stealing goods from them, all present and engaging in it would be guilty of burglary, but if the breaking was actuated only by a mob and riot spirit, with no intent to appropriate the property, there was no burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 24-27; Dec. Dig. § 3.\*]

## 4. BURGLARY (§ 42\*)—SUFFICIENCY OF EVIDENCE.

Two saloons having been raided at the same time, evidence merely that defendant had some whisky shortly after, and that he said it came from the raid, is insufficient to convict him of burglary of one of the places, though whisky of that kind was in such saloon; it not being shown the same kind was not in the other.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 80, 104-107; Dec. Dig. § 42.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Jack Jobe, alias Grundy Jobe, was convicted of burglary, and appeals. Reversed and remanded.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of burglary; his punishment being assessed at two years' confinement in the penitentiary.

The alleged owner of the house and property was Joe Patterson. Patterson was the owner of a saloon located on East Ninth street in Ft. Worth, and had been in that business for eight years, and was so engaged in it on the night of the 15th of May, when this matter is alleged to have occurred. When he left his house at night it was in good condition and properly closed. Some of the openings were glass windows. He says that there were no bricks about the building; when he left it in the afternoon everything was all right, and no breakage about it. The next morning when he came down, somewhere between 10 and 11 o'clock, it had been broken; all the windows had been broken and a door forced open; the mirrors in the saloon were all broken. "The front of the saloon was all torn up; the doors and windows were all knocked out, or rather the windows were, and the doors broken in, and seemed like the locks had been knocked open with a heavy instrument of some kind, crow-

bar or something. There was glass and empty bottles on the floor, and furniture and everything else all torn up. The furniture inside the building was torn up in there, everything broke, whisky cases, bar fixtures, and everything in there; some of the bar seemed to have been turned over—that is, the back bar—and it was all down there, the work board and everything was torn up and torn to pieces. I missed about \$2,000 worth of whisky, \$200 or \$300 worth of cigars, and wine, and all such as that, I found a few bottles there and boxes. I left about 2,000 or 3,000 cigars and two barrels of whisky, and that had never been bunged; I left between 80 and 100 cases of whisky; I left champagne, and I did not find any of that. The stuff that I had left there the night before was all gone next morning; there might have been two or three boxes there." Speaking particularly of the goods he had on hand, he uses this language: "I had on hand Epworth whisky; that was in bottles; then I had some Maxwell whisky in bottles; then I handled Jersey Creme; that is in bottles; then I handled Myrtle Springs; that is in bottles; then I had my barrel goods, Jersey Creme and Kentucky Home, and all such stuff in barrels; that is the way I left my stuff. Then I had the John W. Brooks whisky in bottles. I think McGar handled that whisky, too. McGar's place was 60 or 75 feet, I guess, from my place, just across the street." We might say here that McGar's place was also wrecked. This witness knew nothing about who broke into his saloon of his own personal knowledge, and says: "I cannot swear that this defendant had anything to do with that or not. I don't claim that I know all the brands of whisky that are handled by the saloon men in Ft. Worth; as a matter of fact they all handle different brands. I purchase from all these different wholesale houses here, some of the stuff. The furniture and stuff in there was all torn up. They broke my mirrors, all of them. They broke the big mirror back against the wall; that was broken all to pieces." He did not see many broken bottles; but it seemed like they were all packed off and carried off. The front is glass; the doors are double doors. The glass front was all broken to pieces. The building is a two-story building; there are rooms over the saloon, being a rooming house. He says there is a private club in there and rooms; some windows in the upper part of the house were broken.

Vann Childress testified he was working on the night of this transaction at Joe Vickery's barber shop. That Jobe worked there on the second chair. He says: "I don't know just the date but I seen him next morning after that raid; I saw him about 10 minutes to 6 next morning; he came into the shop there; he had four quarts of whisky and a quart of wine; he sold me one bottle; I

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gave him 50 cents for it; I bought a quart of Jersey Creme. I seen several bottles, one broken one, as I came from breakfast. He asked me where I went the night of the raid, and I told him I went home, and he says 'Good reason you did go home'; I says, 'Yes' I thought it was; I let my conscience be my guide. He had a pocketful of cigars; he asked me was I going to stay there, and I says, 'Yes'; I asked him was he going to stay there, and he says 'Yes,' and I says, 'I am going to breakfast,' and after I came back there from breakfast he opened a quart of wine him and his brother had been drinking. He said he had been out in that raid the night before. He never said nothing particularly to me that morning, just different men coming in that they were working on and talking together and were talking about the raid that night, but I never paid any attention to that at all. That was the next morning after the raid. \* \* \* I went home that night of that raid. I went home because there was a gang around up here, and I did not want to get into anything, and I knew about what they were going to do so I went home. I just had a suspicion what they were going to do; that they were going to do something, and I went home. I don't know exactly where Jack got this whisky; he said he was going out in the raid. This conversation took place over at the shop where we were both working. I never saw anybody else but Blubber at the time he gave me the wine; Blubber was in there. There was nobody present in the shop that morning when I had that conversation except me and him." Speaking of the conversation he had with one of the attorneys, Mr. Baldwin, he says: "I told him I had been out early that morning, and he came in there. I did not describe the kind of whisky he had. I don't know that I am sore about them tearing up all these darkies' property; I can't pay no mind to what some other nigger done; it is none of my business."

The witness Merrett says he saw defendant about 1 o'clock that night, and had a conversation with him. "Henry Vaughn and myself had been there to the jail, or here on the steps watching the crowd at the jail, and we went home and stopped in over there to eat a lunch; we both room at the Scott hotel, and Grundy had some whisky; he had four quarts of whisky, as I remember; that is what I seen. I remember one brand was Mitchell Spring or Myrtle Spring and the other Jersey Creme; I don't remember the other brands. The bottles were sealed. He had some cigars in his pocket; there was about a dozen in the upper coat pocket, and a can of cigars in his lower coat pocket. He didn't say where he got this stuff. He said he had been down here and had plenty of whisky and wanted to sell some. He tried to sell some to me; he said he would take \$3.50 for four quarts. I don't remember that he men-

tioned what part of town he had been in. I don't remember what he said about the raid. \* \* \* There was nothing else said there by the defendant with reference to where he had been the night before or what he had been doing. I stated we had been over there at the courthouse steps watching the crowd at the jail, and I just came from around there to this restaurant; there was quite a crowd around there. I was not in the crowd at the jail, but I was over here and saw them going down Commerce street; they were going in the direction of the negro raid; I understood that was on Ninth street. When I saw them they were just starting out going like a bunch of hounds, right down this street, and then I was here as they came back; I was here on the steps in front of the courthouse when they came back. I would say it was 10:30 or 11 that I saw them go down there. I did not pay much attention to how many did go down, but there was a big noise, and I heard the noise that came from them. They were just yelling and talking. I was out here when they came up the street; there was more than a hundred came up the street. That nigger killing that policeman is what I think caused all that excitement, and I taken that crowd to be the rioters that went down that way. I did not follow them to see what they were going to do."

The witness Schwain testified that he was night captain of the police force on the night of this raid. He says: "The saloons that were raided, as well as I remember, was Joe Patterson's place and McGar's; I don't remember of there being any others. I mean by raided that they just stampeded the saloon and stole a lot of stuff out of there. They threw stones, a shower of stones, that broke out the windows and broke the furniture and mirrors. I understand they made some noise; I was not present myself. I went by indications when I said they had stampeded. I went down there early the next morning. It looked as though a cyclone had passed through there, and the street was literally covered with brick, both small stones and big enough to carry in your pockets. They had been in Joe Patterson's place. McGar's place was also broken into. Then there was a bank there and drug store, jewelry shop; it all happened about the same time. It looked like they had come there to destroy property; it was a riot that resulted from this excitement here that day."

The witness Morris testified that he was 14 years of age, and had been working at the Savoy Theater, and lived with his father and mother on Weatherford street, his father being Dr. Morris. "I was down on Ninth street the night there was some saloons broken into. I was on the opposite side of the street. I heard some windows crash in and bricks going through; I could not swear who threw the bricks, and I saw people

coming out and bringing whisky out. After this glass crashed I saw people going in there; I could not see them all, they were going in so fast; they were all men; when they came out they had whisky in their hands; some of them had whole boxes of cigars and cigarettes and Bull Durham. They were just getting whisky and coming out with it. They were all white men; some of them were young men, and some of them were pretty old. I did not go up to the saloon where they were bringing it out. I don't believe I know this defendant. I knew some of the people who were bringing whisky out of there; I knew a few boys. I didn't stay there until they cleaned up that saloon. I just stayed about five minutes and left. I could not tell who it was broke it open; I was coming down this way when they broke the glass; I had just got off from work. They didn't go against the door; the bricks were flying; there was 10 or 12 people throwing bricks and a big bunch around them. I guess there was a thousand people there, I did not count them. The bricks were flying through the air, and they broke open the doors and windows; I saw some people going in there; just a big crowd of them went in there as soon as the doors were opened, they all went in there, and they commenced carrying it out; they were handing it out around to some of the boys around there; some fellow would go in there and get some stuff, and come out and pass it out around to the rest of them there."

The witness Musick testified he was around at the courthouse about 11:15 or 11:20 o'clock that night; that he saw the defendant there; saw him in the crowd in front of the jail; "he was talking, but I could not call to mind the exact words he said there at the jail; I could not tell you how long he was there; I seen him in the crowd, just like I seen several others there; I did not notice any one particularly or when they left; this crowd remained there up to near 1 o'clock, maybe a little later than that, and then it dispersed. The crowd was coming and going all the time; individuals would break out of the crowd and leave, and then others would come in. I did not see a great number of them leave and go in any particular direction; I seen a bunch return. I did not see this man in any crowd that was down on East Ninth street. I did not know at the time I was at the jail what had transpired down on Ninth street. I went down to Joe Patterson's saloon, and the doors were open and all glass was broken out; the inside of the saloon was nearly completely demolished, as nearly so as anything could be. There was no stock of goods in it; they were all gone."

The witness Flippin testified that he had a conversation with two men, one being defendant, the other man doing most of the talking; that during the conversation they informed him: "You want to be away from

your beat up about the courthouse about 9 o'clock, and he says, 'We are going to take that nigger out—those niggers out and hang them or burn them, all three of them'; says 'We are going to raise thunder,' or something to that effect up here at that time. I told him I would not be on duty, and had nothing to do with it; that I went off at or before 9 o'clock and would not be there at that time at all. I rung off at 8:30."

Another witness says he saw defendant a couple of times the night of this transaction; the first time he supposed about 9 or 9:30 o'clock, and the second time about 11 or 12 o'clock, or maybe after 12. The last time he had some cigars and whisky and some champagne; some Mumms extra dry. He said he had been down on Ninth street. He says: "I don't know where that whisky, wine, and cigars came from. I don't know whether he went down there and stole them, or whether somebody gave them to him; I did not see the saloon they came from; all I know is that he said he had got some from down on Ninth street. That was the night after the raid; about an hour after the raid, I suppose, I am not sure."

This is the case practically in full on the facts.

[1] From the evidence of the witness Childress he is an accomplice, if appellant is guilty. He drank and got some of the whisky from defendant after the transaction, knowing beforehand, he says, the raid was going to occur, and understanding that this whisky came "from the raid," as he terms it. His testimony to connect the defendant with the burglary would have to be corroborated, and this would apply to any witness who received or bought any of the whisky from appellant, if the whisky came out of Patterson's saloon. This remark is made in a general way to show their testimony would not be sufficient unless corroborated.

[2] There are some grounds of the motion for new trial that cannot be considered in the absence of bills of exception: The remarks of the prosecuting officers, the application for continuance, and objections to some of the testimony. There are no bills of exception, and these matters are in no way verified and pass out of consideration.

[3, 4] Appellant insists that the evidence is not sufficient. The writer is inclined to the opinion that this contention is correct. To sum up, in a general way, this evidence shows that a policeman had been killed by a negro, and that a mob had gathered around the jail for the purpose of securing this negro, as well as two others. In this they seemed to have failed, and then they passed from the jail down the street and tore up the saloons belonging to McGar and Patterson; wrecked them to such an extent that the captain of the night police said it looked like a cyclone had passed through that part of the town. No witness places appellant present at the wrecking of the saloons; no

one identifies the whisky as coming out of Patterson's saloon, unless it be contended that the fact that appellant had a bottle of Jersey Creme and a bottle of Champagne, Mumms extra dry, and a bottle of Mitchell or Myrtle Spring whisky. Patterson had in his house champagne; he does not say it was Mumms extra dry. He had also Jersey Creme and Myrtle Springs whisky in bottles, but he does not undertake to identify these as coming from his house; in fact, does not testify in regard to these one way or another. They may as well have come from McGar's. No witness places appellant at the scene of the wrecking of either saloon, and the connection, if it is made by the state, is found in the fact that he had four bottles of whisky and some cigars an hour or so after the wrecking of the saloons. If those saloons were wrecked for the purpose of stealing the goods out of them, then all parties who were present and engaging in it would be equally responsible as principals. If the saloon was broken, not for the purpose of stealing the whisky, but to wreck it because it belonged to the negroes Patterson and McGar in connection with the feeling of mob spirit with reference to failing to get the negroes in jail for killing the policeman, then the case might not be one of burglary for the purpose of committing theft. If the mob and riot spirit actuated the breaking of the saloons with no intent to appropriate the property, then it would not be a case of burglary. It is not burglary simply to tear a house to pieces; there must be the intent connected with it to commit some other offense in connection with the breaking and entry. But even if burglary was committed, and it be conceded the facts are sufficient to show a burglary, unless appellant participated in it, still he would not be guilty of burglary. He might be guilty of receiving stolen property if he knew that the property he had came out of the saloon. The most cogent fact against appellant in connection with the burglary, it occurs to us, is found in the fact that he stated the whisky he had came out of the raid, or he got it in the raid, whichever it may be.

We have a line of decisions in effect holding that where a breaking has been shown and property taken in connection with the breaking from the broken house, and the property is identified as coming out of that house and found in possession of the accused, this would sustain a conviction for burglary. In order to sustain a conviction under this line of authorities, it must show a burglary for the purpose of committing theft, and that the property was taken and recently thereafter found in possession of the accused, and this property must be identified as the prop-

erty coming out of the house. Patterson did not undertake to identify this property, and no one undertakes to identify it as Patterson's property. The main fact by which it is sought to show this property is that of Patterson is that the whisky was Jersey Creme and Mitchell or Myrtle Spring whisky. There is no evidence in the record denying this property came from McGar's saloon. The same mob that raided one raided the other; they were there in 60 or 75 feet of each other. McGar was not used as a witness, and no one connected with the McGar establishment was used as a witness. This record shows the testimony could have been made much clearer and stronger, identifying this whisky, and not only so, but it could have been shown whether or not appellant was in that crowd at either or both saloons. The record clearly shows that there was a great number of men in that mob, and they all seemed to have been white men. Out of that vast crowd who were out on the streets that night and in that riotous condition about the courthouse and around the saloons, evidence could have been obtained that would put this case in such a light that defendant's guilt could have been shown, if as a matter of fact he participated in the taking of the property. There was a singular dearth of evidence in regard to that transaction, and it was one of the most important questions in the case; that is, to show that appellant was in the mob that broke into Patterson's house, and the purposes for which that breaking occurred. With the legal machinery under the control of the government and the courts, this matter could have been elucidated clearly and satisfactorily. Appellant may have been in the crowd; they have not shown it. He may have gotten the whisky from Patterson's saloon; they have not proved it when they could have done so. It is not shown that he did not receive it from others who were engaged in it; he himself not being present. In that crowd some one would have known, or ought to have known, the parties present. Every witness who testifies about the matter did not know whether appellant was in the crowd or not. None of them saw him there, and in fact there were many people on the street at that time of the night and engaged in these matters, and only one witness was placed on the stand, to wit, John Morris, who saw that crowd breaking in those saloons, and he did not see defendant there, and said they were white men breaking in the saloon. The writer is not willing to agree to an affirmance of the case on this sort of record.

The judgment is reversed, and the cause is remanded.

## DARNELL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 26, 1913. On Rehearing, Dec. 17, 1913.)

## 1. BAIL (§ 68\*)—APPEAL BOND.

Under Code Cr. Proc. 1911, art. 919, fixing the form of recognizance in cases of appeal from convictions of misdemeanor, which concludes, "In order to abide the judgment of the Court of Criminal Appeals of the state of Texas in this case," a recognizance omitting the three words "in this case" is insufficient to confer jurisdiction on the Court of Criminal Appeals.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 286; Dec. Dig. § 68.\*]

## On Rehearing.

## 2. TELEGRAPHS AND TELEPHONES (§ 79\*)—OFFENSES.—"INDECENT"—"VULGAR"—"OBSCENE."

The use of the expression "son of a bitch" in a conversation over the telephone falls within the provision of Pen. Code 1911, art. 471, making the use of vulgar, profane, obscene, or indecent language over or through a telephone a misdemeanor, the term "indecent" meaning unfit to be heard, offensive to modesty and delicacy," the term "vulgar" signifying "lack of cultivation or refinement," while the term "obscene" means "offensive to chastity or modesty," for the expression used is not merely rude and uncouth.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 22; Dec. Dig. § 79.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3537; vol. 8, pp. 7364, 7381; vol. 6, pp. 4887-4889; vol. 8, p. 7735.]

Appeal from Haskell County Court; A. J. Smith, Judge.

R. H. Darnell was convicted of using vulgar, obscene, profane, and indecent language over and through a telephone, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted under an indictment charging that he unlawfully used vulgar, obscene, profane, and indecent language over and through a telephone.

[1] The Assistant Attorney General makes the point that this court has no jurisdiction because the recognizance is not in compliance with the statute in that it leaves off the three words "in this case" in the form prescribed by the statute (article 919, C. C. P.). In the opinion of the writer this should not have been held a fatal defect in the recognizance. However, this court has in so many cases held this defect fatal and dismissed the cases because thereof that the court is not now willing to overrule all these cases. We cite some of them. Cryer v. State, 36 Tex. Cr. R. 621, 37 S. W. 753, 38 S. W. 203; Brock v. State, 72 S. W. 599; Page v. State, 72 S. W. 1134; Bradley v. State, 72 S. W. 1133; Mason v. State, 74 S. W. 25; Heinen v. State, 74 S. W. 776; Mallard v. State, 83 S. W. 1115; Armstrong v. State, 77 S. W. 446; Fortenberry v. State, 72 S. W. 586; Forten-

berry v. State, 44 Tex. Cr. R. 535, 72 S. W. 588; Adams v. State, 44 Tex. Cr. R. 535, 72 S. W. 588.

Under the circumstances this court has no jurisdiction of this appeal, and the case is therefore dismissed.

## On Rehearing.

Since this case was dismissed for an insufficient recognizance, appellant has had it corrected and now brings the proper evidence of a sufficient recognizance entered into in the lower court. His motion to set aside the former dismissal of this case and now decide the case on the merits is therefore granted.

[2] The statute under which appellant was convicted was passed in 1909 and is now article 471, P. C., as follows: "If any person shall use any vulgar, profane, obscene or indecent language over or through any telephone in this state, he shall be guilty of a misdemeanor, and, on conviction shall be fined in any sum not less than five dollars nor more than one hundred dollars." The lowest penalty was assessed against appellant.

The uncontradicted proof introduced by both sides shows that on April 30, 1913, appellant, who was a subscriber of the telephone company, called up, on a party line, Mr. Dinamore and discussed with him over and through the phone the insufficient service the phone company was giving to its subscribers, and said: "I think I know what the trouble is, but I don't know where it is from. Like the fellow that went into the saloon and shot it up and shouted, 'I am son of a bitch from Texas,' and the saloon man replied, 'I knew you were but did not know where you were from.'" At least two others on this party line heard this conversation at the time. One of the witnesses at least says appellant used the words "son of a bitch" twice.

It is well known that the telephone exchanges in this state are in charge of and operated by young ladies almost exclusively. It was evidently the intention of the Legislature to protect these young ladies, as well as the patrons of the telephone companies, when in use by any person, from hearing any vulgar, profane, obscene, or indecent language used over it, and that the proper way to prevent this was to make it an offense and punish the person who used any such language. It makes no difference whether such person at the time is using it in anger or otherwise, or uses such language to and of the person to whom he is talking.

The language used was not profane, but it was certainly indecent, vulgar, and obscene. The lexicographers define "indecent" substantially as: "Not decent; unfit to be heard; offensive to modesty and delicacy." "Vulgar" as: "Lacking cultivation or refinement; offensive to good taste or refined feelings; low; coarse." "Obscene" as: "Offensive to chastity or modesty; expressing or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed; offensive to the senses; repulsive; disgusting; foul; filthy; offensive to modesty and decency."

Appellant contends that the word "son of a bitch" used by appellant, taken separately or as a collective phrase, is neither profane, indecent, vulgar, nor obscene, and that the language of appellant at most is only rude and uncouth and not comprehended by the statute.

The court expressly charged the jury that they could not convict appellant unless they believed from the evidence, beyond a reasonable doubt, that such word constituted either vulgar, profane, obscene, or indecent language. We think appellant's contention cannot and should not be maintained, but that the jury found correctly. We have no doubt but that in contemplation of this law the language used was vulgar, obscene, and indecent.

There is no other question raised in such a way that we can review it. The judgment is affirmed.

#### CHAVARIO v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1913.)

##### 1. CRIMINAL LAW (§ 1101\*)—APPEAL—STATEMENT OF FACTS.

Where the court, after accused had filed a pauper's affidavit, ordered the stenographer to make out a statement of facts, the stenographer's refusal to make out same on the ground that he was entitled to pay therefor did not excuse the want of a statement of facts in the record, where accused did not resort to mandamus or any other process to compel obedience to the order, and there was ample time before adjournment of the court and also within the time allowed for filing the statement to have resorted to such proceedings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3204; Dec. Dig. § 1101.\*]

##### 2. CRIMINAL LAW (§ 1092\*)—APPEAL—BILL OF EXCEPTIONS.

That the trial judge, after receiving the bill of exceptions within the time allowed for approving same, stated that he could not give his approval until he had received the statement of facts did not excuse the failure of accused to secure bills of exception in time, where he made no application for extension of the time; it being obligatory upon counsel to follow up bills of exception and see that they are approved and signed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834-2861, 2919; Dec. Dig. § 1092.\*]

Appeal from District Court, Fayette County; Frank S. Roberts, Judge.

Domingo Chavarrio was convicted of manslaughter, and appeals. Affirmed.

L. D. Brown, of La Grange, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of manslaughter; his punishment being as-

essed at two years' confinement in the penitentiary.

[1] The case is before us without a statement of facts or bills of exception. The court adjourned on May 31st. The record was filed in this court on July 25th following. After conviction and before adjournment of court the defendant filed his pauper's affidavit to the effect that he was unable to pay or give security for the costs for making out the stenographic statement of facts. This was filed May 15th, before the adjournment of court on May 31st. The court entered an order ordering the stenographer to make out a statement of facts, which he declined to do on the ground that he was entitled to receive his pay. So far as the record is concerned, there is no showing that appellant resorted to a writ of mandamus or any process to compel the stenographer to file the statement of facts. Under our decisions this showing is not sufficient. In order to have brought himself within the statute, as construed by the decisions, appellant should have resorted to some means or measure by which he could have compelled the stenographer to file a statement of facts; and, had the court refused to force him to do so, then appellant would be in condition to urge this matter before this court. The appellant could have secured a statement of facts by resorting to compulsory process at any time within 90 days after the adjournment of court; and, had the court refused to require the stenographer to make out and file same, this court would reverse because appellant had been deprived of his evidence on appeal.

[2] Bills of exception were presented to the court within 30 days. Just how long before the expiration of the 30 days is not made definitely to appear. There is a letter attached to the affidavit of the attorney in the case, signed by the district judge, written on the 26th day of June, in which he acknowledges receipt of bills of exception in a civil case and refers to the fact that he had received the bills of exception in appellant's case some time before writing this letter but was not in position to sign or approve the bills of exception for want of the statement of facts, stating he would not approve the bills of exception until he received the statement of facts; that his mind was not sufficiently clear about what occurred so that he could intelligently pass upon and approve the proffered bills of exception. Under our decisions this is not a sufficient showing. If the defendant desired a longer time than the 30 days after the adjournment of court, he should have had an order from the judge extending the time beyond the 30 days, and further it seems to be the rule under the decisions that it is obligatory upon counsel to follow up bills of exception and see that they are approved and signed. He was notified by the judge, by the letter

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



previously mentioned, that he could not or would not approve the bills of exception until he had the statement of facts. At the time that letter was written, it was within five days of the limit of the 30 days, counting from the 31st of May, or rather the 1st day of June. There may not then have been, and was not under the circumstances set out in the affidavit and this record, time in which to secure the statement of facts for the judge. It then became the duty of appellant to have an extension of time or some action by which the statement of facts could have been gotten before the judge or at least to have presented the matter for action on the part of the judge in either approving the bills or rejecting them. The statute seems to require that there shall be no want of diligence on the part of appellant or his counsel in securing bills of exception. In the absence of securing the necessary statement of facts and bills of exceptions, under the terms of the statute, the appellant is required to exercise all diligence necessary, otherwise laches will be imputed. Under the circumstances, in the light of the statute and our decisions, appellant has not brought himself within the rule so that these matters can be considered and a reversal granted on account of the failure to secure bills of exception and statement of facts.

Without these matters before us, there is no ground alleged that would require or authorize a reversal of this judgment. It is therefore affirmed.

#### CLEMMONS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1913.)

#### CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for robbery, the court's failure to submit the issues of simple and aggravated assault was not prejudicial to defendant, where the court instructed the jury to acquit if defendant did not take the ring, which he was charged to have taken, from off the person of another, though the evidence would have sustained a conviction for assault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Frank Clemmons was convicted of robbery, and appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of robbery, and his punishment assessed at five years' confinement in the state penitentiary.

No objection was made to the introduction of testimony on the trial of the case, and the record is brought before us on the sole exception that the court failed to submit the issues of simple and aggravated assault.

The record discloses beyond doubt that an assault was made by appellant on Mr. Jones, and Mr. Jones says that he took a diamond ring, from off his person, of the value of at least \$300. Appellant denies taking this ring, and testifies to facts which would perhaps justify him in making the assault. The court in his charge instructed the jury that if appellant did not take the ring, they would acquit appellant. Under the evidence in this case, when the court instructed the jury that if appellant did not take the ring from off the person of Mr. Jones to acquit him, it was a charge presenting the case as made by the testimony in behalf of appellant in as favorable light as he had a right to expect. If he took the ring under the circumstances detailed by Mr. Jones and the witnesses for the state, it was robbery, and when the court instructed the jury that if he did not take the ring, as he and his witnesses testify, to acquit, it was all he had a right to ask. While, perhaps, it is true that, under the evidence, if he did not take the ring, he might have been convicted of an assault, yet when the court made the criterion of his conviction the fact of whether or not he took the ring as testified to by the state's witnesses, this would not be error of which he would be heard to complain. In plain terms the jury was instructed, if he did not take the ring from the person of Mr. Jones with the intent and purpose to appropriate it to his own use, to acquit him, or if they had a reasonable doubt of such being the case, to acquit. The case was presented in a way of which appellant will not be heard to complain.

The judgment is affirmed.

#### YOUNG v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1913.)

#### CRIMINAL LAW (§ 1081\*)—APPEAL—NOTICE.

Unless the record shows that notice of appeal was given at the term during which accused was tried, the Court of Criminal Appeals is without jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722-2724, 2962; Dec. Dig. § 1081.\*]

Appeal from District Court, Grimes County; S. W. Dean, Judge.

Wait Young was convicted of assault to murder, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted, and convicted of the offense of assault to murder, and his punishment assessed at three years' confinement in the state penitentiary.

The record before us does not disclose that any notice of appeal was given during the term of court at which appellant was tried; and, under such circumstances, we have no jurisdiction of the case. *Offield v. State*, 61

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Tex. Cr. R. 340, 585, 135 S. W. 566, 568. However, we have read the record; and, if the case was properly before us for review, there is no error assigned that would authorize a reversal of the case.

The appeal is dismissed.

### FLOYD v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1913.)

#### 1. CRIMINAL LAW (§ 1097\*)—APPEAL—NECESSITY OF STATEMENT OF FACTS.

In the absence of any statement of facts, the court cannot say whether the charges requested should or should not be given, nor review those grounds in the motion complaining of the charge of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2862, 2864, 2926, 2934, 2938, 2939, 2941, 2942, 2947; Dec. Dig. § 1097.\*]

#### 2. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTIONS.

In the absence of a statement of facts, the court must and does presume that the trial court charged the law applicable to the evidence introduced and all the law necessary to be given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.\*]

#### 3. CRIMINAL LAW (§ 1036\*) — NECESSITY OF OBJECTION—EVIDENCE.

Objection to the admission of evidence comes too late after verdict and appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1681-1640, 2639-2641; Dec. Dig. § 1036.\*]

Appeal from Criminal District Court, Dallas County; R. B. Seay, Judge.

Will Floyd was convicted of murder, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of the offense of murder, and his punishment assessed at imprisonment in the penitentiary for life.

[1] No statement of facts accompanies the record; consequently we cannot say whether the charges requested should or should not have been given. Neither can we review those grounds in the motion complaining of the charge of the court.

[2] In the absence of a statement of facts we must and do presume that the court charged the law applicable to the evidence introduced, and all the law necessary to be given. However, there are several bills of exception in the record in regard to the introduction of testimony. As to the testimony of the witness H. Baker, under the facts as stated by the court in approving the bill, it was clearly admissible as *res gestæ* of the transaction. As to the testimony of Dr. Howard, which was excluded by the court, we do not think the court erred in permitting the county attorney to ask the questions he propounded to this witness and other wit-

nesses. In our opinion, if the court correctly states the facts in approving the bills, the court was in error in excluding the testimony, and the county attorney was correct in insisting that the testimony was admissible as a dying declaration, and his persistence in trying to get it admitted would not present reversible error.

[3] Several of the other bills copied in the record the court declined to approve, stating that no such objections were made, and the testimony was admitted without objection. It may be that counsel, after the trial of the case, decided that certain testimony ought not to have been admitted, but it is too late after verdict and judgment to raise the objections.

The judgment is affirmed.

### DEAN v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1913.)

#### 1. CRIMINAL LAW (§ 406\*)—ADMISSIBILITY OF EVIDENCE—AGREEMENT TO PLEAD GUILTY.

Where defendant through her attorney agreed to plead guilty, but afterwards exercised her right not to do so, such agreement was not admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

#### 2. CRIMINAL LAW (§ 1056\*)—APPEAL—NECESSITY OF EXCEPTIONS.

On appeal in a misdemeanor case, where no exception was reserved to the failure of the court to give defendant's requested charges, the court's action was not presented in a way to authorize a review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.\*]

#### 3. CRIMINAL LAW (§ 1172\*)—PROSECUTION—INSTRUCTIONS.

Under an information charging that defendant was the lessee of the premises and kept a house of prostitution, where the evidence fully supported such allegation, error in defining the offense by copying the entire statute as to such offenses was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.\*]

Appeal from Gregg County Court; J. H. McHaney, Judge.

Ella Dean was convicted of keeping a house of prostitution, and she appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted of the offense of keeping a house of prostitution, and her punishment assessed at a fine of \$200 and 20 days' confinement in the county jail.

[1] In bills of exception it is shown that the county attorney, by appellant's attorney and the county clerk, undertook to prove that appellant through her attorney, had agreed to enter a plea of guilty at this term of

court. The court promptly sustained appellant's objections to any such proof being made, and, having done so, the bills present no error. While it is true, if an agreement had been entered into it ought to have been lived up to, yet if the appellant did not desire to enter a plea of guilty, as her counsel agreed she would do, it was her right not to do so, and let the state prove her guilt if it could do so, and the court correctly held that this agreement of counsel was not admissible in evidence.

[2] There were several special charges requested, some of which were not given, but no exceptions were reserved to the failure of the court to give such instructions, and, this being a misdemeanor, the questions are not presented in a way that we would be authorized to review them.

[3] There is one complaint, in the motion for a new trial to the charge as given, that it authorized a conviction of appellant upon a state of facts not supported by the evidence. The information did charge that she was the lessee of the premises, and kept the house as a bawdyhouse or house of prostitution, and the evidence amply and fully supports these allegations, and that in defining the offense the court copied the entire statute would not, under the circumstances, present reversible error. The statement of facts in this case is not presented in a very intelligent shape. It embraces more objections and remarks of counsel for appellant and the state than it does the testimony of the witnesses. However, we have carefully studied it, and no testimony was admitted by the court that was not properly admissible.

The judgment is affirmed.

#### Ex parte COFFEE.

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

#### 1. CONTEMPT (§ 44\*)—POWER TO PUNISH.

It is essential to the power to punish for contempt that the court have jurisdiction both of the subject-matter and the person and authority to render a judgment upon the facts adduced.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 128-130; Dec. Dig. § 44.\*]

#### 2. HABEAS CORPUS (§ 92\*)—SCOPE OF REVIEW—CONTEMPT.

In determining, in original proceedings in habeas corpus in the Court of Criminal Appeals, the power of a court to fine for contempt, the court may go behind the judgment and ascertain the facts.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.\*]

#### 3. CONTEMPT (§ 10\*)—WHAT CONSTITUTES—STATEMENT OF ATTORNEY.

A statement by the county attorney in the presence of the court that, inasmuch as the court had permitted a private citizen to appear and defend in a criminal case, he would decline to represent the state and dissolve his connection with the case did not subject him to be fined for contempt, where the court did not

order him to proceed in the case but adjourned court and subsequently appointed another attorney to represent the state.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 19-22; Dec. Dig. § 10.\*]

Original application for writ of habeas corpus by Thomas J. Coffee. Relator discharged.

Thos. J. Coffee, of Colorado City, for appellant. Lightfoot, Brady & Robertson, of Austin, and O. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Applicant is county attorney of Mitchell county and was fined for contempt in the sum of \$10 by the county judge. The judgment of the court is as follows: "On this the 21st day of July, 1913, when cause No. 1604, State of Texas v. Andrew McGehee, was called for trial, J. N. McGehee, father of the said Andrew McGehee, addressed the court and asked permission to appear as counsel for his son, the said Andrew McGehee. Premises considered, the court granted the said J. N. McGehee the privilege of representing his son, the said Andrew McGehee, being then and there a minor and charged by indictment for a misdemeanor, against the peace and dignity of the state. Whereupon the county attorney, Thomas J. Coffee, arose and addressed the court, stating that if the court permitted the said J. N. McGehee to appear in behalf of his son, the said Andrew McGehee, who was a minor, being only 18 years of age, he (the said Thomas J. Coffee, county attorney) would not appear as counsel for the state of Texas, whereupon the court asked the said Thomas J. Coffee, county attorney, if it was only from the fact that the court had given said J. N. McGehee, the father of said Andrew McGehee, permission to appear for his son, the said Andrew McGehee, that caused him to withdraw from the prosecution of said cause. The said Thomas J. Coffee, county attorney, answered in the affirmative and started to absent himself from the courtroom, the court then and there being in session, and for the said conduct of the said Thomas J. Coffee, county attorney, A. J. Coe, county judge of Mitchell county, holds and is of the opinion that the said Thomas J. Coffee, county attorney, is guilty of contempt of said court and should be fined in the sum of \$10. It is therefore adjudged and decreed by the court that the defendant is guilty of contempt of court and a fine of \$10 is assessed against defendant Thomas J. Coffee"—and then follows the usual recitals in the judgment of the court. And it was further ordered that he be ordered into the custody of the sheriff to be held by him until the fine was paid, and in default of payment the sheriff was ordered to place defendant in the county jail of Mitchell county until it was paid.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

There is also an approved statement of facts filed by the county judge as follows: "Be it remembered that on the 21st day of July, 1913, the case of State of Texas v. Andrew McGehee (No. 1604), pending in the county court of Mitchell county, Tex., was regularly called for trial, and J. N. McGehee, father of the defendant, Andrew McGehee, asked permission of the court to appear as counsel for his son, the defendant, after the state had announced ready for trial, and said McGehee had also announced ready for his son, the said defendant, and the said Andrew McGehee being a minor, 18 years of age, the court granted the said J. N. McGehee the privilege of acting as counsel for and in behalf of his said son, the defendant, Andrew McGehee. The jury had been challenged for cause and peremptorily, but jury had not been sworn to try the case, when thereupon the county attorney, Thos. J. Coffee, stated to the court that, if the court permitted the said J. N. McGehee to represent the defendant, his son, he (Coffee) would not represent the state of Texas. The court then asked the said county attorney, Thos. J. Coffee, if it was for that reason (referring to the statement of said Coffee, above given), and the said Coffee stated it was that fact alone (J. N. McGehee was not a lawyer, and no license had been issued him to practice law). Thereupon the court had the clerk to enter up a fine of \$10 against said Coffee for contempt of court, after which the said Coffee absented himself from the courtroom."

There are also some matters made to appear by affidavits to the effect that the court then took a recess, this being in the morning, until after the noon hour, when another attorney was appointed to represent and did represent the state. It is little doubtful as to whether we should consider these affidavits in the attitude in which the case is presented. If the evidence had been presented only upon affidavits, there would be less room for doubt upon this question; but, where the judge has adjudicated the matter and followed by an approved statement of facts in relation to it, there may be some question as to whether the affidavits in this connection should be considered, but it is not deemed essential, in the manner in which this case is presented, to pass upon that question.

[1,2] We have an unbroken line of authorities since the Degener Case, 30 Tex. App. 566, 17 S. W. 1111, to the effect that three things must occur in order to authorize the court to fine for contempt: First, jurisdiction of the subject-matter; second, jurisdiction of the person; and, third, the authority of the court to render a judgment upon the facts adduced. In other words, that, having jurisdiction of the person and subject-matter, there must be authority in the court to render a judgment upon the

facts which form the basis or predicate for the judgment, and, if no judgment would be justified under the given state of facts, then the judgment would be void and subject to be set aside under habeas corpus; and the rule is further laid down that we can go behind the judgment of the court to ascertain these facts.

In the instant case the applicant was the county attorney, and it seems from the statement of facts and adjudication of the court that he refused to appear in this case because J. N. McGehee was not a lawyer, and therefore not authorized to appear in court and represent his son or practice law. It is deemed unnecessary to discuss the right of the elder McGehee to appear in behalf of his son and the relation to this case of this matter.

[3] The question here is as to whether or not appellant, refusing to appear as counsel in the case, would subject himself to contempt. From the adjudication of the court and from the facts approved by him, quoted above, the offense of the county attorney was that, inasmuch as the court permitted a private citizen to appear in court and defend a criminal case, he, as county attorney, would decline to appear and represent the state, and for this reason only the court states he did not appear and for this reason only he placed him in contempt. It will be noticed, when he notified the court that he declined to appear under the circumstances and dissolved his connection with the case, the court fined him. The court did not order or require applicant to proceed, but, if we go to the affidavits above referred to, then we find that he adjourned court and subsequently appointed another attorney, which the judge was authorized to do on account of the absence of the county attorney at the time of reconvening the court. The appointed counsel seems to have conducted the trial of the case. The simple fact that a lawyer states he severs his connection with a case in the presence of the court would not, in our judgment, in and of itself form a basis of contempt punishment. There must be something more. If the court had ordered him to proceed and he had disobeyed the order, we would have a different proposition. There may be reasons why an attorney may under some circumstances sever his connection with a case, and in which he would not only be justified but the ethics of his profession, as well as the law, may demand or authorize such action. We are of the opinion, therefore, that the mere act of stating he severed his connection with the case would not be sufficient to justify the court in placing the attorney in contempt.

We are of opinion the county attorney was not in contempt of court in stating that he severed his connection with the case under

the circumstances. We therefore hold that the contempt punishment was not justified, and relator is ordered discharged.

### LEACH v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1913.)

CRIMINAL LAW (§§ 1090, 1097\*)—APPEAL—RECORD—STATEMENT OF FACTS IN BILL OF EXCEPTIONS.

Absent a statement of facts and bills of exceptions, grounds in the motion for new trial, complaining of the rejection of evidence, of the failure of the court to charge, and based on newly discovered evidence, cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2853, 2789, 2803-2822, 2825-2827, 2862, 2864, 2926-2928, 2934, 2938, 2941, 2947, 2948; Dec. Dig. §§ 1090, 1097.\*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

Aaron Leach was convicted of burglary, and he appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of burglary, his punishment being assessed at two years' confinement in the penitentiary.

The record is before us without a statement of facts or bills of exception. The first, second, and third grounds of the motion for a new trial refer to the rejection of testimony, and cannot be considered in the absence of the statement of facts and bills of exception. The fourth ground alleges error on the part of the court in not charging on circumstantial evidence. Because the evidence is not before us, this matter cannot be revised. The fifth ground refers to newly discovered evidence. In the absence of the statement of facts, we cannot tell whether this ground presents error or not.

As the record is presented to us, the judgment is affirmed.

### WHITE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

CRIMINAL LAW (§ 857\*)—MISCONDUCT OF JURY.

Where the sole defense is insanity, and an agreement on a verdict of guilty of murder in the second degree is procured as a result of the argument of certain jurors that there is a lunacy commission at the penitentiary, and that this commission is better able to pass upon defendant's insanity than the doctors who testified thereon, and that if defendant is insane he will not be placed in the penitentiary, the case will be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2054, 2055; Dec. Dig. § 857.\*]

Appeal from District Court, Clay County; P. A. Martin, Judge.

Sterling White was convicted of murder in the second degree, and appeals. Reversed and remanded.

Taylor & Humphrey and Wantland & Parrish, all of Henrietta, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant, from a conviction for murder in the second degree, prosecutes this appeal. His sole defense as made by the evidence was that he was insane at the time he killed the young lady.

The record discloses that appellant was a young man who had lived an exemplary life up to the time of the commission of this offense. He had been engaged to marry Miss May B. Lee. When the time fixed for the marriage approached, Miss Lee postponed the marriage for two months. When the second date approached, appellant procured the license, but Miss Lee insisted again on postponing the marriage, this time for two years. Words ensued, and the engagement was broken. Miss Lee began receiving company from other young men, when appellant approached her father and asked him to send her away until he could gather his crop, when he would leave, stating at the time he loved her so much that he just could not stand seeing her go with others. Witnesses say that appellant became morose and different from what he had been before. One night Miss Lee was at a party. Appellant went to this party and saw her there with another young man. She passed and he saw the flash of a ring on her hand, when he pulled his pistol and shot her; the shot causing her death. He then turned the pistol on himself, shot himself twice in the breast and once in the head, but none of these wounds proved fatal. The pivotal issue in the case was: Was appellant sane or insane at the time he fired the shot? The state's witnesses detail facts that would authorize the jury to find that appellant was sane, and this, their verdict would indicate was their finding. Appellant introduced a number of witnesses on the question of his sanity, and these witnesses would have him insane. Mr. Blackstock would have a streak of insanity in appellant's family; some of his relations being in the insane asylum in Arkansas. Drs. Reed, Foote, Jones, and Calhoun all testify that in their opinion he was insane at the time of the commission of the offense. Drs. Reed and Foote were called to see him immediately after the shooting and waited on him that night and the next morning. Dr. Foote says he was the family physician and had known appellant intimately, and testifies: "I observed his actions and listened to his talk that day while I was there and saw him several times before he was moved to Henrietta, and from his manner of talk and from his actions I am sure he was insane at that time, and I am sure that he did not know the nature and consequences of the act he had committed. He was insane at that time, and he was suffering with that type of insanity known as melan-

cholla. I am sure at the time I saw him and talked with him that he did not have mind enough to know right from wrong."

The court fairly submitted the issue to the jury, and we would not disturb their verdict if it was not for matters that took place in the jury room. On the motion for rehearing there was evidence adduced, and J. F. McNeal, a witness for the state, testified three of the jurymen, Pamplin, Roberts, and Coggins, voted, "Not guilty," giving as their reason they believed appellant was insane, when the following questions were propounded and answers elicited from the witness: "Q. Now I will ask you if it is not a fact that Pamplin and Roberts stated in the presence of the jury up there that the reason they had concluded to vote with the balance of the jury was because some of the jurors said that there was a commission in the penitentiary that would pass on his sanity or insanity, and that if he was insane he would not have to stay in the penitentiary? A. Well, they did say something of that kind. Q. They did admit to you and the balance of the jurors that the reason they had agreed to convict him was because some of the jurors had argued that a commission was appointed and there was no danger of his having to stay in the penitentiary if he was insane? A. It is true that there was some talk of that kind, but I could not say there was anything about it being appointed. Q. But the question I asked you was: Did not they say that they were willing to convict him because they had learned that there would be a commission down there that would examine him and if he was insane they would send him to the asylum? A. Yes, this commission, they said there would not be insane men worked in the penitentiary. Q. And that was the reason they would give him a verdict of guilty? A. Yes, sir. Q. That was after some of them had argued that there would be a commission down there to pass on it? A. It was after we had talked about that. Q. Now, then, who was it, if you remember the name of the juror, who advanced the idea that there would be a commission down there to pass on his sanity or insanity? A. Well, Mr. King and I both talked about it; said that we believed there would be arrangements made for crazy men; that we did not believe they worked crazy men in the penitentiary. Q. You all had argued that before these jurors said if that was so they would be willing to convict him, hadn't you? A. Yes, sir."

Mr. King was foreman of the jury and testified: "Q. Now, is it not a fact that after you all had retired to consider of your verdict, and soon after you began to discuss these matters, the jurors began to discuss the fact, and you and Mr. McNeal began the argument with the jury that there was not any danger of this fellow having to serve in the penitentiary if he was insane; that

there was a commission there that would pass on his sanity; and, if he was insane, that he would not have to stay in the penitentiary? A. That question came up; I said this, 'They did not work crazy men in the penitentiary.' Q. Is it not a fact that you and Mr. McNeal used the argument to these jurors that there would be a commission there to pass on his insanity, and that if he was crazy he would not have to work in the penitentiary? A. I said this, 'They would not work a crazy man there, and had authorities to look after that business.' I did not say commission; that was my opinion. Q. You did not hear any testimony about there being that kind of an arrangement in the penitentiary? A. No, sir. Q. In other words, that argument that you were putting up was not because of any testimony that you heard or any law? A. That was simply my opinion, and there was no doubt in my mind at the time that there was; but since that I am told there is not. Q. Is it not a fact that Mr. Pamplin and Mr. J. W. Roberts, in the presence of J. F. McNeal, said that if they had such an arrangement there they would vote for "Guilty"? A. No, sir; I did not hear that. Q. Now, then, Mr. King, it was the intention and purpose of yourself to have made those statements for the purpose of letting the jurors see that there was not any danger of an insane man being worked there like a sane man; that was your object? A. That was my opinion, I believed that was true. Q. Now, Mr. King, you are not in a position to say that that did not influence some of the jurors, you giving that opinion? A. No, sir; I do not know what influenced the jurors."

Mr. Coggins was also offered by the state and testified on this issue: "Q. Did you hear them arguing up there in the jury room about there being a commission appointed in the penitentiary to pass on the sanity of men? A. Yes, sir. Q. Tell the court what you heard. A. It was something like this: One man (I kinder believe it was Mr. McNeal; I am not sure about that) said, 'If the fellow is insane, we have got him, and, if he is not, we have got him.' Q. Did he say anything about a commission down there? A. He said that there was a commission down there to pass on the insanity of convicts; that he would go to the asylum if he was insane; and there was another suggestion (I know that somebody made it) that the commission down there was better able to pass on the sanity than these doctors around here were."

These were all the witnesses introduced by the state to meet the affidavits filed by appellant's counsel, which we do not deem it necessary to copy, and we have only taken short excerpts from the testimony of these jurymen, as from these excerpts it is manifest that the argument was used that there was a lunacy commission at the penitentiary, and that this commission was better able

to pass on the sanity of appellant than the three or four doctors who had testified in the case, and, if that commission found appellant was insane, he would not be placed in the penitentiary; as one jurymen expressed it, "If he is crazy, we have got him, and, if he is not crazy, we have got him." Thus it is seen at least a part of the jury did not pass on the question of whether appellant was sane or insane but thought a commission at the penitentiary would later pass on the question. As this was the sole question in the case, this character of argument being used, and facts considered not in evidence, we do not think the verdict should be permitted to stand, as there is no evidence that such proceedings did not take place.

There are a number of other grounds stated in the motion, and we have reviewed each of them carefully and painstakingly, but none of the others present any error; but on account of the above error, the issue being so sharply drawn by the testimony, we are of the opinion the case should be reversed and remanded.

### DOSH v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1913.)

#### 1. CRIMINAL LAW (§§ 1095, 1102\*)—STATEMENT OF FACTS—TIME FOR FILING.

The statement of facts and bills of exceptions must be filed within 90 days after the adjournment of the term at which accused was convicted, and, if subsequently filed, will be stricken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2847; Dec. Dig. §§ 1095, 1102.\*]

#### 2. ROBBERY (§ 30\*)—INDICTMENT—SUFFICIENCY.

In order to authorize the jury to assess the death penalty for robbery, the indictment must allege that the robbery was committed by exhibiting firearms or deadly weapons.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 43; Dec. Dig. § 30.\*]

#### 3. ROBBERY (§ 28\*)—VERDICT.

In a prosecution for robbery, where the indictment charged that it was committed by the exhibition of deadly weapons, a verdict finding accused guilty as charged in the indictment, and assessing his punishment at the lowest term of imprisonment prescribed, is sufficient

because there are no degrees of robbery, however committed.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 41; Dec. Dig. § 28.\*]

Appeal from District Court, Grayson County; W. J. Mathis, Special Judge.

John Dosh was convicted of robbery, and he appeals. Affirmed.

Burton Richards and John C. Wall, both of Sherman, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. The appellant was convicted of robbery, and his punishment fixed at five years in the penitentiary—the lowest prescribed by law.

[1] The statement of facts and bills of exceptions were filed in the court below 159 days after the adjournment of the court at which appellant was tried. Upon the motion of the Assistant Attorney General both the statement of facts and all the bills of exceptions are struck out, as 90 days is the longest time after adjournment in which either can be filed.

[2, 3] There is but one question which can be considered, in the absence of a statement of facts and bills of exceptions. The indictment properly charged robbery, and in order to authorize the jury to assess the death penalty, it further charged that the robbery was committed by using and exhibiting deadly weapons. The verdict of the jury was: "We, the jury, find the defendant guilty as charged in the indictment and assess his punishment at five (5) years' confinement in the penitentiary." Appellant contends that this verdict is invalid, and the judgment must be set aside because it does not find of what degree of robbery appellant was guilty. There are no degrees of robbery. Robbery, however committed, is only one offense. If the state seeks to inflict capital punishment, it is necessary to allege that the robbery was committed by exhibiting a firearm or deadly weapon; and, unless this is alleged, the jury cannot inflict the death penalty. The verdict in this case was clearly sufficient. Green v. State, 147 S. W. 594.

There is no other question raised which can be considered in the absence of a statement of facts and bills of exceptions.

The judgment is therefore affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**CALHOUN et al. v. ALEXANDER, Co. Atty.**  
(Court of Appeals of Kentucky. Dec. 19, 1913.)  
**FERRIES (§ 31\*)—REGULATION—CHARGES.**

Though the courts have jurisdiction to determine what are reasonable rates for a ferry, yet, when the matter is once settled, it should remain so until there is some substantial change in conditions, as the statute does not contemplate that the owner of a ferry should be harassed by continual application.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. § 78; Dec. Dig. § 31.\*]

Appeal from Circuit Court, McLean County.

Proceeding by R. Alexander, County Attorney, against Margaret Calhoun and others, to reduce ferry rates. From a judgment reducing the rates, defendants appeal. Reversed, and remanded for a judgment dismissing the proceedings.

W. T. ELLIS, of Owensboro, and Joe H. Miller and Wm. B. Noe, both of Calhoun, for appellants. R. Alexander, of Calhoun, for appellee.

**HOBSON, C. J.** Margaret Calhoun and Irene Gates and her children own a ferry across Green river between Calhoun and Rumsey in McLean county; Mrs. Calhoun owning the ferry right on the Calhoun side and Mrs. Gates and her children that on the Rumsey side of the river. This proceeding was instituted by R. Alexander, as county attorney of McLean county, by notice served on them on October 28, 1911, in which he sought to reduce the rate of toll on the ferry to a person on foot from five cents each way to two cents each way. The case coming on for trial in the county court, the county court overruled the motion, refusing to disturb the existing rate of toll. The county attorney appealed to the circuit court, and in the circuit court, the evidence being heard anew, the circuit court entered a judgment, reducing the rate of toll on foot passengers from five cents each way to three cents. From this judgment the owners of the ferry appeal.

In the year 1910 a similar proceeding was instituted by Alexander as county attorney, against the owners of this ferry, to reduce the rate of toll, and, the rates having been reduced, the owners of the ferry appealed to this court, where the judgment was affirmed on March 18, 1911. See *Calhoun v. Alexander*, County Attorney, 143 Ky. 53, 135 S. W. 407. There was then pending in the courts a proceeding instituted by J. S. Willis, the purpose of which was to obtain a judgment declaring that the ferry privilege referred to had expired or was no longer in existence. The circuit court dismissed the proceeding and that judgment was affirmed by this court on October 27, 1911, or about the time that this proceeding was instituted. Section 1801, Ky. St., provides: "An appeal from any order concerning a ferry or ferry rates, in favor of any one interested, shall lie to the circuit

court of the county, and thence to the Court of Appeals, both of which shall have jurisdiction of law and fact; but the Court of Appeals of only such facts as may be certified from the circuit court." While the courts have jurisdiction to determine what are reasonable ferry rates, the matter when once settled, should remain so until there is some substantial change in conditions. The question of what were reasonable rates on this ferry was elaborately gone over in the case finally decided by this court on March 18, 1911; and only about seven months elapsed after that decision before this new proceeding to relitigate the same question was begun. No substantial change had occurred in conditions since the former decision. It is not contemplated by the statute that the owner of a ferry should be harassed by continual applications to the court to change the ferry rates. No reason is shown why all the matters now shown could not have been presented in that case. It is not a proceeding for a new trial, but a new application to change the rates. The evidence is conflicting. The owners of the ferry now get an annual rental of \$1,080 for it; to reduce the rate on foot passengers would reduce the rent to \$600 or \$700 a year. While sometimes more than one passenger is taken over at a time, in the majority of cases the trip is made alone for one passenger. When the river is low, it is only about 125 yards wide, but a large part of the year the river is full of water, and sometimes covers the bottoms. The ferry must be run at all times and under all conditions. The ferry is a common carrier of passengers, and the responsibility of other common carriers attaches to it. The value of the ferry franchise is not to be fixed alone by the value of the boats and the value of the lots on the bank apart from the ferry franchise. The ferry franchise is a valuable right, carrying with it public responsibilities. While the evidence is conflicting in view of all the facts, the question of reasonable rates for the ferry, which has so lately been settled, should not now be relitigated.

Judgment reversed, and cause remanded for a judgment dismissing the proceeding.

**CAVE HILL CEMETERY CO. v. GOSNELL**  
(Court of Appeals of Kentucky. Dec. 19, 1913.)

**1. CEMETERIES (§ 22\*)—STATUTES.**

Under Ky. St. § 1336, providing that any person who shall willfully mutilate the graves, monuments, fences, shrubbery, ornaments, grounds, or buildings in any cemetery or place of sepulcher shall be guilty of a misdemeanor, the sanctity of a burial ground does not depend upon whether the particular portion is filled with graves; the purpose of the statute being to protect the cemetery, and not merely the graves in it.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 24, 25; Dec. Dig. § 22.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



## 2. STATUTES (§ 220\*) — CONSTRUCTION — ACQUIESCENCE BY LEGISLATURE.

Where the Legislature has long acquiesced in the construction of a statute, and has framed its legislative policy in accordance with such construction, the ruling cannot subsequently be disturbed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 298; Dec. Dig. § 220.\*]

## 3. MUNICIPAL CORPORATIONS (§ 434\*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—CEMETERY PROPERTY.

Ky. St. § 1336, making the mutilation of cemetery property and graves a misdemeanor, applies to all property used for burial purposes, and hence the property of a cemetery association is not subject to execution sale for assessments imposed by a municipality for public improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1045-1050; Dec. Dig. § 434.\*]

## 4. CEMETERIES (§ 3\*) — PROTECTION — PUBLIC POLICY.

It is sound public policy to protect the sepulcher of the dead.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 3; Dec. Dig. § 3.\*]

## 5. MUNICIPAL CORPORATIONS (§ 586\*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—PERSONS AND PROPERTY LIABLE — CEMETERIES.

As cemetery property is free from the lien of special assessments for public improvements, such as streets, the court cannot, by indirection, cast such burden on a cemetery corporation by making it personally liable for the assessment, and subjecting thereto moneys in its hands which were to be used for the maintenance and beautifying of the cemetery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1304-1306; Dec. Dig. § 586.\*]

## 6. MUNICIPAL CORPORATIONS (§ 586\*)—PUBLIC IMPROVEMENTS—PERSONAL LIABILITY.

A landowner is not personally liable for an assessment for public improvements placed in front of or near by his land.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1304-1306; Dec. Dig. § 586.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by G. W. Gosnell against the Cave Hill Cemetery Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Randolph H. Blain, of Louisville, for appellant. William Furlong, of Louisville, for appellee Gosnell. J. W. S. Clements and Pendleton Beckley, both of Louisville, for appellee City.

HOBSON, C. J. George W. Gosnell received an apportionment warrant from the city of Louisville against the property of the Cave Hill Cemetery Company for paying with brick a portion of the carriage way of Payne street. The amount of the warrant was \$1,115.49. He brought this suit against the cemetery company to subject the abutting land to its payment. The cemetery company answered in substance that it was a quasi public corporation without stockholders, empowered to conduct a cemetery, not held for

private or corporate profit; that all of its lands and property were held and used under perpetual trust for cemetery purposes; that a part of the property sought to be subjected was occupied by the United States National Cemetery; that the enforcement of the lien would be a violation of the general statutes of the state and the acts of Congress prohibiting the violation of graveyards; that by an act of March 9, 1854 (Loc. & Priv. Acts 1853-54, c. 890), it was provided that the corporation might acquire by gift, devise, or purchase not exceeding 300 acres of land, and that all lands acquired by it should be perpetually held and used for the purposes of a rural cemetery; that by an amendment to this act it was authorized to sell to purchasers burial lots, and issue to them certificates vesting in them the right to use the lots as a burial place for the dead, but not to be subject to execution or in an manner liable for the debts of the purchaser; that all the lands in the cemetery grounds should be forever exempt from taxation; that one or more soldiers of the United States were buried on the land set apart to the United States National Cemetery; that the land sought to be subjected lies wholly within the grounds of the cemetery which, under the charter and deed from the city of Louisville, is to be perpetually held and used for a cemetery; that the grounds are inclosed by a permanent wall, 13 inches thick and 9 feet high, made of vitrified brick laid in cement; that the land sought to be subjected has been graded and prepared for use as burial lots; that shrubbery, trees, and ornamental plants have been set out and are growing thereon; that some graves are upon the land, and that the land cannot be lawfully used or occupied by a purchaser without injuring the wall inclosing the cemetery, or interfering with or mutilating the grave or graves and gravestones included in it, or without destroying the only entrance to the cemetery from Payne street; that over 43,000 of the dead are buried in the cemetery, and that an entrance into it from Payne street is necessary for the proper use and maintenance of the cemetery; that by reason of the premises the city had no power to make the cost of the improvement of Payne street a charge upon the abutting property used as a cemetery, or to subject the property, or any part thereof, to sale. The plaintiff demurred to the answer. The circuit court overruled the demurrer to the answer, but intimated that, though the land could not be subjected, the cemetery company might be required to pay the apportionment warrant. There was an issue between the parties as to how much of the cost of building the street should be apportioned to the cemetery company; but this was settled by an agreed order by which Gosnell recovered of the city of Louisville \$395.32. And it was agreed that the balance

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the warrant, to wit, \$520.17, was the correct proportion of the contract price which should be calculated against the land of the Cave Hill Cemetery Company; but it was stipulated that this judgment should not operate or be construed in any way as an admission by the company that it, or its land, or its funds were in any manner liable for the balance of the apportionment warrant. The plaintiff filed an amended petition, in which he alleged that the cemetery company had funds on hand more than sufficient to pay the claim. The cemetery company demurred to the amended petition; its demurrer was overruled. It then filed an answer, in which it alleged that it was engaged in the improvement and ornamentation of the cemetery, and that it received money from the sale of burial lots, also money from lot owners to be used exclusively in the annual care of their respective lots and graves; that its revenues were sufficient to satisfy its running expenses only by economy; and that all the money it received was dedicated to the care, and upkeep, and beautifying of the cemetery. The circuit court sustained a demurrer to its answer, and entered a judgment, whereby he adjudged the plaintiff a lien on the property of the cemetery for \$520.17, with interest and cost, excepting out of the judgment the land conveyed to the United States National Cemetery. It was further adjudged that, it appearing to the court that the lot of land against which the lien was adjudged is inclosed as part of a burial ground of the dead, the same should not be sold by the commissioner at public sale; but that, it appearing that the cemetery company had more than sufficient funds accumulated as a surplus, it was adjudged that it within 20 days pay into court a sum of money sufficient to satisfy the decree. The cemetery company appeals.

In *Louisville v. Nevin*, 10 Bush, 549, 19 Am. Rep. 78, a suit was brought to subject the land of a cemetery to a street assessment. Refusing to subject the property, the court said: "The chancellor will not decree that to be sold which cannot lawfully be used for the ordinary purposes to which property of a like character is commonly applied, and especially when there is no imaginable beneficial use to which it can be put by the purchaser which would not subject him to punishment under the penal statutes of the state. Section 28, art. 17, c. 29, of the General Statutes reads as follows: 'Any person who shall wilfully mutilate the graves, monuments, fences, shrubbery, ornaments, grounds, or buildings in or inclosing any cemetery or place of sepulchre; or shall violate the grave of any person by wilfully destroying, removing, or injuring the head or foot stone, or the tomb over, or the inclosure protecting any grave, or by digging into or plowing over, or removing any ornament, shrubbery, or flower placed upon any grave or lot shall be fined not less than ten nor

more than one hundred dollars, or imprisoned not exceeding six months, or both, as a jury may determine.' If the lot in question was sold, the purchaser could not use it for any of the purposes for which town lots are ordinarily used without subjecting himself to the penalties denounced by the foregoing statute, and making the court a particeps criminis in his offense. If it be said that the purchaser must take care of it himself, it will be a sufficient answer that the court ought not to offer that for sale which it will not allow to be used by the purchaser for any purpose that can be of the slightest value to him. The city had complete authority to contract for the work, but had no authority to make it a charge on the abutting property, and is therefore liable to the contractor for the price of his work. *Murphy v. City of Louisville*, 9 Bush, 189."

[1] The statute quoted is still in force, and is now section 1336, Kentucky Statutes. In that case it appeared that the lot was filled with graves, and that the trustee had not funds in his hands belonging to the trust with which to pay the assessment. It does not appear here that the lot sought to be subjected is filled with graves; but we do not regard this as material, for the reason that the statute protects the monuments, fences, shrubbery, and ornaments no less than the graves, and the purchaser would be liable for the same penalties if he disturbed these as he would be if he disturbed a grave. The purpose of the statute is to protect the cemetery, and not merely the graves in it.

[2, 3] The question came before this court again in *Colston v. Eastern Cemetery Co.*, 15 S. W. 245, 12 Ky. Law Rep. 763. In that case the cemetery company was incorporated in the year 1854 (*Loc. & Priv. Acts 1853-54*, c. 469), and by its charter was exempt from sale for any cause under an execution or decree; but by an act of March 24, 1882, cemetery property was made liable for assessment for a street improvement in Louisville. This court adhered to the conclusion reached in *Louisville v. Nevin*, and held the amendatory statute not operative, as the charter of the corporation was granted before the act of 1856. It concluded its opinion with these words: "It must be conceded that in a large city like Louisville the existence of burial grounds becomes a matter of necessity, and, if not placed under corporate control, where money may be invested and donated for the purchase and improvement of grounds to be used for cemeteries, the expense for such a purpose would be a public burden, and hence the state is, or should always be ready to encourage the creation of such corporations, not only to lessen the rate of taxation, but to invest the corporate body with the power to raise such funds as will enable them to beautify and ornament the homes of the dead. This was the object of the charter creating this cemetery, where is found, from the testimony, at the time this action was

instituted, nearly 40,000 graves, and no chancellor should authorize the tax gatherer to invade this territory of the dead to enforce the collection of any assessment made by a state, county, or municipality, or take from the faithful trustee the funds set apart from the sale of lots, and apply them to such a purpose, when, by the terms of the charter, the land itself is exempt from execution."

Under these decisions the land of the cemetery company in question cannot be subjected to the apportionment warrant, and is not subject to a lien therefor, for, under the construction of the statutes there adopted, section 1336, Kentucky Statutes, must be held as creating an exception out of the statutes giving a lien for street improvements. It cannot be presumed that the Legislature intended to create a lien upon property when it declared it unlawful to enter upon it or to disturb it in any way. To hold that the purchaser would violate section 1336 if he took possession of the property is necessarily to hold that the Legislature did not intend to create a lien upon it, for it cannot be presumed that it intended a vain thing. The effect of these decisions is that section 1336, Ky. St., is to be read into the statutes creating the lien on the abutting property, and when it is so read it necessarily excepts cemetery property out of their operation. If the section of the statute giving the lien had contained as a proviso the words contained in section 1336, this would admittedly be their effect, and the result is the same when by judicial construction they are to be read into it or as qualifying it. The Legislature, since these decisions were rendered, has acquiesced in this construction. There is no statute now in force giving the city a right to subject cemetery property; the amendatory act above referred to not having been brought over into the present statutes. The construction of the statute, having been acquiesced in by the Legislature, cannot now be disturbed.

[4-6] It remains to determine if the funds in the hands of the cemetery company may be subjected. To require the cemetery company to pay the apportionment warrant when its land is not subject to a lien would be in effect to make the owner of the property personally liable for the amount sued for. But we have often held that the owner is not personally liable for the cost of a street improvement. *Orth v. Park*, 117 Ky. 791, 79 S. W. 206, 80 S. W. 1108, 81 S. W. 251, 25 Ky. Law Rep. 1910, 26 Ky. Law Rep. 184, 342; *Long v. Barbour Asphalt Co.*, 151 Ky. 1, 151 S. W. 6, and cases cited. To require the cemetery company to pay the money into court is only in another form to subject its property to the lien. All the funds in the hands of the cemetery company are held under a trust to maintain the cemetery, and to require these funds to be paid out for other purposes is to require the trustee to di-

vert the funds from the trust to which they were dedicated.

In *Roe & Lyon v. Scanlan*, 98 Ky. 25, 32 S. W. 216, 17 Ky. Law Rep. 596, a county was indebted to a contractor for the construction of a courthouse, and had set apart a fund for the payment of the debt. Mechanics and materialmen, having claims against the contractor for labor done and material furnished in the erection of the building, had given the notice required by the statute, and it was held that they thus acquired a lien upon the fund, although the lien could not be enforced against the courthouse. The same rule upon like facts was applied in *Noonan v. Hastings*, 101 Ky. 313, 41 S. W. 32, 19 Ky. Law Rep. 485, 72 Am. St. Rep. 419; *Allen County v. Fidelity & Guaranty Co.*, 122 Ky. 833, 93 S. W. 44, 29 Ky. Law Rep. 356. But these cases have no application here. The county had contracted for the building of the courthouse, and had set aside the fund to pay for it. The fund so set aside represented the building, and in giving the laborers and materialmen a lien upon the fund no part of it was diverted from the purpose for which it was dedicated. But here the cemetery company has made no contract; it holds the funds in its hands dedicated to other purposes, and these funds do not represent in any way the lots sought to be subjected, and have no connection therewith. In those cases there was a personal liability for the price of the building; here there is no personal liability.

It is a sound public policy to protect the burying place of the dead. Families scatter; family burying grounds sooner or later fall into decay, and experience has shown that the only way to protect permanently burying grounds is to have some organization similar to appellant. The purchasers of lots in the cemetery bought them and paid for them under a contract that the money they so paid should be used in protecting, keeping up, and ornamenting the cemetery. This constituted a large part of the consideration. To require this money now to be paid out for other purposes would be to divert the trust fund from the purposes to which it was dedicated, and to impair the obligation of the contract. This cannot be done.

We do not see, therefore, that either the land may be subjected to the claim or that the cemetery company may properly be required to pay it out of the funds in its hands.

Judgment reversed, and cause remanded for a judgment as above indicated.

#### GOFF v. RENICK et al.

(Court of Appeals of Kentucky. Dec. 19, 1913.)

#### 1. WILLS (§ 334\*)—CONSTRUCTION—ESTATE DEVISED—CONTINGENT REMAINDERS.

Testator devised certain land to four sons by name for their lives, but after their death

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or the death of either of them, then to the heirs of their or his body, and if either or any of the devisees should die without issue then living, then the land was devised to the survivor and to the descendants then living of those that might be dead, to be divided equally among those surviving and the representatives of those who might be dead, the descendants of either of the brothers to represent their ancestor. *Held*, that the will created contingent remainders as to the share of one of the brothers who had a son living, the first taker after the life estate being the son, provided he outlived his father, but if his father survived him, then the share passed to the next in remainder, who were the father's three living brothers, and last in remainder to the children or descendants of such brothers, who would take if, at the time of the death of the life tenant, his son and the three brothers were dead.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

## 2. REMAINDERS (§ 16\*)—SALE OF PROPERTY—PROCEEDINGS—PARTIES.

Civ. Code Prac. § 491, provides that in an equitable action by the owner of a particular estate of freehold in possession, or by his guardian or committee, against the owner of the reversion or remainder, or, if the remainder be contingent, against the person, if in being, in whom it would have vested if the contingency had happened before commencement of the action, real property may be sold for reinvestment of the proceeds in other real estate. *Held*, that where real property was devised to testator's four sons for life, remainder to the heirs of their bodies, and if any of the devisees should die without issue then living, then to the survivor and the descendants then living of those that might be dead, etc., and it was sought to sell the interest of one of the brothers who, at the commencement of the action, was alive and had an adult son, the contingent remaindermen, to wit, the other brothers and their descendants, were bound by the proceedings by representation, and were not necessary parties.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. § 16.\*]

## 3. REMAINDERS (§ 16\*)—SALE—PARTIES—JOINER—PLAINTIFFS OR DEFENDANTS.

Where contingent remaindermen are necessary parties to a proceeding to sell land for reinvestment, it is not necessary to make them defendants if they voluntarily join as plaintiffs and pray for the relief asked in the complaint.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. § 16.\*]

## 4. REMAINDERS (§ 16\*)—SALE OF PROPERTY—PROCEEDINGS—PROOF—AFFIDAVIT.

Under Civ. Code Prac. §§ 543-547, allowing the taking of proof by affidavit in certain cases, such practice was properly permitted in a proceeding to sell real property devised for life subject to contingent remainders, where the parties in interest were all plaintiffs and the object to be attained by the action was for the benefit of all.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 11; Dec. Dig. § 16.\*]

### Appeal from Circuit Court, Clark County.

Action by J. Scott Renick and others for the sale of certain real property for reinvestment. From an order confirming the sale and overruling exceptions interposed by Ben. D. Goff, the purchaser, he appeals. Affirmed.

Geo. C. Webb and S. M. Wilson, both of Lexington, and J. F. Winn, of Winchester, for appellant. Pendleton, Bush & Bush, of Winchester, for appellees.

**SETTLE, J.** This action was brought, pursuant to section 491, Civil Code, by the life tenant and remaindermen to obtain a decree for the sale of 410 acres of land in Clark county, described in the petition, and the reinvestment of its proceeds in other real estate. By the judgment rendered, the sale of the land was ordered as prayed in the petition, and it was thereafter sold at public auction, after due advertisement, by the master commissioner to the appellant, Ben. D. Goff, the highest and best bidder, at the price of \$170.70 per acre, aggregating about \$70,000. Following the filing of the report of sale by the master commissioner, appellant filed numerous exceptions thereto, but, on the hearing of these exceptions, they were overruled by the circuit court, and the sale confirmed. From the judgment entered in pursuance of these rulings, this appeal is prosecuted.

While, in the brief of counsel for appellant, practically all of the exceptions that were filed in the court below to the report of sale are directly or indirectly relied on, we will consider only such of them as have any material bearing on the validity of the sale. It is contended by appellant that there was a fatal defect of parties, in that all persons interested in the property sold were not made parties to the action. Before considering this contention, it will be necessary to determine what persons were interested in the land. The title to the land sold was derived from the will of Abram Renick, deceased, and from the commissioners' deed made pursuant thereto, by which it was conveyed. The clause of the will devising this land is as follows: "All the land herein given to Abram Renick, Jr., Morris Renick, Brink Renick and Scott Renick I devise to them, each of them during their several natural lives, but after their death or the death of either of them to the heirs of their or his body. If either or any of said devisees should die without issue then living, I hereby devise said land to the survivor and to the descendants then living of those that may then be dead to be divided equally among those surviving and the representatives of those who may be dead, the descendants of either of said brothers to represent their ancestor." The commissioners' deed contains the following clause: "To have and to hold said property with its appurtenances unto the said grantee (J. Scott Renick) as provided in the will of Abram Renick, deceased."

[1] The devisees were individually named by the testator, Abram Renick, and the tract of land here involved was that received by J. Scott Renick under the will in question.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

It is admitted that J. Scott Renick is the holder of the life estate, and that he has only one child, a son, who is of age and married, and, further, that J. Scott Renick's brothers, Abram Renick, Jr., Morris Renick, and Brink Renick, are all living, and that they are adults, married, and the fathers of children. It will be observed that, under the provisions of the will, this land was devised to J. Scott Renick for his natural life, and at his death it was to go to the heirs of his body, but in the event he died without issue then living, it passed, by the terms of the will, to his brothers named, Abram Renick, Jr., Morris Renick, and Brink Renick, or to the living descendants of those who might be dead, "to be divided equally among those surviving and the representatives of those that may be dead, the descendants of either of said brothers to represent their ancestors." It is apparent, therefore, that when this action was instituted, the life tenant, his son, who would take at his death, and his three brothers, who were to take in the event the life tenant died without leaving issue then living, were all in being, of age, and free from disability. Obviously, several contingent remainders are created by the will; the first taker being the son of the life tenant, viz., H. Phelps Renick, provided he outlived his father. But, if he is survived by his father, then the next remainder is to the three living brothers, Abram Renick, Jr., Morris Renick, and Brink Renick; and the last remainder is in favor of the children, or descendants, of these three brothers, who would take if, at the time of the death of the life tenant, J. Scott Renick, his son, the three brothers were all dead. The action was instituted by J. Scott Renick, Princess Renick, his wife, Harry Phelps Renick, his son, Abram Renick, B. M. Renick, and Morris W. Renick, his brothers, all being plaintiffs. Section 491 of the Civil Code, under which the action was brought, provides: "In an equitable action by the owner of a particular estate of freehold in possession, or by his guardian or committee if he be an infant or of unsound mind, against the owner of the reversion or remainder, though he be an infant or of unsound mind, and against the owner of the particular estate if he be an infant or of unsound mind; or, if the remainder be contingent, against the person, if in being, in whom it would have vested if the contingency had happened before commencement of the action, though he be an infant or of unsound mind, and against the owner of the particular estate though he be an infant or of unsound mind—real property may be sold for reinvestment of the proceeds in other real estate."

[2] Counsel for appellant insists that the children of Abram Renick, Jr., Morris Renick, and Brink Renick were necessary parties to this action, and that the sale of the land by the commissioner was invalid, and

should be set aside, because they were not brought before the court. We regard this contention unsound, for under the section supra, as these remainders were contingent and go in successive order, it was only necessary to bring before the court, in order to obtain a valid sale of the property for reinvestment of the proceeds, "the person, if in being, in whom it [the title] would have vested if the contingency had happened before commencement of the action." The son of the life tenant was the only person in being in whom this estate would have vested if his father, the life tenant, had died before commencement of the action. In other words, there is only one contingency, under the terms of the will, on the happening of which the estate is to vest in the remainderman, and that is the death of the life tenant. When J. Scott Renick dies, the estate cannot go to all the remaindermen named in the will, but only to the remainderman first in order, who is in being at that time. Therefore, if the son of the life tenant is living, he takes, and the others do not, thus making in the father and son, if that contingency happens, an entire and complete estate, which is the first estate; but if, before the death of J. Scott Renick, his son should die, and there were no other children of either J. Scott Renick or of his son, that would open up another contingency, by which the brothers of J. Scott Renick would take to the exclusion of all others. The estate that would fall to them, in that event, together with the estate held by the life tenant, would necessarily constitute an entire and complete estate in fee, which would be the second estate. But there is further a third and last contingency, dependent upon the second, as the second is dependent upon the first, each subordinate to the other, the last arising in the event of the death of the son of the life tenant and the three brothers before the happening of the contingency, viz., the death of the life tenant, in which case the children of the three brothers, or of such of the three brothers as may die, would take as representing their ancestor—that is, their father's part—and in this condition, we have again an entire estate in fee, made up of the life estate and these remainders in the event they should take, which would make the third estate. But, after all, the vesting of the estate is actually determined by the happening of the one contingency; that is, the death of the life tenant. If our construction of section 491 of the Civil Code correctly interprets its meaning, the brothers of the life tenant, Abram Renick, Morris Renick, and Brink Renick, were not necessary parties to the action, though doubtless made so as a matter of precaution on the part of the life tenant, and to show their approval of the sale of the land.

The construction here given the section of the Code, supra, as well as the application

made of its meaning, has repeatedly been sanctioned by this court. *Luttrell v. Wells*, etc., 97 Ky. 84, 30 S. W. 10, 16 Ky. Law Rep. 812, was an equitable action under this section for the sale of real estate, in which there were remainder interests, for reinvestment of the proceeds in other real property. The property sought to be sold consisted of a farm in Mason county, the title to which was derived under certain provisions of the will of Richard Wells, which devised to his son, William, the rents and profits of the farm during his life and at his death, if his wife survived him, she was to have the use and profits of the land until their youngest child arrived at the age of 21 years, upon the happening of which event the farm was directed to be sold and the proceeds divided between the widow and children of William, she to take a child's part. The will further provided that, should William survive his wife, then, at his death, the farm should be sold and the proceeds divided between his children and their heirs; the heir of a child to take the share of the deceased parent, should one or more of the children be dead when the land was sold, and the proceeds divided according to the provisions of the will. William Y. Wells, his wife, and their six adult children, with the husbands of their daughters who had married, and the two infant children of Wells and his wife were made parties to the action. The purchaser of the property at the decretal sale excepted to the confirmation of the sale, upon the theory that, as some of the children of William Y. Wells, the life tenant, might die before he did, in which event the share of the one dying would, under the terms of the will, pass to his heirs, probably meaning children, and as it cannot for that reason be told who might be entitled to take in remainder under the will, the purchaser could not get a perfect title under the decretal sale. In overruling this exception, the court said: "It is sufficient to say that section 491 of the Code was designed to meet such cases, and that although the remainder may be contingent, yet if the person in being, in whom the remainder interest would have vested if the contingency had happened before the commencement of the action, be properly before the court, as seems to have been the case here, a complete and perfect title may be passed under a proceeding conforming to the provision of that section and the subsequent sections of the Code regulating such proceedings."

It is not to be overlooked that proceedings under this section of the Code are merely for the purpose of changing the investment, and the sale cannot be made unless it is established by proof to the satisfaction of the chancellor that it will inure to the benefit of those owning an interest in the property; and it goes without saying that a reinvestment in real estate, which will benefit the

life tenant and the first taker in remainder, must also benefit the second taker in remainder, and also the third as well. Therefore, on the question of benefits, all the contingent remaindermen must, and will, be affected alike, where the sale is for reinvestment in like property. In all cases the court must pass upon that question before sale is ordered. So, it is to be presumed that the more remote contingent remaindermen will be as much benefited by the sale as the remaindermen standing next in order ahead of them.

In this connection, it is well to notice that section 498 of the Code, which authorizes the sale of trust estates, with remainders, for reinvestment, provides that where lands are held in trust by one for the life of another, with remainder over to a class of persons, or to any person not ascertained, or to be ascertained, until the death of the life tenant, or where the life tenant has the power to dispose of the estate by will or an instrument in the nature of a will, it is provided that such estates may be sold in an action "to which all persons having a present or vested interest in such lands are parties." And this is followed by the further provision in the section that any deed or mortgage so made under order of court "shall be held and construed to have the same effect as if executed by every person having a vested or contingent interest in and ownership of said land, and as if executed by all persons and classes who would take under the limitations or provisions of said deed, or as devisees under the exercise of such power to devise or appoint, and as if every claimant, present or future, under such deed or power, was under no disability whatever."

It is also to be noted that contingent remainders may be sold under this section of the Code without making the contingent remaindermen parties. For only those who have a present or vested interest are required to be made parties, notwithstanding which the contingent remaindermen are concluded by the judgment of sale. While it is true that this section contemplates the existence of a trustee, acting in a representative capacity, its provisions are nevertheless consistent with the recognized doctrine that parties may be made by representation as well as by actual service of process; those acting in a representative capacity as to others who succeed them in interest being held to protect the subsequent interest. It is therefore a rule, recognized by the courts, that persons holding remote contingent interests are not required to be actually brought before the court, but will be treated as parties, where the interests are properly represented by those next before them, if the latter are before the court. *Fritsch v. Klausling*, 13 S. W. 241, 11 Ky. Law Rep. 788, is a case in which the above rule was applied. A satisfactory statement of the rule is given in *Hermann v. Parsons*, 117 Ky. 239, 78 S.

W. 125, 25 Ky. Law Rep. 1344. With respect to a ruling of the circuit court that certain grandchildren of a testator owning a contingent remainder interest in the real estate in litigation should have been made parties to a previous action in which it was sold, and that, as they had not been made parties, they still retained their interest, we said: "We are of the opinion that the lower court erred. These appellees, under this will, merely held contingent remainder interests. Their grandmother held the life estate, and their father the fee, subject to be defeated by his death before his mother's death. The general rule is that it is sufficient to bring before the court the persons whose several interests combined make up the first estate of inheritance. As these appellees' grandmother and their father were parties to that action, and they owned together the first estate under the will at that time, it was unnecessary to have made appellees parties, as they were only contingent remaindermen, and were bound by representation. See Calvert on Parties, p. 251; Freeman on Judgments, § 172. The reason for this rule is stated in *Faulkner v. Davis*, 18 Grat. (Va.) 651, 98 Am. Dec. 698, where the court said, 'This rule of representation often applies to living persons who are allowed to be made parties by representation for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self-interest and affection to make such defense, and they, therefore, consider it unnecessary to make such persons parties, and indeed, improper to do so, and thus compel them to litigate about an interest which may never vest in them.' Their father who held the first estate subject to the life estate of his mother was a party. He had a motive of self-interest and affection to cause him to make defense." Although the opinion calls attention to the fact that there are cases in which a distinction has been made between one who is in privity with the estate and one who is a stranger to the instrument by which the contingent remainder has been created, yet the rule as to representation was conceded to have been properly applied in the case of *Fritsch v. Klausung*, supra, and in that case *Mrs. Evans*, who instituted the action, was not a stranger to the instrument creating the estate, but her relation thereto, like that of the appellees in the instant case, was that of a privity.

In 23 Cyc. 1245, *Hermann v. Parsons* is, among other cases, cited as sustaining the following statement of the doctrine under consideration: "Persons having a remote, contingent, or expectant interest in realty are bound by the judgment rendered in an action concerning the property, although not made parties to the suit, if the holder of the first estate of inheritance is a party, as he represents them. And estates limited over to persons not in esse are represented by

the living owner of the first estate of inheritance, so that a decree in a suit to which the first holder, a living person, is made a party will conclude the rights of after-born remaindermen."

In the more recent case of *Walsh v. Parr's Ex'r*, 110 S. W. 300 (not elsewhere reported), the rule of being bound by representation was again applied, although the land was sold under section 490, Civil Code. The opinion also refers to *Fritsch v. Klausung*, shows its application to the case in hand, and concludes its reference to it as follows: "In that case the interests of the contingent remaindermen were secured by a reinvestment of the proceeds of the sale of their property upon the same terms and conditions as specified in the deed. In the case at bar the contingent remaindermen's interests are protected in the same manner, and they have no interest in the property in litigation."

It is apparent from the opinions in *Hermann v. Parsons*, and *Walsh v. Parr's Ex'r*, that the rule was recognized as applying, whether the sale is procured by a stranger to the instrument creating the estate, or by one or more of those holding under it.

In the more recent case of *McClure v. Crume*, 141 Ky. 361, 132 S. W. 433, the rule in question was again applied as to unborn contingent remaindermen; it being, in substance, held that section 491, Civil Code, was enacted to protect their interest in the real estate sought to be sold for reinvestment, by representation through the contingent remaindermen in being, made parties to the action. In this case the proceeds of the real estate sold were allowed to be reinvested in similar property in another state.

Tested by the provisions of section 491, Civil Code, and the foregoing authorities, it is manifest that all the necessary parties in interest were before the court when the judgment of sale was rendered. It is equally manifest from the record that the sale of the land and reinvestment of its proceeds as adjudged will be to the benefit of all the parties in interest, and that, in making the reinvestment, the court will require the real estate to be conveyed to the parties in interest in the same manner and under the same limitations as the land sold was devised them by will of *Abram Renick*.

[3] We find no merit in appellant's contention that the remaindermen, brothers of the life tenant, should have been made defendants to the action. If it would have been proper to adjudge the sale and reinvestment prayed, by making the remaindermen in question defendants, their voluntary act in making themselves plaintiffs to the action and joining in the prayer for the relief asked could have no other than the same legal effect, and served to reduce the cost of the proceedings. Besides, we have in numerous cases recognized the right of the parties in interest to so conduct the proceedings: *Howard, etc., v. Singleton, etc.*, 94 Ky. 336, 22

S. W. 337, 15 Ky. Law Rep. 309; Shelby, etc., v. Harrison, etc., 84 Ky. 148.

[4] The only other material contention of appellant is the complaint raised by one of the exceptions that the evidence as to the necessity for the sale of the land was permitted by the court to be made in the form of affidavits. This objection from the purchaser of the land is not tenable. In an ex parte proceeding, proof is often made by affidavits. There are in this case no infants or other persons under legal disability. The Civil Code (sections 543-547) allows, in certain cases, the taking of proof by affidavit; and where, as in this case, the parties in interest are all plaintiffs, and the object to be attained by the action is for the benefit of all, it will be presumed, in the absence from the record of a contrary showing, that the taking of proof by affidavit was consented to by all the parties.

There is no error in the judgment appealed from, wherefore it is affirmed.

#### KENTON WATER CO. v. CITY OF COVINGTON et al.†

(Court of Appeals of Kentucky. Dec. 19, 1913.)

##### 1. COURTS (§ 106\*)—ADOPTION OF OPINION OF LOWER COURT.

Where the opinion of the lower court is contained in the record, the appellate court may, without impropriety, adopt it as its own, though it is rarely done.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 359; Dec. Dig. § 106.\*]

##### 2. WATERS AND WATER COURSES (§ 183\*) — WATERWORKS—ACQUISITION BY CITY—CONTRACTS.

A water company, having contracted to supply a town with water, contracted with a neighboring city to purchase the water which was to be transmitted to the town by a system to be installed by the company, but the contract further provided that, should the city, during the term of the contract, annex the town, it should have the option of purchasing the company's property; the price to be fixed by arbitration. The city, after having annexed the town, made an offer to purchase at a fixed price. *Held*, that this proposition was nothing more than an offer upon the part of the city to make a new contract, and was not an exercise of its option to purchase under the contract, and did not bind it to have the price fixed by arbitration.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 73\*)—STATUTE—VALIDITY—LEGISLATIVE CONTROL.

Laws 1910, c. 83, requiring any city, before establishing its own water system in any neighboring town which it might annex, to purchase the property of the company then supplying the town, violates Const. § 181, prohibiting the General Assembly from imposing taxes for the purposes of any county, city, etc., since the purchase of waterworks would necessitate the levy of a tax, and the Legislature cannot do indirectly what it cannot do directly.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 177, 178; Dec. Dig. § 73.\*]

##### 4. MUNICIPAL CORPORATIONS (§ 64\*)—LEGISLATIVE CONTROL.

The extent of legislative control over municipalities extends as far as is essential to accomplish a result in which the state has an interest in its governmental capacity, but this power does not extend to depriving the municipality of discretion in the means or methods of accomplishing the result.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. § 64.\*]

##### 5. MUNICIPAL CORPORATIONS (§ 70\*)—LEGISLATIVE CONTROL.

The establishment of a water system in a city is not a governmental function in which the state may have such an interest as would give it power to compel its maintenance therein.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 170-174; Dec. Dig. § 70.\*]

##### 6. CONSTITUTIONAL LAW (§ 70\*) — JUDICIAL FUNCTIONS—WISDOM OF STATUTE.

Courts can only pass upon the validity of a statute and have nothing to do with its wisdom.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

##### 7. MUNICIPAL CORPORATIONS (§ 286\*) — IMPROVEMENTS—STATUTES — REPEAL—VALIDITY OF REPEALING ACT.

The authority of the city of Covington to construct and maintain a water system granted by Ky. St. § 3058, subsec. 4, was not repealed by Laws 1910, c. 83, prohibiting the city from establishing its own water system until it shall have purchased the property of any water company then supplying, since the latter act was void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 712; Dec. Dig. § 286.\*]

##### 8. CONSTITUTIONAL LAW (§ 40\*)—VALIDITY OF STATUTE.

When the Constitution has expressly denied the Legislature the right to require a particular thing to be done, then it cannot by indirection require it to be done by attaching it as a condition to the exercise of some other power granted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 38; Dec. Dig. § 40.\*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

Action by the Kenton Water Company against the City of Covington. Judgment for defendant, and plaintiff appeals. Affirmed.

S. D. Rouse, of Covington, for appellant.  
S. L. Blakely, of Covington, for appellee.

SETTLE, J. [1] Where, on an appeal, the record is found to contain, as in this case, a carefully written opinion from the judge of the court rendering the judgment appealed from, which fairly indicates the issues of law and fact involved and presents satisfactory reasons and authority in support of such judgment, and this court, upon considering the appeal, is convinced of the correctness of the judgment, it may, though such a thing is rarely done, without impropriety, adopt and hand down the opinion of the circuit judge and thereby make it its own. That course will be pursued in this instance:

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.



the opinion, in the conclusion of which we fully concur, being as follows:

"In this action it is sought by mandamus to compel the defendant to purchase the plaintiff's water plant in former Latonia, now the city of Covington, and to compel the defendant to appoint an arbitrator to fix the price. It is also sought to enjoin the defendant from installing a water system in that part of Covington which was formerly Latonia.

"The facts, as disclosed by the petition and the pleadings, which constitute the basis for the first asserted right are as follows: On June 26, 1903, the plaintiff and the town of Latonia entered into a contract by which the plaintiff was to furnish water to said town and its citizens in accordance with the contract until April 5, 1913, and it installed in that town a water system and proceeded to furnish water under that contract. There is no provision in this contract either binding the town to purchase the water system at any time, or that confers or gives the town any option to purchase, or that relates to the acquisition of the water system during the continuance of the contract or after it expired.

"In furnishing water to Latonia, it was anticipated that the plaintiff would purchase the water to be furnished Latonia from the city of Covington and transmit it through a system to be installed by the plaintiff connecting the water system of Covington with Latonia. This was done by the plaintiff, and, in pursuance of this, plaintiff on April 13, 1903, entered into a contract with the city of Covington whereby the city of Covington was to furnish the water to be by it provided for the town of Latonia for a period of 12 years, commencing May 1, 1903. In this contract it was provided: 'If at any time during the term of this contract the city of Covington shall annex the town of Latonia, that the Kenton Water Company shall sell to the city of Covington, if it so elects to purchase, all its property in said town and district, the city to pay therefor such sum of money as the board of arbitration shall fix as its value, the city to select one arbitrator, and the Kenton Water Company one, and, in case of disagreement, they to select the umpire to act with them; the finding of a majority of said board to be final between the parties.'

"In 1909 the city of Covington annexed the town of Latonia, and thereafter the general council of Covington passed a resolution by which it offered to purchase from the plaintiff its water system at the price of \$26,331.45, which offer was to remain open for ten days. The offer was not accepted by the plaintiff, but counter propositions were made at a fixed valuation, which were likewise rejected.

[2] "It is now contended that this offer of the city of Covington to purchase the prop-

erty at the fixed price of \$26,331.45 was an election on the part of the city to purchase the property in accordance with the provision of the contract above set out and binds it to have the price arbitrated and to accept the property at the price fixed. The contention is so palpably erroneous as needs but little response to it. It is sufficient to say that no authority cited by the plaintiff sustains such a contention. The language quoted from Dillon in plaintiff's brief relates expressly to cases where the city is either by contract or statute bound or compelled to purchase at the expiration of the franchise, or in the event of establishing its own water system in the territory. In this case it was purely optional under the contract for the city to purchase the property and have its value fixed by arbitration, and clearly its offer to purchase at a fixed price, which was not accepted, and which was nothing more than an offer to make an entirely different contract, cannot be turned into an acceptance of the option to purchase the plant at a valuation to be fixed in accordance with the terms of the option.

[3] "The right asserted to have the defendant enjoined from installing its own water system in that part of the city which was formerly Latonia is based upon the following statute, enacted in 1910, and after the annexation of the city of Latonia to the city of Covington, but before the franchise of the plaintiff to furnish water to Latonia had expired. The statute is as follows: 'In case the city shall secure the franchise for supplying any neighboring town, city or municipality, or in case of the annexation of any neighboring town, city or municipality, and if in such city, town or municipality, any water company or person has theretofore laid or constructed water mains, fire plugs, hydrants, etc., in any such city, town or municipality, for the purpose of supplying the same and its inhabitants with water, then, and in that event, the city obtaining said franchise, or annexing said town, city, or municipality, shall be required, before they exercise any franchise therein for supplying water, to purchase all water mains, fire plugs, hydrants and other attachments belonging to said water companies or person or persons in said city, town or municipality, at a price to be agreed upon by the parties, and in the event of a disagreement, the price to be fixed by a board of appraisers consisting of three persons, one to be selected by the city, one to be selected by the water company, and the two so appointed to select the third.' If this act is valid, it follows that the city of Covington cannot install its water system and exercise its right of furnishing water to former Latonia without first purchasing the water system of the plaintiff in that territory, as this act of the Legislature requires this to be done. The validity of this act is, however, assailed

as being in conflict with subsection 15 of section 59, and of sections 19, 181, and 242, of the Constitution of Kentucky, and of the fourteenth amendment to the Constitution of the United States.

"Section 181 of the Constitution provides: 'The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipality, but may by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions.'

"It is clear that to purchase the water system of the plaintiff requires the levy and assessment of taxes by the city of Covington, and I take it as conceded by counsel for the plaintiff, and at any rate it is well settled by reference to all the authorities, that had this statute undertaken to compel, or had simply directed, cities of this class to purchase or acquire private water systems within its corporate limits, to be compensated for in the manner provided by this statute, it would clearly be in conflict with the constitutional provision under consideration, and therefore void. But the point is made that this statute does not compel the city of Covington to purchase its water system but simply makes the purchase of its water system a condition precedent to the right of the city to establish a water system in a part of the city which has recently been brought within the city limits, leaving it optional with the city whether it will establish a water system in that territory or not, and that the Legislature has the power to do that, even though it would in effect require the city to levy and assess a tax to purchase the plaintiff's water system in the event the city should elect to establish its own water system in that territory. To support this contention the plaintiff cites *Dillon on Municipal Corporations*, § 182 (5th Ed.); *National Water Works Co. v. Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827; *Newburyport Water Co. v. Newburyport* (C. C.) 103 Fed. 584; *Citizens' Gas Light Co. v. Wakefield*, 181 Mass. 432, 37 N. E. 444, 31 L. R. A. 457. In the examination of these cases and others cited, the court finds three classes of cases: (1) Where a similar provision for the purchase of the water system of a private corporation is provided in a contract between the city and the water company under which the water company exercises its franchise. (2) Where a similar statute has been enacted and there is no constitutional provision similar to ours. (3) Where there is a constitu-

tional provision similar to our own and where a similar statute was involved.

"*National Water Works Co. v. Kansas City* was a case where there was no statute and no question of constitutional limitation involved. In that case the city had bound itself by contract to purchase the private corporation's water system at the expiration of the franchise, and therefore is not pertinent upon the question of legislative control.

"In *Newburyport Water Co. v. Newburyport* and in *Citizens' Gas Co. v. Wakefield*, there does not appear from the opinion in the case that there was any constitutional provision such as is involved here, but, in the absence of such a provision, the validity of a statute similar to the one in question was sustained, and in the latter case it did so upon the ground that it was a matter of election with the city, and not compulsory, whether or not it should construct its gasworks, but that if it did it must purchase the company's plant, as was provided by the statute.

"*People v. Common Council of Detroit*, 28 Mich. 288, 15 Am. Rep. 202, and *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278, are not squarely in point, as they involved the question of legislative authority to compel the construction of parks, but they are authority, or at least the first case is authority, for the proposition that, even in the absence of any constitutional provision restricting the power of the Legislature, it has not the power to legislate concerning any matter of purely local concern, and held the statute invalid.

"The case of *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412, is a case exactly similar to the case at bar. In that case there was a constitutional provision similar to ours, and in that case the statute provided that, in the event the city established its own water system, it must purchase the system of the company then operating the waterworks, but leaving it optional with the city whether or not it would establish its own system, and in that case the statute was held invalid and in conflict with the constitutional provision. In the construction to be given the law as laid down in this latter case it is contended for the plaintiff that in the Montana case the furnishing of water by a city to its citizens was held to have been done by the city in its private capacity; while in Kentucky the same act is held to be a governmental function, and that, as the right of legislative control turns upon the first question as to whether the establishing of a water system by a city is a governmental function or not, therefore, where it is held to be a governmental function, that the right of legislative control must be admitted.

[4] "I do not find that the distinction mentioned is laid down in the Montana case as the decisive or at all controlling point. In some cases this question of what is done by the city in its private capacity, as distin-

guished from its governmental capacity, is made the criterion of the right or absence of the right of governmental control, but even in those cases the accomplishment of a result, in general, is the thing which is held to be governmental and not the particular means to be used to accomplish it. As an illustration of what is meant, it is clear that the preservation of good order and peace in a city is a matter in which the state is concerned, and even though the state might legislate to the effect that a police department be established and maintained, and even might prescribe the number of police which should be employed, and what their pay should be, and compel the city to levy a tax to maintain it, or it might prescribe other things essential to be done which fairly could be said to be essential to the ultimate purpose to be achieved, and in which the state is interested, the preservation of good order and peace in the community, but none of the authorities cited, or which the court has examined, hold or intimate that the Legislature could provide that a particular piece of property should be purchased at a given price for the purpose of building a police office and direct a levy of a tax to pay for it. Suppose the Legislature should by legislation direct an expensive piece of property be purchased and an extravagant building erected, and levying a tax for that purpose upon the city, will it be contended that the Legislature has such power simply because the preservation of good order and peace within the city is a governmental function? The extent of legislative control over municipalities extends, so far as is essential, to accomplish a result in which the state has an interest in its governmental capacity, but this power does not extend to depriving the municipality of discretion in the means or method of its accomplishment, or the expense it will incur for that purpose, where such minute or specific control in details or means is not essential to the accomplishment of the result, and which interest in the result constitutes the basis of legislative right of control.

"In the cases cited and examined by both the plaintiff and the defendant, the question was constantly put as to what interest the state had in the doing of the act directed by the Legislature to be done, and whether it was a matter of purely local concern was the matter or point upon which the right of the legislative control was made to depend. Suppose the state can be said to have an interest in the matter of supplying the newly annexed territory with water, putting it upon the ground of public health, has it any interest in what particular pipes or property the city shall purchase or utilize to serve that purpose? Even if the shadowy distinctions between governmental and private functions of a city be the turning point in determining the right or absence of right of legislative control, the question is determin-

ed, not by whether or not the general purpose to be achieved is governmental or private, but whether or not the particular thing directed by the act of the Legislature is one in which the state is interested as essential to the accomplishment of the purpose.

[5] "While the court has discussed this question at some length upon the assumption that the establishment of a water system in a city is a governmental function in which the state may have such an interest as would give it power to compel its maintenance in a city, yet the court is of the opinion that the Court of Appeals of this state, in common with the weight of authority elsewhere, is to the contrary.

"Board of Councilmen v. Commonwealth, 94 S. W. 648, 29 Ky. Law Rep. 699, and the subsequent cases following it are relied upon by the plaintiff. Prior to this case, the Court of Appeals has held in *City of Covington v. Commonwealth*, 39 S. W. 836, 19 Ky. Law Rep. 105, that an exemption from taxation given to 'public property used for public purposes,' was synonymous with an exemption given to 'public property used for governmental purposes,' and then held that a water system of a city was not property used for governmental purposes, and that it was therefore subject to taxation. Subsequently, as will be seen by the opinion in *Board of Councilmen v. Commonwealth*, 94 S. W. 648, 29 Ky. Law Rep. 699, the court changed its mind about the exemption for 'public purposes' being the same as an exemption 'for governmental purposes,' and held that the water system was used, not 'for governmental purposes,' but was used for 'public purposes,' and that therefore it was exempt. Now the reading of these cases will show that the court did not hold in the latter case that a water system of a city was used for 'governmental purposes,' but, on the contrary, it adhered to its former opinion that it was not held or used for 'governmental purposes,' but it held that this was different from 'public purposes,' and that it was held for 'public purposes.' The change of opinion was not as to what property was held for 'governmental purposes' but to the effect that property used for 'governmental purposes' was not the same as that held for 'public purposes,' and that a water system was not embraced within the latter. This being true, the whole contention of the plaintiff that the matter is subject to legislative control because a water system of a city is used for governmental purposes fails.

[6] "It has been urged in the briefs by counsel that the effect of this statute, being invalid, would be to permit the city to build a system which would render its system of little value and would eventually compel them to sell to the city for an insignificant sum; on the other hand, it is contended that, if it is valid, then the city will be compelled to purchase and pay for a water system wholly

inadequate and useless, and which it would be compelled to discard if it purchased it. I take it that the validity of the act can only be measured by the legislative authority to enact it and not by the effect it may have in any particular case. If the Legislature has the power to enact it, then any loss it might impose upon the city must be borne by it, and upon the other hand, if it had not the power to enact it, any detriment or loss to the plaintiff which might result by reason of the want of such statute or the authority to enact it must be borne by it, otherwise the courts would be holding the statute valid in some particular instance and invalid in others. With the wisdom of enacting the statute the courts have nothing to do; it being simply a question of legislative power.

[7] "The last proposition involved is this: It is contended by the plaintiff that the authority of a city to construct or maintain a waterworks system is purely a matter of legislative grant, and that, without such legislative grant, it has no authority to construct or maintain a water system, and therefore it is subject to be withdrawn at any time or repealed, qualified, or modified, and that either the act of 1910 (Laws 1910, c. 83) is the only authority for the city's power to construct a water system, or, if it had power to do so by prior legislative grant, that it was repealed by the act of 1910, and that, as the city therefore has no authority to construct or maintain the water system proposed, an injunction should go against it to prevent it, even though the provision relative to the purchase of its plant be invalid. At the time of the enactment of the statute in 1910, and for many years prior thereto, the city of Covington had legislative authority to construct and maintain a water system, which authority was given by subsection 4, § 3058, Kentucky Statutes. If it be contended that this authority was limited to such territory as was then embraced within its boundaries, and not applicable to such as might thereafter be brought within it, it seems to the court that it is so palpably groundless as not to require any citation of authority. In fact, the court feels so certain about it that it has not examined any authority upon the subject, as none has been cited by the plaintiff.

"There is no authority for the contention to the effect that the power of a municipality to construct and maintain a water system must come by way of legislative grant. There is also authority for the position that the doing of whatever is essential to promote the public health is inherent in the municipality. I have not found any authority in Kentucky which has decided the question, and the opinion in the case of *Board of Councilmen v. Commonwealth*, 94 S. W. 648, 29 Ky. Law Rep. 699, relative to the relation existing between a water system and the public health, throws some doubt upon whether the power is only to be obtained by legis-

lative grant. However, the court is of opinion that that is immaterial here. Conceding that the power must be found in a legislative grant, it existed by legislative enactment at and prior to the act in question, and the question resolves itself into whether the provision of the act of 1910, prohibiting the exercise of that power in a given territory within the city except upon the condition that it purchase such water system then in use, had the effect of repealing the former legislative grant, where the condition attached was one which, by express provision of the Constitution, it was prohibited from enacting. I have not the slightest doubt that the Legislature has the power to attach, as a condition to the exercise of a power granted, any condition which is not denied it by the Constitution to make, nor of its power to restrict a power already granted by such condition.

[8] "On the other hand, where the Constitution has by express provision denied the Legislature the right to require a particular thing to be done, or to legislate upon a particular subject or in a particular way, then the Legislature cannot by indirection require it to be done by attaching it as a condition to the exercise of some power which it has granted and which is essential to the public welfare that it be exercised. To do this would be to permit the constitutional provision to be indirectly violated and render it a nullity, for, in order to accomplish or put in force any legislation which it had been denied the power to enact, all it would require would be to attach it as a condition to the exercise of a power which it had granted and which was necessarily essential should be exercised for the public good. The Legislature had no power to require municipalities to purchase water systems within its boundary which would require the assessment and levy of a tax.

"It is perfectly apparent that the purpose of this act was not to repeal the power granted to the city to maintain a water system within its boundary, or in any part of it, and, except upon the assumption that it might render enforceable the provision requiring the city to purchase the plant of water companies, would never have been enacted. That the Legislature did not regard the establishment of a water system in this territory as a thing to be prohibited is evidenced by the fact that it permitted it, conditioned only upon a condition which it had no authority or power to make and which had expressly been denied it. The act in that particular is therefore void, and the provision prohibiting the city from establishing a water system in the territory, except upon this illegal condition, cannot be held to have repealed the power formerly granted, which granted the city the power to construct and maintain a water system anywhere within its boundaries. Having reached this conclusion, it is unnecessary to con-

sider the other objections urged as to the validity of the act."

Judgment affirmed. Whole court sitting.

LOUISVILLE & I. R. CO. v. KRAFT.

(Court of Appeals of Kentucky. Dec. 24, 1913.)

Dissenting opinion.

For majority opinion, see 156 Ky. 66, 160 S. W. 803.

NUNN, J. (dissenting). I am in complete accord with the principles announced in this case to the effect that every private and public interest demands of railroad employes the imperative duty to observe and conform to all reasonable rules and regulations imposed by the company for the protection of life and property, and that any trainman who violates such rules, of which he has knowledge and has undertaken to perform, takes upon himself the personal consequences of his dereliction. If injury results to him by reason of such violation, and which would not, in any probability, have occurred but for it, he should suffer the consequences of his fault. But in applying these principles due consideration should be given to the question of whether the rule in question is reasonable and just; otherwise there is no room for application of the principles stated in the opinion. If the rule is unreasonable, unjust, conflicting, or of doubtful meaning, and there is an indication that it was arbitrarily made by the railroad company for the mere purpose of relieving it of liability, then employes cannot, and should not be, held to that strict accountability.

The Sinclair Case, 100 S. W. 236, 30 Ky. Law Rep. 1040, cited in the opinion, makes this distinction clear, as will be seen from the following quotation taken from it "If a railroad company can make rules that will exonerate it from liability to employes for the gross negligence of the person or persons who represent it as vice principals, without reference to whether the rules are reasonable and just or not, then there is no reason why it should not enact rules that will afford it immunity in every case where an employe is injured."

The opinion quotes as controlling in this case rules 209, 210, and 219, but it omits another rule which was introduced in evidence, and is quite as applicable as any of the three quoted. That rule is the train schedule, or time card governing the operation of appellant's cars. I do not mean that employes were obliged to run their cars on schedule time regardless of the rules quoted, but it was their duty so to do unless in conflict with the rules, and which rules were reasonable and just. That is the only phase of the question I care to discuss, and for that purpose attention is directed to the last clause of rule 210, which is as follows: "When the view is obscured by curves, fog

storms, or other causes, they must be kept under such control that they may be stopped within the range of vision." This is the only rule which it is even pretended appellee violated. The other rules quoted are peculiarly applicable to those in charge of the car in front. Appellee was in charge of the rear or regular car, and was running on schedule time. The forward car was an extra, and it was the especial duty of those in charge of it to see that the required interval of time and space be maintained between the two cars, and, in event of accident to the front car, it was incumbent upon them to give proper warning to the one following. From the time card those in front knew where the latter car was, or should be, but those behind could have no knowledge of any accident to or stoppage of the front car except as those in charge of the front car gave it warning as required by the rules; so it follows that, unless appellee violated that clause of rule 210 quoted above, he was guilty of no negligence, and, if guilty of no negligence, this case should not be reversed.

The first inquiry is, Why was the word "curves" used in that rule? If the rule be read and construed literally, then it is in direct conflict with the time card. The time card provides for the running of these cars on schedule during the hours of every night. Every night the view of the motorman is obscured by darkness. With the headlight reflecting straight in front, naturally on a curve the range of vision is very limited, usually less than 50 feet. Considering the numerous curves upon this railroad, in fact, upon every railroad in Kentucky, if a motorman be required to slow down his car upon rounding these curves after dark, so that it may be stopped within the range of vision, it is manifestly impossible for him to approximate the schedule time. Instead of making 25 miles an hour, according to the schedule between La Grange and Louisville, he could not make 10. Had there been no accident, and appellee run his car into Louisville pursuant to such a construction of the rule can any one suppose the company would have accepted it from appellee as a sufficient excuse for the delay to his own cars as well as to all traffic following him which would necessarily have ensued because of it? The railroad company did not intend that its motorman, or any others, place upon this rule any such construction. Then what does the rule mean?

There are times of unusual weather conditions when these cars must be operated, not by the time card, nor by telegraph or telephone orders, but by the natural senses of those in charge of the car. They must rely upon sight and hearing. In fog conditions the lives of persons crossing the track at public roads would be endangered unless the car be kept under such control as to be quickly stopped. Windstorms break down telephone and telegraph wires, blow down

trees, or cause the track to be otherwise obstructed. Rainstorms destroy bridges and wash out fills. All these are causes making the rule imperative, and also making it the imperative duty of those in charge of the car to so run that the car may be stopped quickly; that is, within the range of vision.

The phrase "or other causes" clearly means *other causes like fog, or storms*, that is, other unusual conditions causing like effects. To my mind the above is the meaning of the clause quoted, and the only interpretation which the company intended its employés to give to it. The word *curves* as used in that connection has no meaning, unless it be said it was placed there by the company arbitrarily, and for the purpose of relieving itself of liability in all cases of rear-end collisions. The appellee was operating his car in the usual manner, upon schedule time. There was no evidence of fog, storm, or other like conditions. On the contrary, it was a clear, still night, and in my opinion there was nothing in the rules, or elsewhere, warning or compelling appellee to operate his car in any different manner. He knew there was a car in front, which should be running at least five minutes, and not less than 1,000 feet, ahead of him. That time and distance gave those in charge of front car ample opportunity to warn him of trouble to it, and he had a right to rely upon those in charge of it performing their duty. Entertaining this view of the case, I perceive no negligence upon the part of appellee. Since he was guilty of no negligence, and violating no rule, it is immaterial, so far as the company is concerned, whether the court instructed the jury that he should exercise ordinary care, or the utmost care, or that it was his imperative duty to follow and comply with the rules of the company.

For these reasons, I most earnestly dissent from the opinion in this case.

#### DAY v. SHARP.

(Supreme Court of Tennessee. Nov. 18, 1913.)

COUNTIES (§ 64\*) — OFFICERS — ELIGIBILITY AND QUALIFICATION—"OFFICE."

Const. art. 2, § 25, provides that no person who has been a collector or holder of public moneys shall hold any other state office until he shall have accounted for and paid into the treasury all sums for which he may be liable. Shannon's Code, § 1060, excepts from eligibility to office defaulters to the treasury at the time of election and declares the election of such person void. Defendant's election to the office of trustee of a county was void because he was then a defaulter, and after a judgment by the inducing authority that he was ineligible, but that a vacancy was thereby created, he settled his default and was elected by the county court to such office. *Held*, on petition of resistance to his induction therein, that the word "office," as used in the Constitution and statute, implied the right to exercise the functions of a public trust or employment and to

receive the fees and emoluments belonging to it and to hold the place for the term prescribed by law; that "office for a term" was an entity; and that the removal of an officer for disqualification did not operate to divide the term or create a new and distinct term, so that the default and consequent disqualification did not merely affect a part of the term but made him ineligible for election by the county court to hold the remnant of the term.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 91-96; Dec. Dig. § 64.\*

For other definitions, see Words and Phrases, vol. 6, pp. 4921-4931; vol. 8, p. 7736.\*]

Appeal from Criminal and Law Court, Claiborne County; Xen Hicks, Judge.

Petition of resistance by W. N. Day against the induction of A. K. Sharp into office of trustee of Claiborne County. Judgment for Sharp, and Day appeals. Reversed.

John P. Davis, of Tazewell, for appellant. Paul E. Divine, of Johnson City, and Montgomery & Montgomery, of Tazewell, for appellee.

WILLIAMS, J. A. K. Sharp, claiming to be the holder of a certificate of his election to the office of trustee of Claiborne county at the regular August, 1912, election, presented himself with his certificate to the proper inducing authority for induction into the office. Thereupon W. C. Parkey, who was the then incumbent of the office of trustee and also a candidate for re-election, filed a petition in pursuance of the statute resisting Sharp's induction on the ground, among others, that at the date of the August election, and also at the date of Sharp's application to be inducted, he (Sharp) was a defaulter to the treasury as circuit court clerk of the county.

Upon hearing the case the inducing authority adjudged that by reason of said default, found to exist, Sharp was ineligible to hold the office of trustee, but further that a vacancy was thereby occasioned in the office of trustee; and this last finding was certified to the quarterly county court to the end that that body by an election by it might fill the office thus adjudged to be vacant. The quarterly county court proceeded thereon to elect Sharp to the office in respect of which he had been held to be ineligible.

Sharp procured a certificate of election from the quarterly county court for induction thereon, and on its presentation W. N. Day interposed his petition of resistance as a citizen and taxpayer of the county on the ground that Sharp was a defaulter. Sharp, intermediate the popular election and the date of the election attempted to be held by the quarterly county court, settled his default in an effort to qualify himself for the office.

Defendant Sharp does not claim under the election at the polls in August, 1912; but, on the contrary, he insists that he acquiesces in the decree of the county court, the induct-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

ing authority, to the effect that he was on and after that election day a defaulter, and that the election was therefore void; and he insists that thereafter, and before his election by the quarterly term of the county court, his payment of the amount of his default rendered him eligible at the later election. He relies alone upon his election by the quarterly county court to fill the claimed vacancy.

It is an insistence of Day that Sharp could not make himself eligible by thus purging himself of the taint of the default. It is argued that it would be opposed to the policy as well as the provisions of the law to permit one, ineligible to office by reason of his default, to render himself eligible for the same office during the same term by a payment of the amount of his delinquency.

The Constitution, art. 2, § 25, provides: "No person who heretofore hath been, or may hereafter be, a collector or holder of public moneys, shall \* \* \* hold any other office under the state government, until such person shall have accounted for, and paid into the treasury, all sums for which he may be accountable or liable."

Code, Shannon, § 1069, providing for eligibility to hold office, makes, among others, this exception:

"(4) Those who are defaulters to the treasury at the time of the election, and the election of any such person shall be void."

It was held in *Lewis v. Watkins*, 3 Lea, 174, 182, that the point of time to test the eligibility of the candidate is the day of the election, under the statute; that the Constitution is differently worded and might admit of less rigid legislation. But, applying this test, did the settled default of Sharp operate to affect and render void what is claimed to have been his after-election by the quarterly court?

The purpose of the constitutional and statutory provisions may be said to be two-fold: To discourage official defaulting to the treasury; and, where that has occurred, to encourage a purging thereof by settlement. Had Sharp settled his delinquency prior to the day of the August election, it seems clear that he would have been eligible. But were there, or could there have been, two distinct elections of Sharp to office during the period of the single term, the last of which elections may not be denounced as void or invalid?

In the case of *State ex rel. Childs v. Dart*, 57 Minn. 261, 59 N. W. 190, it appeared that a county treasurer was removed in a proper proceeding for the misappropriation of public funds. Afterward the board of county commissioners, which had authority to fill the vacancy, elected him to fill out the term. The question arose whether there was power in the board to thus reinvest him with the office. The court said: "The removal proceedings cannot be nullified or reversed in that manner. Such removal proceedings are

not merely for the purpose of ousting the person holding the office; they include a charge that he has forfeited his qualification for the office for the remainder of the term. They are brought to declare a forfeiture of a civil right, his eligibility, his qualification to hold that office for the rest of that term. The proceeding is not brought for his removal from a day or a week or a month of his term, but for the whole of the remainder of his term. \* \* \* Nothing less is involved in the proceeding. Whether the voters at the polls could condone the offense by which he forfeited his office it is not necessary here to decide. We are of the opinion that the county commissioners could not do so."

The same principle was announced in *State v. Rose*, 74 Kan. 262, 86 Pac. 296, 6 L. R. A. (N. S.) 843, 10 Ann. Cas. 927, writ of error dismissed 203 U. S. 580, 27 Sup. Ct. 779, 51 L. Ed. 826, where it appeared that an officer by official misconduct during his term had forfeited his office, and the forfeiture had been judicially declared. It was held that the judgment operated to deprive him of the right to take or hold the office during the remainder of the term to which he had been elected, even under a re-election at the polls. The court said: "Suppose a county clerk, who was engaged in speculation with the connivance of the board of county commissioners, was removed from office; the board, which has the power to fill the vacancy, might be willing to give the defaulter a new lease of power to continue his frauds against the public until the end of the term, but to allow it to be done would be trifling with justice. No such purpose can reasonably be imputed to the Legislature. Counsel for the defendant were inclined to concede that an officer removed for dereliction of duty could not be reappointed to fill the vacancy, but contended that a different rule obtains where provision is made for filling the vacancy by election. \* \* \* The protection of the public is involved in the proceeding and judgment. Nothing in the statute suggests that electors, even, can condone the misfeasance, revive the forfeited right, or limit the effect or enforcement of a judgment of ouster."

It will be noted that in each of the cases the acts, resulting in disqualification, occurred while the term of office was current, while here the act of default to the treasury is argued to have been committed before Sharp's term as trustee began. He, however, continued in default to and within the period of time covered by that term, and he was adjudged disqualified for his default so existing. His attempt at absolution by payment was after the period covered by that term had begun to run. Can this case be, on principle, differentiated?

In our opinion this question involves a consideration of what is the meaning of the word "office" used in the Constitution and

statute. The word has been held, in such connection, to imply the right to exercise the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place for the term prescribed by law. *State v. Rose*, supra; *United States v. Hartwell*, 6 Wall. 385, 393, 18 L. Ed. 830, 832; *People v. Duane*, 121 N. Y. 367, 375, 24 N. E. 845.

Office for a term has been described as an entity in so far as that a removal, for disqualification, of an officer does not operate to divide the term or create a new and distinct one. "In such a case the successor is filling out his predecessor's term; and, when the defendant re-entered the office and undertook to exercise its duties, he was simply serving a portion of the very term which the court had decided he was unfit to hold." *State v. Rose*, supra.

In *People v. Ahearn*, 131 App. Div. 30, 115 N. Y. Supp. 664 (1909), it was held that a removal conclusively determined that the officer was in legal contemplation an unfit person to continue to perform the public trust appertaining to his office during the term, and that the removal covered the entire term, so that it was not within the power of the board of aldermen of the city of New York to reinstate him to serve for the remainder of the term. On appeal from this judgment of the Appellate Division, the Court of Appeals of New York, in writing for affirmance, through Judge Hiscock, said: "Doubtless we might say, as so earnestly urged by counsel, that the strict letter of the statute would be satisfied by a removal which ousted appellant from his office for a day or an hour until some appointing power could reinstate him. But if we consider the general scope and purpose of this statute we shall be led to the conclusion that the Legislature must have contemplated and intended more than this, and that the language which it employed is susceptible of a construction which will carry out its purpose. \* \* \* It is equally clear, and will doubtless be so conceded in anything which may be said or written on the other side of the question, that this purpose will be frustrated and the administration of the law turned into a farce if under it an official may be immediately reappointed and a removal turned into a mere temporary suspension. In order to avoid such a result, and keeping in mind the purpose of the statute, we are justified, in my judgment, in con-

struing the removal for which it provides as meaning a permanent and lasting ouster for the entire remaining term of the incumbent from the office which he has been filling or whose obligations he has been found unable or unwilling to discharge. As was well said by Mr. Justice Scott at the Appellate Division, an office implies 'much more than the right to physically occupy a certain room, to exercise certain power, and to receive a prescribed emolument.' So far as its beneficial aspect was concerned, appellant's office consisted of the right to enjoy certain powers, privileges, honors, and emoluments for a given term, and, when the statute prescribed that he should be removed, it may be construed to mean that he should be removed from and deprived of all that which thus made up his office, namely, the right to enjoy these things for and during the entire term for which he had originally been selected. It is, of course, true, as is urged by counsel, that we do not speak of removing an officer from his 'term' of office. But the right to enjoy for a certain period the privileges and profits of a given position is an important element of an office in its complete conception, and a removal from office under the conditions here present may fairly mean a dismissal for that period from those rights and privileges." *People v. Ahearn*, 196 N. Y. 221, 229, 89 N. E. 930, 26 L. R. A. (N. S.) 1153. In accord in its reasoning is *Advisory Opinion*, 31 Fla. 1, 12 South. 114, 18 L. R. A. 594, and *contra State ex rel. v. Jersey City*, 25 N. J. Law, 536.

Office or election to office being thus conceived of as implying not merely place but term or tenure as well, we are of opinion that the reasoning of the courts in the above-cited cases applies here; and that, under the provision of the statute to the effect that the election to office "of any such person (defaulter) shall be void," an election of Sharp at the polls in August, 1912, if assumed, was not nullified for a period less than the prescribed term of the office, so far as Sharp was concerned as beneficiary. His default and consequent disqualification did not merely affect a part of the term. The result is that he was not eligible to be elected by the quarterly county court to hold the remnant of that term.

The lower court held to the contrary. Its judgment is therefore reversed. Costs below and on appeal will be paid by A. K. Sharp.



## DOYLE v. CITY OF CHATTANOOGA.

(Supreme Court of Tennessee. Nov. 29, 1913.)

## 1. NEGLIGENCE (§ 85\*)—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY.

Even if contributory negligence could be attributed to a young boy, he would not be guilty of such negligence in jumping into a pond to save his young brother from drowning, having acted in an emergency.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-128; Dec. Dig. § 85.\*]

## 2. DEDICATION (§ 37\*)—STREETS—ACCEPTANCE—USE.

The acceptance of a street by a municipality may be implied from a general and long-continued use thereof by the public as of right.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.\*]

## 3. DEDICATION (§ 38\*)—ACCEPTANCE OF STREETS.

The use of a street by the general public may operate as an acceptance thereof so as to bind the dedicant and make the dedication irrevocable.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 77, 78; Dec. Dig. § 88.\*]

## 4. MUNICIPAL CORPORATIONS (§ 819\*)—ACCEPTANCE OF STREETS.

If a strip, offered to be dedicated as a street, contains thereon a nuisance, such as a dangerous pond, slight acts of acceptance by the municipality would be sufficient to show an acceptance so as to make it liable for injuries arising from the pond.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.\*]

## 5. DEDICATION (§ 35\*)—ACCEPTANCE.

If the tract dedicated as a street is clearly defined as by a map, and the public use is practically of the whole tract dedicated, it is presumed that an act accepting a part of the tract dedicated is an acceptance of the whole.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 68-71, 75, 76; Dec. Dig. § 35.\*]

## 6. MUNICIPAL CORPORATIONS (§ 821\*)—DANGEROUS STREETS—ACCEPTANCE OF DEDICATION—SUFFICIENCY OF EVIDENCE.

Evidence held to make it a jury question whether a tract containing a dangerous pond was accepted by a municipality as a street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

## 7. NEGLIGENCE (§ 23\*)—ATTRACTIVE NUISANCES.

The owner of dangerous machinery, naturally attractive to a child, is liable for injuries to one attracted thereto, while the machinery is on the owner's premises.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.\*]

## 8. MUNICIPAL CORPORATIONS (§ 766\*)—DEFECTIVE STREETS.

A city was responsible for the death of boys 11 and 9 years of age by drowning in a pond which occupied the whole width of a public street, about 120 feet from a public park, in analogy to the rule imposing liability for maintaining an attractive nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1621, 1622; Dec. Dig. § 766.\*]

Certiorari to Court of Civil Appeals.

Actions by M. A. Doyle, administrator, against the City of Chattanooga and another.

Judgment for defendant, in each case, was affirmed by the Court of Civil Appeals, and plaintiff brings certiorari. Reversed and remanded.

M. N. Whitaker and Jephtha Bright, both of Chattanooga, for plaintiff. W. L. Frierson and Garvin & Cantrell, all of Chattanooga, for defendants.

WILLIAMS, J. Under the above case style two separate actions have been prosecuted by M. A. Doyle, as administrator, to recover for the death of each of two sons by drowning in an artificial pond, claimed to be within the limits of a street of the defendant city, known as Bluff street.

It appears that many years ago a quarry was worked, by the then owner of the land, on the site of the pond complained of; the excavation of stone was to a depth of about 18 feet below the natural surface, and after the abandonment of the quarry water accumulated, forming a pond of that depth, approximately.

The pond covers the entire width of what is claimed to be the street, and overlaps a few feet on some of the abutting lots, herein after referred to. The excavation also formed a bluff on and near the side of the street, which bluff overhung precipitously the water in the pond.

The city maintains as pleasure grounds Jackson Park, about 120 feet distant from this pond; a wire fence intervened, over which a stile had been erected, and a path led from this stile towards the pond.

The two deceased sons of plaintiff, one aged 11 and the other aged 9 years, with a third small boy, Leiby, went to the park to play, and after swinging in swings, there provided, for a time, one of the Doyle boys suggested that they all go to the pond. This they did; and, after throwing rocks in the pond for a while, they climbed the overhanging stone bluff towards the top, when the younger Doyle lost his footing and fell into the pond. The place where he slipped was on an abutting lot, a few feet from the street's margin. His older brother, Alex, cried to him: "Stay up; I'll get you or go with you." Young Leiby grabbed Alex in an effort to keep him out of the pond, but the latter fought, bit young Leiby, and forced his release, and then jumped into the pond to rescue his younger brother. Both sank in the water overlaying the street.

The plaintiff administrator seeks to recover on the theory that the city allowed an attractive and enticing nuisance to exist in a public street; the city defends on grounds: (1) That such pond is not such an attractive nuisance as can render the municipality liable; and (2) that there exists no such street as a public highway; that there has never been an acceptance of same on the part of the city authorities or otherwise.

In 1891 a land company platted the territory surrounding this pond into blocks, lots, streets, and alleys, and registered the plat. One of the streets was platted through this pond, Bluff street, which is a short street about three city blocks in length. Later, in 1907, this territory was annexed to the city of Chattanooga. For from 10 to 20 years prior to annexation, and ever since, there has been a considerable travel by the usual modes over this street for its entire length, except that when the pond was reached, the travel was diverted over private property just to one side of the pond, and near the street margin, returning again into the street after the pond was passed. This street was level in comparison with other nearby parallel streets, and also ran diagonally, and for these reasons was sought by travelers.

It was in proof that the city had placed a fire plug on Bluff street, and that this street had been platted as such on city map or maps. There was proof that some work had been done on the street, but it was too indefinite to establish that it was done by the city authorities.

The neighborhood, along cross and parallel streets, is thickly settled, but only a few face Bluff street. Complaints of the pond had been lodged by residents there touching the pond, which could have been fenced or filled. The trial judge excluded proof offered to the effect that other children had been drowned in the pond.

A motion of the city for peremptory instructions in its favor was sustained. On appeal the Court of Civil Appeals affirmed that ruling; and the case is here for review on writ of certiorari.

[1] If there be liability on the part of the city for the death of the younger Doyle boy, there would be for the death of his older brother. If contributory negligence could be attributed to a child of tender years in any event, still, he having acted in a sudden emergency to save the life of another in imminent danger, such negligence could not be predicated on his conduct. *Railroad v. Ridley*, 114 Tenn. 727, 86 S. W. 606.

One of the main defenses of the city was its nonacceptance of the dedicated street; and on this, chiefly, it prevailed in the lower courts.

[2] "It may now be considered as the prevailing opinion that an acceptance may be implied from a general and long-continued use by the public as of right. The later decisions upon the subject will, when analyzed, be found to be well bedded in principle.

\* \* \* The municipal corporation consists of the inhabitants and not the officers; the officers are, in truth, nothing more than the agents of the corporation. The inhabitants, therefore, stand to the officers as principals, and if the principals have, by their conduct, accepted the dedication, it is of no great importance that the agents have taken no ac-

tion in the matter. The inhabitants of a locality having, by long-continued use, treated the way as a public one, they make it such without the intervention of those who derive their authority from them." *Elliott, Roads & St.* (2d Ed.) § 154; 3 *Dillon, Mun. Corp.* § 1087; *Phillips v. Stamford*, 81 Conn. 408, 71 Atl. 361, 22 L. R. A. (N. S.) 1114; *Southern P. R. Co. v. Ferris*, 93 Cal. 263, 28 Pac. 828, 18 L. R. A. 510, and note.

The contrary doctrine is declared in 13 Cyc. 467; but our case of *Railroad v. State*, 1 Baxt. 55, as construed and followed in *Hill v. Hoffman* (Ch. App.) 58 S. W. 932, opinion by the present Chief Justice, evidences, to say the least, a trend toward the doctrine announced by Elliott and by Dillon. However, a decision of this case would not necessarily call for a ruling on that point, though it may be noted that the great weight of authority is in favor of the rule thus declared. Indeed, the case most relied upon by the writer of Cyc.'s article on Dedication (*Downend v. Kansas City*, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170) has been repudiated by the same court in the later case of *Benton v. City of St. Louis*, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561, and see monographic note appended, the writer of which, after summarizing the cases, stated that the decided weight of authority is as we have indicated. We hold, in accord with our previous cases, to that rule.

[3] Certain it is that, ever under the minority rule, a user by the general public, in its unincorporated capacity, may operate as an acceptance on its part, binding the dedicant by way of consummating the dedication, and placing it beyond revocation on his part. 13 Cyc. 465; *Mathis v. Parham*, 1 Tenn. Ch. 533; *State v. Hamilton*, 109 Tenn. 286, 70 S. W. 619.

[4] If, in this attitude of the way, under that rule, there be therein a nuisance, such as a dangerous artificial pond, it seems to us that it would be a harsh pronouncement of the law that any liability therefor continues to rest on the dedicant; the public in travel enjoying the use of the way the while. *Attorney General v. Abbott*, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251.

Under such conditions, slight acts of acceptance on the part of the incorporated body, standing for that public, should be sufficient to bring upon it the burdens, as well as the benefits, of the dedication.

In *Town Council v. Lythgoe*, 7 Rich. (S. C.) 435, it was held "that digging a well in the way was evidence of acceptance" by the municipality, and of the decision it is said in *Elliott, Roads and Streets*, 116: "We have no doubt of the soundness of this decision, for, no matter what the particular act is, if it be one which could only be rightfully done on a highway, it should be regarded as evidence of acceptance." See, also, *Dil. Mun. Corp.* (5th Ed.) § 1807, note;

Campbell v. Elkins, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159; Brewer v. Pine Bluff, 80 Ark. 489, 97 S. W. 1034. It would seem that the placing of a fire plug within the limits of Bluff street is one so similar as to be the legal equivalent of the act of digging a well.

The execution of an official map by the city, showing the street offered to be dedicated to be such, has also been held to be evidence of an acceptance. Gibbs v. Ashford, 27 Tex. Civ. App. 629, 66 S. W. 858; Dallas v. Gibbs, 27 Tex. Civ. App. 275, 65 S. W. 81.

[5, 6] Where the dedication is clearly defined, as in this case by registered map, and the public user is of the whole, practically speaking, the presumption is that an act of acceptance of a part thereof is an acceptance of the whole. Town of Derby v. Ailing, 40 Conn. 410; Pittsburg v. Epping-Carpenter Company, 194 Pa. 318, 45 Atl. 129; Dallas v. Gibbs, 27 Tex. Civ. App. 275, 65 S. W. 81; Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176; 3 Dil. Mun. Corp. (5th Ed.) § 1088. If we were proceeding under the minority rule, it would not be necessary for us to decide that either of the above acts—the placing of the hydrant or the execution or adoption of the official map—would of itself support a finding of acceptance on the part of a municipality, under the situation referred to, since here both of these acts concur, in combination with long user of the street by the public, beneficial to the public. There was sufficient evidence, in any view, to take the case to the jury on the question of fact of acceptance by the public authorities.

If, therefore, the quarry pond may be deemed, or may be by a jury found, to be within the limits of Bluff street, may the City of Chattanooga be held liable to the plaintiff administrator on his contention that the city had permitted the pond to exist as an attractive nuisance?

[7] This court is committed to the doctrine of the liability of the owner for the maintenance of negligently exposed dangerous machinery, attractive to a child, in the exercise of his natural instinct or curiosity injured thereby, even though the machinery was on the owner's private premises. Whirley v. Whiteman, 1 Head, 610.

The principle was applied by this court to a turntable, so maintained, in Railroad v. Cargille, 105 Tenn. 628, 59 S. W. 141, which cites as authority the "turntable case" of Sioux City, etc., R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, which cited and relied on the case of Lynch v. Nurdin, 1 Ad. & El. N. S., 29, 1 Q. B. 30, 41 E. C. L. 422, as did also our case of Whirley v. Whiteman, supra.

The English courts have recently approved Lynch v. Nurdin, and carried forward its doctrine in an application of same to a turntable case (Cooke v. Midland, etc., R. Co. [1909] A. C. 229, 5 Ann. Cas. 557); while the

Supreme Court of the United States has adhered to the doctrine of the Stout Case, and evinced its willingness to advance its application to case of attractive nuisance in the form of a slack pit, beneath the surface of which the slack was burning. Mr. Justice Harlan, in the opinion, said: "If the company left its slack pit without a fence around it, or anything to give warning of its really dangerous condition, and knew or had reason to believe, that it was in a place where it would attract the interest or curiosity of passers-by, can the plaintiff, a boy of tender years, be regarded as a mere trespasser, for whose safety and protection while on the premises in question, against the unseen danger referred to, the railroad company was under no duty or obligation whatever to make provision?" Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, holding liability.

Many of the state courts of last resort have, however, declined to accept the doctrine of the turntable case; and others, which apply it to turntables and other dangerous machinery on private premises, deny its application to artificial ponds so located. Many of the authorities are reviewed in the case of Cooper v. Overton, 102 Tenn. 211, 52 S. W. 183, 45 L. R. A. 591, 73 Am. St. Rep. 864, and Railroad v. Ray, 124 Tenn. 16, 134 S. W. 858, Ann. Cas. 1912D, 910, Bottum's Administrator v. Hawks, 84 Vt. 370, 79 Atl. 858, 35 L. R. A. (N. S.) 440, Ann. Cas. 1913A, 1025, and note.

We need only observe that we have not in the case in hand an attractive nuisance on private premises. However, the courts that deny liability in turntable cases do so on the ground that under common-law principles, as construed by them, the attractiveness of the instrumentality or object causing the injury cannot be construed into or as the equivalent of an invitation to a child, on the part of the owner of the premises, and that, without an invitation, express or implied, no duty of active care arises even in respect of a child of tender years going on the premises.

[8] In the case at bar, the attractive object was in a place (within the limits of a public street) where a child had a right to go, on invitation such as is impliedly given to the public at large. A trespass could not be imputed to an approach to or use of such a public street. The city cannot be heard to say that the boys were without invitation to go upon the street. Therefore the point of difficulty with some courts in granting remedy in cases of the character noted does not here appear.

In the case of Busse v. Rogers, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183, it was held that one who, is using a street adjoining his property piled lumber there in an unstable manner was liable for injuries caused by its fall upon a child who, in play, attempted to

climb upon the pile, and thereby caused the lumber to fall. The court said: "This is not the case of an owner of land putting an attractive and lawful but dangerous machine or thing upon his own property and leaving it unguarded. It is the case of an owner placing an unlawful nuisance in the highway and leaving it unguarded. \* \* \* Had a loose timber fallen from the pile by reason of sole negligent piling, and injured a traveler passing on the sidewalk, there would be but little doubt of the liability of defendants, and of the city as well, provided the danger was one which had existed long enough so that the city officials should have known of it. \* \* \* The central idea is that children are liable always to be upon the public streets, and also are liable to turn aside from traveling and play, or meddle with attractive things left thereon; that a reasonable man must bear this fact in mind, and hence may not negligently or willfully place upon the street a dangerous \* \* \* trap, well calculated to arouse the admiration or curiosity of a child, and, when it has accomplished the natural result which might be reasonably expected escape the consequences by saying that the injured child should not have yielded to his curiosity." In accord are the later cases of *Secard v. Lighting Co.*, 147 Wis. 614, 133 N. W. 45; *Kelly v. Southern Wis. R. Co.*, 152 Wis. 328, 140 N. W. 60, 44 L. R. A. (N. S.) 487; *Kessler v. Berger*, 205 Pa. 289, 54 Atl. 887, 61 L. R. A. 611.

In *Kramer v. Southern R. Co.*, 127 N. C. 328, 37 S. E. 468, 52 L. R. A. 359, the same doctrine was held and applied.

In *City of Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528; s. c., 50 Neb. 804, 70 N. W. 363, it appeared that the city had allowed a pond to collect in an accumulation of surface water on a portion of a street and abutting lots and that a boy, 10 years old, got on a detached plank of a sidewalk, at the time floating on the water, and used same as a raft, and while so doing was drowned in water that overlaid the lots of the abutting owners.

The pond was near a public school building and without safeguards. The court held that it "was negligence on the part of the city to leave the pond of water unguarded, knowing that children would be attracted to such a place." See, also, *Linnberg v. Rock Island*, 138 Ill. App. 495.

The city of Chattanooga, which was under obligation in its corporation capacity to abate nuisances, has permitted a condition to exist in one of its streets liable to cause injury to children of tender years, when a jury might find it knew or should have known that children were liable to be lured thereby to hurt or death. Whatever may be claimed for an owner of private premises on which such a pond is allowed to exist, or

for the argument based upon the meum and tuum view of property rights, lying so pronouncedly at the base of the decisions in favor of such private owner, we hold that a city cannot, under the circumstances here appearing, stand acquitted as having had due regard for the protection of the child life within its borders; and this regard the law, in its increasing humanity, should be solicitous to enforce.

In withdrawing the two cases against the city from the jury there was error; each is reversed and remanded; costs of the appeal will be paid by the city.

#### CITY OF CHATTANOOGA v. SOUTHERN RY. CO.

(Supreme Court of Tennessee. Nov. 22, 1913.)

##### 1. RAILROADS (§ 99\*)—STREET CROSSINGS—POLICE POWER.

Acts 1907, c. 149, § 25, empowering a city to require, by ordinances, railroad companies to build, maintain, repair, or replace at their own expense such bridges and approaches over their tracks when crossing any streets as the council may deem necessary to the safety and convenience of travelers on the street, and an ordinance pursuant thereto are within the scope, and an exercise, of the police power.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-295, 297-304; Dec. Dig. § 99.\*]

##### 2. CONSTITUTIONAL LAW (§ 115\*)—IMPAIRING OBLIGATION OF CONTRACTS.

The matter of proper crossings of streets and railroads for the safety and welfare of the public is one within the police power, future exercise of which cannot be bargained away by a city, so that Const. U. S. art. 1, § 10, forbidding passage of laws impairing obligation of contracts, is not contravened by Acts 1907, c. 149, § 25, empowering a city, by ordinance, to require a railroad to build or replace bridges over its tracks at street crossings, and an ordinance requiring the company to build a new bridge at such a crossing, though prior to the act, in consideration of contribution by the company to a bridge there built, the city contracted with it to forever after maintain a suitable bridge there.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 274-277, 290; Dec. Dig. § 115.\*]

##### 3. RAILROADS (§ 99\*)—STREET AND RAILROAD CROSSINGS—POWER TO REQUIRE BRIDGES.

Under the common law a city could require a railroad to construct and maintain, at its expense, a proper bridge at a street crossing over its tracks.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-295, 297-304; Dec. Dig. § 99.\*]

Appeal from Chancery Court, Hamilton County; T. G. McConnell, Chancellor.

Suit by the City of Chattanooga against the Southern Railway Company. Decree for complainant, and defendant appeals. Affirmed and remanded for further proceedings.

Bachman & Noll and Coleman & Frierson, all of Chattanooga, for City of Chattanooga. Cooke, Swaney & Hope, of Chattanooga, for Southern Ry. Co.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**WILLIAMS, J.** This suit, standing on bill of complaint of the city and cross-bill of the railway company, was brought to determine whether the city or the company is liable for the cost of constructing a bridge over the track of the company on one of the streets of the city. The bridge, being deemed by both parties an urgent necessity, was constructed at a cost of \$8,354.90, under an agreement that provided that each party should contribute one-half of the cost, and that neither should be precluded of its right later to recover of the other. The city sues for \$4,177.45, and the company by its cross-bill sues the city for a like sum.

[1] The city predicates its right to recover on an ordinance duly passed pursuant to power conferred on it by an act of the Legislature (Acts 1907, c. 149, § 25) "to require, by ordinance, railroad companies to build, maintain, repair, or replace, at their own expense, such bridges and approaches, \* \* \* over their tracks when the same cross any of the streets of said city, as the general council may deem necessary to the safety and convenience of the public traveling on said streets," etc.

The bridge in question replaced an old wooden structure which had been erected in 1876, and, concededly, had become inadequate.

The company's defense, and also its right to recover under its cross-bill, is, in the ultimate, based on a contract in reference to the construction of the old bridge; it being alleged that in 1876 its predecessor company had contributed \$1,000 towards such construction under a contract, duly entered into, which provided that for that consideration the city should build and forever afterwards maintain a bridge at the crossing in question, sufficient and suitable to accommodate the travel at that and all future times. It is contended by the company that this contract was validly entered into, and that it cannot be affected by the statute and the pursuant ordinances, later passed, because of the provision of the Constitution of the United States (article 1, § 10) forbidding the passage of laws impairing the obligation of contracts.

It is clear that the statute and ordinance touching such bridge were within the scope, and an exercise, of the police power of the state. Authorities subsequent.

[2] But the company's contention is that, while this may be true generally, yet the extension of the police power of the city by the legislative act could not operate to nullify the contract previously made, especially since the city does not purpose a change in the character of the crossing from an overhead structure to one not overhead.

The insistence of the city is that it was beyond the power of the board of mayor and aldermen of Chattanooga, in 1876, to so bargain or contract as to deprive future boards

of the exercise of police power in relation to this subject-matter, thereafter conferred on the municipality by the state.

No court has gone further than the Supreme Court of the United States in giving to the police power a broad scope and application. *Chicago, etc., R. Co. v. People*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175.

Recent decisions by that court appear to us to have construed the provision of the national Constitution invoked by the company—forbidding the impairment of the obligation of contracts—in connection with the police power, in such way as to demonstrate the unsoundness of the company's contention.

In *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948, it was held that contracts which affect the safety and welfare of the public are within the supervising power and control of the Legislature when exercised under the police power to protect the public safety, and that the obligation of a contract between a city and a railroad company to participate, in view of their mutual duty to the public, in the construction of a viaduct over the company's tracks is not violated or impaired by a statute and ordinance, later passed, compelling the railroad alone to repair it. The court, speaking first in respect of the contract to participate in the construction of the viaduct, said:

"No doubt the agreement of 1886 constituted a contract in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation?

"Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other, and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health, and morals, and that clause of the federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked.

The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature.

"We do not, indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the state; \* \* \* that, while it is not questioned that the maintenance of the viaduct is essential to the safety of the community, yet, if existing contract obligations devolve this burden upon the city, the Legislature of the state cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the federal Constitution."

Continuing the discussion on the point pressed on us in the case in hand, the court said:

"In view of the paramount duty of the Legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control, and change such agreements as may be from time to time entered into between the city and the railroad company in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the Legislature."

In *State ex rel. Minneapolis v. St. Paul, etc., R. Co.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, there was involved a contract, entered into in 1892, by which the city of Minneapolis, in consideration of the railroad company constructing certain bridges and approaches at the intersection of stipulated streets, expressly agreed that the city would thereafter construct and maintain all crossings or approaches made necessary by the opening of new streets. It was contended by the railroad company that this constituted a valid contract with the city, and, having been complied with on the part of the company, that it was beyond the power of the city later to require the company to construct the bridge over a new street, in question; that to so require would be to impair the obligation of the contract. The court said:

"In this we do not concur. The power of the state to require the defendants to construct the bridge in question, or any other bridge, at streets crossing the right of way is an exercise of the police power, which can be neither contracted away nor lost by inaction on the part of the public authorities.

The contract was beyond the authority of the city council, and ultra vires, and void"—citing *Chicago, etc., R. Co. v. Nebraska*, supra.

This Minnesota case was, by writ of error, taken to the Supreme Court of the United States, where it was affirmed (214 U. S. 497, 29 Sup. Ct. 698, 53 L. Ed. 1060), on the authority of the case of *Northern Pacific R. Co. v. Minnesota ex rel. Duluth*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630.

This last-named case was a companion case to the Minneapolis case, and in it the opinion of the Minnesota court in the Minneapolis case was freely and approvingly quoted by the Supreme Court of the United States. Referring to rulings of the Supreme Court of Minnesota to the effect that it lay in the power of the city, at common law, at the time the contract was made with the company, to have required the latter to maintain in safety its crossings with both existing and future streets, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy, and void, the court said, through Mr. Justice Day:

"This doctrine is entirely consistent with the principles decided by this court. But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contract rests, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety." *Northern Pacific R. Co. v. Minnesota ex rel. Duluth*, supra.

It was there again specifically ruled that the defense here urged of impairment of the obligation of a contract was not maintainable. The court well said that the police power is a continuing one, and that a requirement imposed on the company under it was "not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

We are unable to distinguish the case at bar, in principle, from the Minneapolis case; and on its facts it is a counterpart of the Duluth case, where the contract was one under which the city and company shared the construction cost of an overhead bridge, and the city agreed that it would thereafter forever maintain and keep in repair the approaches thereto, and, for a period of 15 years, the structure proper. Within the 15 years the city demanded of the company that it repair the structure, and the litigation and rulings related thereto. 98 Minn. 429, 108 N. W. 269.

[3] A fundamental contention of the com-

pany in this case is that in 1876 the duty of constructing and maintaining the old bridge was devolved by law on the city, and that the city had not power in law to compel the company to erect or maintain the bridge then constructed. If it be conceded that at that date there was no statutory power in the city to that end, did it exist at the common law? This question is also discussed at length in the cases *supra*, decided by the Supreme Courts of Minnesota and the United States, where it was held that, by the great weight of authority, the city could enforce the construction and maintenance of such a structure as an obligation imposed on the company by the common law.

In this state as early as 1859 it was held, in *Railroad v. State*, 3 Head, 523, 75 Am. Dec. 778, that it was the duty of such a company to construct a suitable crossing, a bridge if necessary, "under the general principles of the common law." Our later case of *Dyer County v. Railway*, 87 Tenn. 712, 11 S. W. 943, is in accord, and further holds that the company's duty was a continuing one as to repair, and that case was cited by the Supreme Court of Minnesota in the Minneapolis case in support of its own holding. See, also, *Railway v. State*, 87 Tenn. 751, 11 S. W. 946.

It is clear that, if that right was then by the city deemed doubtful, and that, under doubt as to where to lay the paramount duty to construct and maintain the bridge, the contract was then entered into, in quasi compromise or truce, a later valid exercise of the police power did not work an impairment that was a violation of the constitutional provision invoked.

If it be conceived that the contract of 1876 was valid to an extent, still the contracting parties were charged with notice of the limitation of power on the part of the city in respect of its binding itself not to exercise in after years a police power to operate the company with the construction and maintenance of a safer and more adequate bridge, demanded by changed conditions, mainly incident to the growth of the city.

The chancellor was not in error in so ruling; decree below affirmed, and the cause remanded for further proceedings in accord.

#### HARRISON v. KNAFFL et al.

(Supreme Court of Tennessee. Nov. 15, 1913.)

##### 1. MECHANICS' LIENS (§ 132\*)—TIME FOR FILING NOTICE—COMPLETION OF BUILDING.

Under a contract for construction of a building, including the installing of a sprinkler system, to be approved by the State Inspection Bureau, the building is not completed, as regards the 30 days thereafter for filing notice of lien, till the work required by the bureau on its inspection is done.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. § 132.\*]

##### 2. BANKRUPTCY (§ 192\*)—PRIORITIES—LIENS.

Relative to the question of certain creditors of a bankrupt contractor being entitled to priority as having filed notices of lien within 30 days of completion of a building, the bankrupt's trustee is bound by the agreement of the contractor and building owner in extending time for the completion.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 294; Dec. Dig. § 192.\*]

##### 3. MECHANICS' LIENS (§ 132\*)—TIME FOR FILING NOTICE—ENLARGEMENT OF CONTRACT.

Within the statute giving materialmen 30 days from completion of the work provided by the contract within which to file notices of liens, they have 30 days from completion of the work as enlarged by amendment of the contract between the owner and contractor, though part of their material was furnished before such amendment and all of it was for the work previously provided for by the contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. § 132.\*]

Appeal from Chancery Court, Knox County; Will D. Wright, Chancellor.

Suit by C. Raleigh Harrison, trustee, against Joseph Knaffl and others. From an adverse decree, complainant appeals. Affirmed.

Green, Webb & Tate, of Knoxville, for appellant. Jesse L. Rogers, of Knoxville, for appellee General Fire Extinguisher Co. J. Bailey Wray, of Knoxville, for appellee Alex A. Scott Brick Co. Culton & Morrill, of Knoxville, for appellee Tennessee Mill & Mine Supply Co.

LANDSEN, J. Harrison is the trustee in bankruptcy of the S. M. Beaumont Company and filed this bill in the chancery court for the purpose of contesting with the General Fire Extinguisher Company, the Tennessee Mill & Mine Supply Company, and the Alex A. Scott Brick Company the claims of the latter to a furnisher's lien in certain fund paid into court by Knaffl and wife to represent the value of two certain houses constructed for them by S. M. Beaumont Company, the complainant's bankrupt.

[1] The question here is whether the lien claimants are entitled to priority in the fund representing the real estate over the general creditors of the bankrupt.

The Alex A. Scott Brick Company and the Tennessee Mill & Mine Supply Company furnished the material used in the construction of the buildings, and the Fire Extinguisher Company installed an automatic fire extinguishing plant in the two buildings. It is not claimed that the Brick Company or the Supply Company have given 30 days' notice from the last date of materials furnished by them. It is claimed by them, however, that their notice was given within 30 days after the completion of the buildings, and this is likewise the claim of the Fire Extinguisher Company. Whether or not this is true depends upon the effect to be given to certain work done upon the sprinkler system

December 26th, 27th, and 28th. The notice of each of the claimants was given within 30 days from those dates, but, if the work done upon the dates referred to does not fall within the contemplation of the building contract, notices are not within time.

This makes it necessary to state the contract between S. M. Beaumont Company, the principal contractor, and Knaffl and wife, as the owners for the construction of the two buildings. The buildings were adjoining each other and were to be built on lots of a frontage of 50 feet each and according to plans and specifications prepared by certain architects and revised and approved by the contractor. These drawings and specifications were made parts of the contract. The original contract provided that "no payment made under this contract except the final payment shall be conclusive evidence of the performance of this contract, either wholly or in part, and no payment shall be construed as an acceptance of defective work or improper material."

Soon after the execution of this contract, and before any material part of the work in the construction of the buildings was done, the parties agreed in parol to enlarge the terms of the original contract by providing that one of the buildings should have an additional story above the basement, and a complete automatic water sprinkler system, should be put in both buildings, but as one system, by the contractor. The water sprinkler system was to be continuous through both buildings with one pressure tank and one supply pipe for the system. The contractor, after this enlargement of his contract with the owner, entered into a written contract with the Fire Extinguisher Company by which that company agreed to install the sprinkler system in accordance with a contract between the contractor and the owner. This contract provided that the material should be of standard quality and the work done in a thorough and workmanlike manner and in conformity with plans to be approved by the Tennessee Inspection Bureau. The specifications provided, after designating the number of automatic sprinklers, pipes, fittings, hangers, and the like, that it shall be installed "in a thorough and workmanlike manner and in strict conformity with the rules and requirements of the within-named insurance interests."

It is also provided in the contract "that it is the intention of this contract to cover a complete equipment in every respect and install in a manner that will meet with the approval of the within-named insurance interests and Beaumont Bros., architects."

The evidence shows that one of these buildings was completed so that a tenant was placed in it August 1, 1912, and the other was completed and occupied by tenant November 6, 1912. The sprinkler system was installed in the two buildings in such manner that the foreman of the Fire Extinguish-

er Company believed it to be in compliance with the contract between that company and the principal contractor, some time in October, and certainly in November, 1912. The sprinkler system was inspected by an inspector of the Tennessee Inspection Bureau, in October, and water was turned into the system November 6, 1912. Insurance was effected on the buildings November 6th, and the sprinkler system was believed by the insurance agent to be complete, judging alone, however, from its general appearance.

One of the buildings was used as a factory for the manufacture of overalls, pants, and the like, and, in the course of manufacturing these articles, it is necessary to use large tables upon which the garments are cut. These tables were installed after the building was leased to this tenant, and it became necessary to add a number of sprinkler heads under these tables because the tables cut off the protection to the floor which would be afforded by the sprinkler heads located in the ceiling over the tables. This work was done December 26, 27, and 28, 1912, and there is no claim by the lien claimants that this additional work would fall within the contract between the parties so as to extend the time of their lien. The claim made by the lienors is that the contract for the construction of the sprinkler system required that the system be approved by the Tennessee Inspection Bureau before it was complete or would be accepted by the owner, and that the system as first installed was inspected by that bureau and disapproved until certain other things were done about it, and that this work was not done until the dates last named. The inspector reported the system equipment to be good in general, the piping well installed, and the heads arranged both staggered and in regular order; that the water supply was good; and that the equipment should control any ordinary fire originating in the building. The inspector also recommended that a sprinkler head located against a steam pipe be moved eight inches, and that a hanger should be placed on the end of the line; that certain crooked sprinklers should be straightened up, and all high heads should be lowered, so that the deflectors would be at least three inches below the bottom of the beams in the basement; that the alarm should be placed in proper working order and plugs inserted in drain valves. He also recommended that an additional head should be placed over the deck of the stairs on the second floor.

Under the authority of *Voightman v. Railroad*, 123 Tenn. 463, 131 S. W. 982, Ann. Cas. 1912C, 211, if the improvements suggested by the inspector were provided for by the contract for the installation of the sprinkler system, and a material part of it, and this work was not properly done by the subcontractor, the building could not be considered as completed until after the improvements were made in December. If, however, it was



merely an unimportant detail or an inconsiderable thing not of the essence of the contract, or if it was merely to supply defective material or to repair defective work, it would not extend the time for the furnisher's lien.

As to whether this work was necessary to make the sprinkler system a completed one and such as would be approved by the Tennessee Bureau of Inspection is a matter of proof. The witness Clark, foreman of the Fire Extinguisher Company, states at one place in his testimony that the plant could not be considered as completed unless the improvements recommended by the inspector were placed in order and the corrections made, and he says specifically that the work done December 26th, 27th, and 28th was necessary to complete the installation of the plant. This testimony is not entitled to great weight, in view of the fact that the witness had previously stated that, when the water was turned on November 6th, he regarded the system as completed within the meaning of the contract. It appears from this witness' testimony that the improvements suggested by the inspector were sent to the home office of the Inspection Bureau, and from there to the general office of the Fire Extinguisher Company, and from the office of the Fire Extinguisher Company to this witness, and that he received the designations for improvement some time in November. He also says that the work of making these improvements was postponed by agreement between the owner and the contractor for the convenience of the tenant until the Christmas holidays. The inspector inspected the building October 19, 1912. As this time he directed certain improvements to be made in the sprinkler system, and he says that these improvements were necessary to be carried out by the Fire Extinguisher Company before the Inspection Bureau would recognize it as a completed system. He says that it would not be a standard system with the suggested improvements left off, and that he would not recommend it to the bureau until the "little defects" mentioned in the report were corrected.

He was asked if the matters of moving the sprinkler from near the radiator, fixing the alarm, and the use of the additional hangers were unimportant matters, and he replied that it would be necessary for these things to be done to complete the system, but that they were not as important as the installing of the extra heads under the work tables. It appears that, in order to lower the sprinkler heads in the basement so that they would be three inches below the beams, it was necessary to lower the pipes in the basement about 25 inches. He was again asked if all the improvements recommended by him were important, and he answered as follows:

"In inspecting we do not take into consideration whether they are important or not. They are simply necessary to get the maxi-

mum protection and might never be used, while again they might. \* \* \* Some of them were small matters. The question of putting an additional hanger on did not amount to as much as moving the head from the steam pipe. They simply meant additional protection to the occupant of the building and to the owner."

He again states that the system would not have been recognized until all of the improvements that were reported, after the inspection, had been put in and the recommendations carried out.

The learned chancellor held that the building was not completed until the improvements required by the Tennessee Inspection Bureau were put in by the Fire Extinguisher Company for the reason that the approval of the Inspection Bureau was of the essence of the contract between the Fire Extinguisher Company and the principal contractor, and that under the proof the importance, or expensiveness, or extensiveness of the improvements was not entitled to particular weight, because the approval of the Inspection Bureau was the thing that must be obtained by the Extinguisher Company before its contract was complete.

We think this is a correct view. The parties can by mutual consent make the completion of the building to depend upon any lawful event which may suit their purposes. The purpose of installing the sprinkler system was of course to reduce insurance rates, and under the testimony the insurance rate would be governed by the recommendation of the Inspection Bureau so far as this sprinkler system would affect it. So one of the chief values of the sprinkler system to the owner was its approval by the Tennessee Inspection Bureau. This could not be had without the work done in December.

While it is entirely true that the expense of making the improvements and the labor done in connection with them are very small items as compared with the cost and labor of installing items as compared with the cost and labor of installing the entire system, this does not necessarily mean that the improvements themselves are unimportant. The sprinkler system is intended to extinguish fire automatically by releasing the water under pressure in the pipes when the heat generated by a fire in the building is sufficient to put the system in operation. The sprinkler heads were to be so arranged that they would spray water over the entire surface of the building. It is thus apparent that it was of the first importance that the sprinkler head too near the steam pipe should be removed, and that the sprinkler heads in the basement too near the beams should be lowered so that the water, when released, would be sprayed over the entire area of the basement.

[2] The delay in making these improvements from November until the Christmas holidays was agreed upon by the owner and

the principal contractor, the complainant's bankrupt. It was entirely competent for them to make this agreement, and the complainant, as representing creditors, is bound thereby.

[3] It is also insisted that the Brick Company and the Supply Company are not entitled to their liens for the reason that the installation of the sprinkler system in the two buildings was not part of the general contract for the erection of the buildings under which the Supply Company and the Brick Company furnished material. As stated, Mr. and Mrs. Knaff made a contract with the Beaumont Company to erect the two buildings referred to. The Beaumont Company was the principal contractor. Later this contract was enlarged so as to provide for an additional story upon one of the buildings, and the sprinkler system in both the buildings. This addition to the contract was made long before these two claimants furnished all of their material. We think it would be sticking in the bark to say that these claimants are not entitled to their liens upon notice filed within 30 days from the completion of the contract between the owner and the principal contractor simply because the contract between them had been enlarged before the claimants furnished all of their material. The statute says they shall have the lien if they give the notice within 30 days from the completion of the work provided by the contract. This they have done.

Other questions were disposed of orally.

**STATE ex rel. NATIONAL CONSERVATION EXPOSITION CO. v. WOOLLEN, State Comptroller.**

(Supreme Court of Tennessee. Nov. 29, 1913.)

**1. STATUTES (§ 5\*)—POWERS OF LEGISLATURE — EXTRAORDINARY SESSION — APPROPRIATIONS.**

Under Const. art. 3, § 9, authorizing the Governor, on extraordinary occasions, to convene the General Assembly by proclamation, "in which he shall state specifically the purposes for which they are to convene, but they shall enter on no legislative business except that for which they were specifically called," the Governor can limit the subject which the Legislature can consider, and he can do this by the imposition of qualified matter upon a general subject; hence he could qualify the general subject "appropriations" by "necessary to maintain the state's institutions."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 4; Dec. Dig. § 5.\*]

**2. CONSTITUTIONAL LAW (§ 48\*) — PRESUMPTION IN FAVOR OF VALIDITY.**

A presumption is always in favor of the constitutionality of an act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**3. STATUTES (§ 5\*)—ENACTMENT AT EXTRAORDINARY SESSION — PROCLAMATION OF GOVERNOR—"MAINTAIN"—APPROPRIATIONS.**

An appropriation of \$25,000 to the National Conservation Exposition Company, a corporation, created for the purposes of holding ex-

positions, encouraging and supporting agriculture, industrial enterprises, and the breeding of blooded live stock and poultry, made by the Legislature in extraordinary session, and contained in the general appropriation bill under the head of "Department of Agriculture," was not embraced within the call of the Governor, which was "to make such appropriations of the public moneys as may be deemed necessary and proper to maintain the state's institutions, offices and departments," since, though some of the purposes of the corporation were identical with those of the agricultural department, and it, in carrying out its purposes, might indirectly aid the department, it was a separate institution in no way connected with the agricultural department, and the word "maintain" as used in the Governor's call meant, if not direct maintenance by an appropriation to the department itself, at least one under its control; hence the appropriation was void, because in violation of Const. art. 3, § 9, authorizing the Governor to convene the General Assembly by a proclamation limiting their power specifically to the purposes for which they are convened.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 4; Dec. Dig. § 5.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4277-4281; vol. 8, p. 7712.]

**4. STATES (§ 137\*)—VALIDITY—PERSONS ENTITLED TO QUESTION.**

The officers of the state upon whom is imposed the duty of disbursing the public funds can question the validity of an appropriation made by the Legislature.

[Ed. Note.—For other cases, see States, Cent. Dig. § 134; Dec. Dig. § 137.\*]

Neil, C. J., dissenting.

Appeal from Chancery Court, Knox County; Will D. Wright, Chancellor.

Suit by the State of Tennessee on relation of the National Conservation Exposition Company, to compel George P. Woollen, Comptroller of the Treasury of the State of Tennessee, to issue his warrant to the relator for \$25,000 the amount of an appropriation made by the Legislature at Extraordinary Session to relator. Decree for relator, and defendant appeals. Reversed, and bill dismissed.

Frank M. Thompson, Atty. Gen., for appellant. Shields & Cates, of Knoxville, for appellee.

NEIL, C. J. Finding an excellent statement of the case and of the facts in the brief of the counsel for the complainant, we adopt it as follows:

"The state of Tennessee on relation of the National Conservation Exposition Company, filed this petition in the chancery court at Knoxville to compel the defendant, George P. Woollen who is the comptroller of the treasury of the state of Tennessee, to issue the comptroller's warrant for an appropriation for \$25,000, which was made to the National Conservation Exposition Company by the 'general appropriation bill' passed by the extra session of the 58th General Assembly of the state of Tennessee, being Senate Bill No. 1 and chapter 19 of said Acts.

"The defendant George P. Woollen filed a demurrer to this petition, by which he chal-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lenged the constitutionality of said appropriation, and resists the prayer of the petition upon the following three grounds, to wit:

"First. He insists that the proclamation of the Governor convening the 58th General Assembly in extraordinary session does not 'state specifically' that the appropriation of \$25,000 to the National Conservation Exposition Company is one of the 'purposes for which they are to convene,' and that said appropriation is unconstitutional and void, in that it contravened article 3, § 9, of the Constitution of the state of Tennessee.

"Second. He insists further that he cannot be made to issue a comptroller's warrant for an unconstitutional appropriation, and that a peremptory mandamus commanding him to do so in this case would violate article 2, § 24, of the Constitution of Tennessee, which provides that 'no money shall be drawn from the treasury but in consequence of appropriations made by law.'

"Third. He insists, further, 'that the attempted appropriation and setting apart of the public moneys to the relator, a private corporation, by said Senate Bill No. 1 was beyond and outside of the caption thereof.'

"This cause was heard by the chancellor on the bill and demurrer on October 28, 1913. The chancellor overruled the defendant's demurrer and ordered him to make further defense to said petition; but he declined to do so, and elected to stand and rely upon said demurrer as his sole defense to the petition. That part of the decree showing this fact is as follows:

"It is therefore decreed by the court that the said demurrer be and the same is overruled, and that the defendant shall answer said petition; but the defendant, being in court through and by his counsel, the Attorney General and Reporter of the State of Tennessee, declined to make other or further answer or defense to said petition than is made by said demurrer, and elects to stand and rely upon said demurrer.'

"Thereupon the chancellor entered a decree ordering the clerk and master to immediately issue a mandatory mandamus commanding and compelling the defendant to issue his comptroller's warrant to the National Conservation Exposition Company upon the treasury of the state of Tennessee for said \$25,000 appropriation.

"From this decree, the defendant prayed, and has perfected an appeal to this honorable court, and has assigned errors by which he raises the same questions that are raised by his demurrer.

"The undisputed facts are as follows, to wit:

"The National Conservation Exposition Company is a corporation organized under the laws of the state of Tennessee for the purpose, as stated in its charter, 'of holding and conducting expositions and amusements; to promote the conservation and development of natural resources, the encouragement

and support of agricultural, horticultural, industrial enterprises, commerce, and the breeding and raising of blooded live stock and poultry.'

"In the latter part of 1912 the National Conservation Exposition Company began preparations to hold an exposition at Knoxville, Tennessee, beginning September 1, 1913, and ending November 1, 1913, 'for the purpose and with the result of promoting the highest development and best uses of the natural resources of this country; to illustrate and teach the ways in which the wealth in lands, forests, waters, minerals, wild animal life, and human efficiency may be more effectively promoted and utilized; to teach the use of modern machinery, and show how it lightens labor and increases production; to promote, encourage, and teach our farmers how to improve their soil, and produce better and more farm products; to incite industry, thrift, development, and worthy emulation in the different avenues of commerce, agriculture, manufacture, art, and education within the state, thereby tending to the permanent betterment and prosperity of the whole people; and to advertise to the world the natural resources and wealth of our state, and thereby encourage immigration to the state and the building up and development of all our resources, which will inure to the benefit of the state and its entire population.'

"In accomplishing these purposes the National Conservation Exposition Company 'spent over \$350,000 in erecting buildings in which to exhibit our resources, and in obtaining material for teaching the purposes of the exposition by object lessons, in paying premiums to our farmers for the best exhibits of all farm products by them, and of all poultry and live stock raised and exhibited by them, and in advertising the exposition and its purposes throughout the United States.'

"Early in the regular session of the General Assembly of the state of Tennessee for the year 1913, and while the petitioner was getting together an exhibit of the natural resources of Tennessee, 'a bill was introduced in the House and Senate appropriating \$30,000 to the National Conservation Exposition Company to be expended by it in gathering, assembling, housing, and exhibiting an agricultural, horticultural, forestry, and mineral exhibit of the resources of the state of Tennessee. This bill passed the Senate, but was held up in the House behind a multiplicity of bills, and was never reached on the calendar. During this same General Assembly, however, there was introduced a general appropriation bill by which an item of \$30,000 was appropriated to the National Conservation Exposition Company to defray part of the expenses of its exhibition of the natural resources of the state. This bill passed the Senate and House, but was vetoed by the Governor on the ground that it passed the House when no quorum was present.

When the House reassembled, it was passed over the Governor's veto but at a time when the quorum was broken during the call of the roll on the bill, and because of that complication the bill failed to pass over the Governor's veto in the Senate. \* \* \* After the passage of this general appropriation bill, the National Conservation Exposition Company actually expended on the faith of this appropriation more than \$30,000 in getting exhibits of the agricultural, mineral, and timber exhibits of the state, and more than that amount of money in agricultural exhibits alone.'

"On August 29, 1913, the Honorable Ben W. Hooper, Governor of the state of Tennessee, issued a proclamation to the members of the 58th General Assembly of the state of Tennessee, reciting that 'the public welfare demands legislation upon several matters of general and local interest which are of such importance as to create extraordinary occasion for the assembling of the Legislature of the state of Tennessee,' and, by virtue of the authority vested in him by article 3, § 9, of the Constitution of Tennessee, he called the members of the 58th General Assembly of Tennessee to convene in extraordinary session in the Capitol at Nashville on Monday, September 8, 1913, 'for the purpose of considering and acting upon the following matters of legislation:

"(1) To make such appropriations of the public moneys as may be deemed necessary and proper to maintain the state's institutions, offices, and departments, with the exception of educational institutions; these having been liberally provided for at the regular session.'

"In pursuance of this proclamation the members of the 58th General Assembly of the state of Tennessee convened in extraordinary session in the Capitol at Nashville on Monday, September 8, 1913, and enacted, among other legislation, 'Senate Bill No. 1,' the provisions of which in so far as they affect the questions involved in this controversy are as follows, to wit:

" 'Senate Bill No. 1.

" 'General Appropriation Bill.

" 'An act to appropriate money out of the state treasury for the purpose of defraying the expenses of the state government for two years commencing March 19, 1913.

" 'Section 1. Be it enacted by the General Assembly of the state of Tennessee, that the appropriations hereinafter set out are hereby made for the purpose of defraying the expenses of the state government for two years commencing March 19, 1913, which appropriations shall be paid out of the state treasury upon the warrants of the comptroller.'

"This act declares 'that the appropriations hereinafter set out are hereby made for the purpose of defraying the expenses of the state

government for two years commencing March 19, 1913, which appropriations shall be paid out of the state treasury upon the warrants of the comptroller.' In subheadings under the general headings 'Judiciary,' 'Office of Governor,' 'Department of History,' 'Archives,' and 'Office of Insurance Commissioner,' it appropriates moneys for the payment of salaries and all classes of expenses germane to these general subjects.

"In subheadings under the next general heading of 'Office of Commissioner of Agriculture,' it appropriates moneys for the payment of the salaries of the commissioner and all of his clerks and his office expenses, to establish a 'Serum Plant,' for 'Live Stock Sanitary Control,' for holding 'Farmers' Institutes,' for the 'State Board of Entomology,' for the 'Bureau of Immigration,' and for the 'Department of Agriculture.' Under the subheading 'Department of Agriculture' the following appears, to wit:

" 'Department of Agriculture.

For state laboratory, \$3,500.00, annually ..... \$7,000 00

" '(Act General Assembly 1913, House Bill No. 137.)

To the Recreation Park Commission of Memphis, as created by the Acts of General Assembly, chapter 5, Acts of 1911, for the erection of a state building or buildings within which there is to be collected, housed and exhibited resources of the state of Tennessee, for the Tri-State Fair at Memphis..... \$25,000 00

" 'The building or buildings to be erected under the direction of the commissioner of agriculture, and all expenditures made out of this appropriation to be first approved by the said commissioner.

To the National Conservation Exposition Co., Knoxville, Tennessee ..... \$25,000 00.  
"[Acts 1913 (1st Ex. Sess.) c. 19.]"

The original capital stock authorized by the charter of the National Conservation Company was \$100,000. Amendments were subsequently made which authorized the stock to be raised to \$1,000,000.

It is not shown that this corporation is in any wise under the control of the department of agriculture, or connected therewith organically or otherwise, save that some of its purposes, already outlined, are the same as those for which the agricultural department was established.

It is insisted by the Attorney General for the defendant that the appropriation in favor of the National Conservation Exposition Company was not embraced within any of the purposes of the special call made by the Governor convening the Legislature in extra session, and therefore that so much of the act as made that appropriation was unconstitutional and void.

The section of the Constitution (article 2,

§ 9) which controls this subject reads as follows:

"He [the Governor] may, on extraordinary occasions, convene the General Assembly by proclamation, in which he shall state specifically the purposes for which they are to convene; but they shall enter on no legislative business except that for which they were specifically called together."

It is insisted for the complainant that, while article 3, § 9, of the Constitution, requires the Governor's proclamation for convening an extraordinary session of the Legislature to "state specifically the purposes for which they are to convene," and provides that the Legislature "shall enter on no legislative business except that for which they were specifically called together," yet that it is "perfectly well-settled law that they can constitutionally enact any legislation that is germane to the general purpose stated in the proclamation, and that an attempt in the proclamation to abridge this power is absolutely void"—citing *People ex rel. v. Johnson*, 23 Colo. 153, 46 Pac. 681; *Brown v. State*, 32 Tex. Cr. R. 119, 22 S. W. 596-602; *Baker v. Kaiser*, 126 Fed. 321, 61 C. C. A. 303; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 879; *Stockard v. Reid*, 57 Tex. Civ. App. 126, 121 S. W. 1144; *Mitchell v. Turnpike Co.*, 3 Humph. 456; 1 *Sutherland on Statutory Construction*, p. 112.

We shall now state the substance of these cases:

*People ex rel. v. Johnson*. This action grew out of a contest between two factions; each claiming the right to file nominations of and for the "People's Party," and to use the emblem of that party, to wit, the device known as the "cottage home." Each faction claimed that it constituted the only genuine "People's Party"; one convention having met in the city of Denver on September 7, 1896, and the other in the city of Pueblo two days later. The contest originally arose before the secretary of state, who decided in favor of the list of nominees selected at Denver, and that the ticket so nominated was entitled to use the emblem in question. From the secretary of state the matter was carried into the district court of Arapahoe county. That court, upon a final hearing, decided in favor of the ticket nominated at Pueblo, and directed the secretary of state to certify that ticket upon the official ballots, giving to it the emblem and name of the "People's Party." The unsuccessful faction applied for a writ of prohibition to restrain the district court from carrying its judgment into effect. The jurisdiction of the district court thus challenged was the only question before the court. That jurisdiction was attacked on two grounds, the first of which was as follows:

"The act relied upon to support the jurisdiction having been passed at the special 1894 session of the Legislature, it is claimed it is

void and of no force or effect because not embraced within the call by the Governor for such special session."

This is the only point we are concerned with.

Speaking to this matter, the court said:

"In support of the first ground section 9 of article 3 of the state Constitution is relied upon. It reads:

"Sec. 9. The Governor may, on extraordinary occasions, convene the General Assembly by proclamation, stating therein the purpose for which it is to assemble; but at such special session no business shall be transacted other than that specifically named in the proclamation. \* \* \*

"The call for the special session of the Legislature in 1894, issued in pursuance of the foregoing constitutional provision, contained, among other subjects submitted for legislation, the following:

"(29) To enact that the law in relation to elections, etc., in this state, known as the 'Australian Ballot Law,' be amended so as to provide:

"This is followed by paragraphs designating in detail the amendments which the executive desired the Legislature to make. The Governor, by specially designating in the proclamation convening the General Assembly as one of the subjects of legislation the law in relation to elections, etc., in this state, known as the 'Australian Ballot Law,' for amendment, must be held to have submitted the whole subject-matter of such act for legislative action thereon. He had no more authority to go farther than this and specify the particular character of the amendments that were to be voted upon than he would have had to have prepared the bills, and attached them to his call, and directed the Legislature to have passed or rejected the same without amendment. Such specific instructions can, at best, be regarded as advisory only, and not as limiting the character of legislation that might be had upon the general subject of the Australian ballot law."

*Baker v. Kaiser*. This case also concerns the constitutional provisions of Colorado considered in the case just quoted. The opinion was rendered in the United States Circuit Court of Appeals for the Eighth Circuit. The following excerpt from that opinion shows sufficiently the contents of the case upon the subject:

"The Constitution of the state of Colorado provides that in the calling of special sessions of the General Assembly the Governor shall indicate the subjects of legislation to be dealt with, and that the business of any such session shall be confined to the matters specifically mentioned in the proclamation. The act under consideration was passed at the special session of 1894. Among the various matters specified in the proclamation of the Governor was the following: 'To pro-

vide to reduce the penalties and interest on delinquent taxes to one-half the present rates.' In this particular it is claimed that, inasmuch as the prior law provided for a penalty of 10 per centum upon the amount of the delinquent tax, and the reduction was to 40 cents per tract of land, the limit prescribed by the call of the Governor was disregarded, and that therefore the act is unconstitutional. The Supreme Court of Colorado, upon a precisely similar attack upon a law passed at the same session, said:

"Legislative judgment and discretion as to transaction of the business specially named are certainly not inhibited at special sessions. The Legislature cannot go beyond the limits of the business specially named in the proclamation; \* \* \* but within the limits of such business it may act freely, in whole or in part, or not at all, as may be deemed expedient, according to its own judgment. The Legislature must do this much, or the right of legislating by the representatives of a free people at special session is destroyed, and all our ideas of such right are rendered obsolete. \* \* \*

"And in another case touching the validity of the act we are considering, the same court said: 'The general subject submitted for legislation by the executive is the reduction of the penalties and interest on delinquent taxes. The words following are to be treated as advisory merely. The subject having been particularly designated in the call, the extent to which legislation shall extend is primarily for legislative, and not for executive, determination.' In re Amendments of Legislative Bills, 19 Colo. 356, 35 Pac. 917.

"This interpretation by the Supreme Court of Colorado of provisions of the Constitution of the state was given in answer to questions propounded by the House of Representatives while the act was in process of legislative formulation, and such interpretation by the highest court of the state is binding upon this court. Moreover, it is, in our opinion, wholly consonant with good reason."

Brown v. State, 32 Tex. Cr. R. 119, 132, 22 S. W. 596, 601. We copy the following matter from the opinion, which fully states the controversy:

"It is contended that the act of the special session of the Twenty-Second Legislature organizing the Twenty-First judicial district is unconstitutional, because the Governor did not, in his proclamation convening said Legislature, designate this particular matter in said proclamation as a 'subject' for legislation. Article 4, § 8, Const., provides that the Governor 'may, on extraordinary occasions, convene the Legislature at the seat of government (or at, etc.). \* \* \* His proclamation shall state specifically the purpose for which the Legislature is convened.' It is further provided by article 3, § 40, of said Constitution: 'When the Legislature shall be convened in special session, there

shall be no legislation upon any subject other than those designated by the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days.' The proclamation, among other things, convened the Legislature 'to reapportion the state into congressional, senatorial, judicial, and representative districts, and to provide for the election of officers therein.' The judicial districts mentioned in the proclamation were those prescribed over by the district judges. A casual inspection of the proclamation renders this certain. That the authority to reapportion or reorganize the judicial districts of the entire state necessarily carried with it the power to reapportion any given number of such districts is to our minds a self-evident proposition. The office of the proclamation is to designate the subjects, and not the manner or extent of legislation on such subjects. 'It is not the intention to require the Governor to define with precision as to detail the subjects of legislation, but only in a general way by his call to confine the business to the particular subjects.' Mitchell v. Turnpike Co., 8 Humph. [Tenn.] 456; Devereaux v. City of Brownsville [C. C.] 29 Fed. 742; Baldwin v. State, 21 Tex. App. 591, 3 S. W. 109. That the Legislature may only enact legislation in part in relation to the subject mentioned in the call does not render such legislation invalid, nor is it necessary to the validity of such legislation that the whole subject-matter should be acted on by the Legislature. The call includes the entire subject of reapportioning the judicial districts, and authorized 'any and all such legislation upon that subject as was deemed necessary by the Legislature. It was not necessary, nor would it have been proper, for the Governor, in his proclamation, to have suggested in detail the legislation desired. It was for the Legislature to determine what the legislation should be.'"

Stockard v. Reid. "The first proposition," said the court, "presented and urged in this court is that the court below erred in holding the act of the Thirtieth Legislature, passed at its special session, and approved May 14, 1907 [chapter 8], relating to the contest of local option elections valid, constitutional, and binding, for that said act is contrary to section 40, art. 3, of the Constitution of this state, because it relates to the contest of prohibition elections, and not to the procedure in a civil or criminal trial, and such legislation was not designated in the proclamation of the Governor convening said special session, nor presented by the Governor in any message to the Legislature. The act in question was passed at the special session of the Legislature convened by the Governor on the 13th of April, 1907. The first clause or paragraph of the procla-

mation relative to the purpose for which the special session was called is as follows: 'To enact adequate laws simplifying the procedure in both civil and criminal trials \* \* \* and also upon the needed reforms in our jury system, I again call your attention to the importance of these reforms, both to the counties and state, and to the people who bear the burden of a system almost bewildering in its meshwork of technical absurdities. I cannot too strongly urge upon the Legislature the necessity for the reforms demanded.' The court here copied the clause from the Constitution which is set forth in the excerpt from the preceding case, and held that the act was within the call of the Governor, and not violative of the constitutional provision.

State v. Shores. Said the court:

"It is insisted the court erred in permitting the attorney for the state, against the objection of the prisoner, to strike 2 jurors from the panel of 20 qualified jurors, on the ground that the act of 1887 permitting it is unconstitutional. It is not claimed that it is unconstitutional because it denies the prisoner any right secured to him by the Constitution, but because the act was passed at an extraordinary session of the Legislature, and it is claimed the subject was not embraced in the proclamation of the Governor. The Constitution provides that 'the Governor may, on extraordinary occasions, convene at his own instance the Legislature; but, when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together.' Section 7, art. 7. The Governor, under this authority, issued his proclamation convening the Legislature in extra session on the third Wednesday in April, 1887, to consider and act upon the business stated in the proclamation, among other business, 'to protect the public treasury against unnecessary expenditures by regulating the costs, charges, and proceedings in criminal cases before justices of the peace and circuit courts.' Acts 1887 [Extra Sess.] p. 235. The Legislature so convened on the 7th day of May, 1887, amended sections 1, 3, 4, and 8 of chapter 159 of the Code. The first clause of section 3 was amended so as to read: 'In case of felony twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors free from exception be completed; from which panel the accused may strike off six jurors, and the prosecuting attorney may strike off two jurors,' etc. The section, by its terms, applies only to indictments for offenses committed after the act took effect. This act the Governor approved, thus deciding for himself that it was embraced in the subjects mentioned in

the proclamation. Acts 1887 [Extra Sess.] c. 6, p. 243.

"All the presumptions are in favor of the constitutionality of the act. If by any reasonable construction of the language of the proclamation the subject legislated upon in section 3 is embraced therein, the act is constitutional. If the direct tendency of this act is to lessen the expenses of criminal trials, and thus to any extent protect the public treasury against unnecessary expenditures, and no constitutional right of the citizen is abridged thereby, then the act is within the list of subjects embraced in the proclamation, and the act is constitutional, we cannot see how the act in any wise abridges the constitutional rights of the citizen. State v. Davis, 31 W. Va. 390. We judicially know that one great cause of expense in criminal trials is hung juries, and as a consequence new trials. The panel must contain 20 jurors free from legal exception. When all the challenges for cause have been made by both the state and prisoner, and the panel contains 20 jurors, there remain 8 peremptory challenges for cause entirely within the breast of the challenger. He may strike off the number he is permitted by law to strike, without assigning any reason therefor.

"As the law formerly stood the prisoner alone was permitted to exercise the right of peremptory challenge. If he had a warm personal friend on the jury, who would be unconsciously prejudiced in his favor, of course he would be left on the jury, and so would all such, unless they were more than 12. The prosecuting attorney might see 2 of the most intimate friends of the accused on the jury, men who he might have every reason to believe would refuse to render a verdict against the prisoner. He is powerless to prevent them remaining on the jury. He goes through the trial, and because these men were on the jury there is no verdict, and there must be another trial with all its attendant expense to the state. There can be no doubt that giving the prosecuting attorney a peremptory challenge of 2 jurors tends to prevent hung juries and mistrials, and to lessen the expense of criminal trials, and thus protect the public treasury. We see no objection to the act because it was passed at the extra session, and it is constitutional and valid."

Passing for the present our own case of Mitchell v. Turnpike Co., 3 Humph. 458, we shall refer to certain cases from other jurisdictions cited by the Attorney General. The first of these is Wells v. Missouri Pac. Ry. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847.

In that case it appeared that the Governor, in his message calling the Legislature into extraordinary session, made, by particular reference, certain parts of his biennial message of the same year a part of his special message; that is, the Supreme Court of Missouri, in deciding the question presented to

it, said, in effect, it would so consider the special message.

The Governor thus called attention to section 14 of article 12 of the Constitution of 1875. This section was:

"Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

Thus treating the biennial message as a part of the special message, the Governor said: "I call your particular attention to the following sections of article 12 of our state Constitution: \* \* \* Section 14, which declares railways to be public highways, and the companies operating them common carriers; it also directs the General Assembly to pass laws to correct abuses, and to prevent unjust discrimination and extortion, and to fix maximum rates of charges, and enforce all such laws by adequate penalties."

The Legislature passed under this call the act of June 16, 1887 (Acts [Extra Sess.] 1887, p. 14), "to provide for the prevention of accidents to railroad employes and others, by requiring the switches, frogs and guard rails to be properly blocked." By its first section it was declared that "all companies or corporations, lessees or other persons owning or operating any railroad or part of a railroad in this state, are hereby required, on or before the first day of November, 1887, to adopt and put in use the best known appliances or inventions to fill or block all switches, frogs and guard rails on their roads in all yards, divisional and terminal stations, and where trains are made up to prevent, as far as possible, the feet of employes or other persons from being caught therein." The second and last section declared in substance that, in suits for damages growing out of noncompliance with the first section, the contributory negligence of the injured party would not relieve the defendant from liability.

The Supreme Court of Missouri held that the act did not fall within the scope of section 14 of article 12 of the Constitution, which was the special subject they were called to pass a law or laws upon. The court said that the words "to correct abuses" as employed in section 14 referred to abuses having some relation to the freight or passenger tariffs of railroads as public highways and common carriers; that no reasonable interpretation of the language of section 14 would suggest any constitutional command for legislation of the kind appearing in the act of June 16, 1887, above mentioned; that

that act, imposing as it did a duty to block all switches, frogs, etc., not only upon railway companies, but upon all kinds of corporations "or other persons" owning any part of a railroad, would reach the case of every private citizen owning a small track for his own convenience, as well as the great railroad lines of Missouri; that the effect of the second section would be to introduce a radical innovation in procedure by the attempted elimination of contributory negligence as a defense by the way of penalty for the violation of the act in cases to which it might apply. The court said: "It has no fair relevancy that we can discover to the subject of freight or passenger tariffs, or to abuses of corporate power by railways in the respects alluded to in section 14, art. 12, of the Constitution. We conclude that the act does not fall within the range of the subjects submitted to the Assembly for action by the Governor in his proclamation and messages." It was therefore held void.

The provisions of the Constitution of Missouri concerning the limitation upon legislation passed under special call of the Governor are as follows: "On extraordinary occasions he may convene the General Assembly by proclamation, wherein he shall state specifically each matter concerning which the action of that body is deemed necessary." Const. 1875, art. 5, § 9. It was further declared by section 55 of the fourth article of the same instrument that "the General Assembly shall have no power, when convened in extra session by the Governor to act upon subjects other than those specially designated in the proclamation by which the session is called, or recommended by special message to its consideration by the Governor, after it shall have been convened."

Jones v. Theall, 3 Nev. 233. The question in this case was not whether a specific act fell within the Governor's call, since it was not mentioned therein, or in his special message to the Legislature after it had convened, but whether under certain peculiar provisions of the Constitution of that state it was automatically before that body as a part of the legislation to be considered under the special call. It appears that, when a certain time has elapsed after the bill has been received by the Governor, and the Legislature adjourns while it is in his hands, he may state his objections in writing after the adjournment, and file the bill with his objections in the office of the secretary of state, whose duty it then becomes to lay this bill with the objections "before the Legislature at its next session in like manner as if it had been returned by the Governor, and if the same shall receive the vote of two-thirds of the members elected to each branch of the Legislature upon a vote taken by yeas and nays to be entered upon the journals of each house, it shall become a law. The court said:

"To the special session of the Legislature convened by the proclamation of the Gov-



ernor a few days after the adjournment of the general session, the secretary of state returned this bill, which was taken up and passed by a two-thirds' vote, and thus, it is claimed, became a law. Upon these facts, it is urged on behalf of the defendant that the Legislature, at its special session, had no power to act on the bill, it not having been called to its attention by the Governor, and therefore that it never became a law.

"Such is also our opinion, and we think it most clearly sustained both by the letter and spirit of the Constitution. Whilst the scope within which the Legislature may act during its general session is almost unlimited, it is restricted at its special session to the consideration of such business as may be specially called to its attention. Section 9, art. 5, of the Constitution prescribes the limits of its power at such session in the following language: "The Governor may on extraordinary occasions convene the Legislature by proclamation, and shall state to both houses, when organized, the purpose for which they have been convened, and the Legislature shall transact no legislative business except that for which they were especially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in session."

"There is certainly no ambiguity in this language, and, unless we adopt the saying of Talleyrand—that words are given to conceal ideas—there can be no difficulty in ascertaining the object sought to be accomplished by this section of the Constitution. The powers of the Legislature at its special sessions are expressly and clearly limited to the transaction of the business for which it may be convened, or such other business as the executive may call to its attention while it is in session. If the Legislature can break through this limit for one purpose, it may for all purposes, and enter upon general legislation. If it may take up a vetoed bill to which its attention is not directed by the Governor, it may frame and pass an entirely new bill upon a subject not referred to in any executive message. It is either strictly limited to such special subjects as may be called to its attention or it is not limited at all. There is no mean between these extremes which can be adopted without a clear departure from the letter of the Constitution. Let it be borne in mind that it is only upon extraordinary occasions that a special session is authorized to be called; such being the same, it is fair to presume that it was the intention to allow none but urgent business, and such as would admit of no delay, to be transacted at such a session. That ordinary legislative business should not be transacted at a session which can properly be convened only upon some extraordinary occasion, or when some great emergency makes it necessary, is so manifestly proper, and the transaction of such business would seem to be so manifestly improper, that we are confirmed

in the opinion that it is the purpose of the Constitution to forbid consideration of any but such business as the Governor may deem necessary to be transacted at such sessions; but a reconsideration of all bills vetoed and filed by the Governor in the office of the secretary of state after the adjournment of the general session is not necessarily business of such urgent importance as to make a special session necessary, or such as to justify the attention of the Legislature if so convened. Such bills might possibly be of the most trivial character. At least, if it were deemed important to have them reconsidered, it is the province of the executive to ask legislative action upon them. \* \* \* What is meant by the words 'such other legislative business as the Governor may call to the attention of the Legislature while in session'? Clearly such business as the Governor may deem it necessary for the Legislature to transact, and upon which he may solicit action—the business for which the special session is convened, or such other business as may be called to the attention of that body by some message coming from the Governor during the session, and upon which he may ask legislative action. Many subjects may incidentally be referred to in the executive messages upon which no action whatever is required; but it will hardly be claimed that such incidental reference would authorize legislation upon all such subjects at a special session. The evident object, it seems to us, is to restrict legislation at such session to those subjects which the Governor may deem it necessary to legislate upon. If such be not the object, why was any restriction whatever placed upon the Legislature at its special sessions, or any control over its power given to the executive? If we are correct in the construction which we place upon section 9, above referred to, it cannot be said that the Governor's objections to a bill filed with the secretary of state before the convention of the special session is such a calling of attention to the bill as to justify its consideration at such session. We are satisfied that the Legislature, at a special session, can only legislate upon such subjects as are specially called to its attention by the Governor, with a view to secure legislative action thereon."

We shall now proceed to state the substance of our own case of *Mitchell v. Turnpike Company*.

In 1836, as stated in the opinion, at a called session of the Legislature (chapter 4, § 2) it was provided that the commissioners of any railroad, or turnpike company, might make a survey, or resurvey, as far as to locate routes or make such changes as they might deem to be in the interest of said companies. By authority of this provision the commissioners relocated the Franklin & Columbia Turnpike Company's road so as to make it run over Mitchell's farm. Damages were assessed to him in the manner customary at

that time; but, desiring to escape the burden of the road altogether, he attacked the act providing for the relocation on the ground that it was unconstitutional. We now quote from the opinion what is said upon the subject:

"The alleged unconstitutionality of this provision is not supposed to arise from the character of the provision itself, or the nature of the subject, for the Constitution, art. 11, § 9, declares that a 'well-regulated system of internal improvement is calculated to develop the resources of the state, and promote the happiness and prosperity of her citizens, therefore it ought to be encouraged by the General Assembly.' But it is supposed to arise from the limited powers of the Legislature at a called session; their commission at such time to legislate, so to speak, depending upon the scope and extent of the Governor's message, to be laid before them. Article 3, § 9, of the Constitution provides that the Governor 'may, on extraordinary occasions, convene the General Assembly by proclamation, and shall state to them when assembled the purposes for which they shall have been convened, but they shall enter on no legislative business, except that for which they were especially called together.' This undoubtedly is a very salutary provision, tending somewhat to check overlegislation, and to render laws a little more stable, by furnishing a period of two years during which they may be in some degree subjected to the test of a brief experiment. And cases may sometimes arise, it is to be sincerely hoped but seldom, in which it may become the duty of the court to declare a law passed under such circumstances beyond the scope of the legislative commission arising out of this provision of the Constitution. Our present inquiry is whether this be one of such cases. The message of Newton Cannon, Governor of the state at the time in question, calls the attention of the Legislature to the survey of a route through the state for the contemplated Louisville, Cincinnati & Charleston Railroad, to the omission of a county in a late electoral law, to the disputed boundary with the state of Mississippi, to the treaty with the Cherokee Nation, to compensation of volunteer militia called into service under the requisition of the President of the United States, and finally to the act of Congress entitled 'An act to regulate the deposits of the public money,' a copy of which was transmitted to them, and with respect to which the Governor remarked that it presented another subject demanding legislative action during that session, and he adds that the reception and judicious investment of such sum or sums of money as may from time to time be appropriated to our state under the provisions of the said act must be regarded by all as a matter of paramount importance, and that he had the 'fullest confidence that they would devote to it the most mature consideration.'

"He adds, with regard to the acts of Congress, \* \* \* that 'its happy influence in stimulating us to increased and vigorous exertions in the prosecution of our system of education and internal improvement must be extensively beneficial to the whole community.' At that time by the pre-existing laws the state was interested to the extent of one-third in all the turnpike companies, and we cannot say that the resurvey or change in the location of the routes of such public improvements would not constitute a step, and a very material step, to the judicious investment of the fund alluded to.

"We cannot say, in view of the message, that it was not competent for the Legislature 'to enter upon the business' thus submitted to their consideration, or that the provision in question is so remotely connected with that matter or 'business' as not properly to spring out of the general subject.

"The Governor or executive, with us, is in no degree, or in any sense, a part of the Legislature, and has not even at a called session the initiation of bills. At such session, when he submits a general subject, and the Legislature 'enter upon the business' of legislating upon it, it will be found a difficult and invidious task to secure the character and details of their provisions so as to determine them of too remote affinity with the message from which they arise. In this case it is not necessary."

[1-3] We have thus set out the cases very fully, with a view to more conveniently examining and comparing them, and deducing conclusions from them. The illustrative facts in each enable us better to apply the principles announced.

Comparing these cases we see no substantial difference in the constitutional limitations upon legislative power. They all provide that the Governor may confine the Legislature, called in special session, to such subjects of legislation as he may prescribe, which limitations he may make operative, in some by his proclamation alone, in others by a special message or messages after the body is convened, in others still by both means. All the cases agree that, while the Governor may so limit the subjects of legislation, he cannot dictate to the Legislature the special legislation which they shall enact on those subjects. In all of them the inquiry is finally reduced to the ascertainment of the subject or subjects embraced in the call, or message, determined by an analysis and construction of that paper as in the case of any other written instrument, and by a like analysis and construction of the legislation drawn in question for the purpose of deciding whether it is embraced within the call, or message. It is agreed, so far as any of the cases speak on the matter, and this view is undoubtedly sound, that the presumption is always in favor of the constitutionality of an act, and that any piece of legislation so under consideration should be held within the call, if

it can be done by any reasonable construction. To these principles we agree, and we now proceed to examine Governor Hooper's call to ascertain the subjects of legislation thereby proposed. For convenience we reproduce so much of it at this point as we think necessary to facilitate the construction.

The Legislature, then, was called "to make such appropriations of the public moneys as may be deemed necessary and proper to maintain the state's institutions, offices, and departments."

[4] The general subject or purpose was "to make appropriations \* \* \* to maintain the state's institutions, offices, and departments." It was not to make appropriations in general to promote the welfare of the state, but to make appropriations limited to the maintenance of the state's institutions, offices, and departments; the power to make such appropriations being reposed in the Legislature, and the duty imposed on them by the same instrument. The call, then, was to the discharge of a duty of the Legislature imposed by the Constitution, if not in terms, still by necessary implication. Within the limits of this subject or purpose mentioned the Legislature had power to enact any laws they might deem proper, any laws which would be germane to such maintenance, or which would have a reasonably direct bearing thereon, and the Governor could not in any manner confine that power. But the Governor has power, under the Constitution, to limit the subjects which they may consider, and in order to do this he may define the subject so as to make it broad or narrow, according to his conception of his public duty. He cannot, under the guise of a definition, impose his will upon the Legislature as to the laws they shall pass, as it seems was attempted in the Colorado cases. But, we repeat, he can by bona fide definition limit the subject to be legislated on so as to make that subject either broad or narrow. This narrowing by definition is accomplished, as in all other matters under the dominion of the laws of thought and the laws of expression in human language, by the imposition of qualifying matter upon a general subject. Just as the general subject "animal" may by the addition of qualifying limitations be reduced to the concept man, and this down further to some special race, or class, or group of men. Each one of these would in its turn be truly a subject of thought, and concerning which propositions might be affirmed, or laws enacted. So here it was within the power of the Governor by definition, or the imposition or addition of qualifying matter, to reduce the general subject of appropriations down to, or restrict them to, those for the maintenance of the institutions, offices, and departments of the state for the ensuing two years from March 19, 1913. He could not fix the

amount, or impose any terms as to the method or means of such maintenance. This would be a matter for the Legislature only. But this last observation must be restricted to the relations between the Governor and the lawmaking body. The officers of the state upon whom is imposed the duty of disbursing the funds of the state have the right to have submitted to the courts the question whether the appropriation has been constitutionally made. The courts in determining this question will inquire whether the legislative act passed at a special session was within the Governor's call. But in the effort to reach a conclusion on this subject the courts will, as already said, give a liberal construction with a view to upholding the act if it can be reasonably done. They will adopt a construction, even though not the most obvious, if that construction is still a reasonable one, and will sustain the legislation. The same observation is true of the Governor's call as one of the necessary conditions of the legislation.

Now, in this view, what meaning should be ascribed to the word "maintain"? The most obvious is, of course, direct support. Another meaning somewhat more remote is to aid. This may be given, and is best given, usually, by direct appropriation. But it may also be given, as the writer thinks, by holding up the hands of those who are doing the same work, that is, work which the special department of the state government was created to do. It is in this view, he thinks, that the Constitution authorizes the Legislature to exempt certain charitable institutions from taxation, which exemption is an indirect largesse. These institutions do work in helping the indigent and unfortunate people of the state, which relieves the state of the direct burden. So, according to the description given of the complainant's work, it was most largely and efficiently assisting in the work for which the agricultural department was designed. It was not inappropriate, therefore, as the writer believes, that the state should endeavor to help forward the work of that department by making the appropriation in behalf of so able a coadjutor. By placing the appropriation under the head of the agricultural department, the Legislature showed, as it seems to the writer, that it understood it was thereby assisting and, albeit indirectly, maintaining that department. It goes without saying that such an appropriation was for a public purpose, and that money could not be appropriated for any other purpose. And there is no doubt such an appropriation, as the writer understands, might have been made by a bill at any general session, since it was for such public purpose. This special phase of the question was settled in the case of *Shelby County v. Exposition Co.*, 96 Tenn. 660, 36 S. W. 694, 33 L. R. A. 717.

The majority of the court, however, while

thoroughly approving the principles announced, are of the opinion that the writer has given to them an application which they do not support. The majority are of the opinion that the word "maintain" as used in the Governor's call meant, if not direct maintenance by an appropriation to the agricultural department to be received and used by it, at least one under its own direction and control, and that it was not susceptible of any other or additional meaning, and that its intent could not find true expression in an appropriation to a separate institution or corporation to be expended by such separate institution or corporation, although such separate organization might be engaged in whole or in part in doing work for which the department was organized. The majority believe that the call was to appropriate money to the support of the department itself, and not in any sense to aid some other in doing work of the same kind.

It results that the decree of the chancellor must be reversed, and the bill dismissed, at relator's costs.

NEIL, C. J., dissenting.

#### JONES v. STATE.

(Supreme Court of Tennessee. Nov. 29, 1913.)

##### 1. HOMICIDE (§ 308\*) — ISSUES — SECOND DEGREE MURDER.

In view of Shannon's Code, § 6441, requiring the jury to ascertain in their verdict whether the offense is murder in the first or second degree, it was error, on trial of an indictment for murder, for the court not to instruct on second degree murder.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 642-647; Dec. Dig. § 308.\*]

##### 2. HOMICIDE (§ 307\*) — INSTRUCTIONS — DEGREES OF CRIME.

It is the better practice to charge upon all of the offenses embraced in the indictment, since failure to do so will be reversible if there is any doubt that accused was prejudiced by such omission.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 638-641; Dec. Dig. § 307.\*]

##### 3. HOMICIDE (§ 340\*) — APPEAL — HARMLESS ERROR—FAILURE TO INSTRUCT.

Failure to instruct on second degree murder so that the jury could ascertain in its verdict whether the offense was first or second degree murder, pursuant to Shannon's Code, § 6441, was reversible error, notwithstanding Pub. Acts 1911, c. 32, providing that no judgment shall be set aside for error in the charge, etc., unless it affirmatively appears that it affected the result.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.\*]

##### 4. CRIMINAL LAW (§ 1178\*)—APPEAL—WAIVER OF ERROR.

The fact that counsel both for the state and for accused took the position that he was guilty of first degree murder or entitled to acquittal on the ground of self-defense would not operate as a waiver of accused's right to have the question of second degree murder submitted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.\*]

**Appeal from Criminal Court, Knox County; T. A. R. Nelson, Judge.**

Preston Jones was convicted of first degree murder, and appeals. Reversed and remanded.

J. A. Atchley, E. F. Walsh, and Gordon Mynatt, all of Knoxville, for appellant. W. W. Faw, Asst. Atty. Gen., and W. T. Kemmerly, City Atty., of Knoxville, for the State.

NEIL, C. J. The plaintiff in error was indicted and convicted in the criminal court of Knox county for the murder of Samuel C. Hickey on the morning of June 1, 1913. He was sentenced to death and has appealed to this court. Numerous errors are assigned by his counsel, but we need consider only one.

[1] The assignment referred to is in substance that the trial judge charged the jury only on the subject of murder in the first degree, and self-defense, and matters relating thereto, and failed to instruct them on the crime of murder in the second degree. This was reversible error. The sections of our Code bearing on the subject are as follows:

"6438. If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

"6439. Every murder perpetrated by means of poison, lying in wait, or by an other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, or larceny, is murder in the first degree.

"6440. All other kinds of murder shall be deemed murder in the second degree.

"6441. The jury before whom the offender is tried, shall ascertain in their verdict whether it is murder in the first or second degree; and if the accused confess his guilt, the court shall proceed to determine the degree of crime by the verdict of a jury, upon the examination of testimony, and give sentence accordingly."

Manifestly it was impossible for the jury to perform the duty imposed upon them in the section last quoted, when the trial court failed to submit to them the question whether the prisoner's crime fell within the description of murder in the second degree. His failure to charge upon this subject was equivalent to a specific instruction that plaintiff in error was guilty of murder in the first degree, or entitled to an acquittal under his plea of self-defense. He thus withdrew from the jury a question which the Code specifically required should be submitted to them. The difference was vital, since the punishment for murder in the first degree is death, while that for murder in the second degree is imprisonment in the penitentiary from 10 to 20 years.

It was said in *Good v. State*, 1 Lea (69 Tenn.) 293, 294:

"When it is clear that the grade of offense charged is proved, and there is no room for doubt as between it and a lesser grade embraced by statute in the higher, and of course included in the indictment, to charge the law pertaining to such lesser grades would simply tend to confuse and mislead the jury and often result in verdicts inadequate to the crime actually committed. In applying the rule of this opinion, courts will of necessity act with circumspect caution, giving to the accused the full benefit of all the rules of law applicable to the facts developed in the trial of his cause.

"When the offense charged is beyond controversy made out and is complete, it is the duty of the court to confine its charge to such case; and so, if the offense must be the one charged or no offense in law, as frequently happens, the charge should be so restricted that the jury may be enabled to decide intelligently the single question presented and not be mystified by abstractions."

This case was followed and approved in the following subsequent cases: *State v. Hargrove*, 13 Lea (81 Tenn.) 178; *State v. Parker*, Id. 221; *Palmer v. State*, 121 Tenn. 465, 488, 118 S. W. 1022; *Frazier v. State*, 117 Tenn. 430, 439-441, 100 S. W. 94; *Powers v. State*, 117 Tenn. 363, 372, 97 S. W. 815. Of these, three were murder cases, but in none of the murder cases was there a failure to charge upon the crime of murder in the second degree as well as murder in the first degree. In *State v. Hargrove* and *Frazier v. State*, the error assigned was the failure to charge on the subject of manslaughter; in *Powers v. State* the failure to charge the law applicable to involuntary manslaughter, assault and battery, and simple assault. Of the other cases, *Good v. State* involved a prosecution for robbery; *State v. Parker* for assault and battery; *Palmer v. State* a conviction for rape. The special question now before us, arising under Code, § 6441, could not therefore have arisen in these last-mentioned cases.

[2] It follows therefore that, in every murder case wherein the crime of murder in the first degree is involved or embraced in the indictment, the trial judge must charge on both murder in the first degree and murder in the second degree. To lower grades of homicide and to all other kinds of crime, the rule laid down in *Good v. State* applies, but we deem it proper to repeat the caution offered in *Frazier v. State*, supra, as follows:

"The better practice to be pursued by trial judges undoubtedly is for them to charge upon all offenses embraced in the indictment, because whenever there is any doubt that the defendant has been prejudiced by such omission it will be error, for which it will be the duty of this court to reverse the judgment and remand the case for a new trial.

"It is only in cases where it is absolutely certain that the omission was not prejudicial to the defendant, in the trial court, that a charge omitting instructions upon every offense contained in the indictment can be sustained."

The court added that it was only because of "such absolute certainty" that the assignment was overruled in that case.

[3] Chapter 32, Acts of 1911, cannot reach the vital error committed in the case before us.

[4] It is proper to state that the bill of exceptions in the present case sets forth the fact that, in their addresses to the jury, both counsel for the state and for the prisoner took the position and argued that the prisoner was either guilty of murder in the first degree or entitled to an acquittal on his plea of self-defense. It could not be treated as a waiver of the prisoner's right to have the case submitted to the jury in the manner prescribed by statute.

For the error indicated, the judgment must be reversed, and the cause remanded to the criminal court of Knox county for a new trial.

#### SHIPP v. STATE.

(Supreme Court of Tennessee. Nov. 29, 1913.)

##### 1. HOMICIDE (§ 282\*)—TRIAL—DIRECTION OF VERDICT.

In a prosecution for homicide, where accused pleaded not guilty, though he admitted the firing of the fatal shot, claiming that it was caused by his nervousness, and that he was only attempting to rob deceased, it is reversible error for the court to charge that the only question for the jury to determine was whether accused was guilty of murder in the first degree with mitigating circumstances, for Shannon's Code, § 6441, declares that the jury before whom an offender is tried shall ascertain whether it is murder in the first or second degree, and if accused confess his guilt, the court shall determine the degree of crime by the verdict of a jury, and the court, not having the power to set aside the verdict of a jury, cannot, as it practically did in this case, direct a verdict of guilty or pass on any question of fact.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 574; Dec. Dig. § 282.\*]

##### 2. CRIMINAL LAW (§ 753\*)—TRIAL—DIRECTION OF VERDICT.

In a prosecution for felony, where a plea of not guilty is interposed, the court can neither direct a verdict of guilty nor can it pass on any question of fact unfavorable to accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1713, 1727-1739; Dec. Dig. § 753.\*]

Appeal from Criminal Court, Hamilton County; S. D. McReynolds, Judge.

Peter Shipp was convicted of murder in the first degree, and he appeals. Reversed and remanded.

W. L. Frierson, of Chattanooga, for appellant. W. W. Faw, Asst. Atty. Gen., for the State.

**WILLIAMS, J.** In this case there was a conviction of the plaintiff in error of the crime of murder in the first degree for the killing of one Bedell; the sentence being one for his execution. He has appealed and assigned as error that the trial judge charged the jury as follows, notwithstanding he stood at the time on a plea of not guilty:

"The defendant makes no denial of this occurrence, but states on the stand that he did commit this murder, but insists that he was raised up around Bedell's place, that he never had any education, and that he was raised up under Bedell's tutelage to some extent. And from these facts his attorney, in argument, requests the jury to find the defendant guilty of murder in the first degree with mitigating circumstances. From this admission of defendant and his counsel, the only thing left for you, gentlemen of the jury, is to determine whether or not you will recommend mercy in your verdict, and this is a matter for you to determine and report. If you find the defendant guilty of murder in the first degree, without more, under the law he will have to suffer death. If you find him guilty of murder in the first degree, with mitigating circumstances, and so report, then it is a question for the court to determine as to whether he shall be sentenced for life or sentenced to death under the law."

The reference in the charge is to the testimony of plaintiff in error to the effect that he did kill Bedell, not that in so doing he committed murder in the first degree; that he and one Dodson had planned to rob Bedell and laid in wait in the darkness for deceased to leave his store to go to his residence; that plaintiff in error did not start out or design to shoot Bedell but intended to hold up deceased and rob him. "Q. Now, how came it that he was shot? A. I don't know. Scared—nervous, I reckon—and pulled the gun off, I reckon. I didn't intend to."

The charge from which the above excerpt is made contained the usual instructions in respect to the different degrees of homicide, the presumption of innocence, reasonable doubt, and weight of evidence.

[1, 2] The argument of counsel of the accused for error is that the portion of the charge of the trial judge quoted was tantamount to giving peremptory instructions to the jury to find plaintiff in error guilty of murder in the first degree and was an invasion of the province of the jury as well as a denial of trial by jury guaranteed by the Constitution.

It will be noted that the trial judge told the jury that, in view of the admissions made, the only thing left for the jury to do was to determine whether or not extenuating circumstances existed. The jurors could have drawn no conclusion from this other than that they were under instruction to proceed upon the basis of murder in the first degree being fixed on the accused, so far as they were to make return.

This was error. Whatever may be the rule in relation to misdemeanors, the weight of authority is overwhelming to the effect that in prosecution for felony, where a plea of not guilty is interposed, it is not permissible for the court to direct a verdict of guilty or to pass on any question of fact unfavorably to the defendant. This is true even though the incriminating evidence is uncontradicted or conclusive. *Huffman v. State*, 29 Ala. 40; *State v. Wilson*, 62 Kan. 621, 64 Pac. 23, 52 L. R. A. 679; *State v. Godwin*, 145 N. C. 461, 59 S. E. 132, 122 Am. St. Rep. 467; *Konda v. U. S.*, 166 Fed. 91, 92 C. C. A. 75, 22 L. R. A. (N. S.) 304, and note.

In the last cited case, *Baker*, Cir. J., said: "In our judgment, however, a defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. \* \* \* In a civil case, the judge may exercise the power of directing a verdict for the plaintiff when there is no conflict in the evidence and the only inference that may be drawn by reasonable minds as to the ultimate facts in issue favors the plaintiff. This power, we opine, grew out of the practical administration of the fundamental power to review, on a motion for a new trial, the findings of the jury. \* \* \* But in a criminal case, if the jury returns a verdict for the defendant, the judge, no matter how contrary to the evidence he may think the verdict is, cannot set it aside and order a new trial. Therefore, since the judge is without power to review and overturn a verdict of not guilty, there is no basis on which to claim the power to direct a verdict of guilty. Our conclusion is that an accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting. Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied on in the plain and simple ones."

In this state we have a statute (Shannon's Code, § 6441) providing, in reference to trials for murder, as follows: "The jury before whom the offender is tried, shall ascertain in their verdict whether it is murder in the first or second degree; and if the accused confess his guilt, the court shall proceed to determine the degree of crime by the verdict of a jury, upon the examination of testimony, and give sentence accordingly."

If on a plea of guilty the jurors are by statute made the determiners of the degree of such an accused's guilt, a fortiori the trial judge cannot be permitted to exercise that function and instruct as in this case, where the accused had pleaded not guilty.

Further, plaintiff in error testified that the shooting and killing was not intentional,

but were attributable to his nervousness in carrying out the real design to rob. Whatever of weight or lack of weight this testimony carried was a matter for the jury, to be considered when, under the statute quoted, it came to ascertain by verdict whether the crime was murder in the first or second degree. This phase of the statute is treated of in an opinion by the Chief Justice at this term in the case of *Jones v. State*, 161 S. W. 1016, and need not be here further discussed. Plaintiff in error was entitled to have the jury determine whether his guilt was that of murder in the second degree. Reversed and remanded.

### SHACKLEFORD v. CAMPBELL et al.

(Supreme Court of Arkansas. Dec. 1, 1913.)

#### 1. COUNTIES (§ 127\*)—CONTRACTS—MODIFICATION—VALIDITY.

A contract duly let to the lowest and best bidder as required by law for the construction of an annex to a courthouse for \$565,987, called for a four-story building; the first story to be of Arkansas granite, and the remaining stories of Bedford stone. The interior was to be a steel-frame construction, with brick masonry partition walls, and fireproof windows were to be constructed on one side, next a club. After its execution, it was ascertained that Arkansas granite could not be quarried in sufficient quantities to erect the building within a reasonable time, and, as the public needs required that it be erected as expeditiously as possible, it was agreed, pursuant to a provision, that modifications might be made, that a different kind of stone as suitable and durable as Arkansas granite, and making no difference in the appearance of the building except in the color of the stone, should be substituted; a deduction in the price of \$2,374 being allowed because of the substitution. The county having purchased and torn down the club building, it was deemed unnecessary to construct the fireproof windows, and they were changed to conform to the other windows. It was also found that great delay would be had in procuring steel for the interior work, and this was changed to re-enforced concrete construction, which was as durable as that provided for under the original contract, gave more floor space, and permitted changes in the interior arrangement of the building which could not be made with the steel and masonry construction first contemplated. A deduction in the price of \$7,180 was allowed because of this change. *Held*, that while a change in the general plans of the building and the construction of a building of wholly different kind and character from that provided for under the original contract would be a palpable evasion of Const. art. 19, § 16, requiring contracts for erecting or repairing public buildings to be given to the lowest responsible bidder, and of the statutes regulating the erection of public buildings, the county court and courthouse commissioner, in the absence of bad faith, had authority to authorize such changes, and the contract was not void because thereof.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 192, 193; Dec. Dig. § 127.\*]

#### 2. COUNTIES (§ 196\*)—CONTRACTS—TAXPAYERS' ACTION—SUFFICIENCY OF EVIDENCE.

In a taxpayers' suit to restrain the performance of a contract for the erection of an annex to a courthouse, evidence as to whether changes and modifications in the original contract were authorized by the county court and

courthouse commissioner fraudulently or in good faith *held* to support the chancellor's finding in favor of defendants.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 306; Dec. Dig. § 196.\*]

#### 3. APPEAL AND ERROR (§ 1009\*)—REVIEW—QUESTIONS OF FACT.

The chancellor's findings of fact will not be disturbed on appeal unless they are against the clear preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Taxpayers' suit for an injunction by John D. Shackelford against A. O. Campbell and others. From a decree dismissing the complaint, plaintiff appeals. *Affirmed*.

This is a proceeding by appellant, a taxpayer of Pulaski county, against appellees to restrain them from proceeding further in the erection of an annex to the Pulaski county court house. The county court deemed it expedient to erect an annex to the present courthouse, and the quorum court made an appropriation for that purpose. Gordon N. Peay was appointed commissioner of public buildings, to superintend the erection of the same. George R. Mann was appointed architect, and, as such, prepared and submitted to the county court complete and detailed plans and specifications of the proposed annex, with the dimensions thereof and the materials of which it was to be composed, with an estimate of the probable cost thereof. The plans were approved by the county court, and the commissioner advertised for receiving proposals for erecting the building. In July, 1912, the contract was awarded to A. O. Campbell at the sum of \$565,987, he being the lowest and best bidder; and a formal contract was executed to erect the building according to the plans and specifications. The specifications called for a four-story, fireproof courthouse building, to be erected on the corner of Spring and Markham streets, in the city of Little Rock, Pulaski county, Ark. The proposed building adjoins the site of the present courthouse. The first story was to be of Arkansas granite, and the remaining stories of Bedford stone. The interior was to be a steel-frame construction, with brick masonry partition walls, and fireproof windows were to be constructed on the west side, next to the Quapaw Club. After the contract was executed for the erection of the building, and soon after the excavation for the foundations was commenced, certain changes in the construction of the building were suggested. It was ascertained that it was not practical to quarry Arkansas granite in sufficient quantities to erect the building within a reasonable time, and that a delay of more than one year would be caused if the walls of the first story should be constructed of that material. It was agreed that the first story should be constructed of

Batesville stone, instead of Arkansas granite, and a deduction in the contract price of \$2,374 should be allowed the county by reason of the change in the stone. After the contract was made, the county purchased the ground occupied by the Quapaw Club building, and tore down that building. It was then deemed unnecessary to construct the fireproof windows, and they were changed so as to conform to the other windows in the building. It was also found out that great delay would be had in procuring the steel for the interior work, and this was changed to reinforced concrete construction, and a deduction, on account of the change in the windows and the change to reinforced construction, was to be allowed the county in the sum of \$7,180.

The original contract provided, in effect, that the county court should have the right to make any alterations, additions, or omissions of work or material or in designs and plans, during the progress of the erection of the building, that it should find necessary. It is conceded by appellant that the original contract was executed in conformity with the provision of article 19, § 16, of the Constitution, and with chapter 35 of Kirby's Digest, and that the same is valid in all respects. The county court, by appropriate orders, approved the changes as set out above, and the contract was modified so as to allow them to be made. It is contended by the appellant that these changes were made without authority of law, and that they render the whole contract void. Appellant also contends that the changes were procured by fraud, and, on that account, the contract is void. The present suit was commenced on the 1st day of August 1913, and at that time the change from Arkansas granite to Batesville stone, for the first story, was finished, and the greater part of the changes made in the interior, as provided for in the modifications of the contract, was also completed. Appellees filed an answer in which they denied any fraud on their part in making the changes, and alleged that the reduction made on account of the changes is fair and adequate and represents fairly the difference in the cost of construction. They also claim that under the contract they had a right to make the changes. Other evidence heard before the chancellor on the trial of the case will be stated in the opinion. The chancellor dismissed the complaint for want of equity, and the cause is here on appeal.

Jno. D. Shackelford and Henry C. Riegler, both of Little Rock, for appellant. Cockrill & Armistead and Marshall & Coffman, all of Little Rock, for appellees.

HART, J. (after stating the facts as above). [1] Article 19, § 16, of our Constitution, provides that the contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor, shall be given to the lowest responsible bidder under

such regulation as may be provided by law. Appellant contends that under this provision of the Constitution, and under chapter 35 of Kirby's Digest, the county court had no authority to order the changes made in the plans and specifications, and that the changes, as made, render the contract void. He relies upon the case of Fones Hardware Co. v. Erbe, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353, to sustain his contention; but we do not think that case an authority for the position he has assumed. There, general plans were adopted for building a bridge across the Arkansas river in Pulaski county, and competitive plans and specifications were advertised for and received by the board of commissioners. Each bidder prepared his own plans and specifications and made his bid thereon, and the court said that it was plain that no two of the bids would be made upon the same basis, unless by accident, and therefore, under such a plan, there could be no competition among bidders. This was a palpable violation of the Constitution and statute regulating the erection of public buildings and bridges. Here, complete detailed plans and specifications were prepared by the architect and adopted by the county court. The advertisement for bids was made in accordance with the plans and specifications adopted; and it is perfectly evident that each bidder bid upon the same plans and specifications, and thus competitive bidding was secured.

It is conceded by appellant that the original contract was let in accordance with the provisions of the Constitution and statutes above referred to; but he contends that the modification of the contract was made without authority of law, and that this rendered the whole contract void. The original contract contained a provision that modifications of it might be made. The evidence shows that it is usual to insert in contracts for the erection of buildings of any magnitude provisions for modifications in the contract, so that necessary changes or alterations in the plans of the building may be made, and such clauses have been generally held to be valid when applied to contracts made between private individuals. In the absence of constitutional and statutory prohibition, there seems to be no good reason why such a clause may not be legally inserted in a contract for a public building. The power so to do is recognized in 11 Cyc. 485; but the author adds that in no event can the county board or court make important general changes in the plans of the building, and cites in support of the text the cases of Gibson County v. Cincinnati Steam Heating Co., 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502, and Kitchel v. Union County, 123 Ind. 540, 24 N. E. 366. Under the laws of Indiana, as in this state, contracts for the erection of public buildings must be let at public bidding after the plans and specifications have been adopted and filed in accordance with the statute.



In the case last mentioned, certain taxpayers sought to enjoin the county from proceeding in the erection of the courthouse upon the ground that the specifications submitted to the bidders permitted alterations and changes. The Supreme Court of Indiana held that the objection was unavailing, and said that no prudent individual would make a contract for the construction of a building of any magnitude without incorporating a provision somewhere making specific and definite agreements concerning extra work, and that the provision complained of seemed to be of that character. In the first-mentioned case, plans and specifications were adopted for the construction of a courthouse as required by law, and it was contended that there was no authority to contract for a steam heating apparatus for the reason that no plans or specifications were ever filed therefor and that the contract was not let at public bidding as required by the statute. In discussing an objection that the board had no authority to contract for the steam heating apparatus, the Supreme Court of Indiana said: "In our opinion the statute was not intended to prevent changes in plans and specifications from being made in cases where it becomes apparent in the progress of the work, that changes are required. We do not mean to be understood as holding that changes in the general plan of the work may be made at the pleasure of the board of commissioners, but we do mean to adjudge that changes may be made in details and minor particulars."

In the case of Board of Commissioners v. Gibson, 158 Ind. 471, 63 N. E. 982, the court again had occasion to discuss the question. In that case, a contract to construct a courthouse was let, in accordance with the statute, to the lowest bidder, for \$76,000. The contract contained a provision allowing changes and alterations to be made. After the contract was executed and the excavation for the building was commenced, it was discovered that, owing to the character of the soil, the foundation would have to be laid much deeper than was provided for in the contract. It was then suggested that a subbasement could be added for very little more cost, and this was done at the additional cost of \$20,000. The court held the modification thus made in the contract was valid, and, in discussing the objections to its validity, said: "The statute referred to [Rev. St. Ind. 1881, §§ 4243, 4244] was intended as a safeguard of the public interest, and we are disposed to enforce it according to its spirit. We do not think, however, that it was intended to apply to a case like this, where a sudden and unforeseen emergency confronts a board of commissioners after it has regularly let a contract for a public building, and where it is to be desired to avoid delay, and not to put a new contractor on the work, but to have the work continued by the general contractor for the construction of the build-

ing. In such a case, where it can be said that the new work is but an incident of a work before regularly contracted for, and where it does not appear that the act of the parties was a mere effort to evade the statute, we do not think that the statute is applicable." The court also said: "Where the parties act in good faith, the authority of the board to make changes without complying with the statute referred to should be determined, not primarily by the cost of the change, but by the relation that the change bears to the main work, and the circumstances that confront the commissioners when they order the change."

In the case of Mueller v. Eau Claire County, 108 Wis. 304, 84 N. W. 430, the court said: "A clause in the contract provides that: 'Should said committee, at any time during the progress of the work of said heating plant, require any alteration, addition, or omission from the work specified, the same shall be done, and shall not affect or avoid this contract and will be added to, or deducted from, the contract price, as may be, by a fair and reasonable valuation.' Upon this the plaintiffs attempt to found an argument that it is an evasion of the statute, which says that the board shall prepare 'complete' plans and specifications for the work. This 'smacks of over-refinement.' It is the clause usually put in building contracts to enable the owner to make changes, correct mistakes, or cause additions or omissions in order to make the building more truly conform to its intended use. It must be construed reasonably, and, so construed, would, of course, limit the changes to such as would not alter the substantial character of the building, or increase its cost to an unreasonable amount."

Our Constitution and statutes governing the erection of public buildings do not prohibit the contract from providing for necessary changes in the plans and specifications; and, when this fact is considered in connection with the principles of law announced in the cases above referred to and quoted from, we do not think the modification made in the original contract for the erection of the annex to the courthouse rendered the contract void.

When the original contract was executed, the Quapaw Club building was situated close to the proposed annex, and it was deemed proper to provide for fireproof windows next to that building. Subsequently, the county purchased this building and tore it down. The fireproof windows then became unnecessary, and the county court properly changed the contract so as to dispense with them.

The evidence shows that the public needs required that the annex to the courthouse should be erected as expeditiously as possible, and that it would cause a delay of more than a year if the original plan of constructing the exterior of the first story of Arkansas granite should be adhered to.

The Batesville stone was substituted in its place, and the substitution made no difference whatever in the appearance of the building, except in the color of the stone. Both stones were suitable for the erection of the kind of building under construction, and there appears to be no difference in their suitability for that purpose as far as durability is concerned. Therefore it was entirely proper to make this change.

The building, as originally contemplated, was not what is commonly known as steel construction, but was a combination of steel and masonry construction. The steel construction was supported on brick walls; in other words, the interior walls were built of brick. On these brick walls were to be placed steel I-beams, resting from one brick wall to another at intervals of from six to ten feet. On top of that was placed a reinforced concrete slab. The roof was to be constructed in like manner, except that it was to be made of cinder concrete.

The change to reinforced concrete construction gave about 6,000 square feet of additional floor space. The evidence shows that the reinforced concrete construction makes a better kind of building than the construction under the original plan, because the building is put up independently of the walls, and the interior arrangement of the building can be easily changed. Under the plan of the original construction, the interior arrangement of the building could not be changed, because the brick wall supported the building. The testimony shows that the reinforced concrete construction was as durable as that provided for under the original plan, and that the interior arrangements of the building can be easily changed under the altered construction, for the simple reason that the partitions are carried independent on each floor and that the interior wall can be shifted about in any way required. Under the original plans and specifications, the work was let to Campbell for the sum of \$585,987. Under the contract as modified, the county was allowed the sum of \$9,554 on account of the changes made in the construction of the building. No change has been made in the general plan of the building. It presents the same general appearance, both on the interior and exterior of the building, except that the color of the stone on the first floor is different. The substantial character of the building remains as it was under the original plans and specifications.

When we consider the cost of the change as compared with the cost of the whole building under the original contract, and the relation of the changes made to the whole building, and the necessity for the same, as well as the conditions which confronted the county court and the courthouse commissioner, inducing them to make the change, we are of the opinion that, under the terms of the original contract providing for changes

in the building during the progress of the work, they had a right to make these changes, and that they did not render the contract void. We do not mean to hold that they had a right to change the general plans of the building and construct a building of wholly different kind and character from that provided for under the original contract. To do so would be a palpable evasion of the Constitution and statute regulating the erection of public buildings, and would constitute fraud. But we do not think the changes made in the erection of the courthouse annex were of that character, and are of the opinion that they did not change the substantial character and general plan of the building.

[2] It is also contended by appellant that the changes and modifications made in the original contract were procured by fraud. The county judge, the courthouse commissioner, the architect, and the contractor all testified that the reduction made on account of the changes is fair and adequate, and represents the difference in cost of construction. They say that the changes were made honestly and in good faith and because it was necessary to do so in order not to unduly delay the erection of the building.

The evidence on the part of the appellees shows that the Batesville stone was placed in the first story before this suit was commenced, and that the change in the interior construction from steel and masonry to reinforced concrete was practically completed before the suit was instituted. The contractor testified that on this account he knew exactly what the changes cost, and that he did not charge any profit to the county but only required the county to pay him the actual cost of construction, as far as these changes are concerned. He took up the plans and specifications in detail and showed what the work actually cost. He also took the original plans and specifications and, in a detailed manner, showed what the cost would have been under them. He said the reductions allowed to the county actually represented the difference in cost of construction. Witnesses who were engaged in cut stone, marble, and granite work in Little Rock, Ark., testified that they were familiar with the prices of Arkansas granite and Batesville stone, and knew the difficulties in procuring the Arkansas granite. They took the detailed plans and specifications of the original contract for the Arkansas granite, and the detailed plans and specifications under which the Batesville stone was substituted for the Arkansas granite, and, after figuring and estimating the difference in the cost of the two stones, say that the reduction allowed the county by the contractor was fair and represented the actual difference in the cost of substituting the Batesville stone for the Arkansas granite.

Other witnesses who had had great ex-

perience in constructing buildings of reinforced concrete took up the original plans and the changed plans in detail, and testified that the reduction made represented the actual difference in the cost of substituting reinforced concrete for steel and masonry construction on the interior of the building. The testimony shows that the change gave an additional floor space of 6,000 feet, and that the reinforced concrete construction was as durable and more desirable than the construction provided for in the original contract because the interior arrangement of the rooms could be changed if it became desirable in the future to do so. Opposed to this is the testimony of appellant's witnesses as to the difference of the cost of the building, as originally planned, and of the same as changed. None of these witnesses took up the plans and specifications in detail and figured as to the difference in cost. They only testified in a general way that the cost would have been much less under the original plans and specifications. One of them frankly admitted that his estimate was only a guess, and the others admitted that their testimony was not based upon an examination of the detailed plans and specifications, but was made from their general knowledge of the matter.

Without meaning in any way to reflect upon their integrity and honesty of purpose, we do not think that the general declarations made by them are sufficient to overcome the testimony given by the witnesses for the appellees, as above set forth, and established fraud. We have not attempted to set out in detail the testimony of the witnesses on the question of fraud. To do so would extend the opinion beyond reasonable limits and could serve no useful purpose. The testimony is set out at length in the abstracts of both parties, and we have carefully and patiently considered it and weighed it in all its bearings, and have reached the conclusion that the finding of the chancellor in favor of appellees is not against the preponderance of the evidence.

[3] It is well settled in this state that the findings of fact made by a chancellor will not be disturbed on appeal unless they are against the clear preponderance of the evidence.

The decree will therefore be affirmed.

#### PRICKETT et ux. v. WILLIAMS.

(Supreme Court of Arkansas. Dec. 1, 1913.)

##### 1. MORTGAGES (§ 32\*)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

A deed absolute in form will be construed to be intended as a mortgage if the proof of such intent is clear, unequivocal, and convincing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

##### 2. USURY (§ 115\*)—PAROL EVIDENCE—ADMISSIBILITY.

Parol evidence is admissible to show that a contract for the purchase and resale of land is a mere cloak for usury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 326; Dec. Dig. § 115.\*]

##### 3. APPEAL AND ERROR (§ 842\*)—REVIEW—QUESTIONS OF FACT.

In a suit to have a conveyance declared a usurious mortgage, evidence held to make a question of fact for the trial court as to whether defendant loaned plaintiff the money with which to carry out a contract of purchase with a third person taking a deed as security, or whether he purchased the land from the third person and resold it to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8316-3330; Dec. Dig. § 842.\*]

##### 4. APPEAL AND ERROR (§ 1009\*)—REVIEW—QUESTIONS OF FACT.

The chancellor's findings of fact will not be disturbed on appeal unless against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

Appeal from Logan Chancery Court; J. V. Bourland, Chancellor.

Suit by A. G. Prickett and wife against Charles X. Williams. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

Robt. J. White, of Paris, for appellants.  
Anthony Hall, of Paris, for appellee.

HART, J. In the spring of 1911, T. M. Downs made an agreement with A. G. Prickett to sell and convey to him 130 acres of land, and the price agreed upon was \$1,750; \$300 of the purchase money was paid down, and the balance of \$1,450 was to be paid on January 1, 1913. Downs executed a deed to A. G. Prickett for 90 acres of the land and to his wife for the remaining 40 acres. The deeds were deposited by Downs with Charles X. Williams to be delivered to Prickett upon the payment of the balance of the purchase money on January 1, 1912, and it was understood that if the money was not paid on that date the deeds were not to be delivered, and the verbal contract of sale was to be canceled. Prickett entered into possession of the land, but failed to make the payment on the 1st day of January, 1912. When Prickett failed to pay the balance of the purchase money on January 1, 1912, it was agreed that Downs should make a deed to Charles X. Williams to the land for \$1,450, which was done. Williams made a contract in writing with Prickett, whereby he agreed to make him a deed to the lands in question on a payment to him, on or before June 1, 1912, of the sum of \$1,550; and the agreement provided that if the payment was not made on or before that date the contract should be of no effect. This suit was instituted by Prickett and his wife against Wil-

lliams, and its object and purpose is to have the conveyance from Downs to Williams declared to be a mortgage, and the debt which it was given to secure is alleged to be usurious. The chancellor held that the transaction complained of was a sale and not a loan of money from Williams to Prickett. A decree was accordingly entered, dismissing the complaint for want of equity, and the case is here on appeal.

[1, 2] The appeal raises the question as to whether the alleged contracts of purchase and of resale were a mere cover for a loan. We have held that a deed absolute in form will be construed to be intended as a mortgage in effect if the proof of such intent is clear, unequivocal, and convincing. *Griffin v. Welch*, 88 Ark. 336, 114 S. W. 710; *Rush-ton v. McIlvane*, 88 Ark. 299, 114 S. W. 709. We have also held that parol evidence is admissible to show that contracts of purchase and of resale of land may be a mere cloak for usury. *Lowe v. Loomis*, 53 Ark. 454, 14 S. W. 674; *Tillar v. Cleveland*, 47 Ark. 287, 1 S. W. 516.

[3] Prickett testified that he borrowed the \$1,450 from Williams to pay Downs for the land, and that he was to pay him \$100 bonus and 10 per cent. interest. That the deed was executed by Downs to Williams for the purpose of securing the latter. Prickett stated that the contract with Williams purporting to resell the land to him was executed on the 8th day of January, 1912, before the deed from Downs to Williams was executed and delivered.

T. M. Downs testified: "After Mr. Prickett failed to pay the balance of the purchase money on the land on the 1st of January, 1912, he came to me and said that he had made arrangements to get the money from Mr. Charles X. Williams to pay me. We then went down to the bank, of which Mr. Williams was cashier, to talk over the matter, and Williams said that he would not have anything to do with the matter unless all the strings were cut loose. He said: 'I will take up the deal, but all strings will have to be cut loose on that place, and I will have to have the deed direct to me.' I executed a deed to Williams for the land, and he paid me \$1,450. I do not know that I understood at any time that I was selling the land to Williams. I understood the agreement between Prickett, Williams, and myself to be that I would have to make Williams a deed for the place, as I was looking to him for the money; but I thought I was carrying out my original deal with Prickett. Williams executed a written contract to Prickett, whereby the latter was to pay him \$1,550 for the land."

Charles X. Williams testified: "Prickett applied to me to borrow money, both as cashier of the bank and as a private individual, and I refused to lend it to him. My grandfather owned and settled the land in

question, and I was perfectly familiar with it. I never agreed to lend him money to pay off the balance due on the land. I told him I thought he had agreed to pay too much money for the place; he having agreed to pay \$1,750 for it and having already paid \$300 of this amount. I bought the land from Mr. Downs and paid him \$1,450 for it. I then agreed to sell it to Mr. Prickett for \$1,550."

Mrs. Mattie Edwards testified: "I heard part of the conversation between Mr. Williams and Mr. Prickett in regard to the land in question, but did not pay much attention to it. I heard enough of the conversation between them to know that Mr. Prickett wanted to borrow money and Mr. Williams refused to lend it to him. Mr. Williams said the only way he would have anything to do with the transaction would be to buy the land outright."

Dorsey Yancy testified that he was a tenant on the place, and that Prickett told him that he had arranged things with Mr. Williams; that a deed had been made to the land to Mr. Williams for so much money, and that he had a contract with Williams.

[4] Thus, it will be seen that it is a question of fact whether or not Williams bought the land and then contracted to resell it to Prickett, or whether the transaction was a mere cloak for usury. The testimony of Williams and Prickett in regard to the transaction is in direct and irreconcilable conflict. While Downs testifies that he understood that Williams was lending money to Prickett with which to pay him the balance of the purchase price of the land, he also states that Williams said that he would have nothing to do with the matter unless all the strings were cut loose and a deed was made direct to himself. He further stated that he did not know what Williams meant by saying that all the strings must be cut loose. It is evident, however, from Williams' testimony, and that of Mrs. Edwards, that he meant that he would not have anything to do with the matter unless the contract between Downs and Prickett was canceled, in which event he would purchase the land himself and resell it to Prickett, provided the terms could be agreed upon. While Mrs. Edwards testified that she did not pay much attention to the conversation between Prickett and Williams, she does state that Prickett was trying to borrow money from Williams, and that Williams refused to lend it to him. She also says Mr. Williams said the only way he would have anything to do with the place was to buy it outright. Under this state of the proof, the chancellor found that the transaction in question was a purchase by Williams from Downs and a resale by Williams to Prickett, and that it was not a loan of money from Williams to Prickett. It is well settled that the findings of fact made by a chancellor will not be dis-

turbed on appeal unless against the preponderance of the evidence.

It follows that the decree must be affirmed.

### WESTERN UNION TELEGRAPH CO. v. HEARN.

(Supreme Court of Arkansas. Nov. 17, 1913.)

#### 1. TELEGRAPHS AND TELEPHONES (§ 73\*)—TRANSMISSION OF MESSAGES—DELAY—ASSESSMENT OF DAMAGES.

In an action for damages for delay in transmitting a death message, evidence of negligence *held* sufficient to go to the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.\*]

#### 2. TELEGRAPHS AND TELEPHONES (§ 66\*)—TRANSMISSION OF MESSAGES—DELAY.

Where a telegraph company accepted a death message on Sunday and transmitted it to within a short distance of the destination before 2 o'clock in the afternoon, and the message was not delivered until 8 o'clock the following morning, the telegraph company has the burden of explaining and excusing its unreasonable delay.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 63.\*]

#### 3. TELEGRAPHS AND TELEPHONES (§ 38\*)—DELAY IN TRANSMISSION OF MESSAGE—EXCUSE.

Where a telegraph company accepted a death message for transmission on Sunday, and it was not transmitted because of a defect in the line, the fact that the lineman refused to repair it on that day will not alone excuse the company; for, having accepted the message, it was bound to use reasonable diligence and is chargeable with the lineman's negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.\*]

#### 4. APPEAL AND ERROR (§ 882\*)—PERSONS ENTITLED TO ALLEGE ERROR.

In an action against a telegraph company for damages for delay in the transmission of a death message, where proof of the giving of written notice within 60 days of intention to claim damages for delay was excluded on the company's objection, it cannot urge on appeal the failure to give notice as ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

#### 5. TELEGRAPHS AND TELEPHONES (§ 54\*)—DAMAGES FOR NEGLIGENT DELAY—CONTRACTS LIMITING LIABILITY.

While common carriers may stipulate against contractual or common-law liabilities, it is against public policy to allow them by contract to protect themselves from liability for their own negligence, and hence a stipulation on a telegraph blank limiting damages for delay to \$50 is ineffectual.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. § 54.\*]

#### 6. TELEGRAPHS AND TELEPHONES (§ 54\*)—DAMAGES FOR DELAY—STATUTE.

Under Kirby's Dig. § 7947, providing that telegraph companies shall be liable in damages for mental anguish or suffering, for negligence in transmitting or delivering messages, and that the jury may award such damages as they conclude resulted from negligence, a stipulation in

telegraph blanks limiting damages for delay to \$50 is ineffectual to so limit the recovery for negligence in transmitting a death message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. § 54.\*]

Appeal from Circuit Court, Pike County; Jeff. T. Cowling, Judge.

Action by Mrs. Jennie Hearn against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearons, of New York City, Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and W. C. Rodgers, of Nashville, for appellant. S. S. Langley and A. P. Steel, both of Murfreesboro, for appellee.

MCCULLOCH, C. J. The plaintiff, Mrs. Jennie Hearn, instituted this action against the Western Union Telegraph Company to recover damages on account of alleged negligent failure of appellant to deliver a telegram apprising plaintiff of the death of her father. She alleges and attempts to prove that, if the telegram had been delivered with reasonable promptness, she could, and would, have reached the place where her father died in time to attend the funeral, and that she suffered mental anguish by reason of being deprived of that privilege. The plaintiff lived at Roseboro, Ark., a point on the railroad north of Gurdon, and her father, R. B. Alexander, lived at Whelen, Ark., a railroad point south of Gurdon. Her father died at Whelen early in the morning on Sunday, October 6, 1912, and about 10 o'clock that morning one Stone delivered to defendant's telegraph operator at that place a message directed to plaintiff in the following language: "Father died about 1 o'clock. Come at once." The customary toll was paid, and the message was accepted. If the message had been delivered at any time prior to 7 o'clock a. m. Monday, October 7th, plaintiff could have gotten a train at Roseboro, which would have carried her to Whelen in time to reach there several hours before the funeral occurred; but the telegram was not delivered until shortly after 8 o'clock on October 7th, which was too late to get a train or any other mode of conveyance to the scene of the funeral. The body could not be kept over another day, and plaintiff was thus deprived of the privilege of attending her father's funeral. She recovered damages at the trial in the sum of \$250, and the amount of the verdict is not challenged as being excessive. The operator at Whelen transmitted the message to Little Rock, and thence it was sent to Gurdon, reaching there about 2 o'clock p. m. Sunday. It was sent over the railroad wire, because of the fact that the commercial wire was not in use except during the office hours for that day, which were limited to the hours between 8

a. m. and 10 a. m. and from 4 p. m. to 6 p. m. The Gurdon operator attempted to forward the message to Roseboro, but found the wires down, and an effort was made to have the wires repaired, but the linemen on duty at that place refused to work because it was Sunday. The operator also testified that he tried to telephone the message to Roseboro, but found that the telephone wire to Gurdon was also out of use. The message was sent through early Monday morning soon after the telegraph line was repaired and, as before stated, was delivered about 8 o'clock, but too late for plaintiff to catch the morning train. There is evidence to the effect that the telegraph wire between Gurdon and Roseboro went down on the evening or night of October 5th.

[1, 2] We are of the opinion that the evidence was sufficient to sustain a finding of negligence which warranted the award of damages and that the court did not err in refusing to give a peremptory instruction. There was an unreasonable delay in transmitting and delivering the message, and the burden was on the defendant to account for the delay so as to free itself of the charge of negligence. *Western Union Telegraph Co. v. Chilton*, 100 Ark. 296, 140 S. W. 26. The message reached Gurdon at 2 o'clock p. m. on Sunday, and appellant had from then until 7 o'clock the next morning to forward and deliver it in time for the train which plaintiff might have caught.

[3] The evidence tends to show that the line was down the evening before, and reasonable diligence might have discovered its condition even before the Sunday hours began. There was no attempt to show that the trouble with the wires was discovered at the earliest moment and effort made to repair it. *Western Union Telegraph Co. v. Bickerstaff*, 100 Ark. 1, 138 S. W. 997, Ann. Cas. 1913B, 242. But be that as it may, defendant having accepted the message on Sunday, it was its duty to exercise reasonable diligence to transmit it to destination, and it does not free itself from the charge of negligence merely by showing that its linemen on duty at Gurdon refused to work. The trouble with the line might have been a trifling one which could have been easily remedied by some one else. The fact that it was Sunday did not relieve defendant of exercising diligence to repair its line and deliver a message which it had received for transmission, and the fact that its linemen refused to work on that day was no excuse for failing to transmit a message which it had accepted for that purpose. It had the legal right to refuse to accept messages on Sunday, but, having done so, it was bound to exercise diligence to transmit and deliver the same. The refusal of the lineman to perform his part of the work necessary to complete the transmission of the message is chargeable to the company and renders it

liable. *Arkansas & Louisiana Ry. Co. v. Lee*, 79 Ark. 448, 96 S. W. 148.

[4] It is contended that the plaintiff's action must fail because she failed to allege and prove that she gave notice to the company within 60 days of her intention to claim damages. The blank upon which the message was written contained the usual stipulation that "the company will not be liable for damages or statutory penalties in any case where claim is not presented in writing within 60 days after the message is filed with the company for transmission." It is not alleged in the complaint that this provision of the contract was complied with, but the answer contains a paragraph denying that the contract in that respect was complied with. Thus, notwithstanding the omission of such an allegation in the complaint, the answer set up this failure on the part of plaintiff to comply with the contract as a defense to the action, and the issue was thus tendered. No objection was made to the sufficiency of the complaint by demurrer or otherwise. Counsel for appellant in their brief call attention to the fact that, during the progress of the trial, the plaintiff offered to introduce testimony to the effect that this clause of the contract was complied with, but upon their objection the court excluded the testimony. Appellant, by its own act in objecting to the testimony, eliminated this issue from the case, and it is too late now to raise the issue for the first time here. *White v. Moffett*, 158 S. W. 505. A party cannot on appeal take advantage of a defect in the proof which was brought about by a ruling of the court made at its own request.

[5, 6] Nor is there any merit in the contention that the damages must be limited to the sum of \$50 by reason of the stipulation to that effect in the contract. It has long been the rule of this court that a common carrier cannot lawfully stipulate for exemption from responsibility on account of negligence of its own servants. *Railway v. Lesser*, 46 Ark. 236. Carriers may, for a reasonable consideration, stipulate against contractual or common-law liabilities, express or implied; but it is contrary to public policy to permit them to stipulate against responsibility for their own acts of negligence. *Railway v. Weakley*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104. Besides, a statute of this state expressly declares that "telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages; and in all actions under this section the jury may award such damages as they conclude resulted from the negligence of the said telegraph company." *Kirby's Digest*, § 7947. This is a positive statutory provision which cannot be changed by contract, for the reason, as before stated, that it is contrary to public policy to

allow a public service corporation to stipulate against liability for its own negligence.

There are objections made to the rulings of the court in giving and refusing instructions, but after a careful consideration of the record we are of the opinion that all the issues were properly submitted to the jury and that there was no error. A discussion of each assignment separately is useless, as no new question is involved.

The case was properly submitted to the jury, and the evidence is found sufficient to sustain the verdict, so the judgment is affirmed.

# WESTERN UNION TELEGRAPH CO. v. ALFORD.

(Supreme Court of Arkansas. Dec. 8, 1913.)

## 1. TELEGRAPHS AND TELEPHONES (§ 55\*)—SELECTION OF ROUTE.

If the initial company does not operate a telegraph line to destination, a sender has the right to select the route beyond such company's last receiving office.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 23; Dec. Dig. § 55.\*]

## 2. TELEGRAPHS AND TELEPHONES (§ 55\*)—SELECTION OF ROUTE.

Where, though the initial telegraph company's lines do not extend to the ultimate destination of a message, there is a continuous telegraphic route, the sender, by selecting the telegraph as a means of transmission, impliedly selects that means over the whole route, and the telegraph company is liable for resulting damages if it transmits to final destination by telephone.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 23; Dec. Dig. § 55.\*]

## 3. TELEGRAPHS AND TELEPHONES (§ 54\*)—CONTRACTS—LIMITATION OF LIABILITY.

A limitation of the company's liability, contained in a telegraph blank, to the sum of \$50, is not binding on the sender.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39-47; Dec. Dig. § 54.\*]

## 4. TELEGRAPHS AND TELEPHONES (§ 66\*)—FAILURE TO DELIVER—ACTIONS—ADMISSION OF EVIDENCE.

In an action for damages for mental anguish for failure to deliver an illness message, which was telephoned to M., the ultimate destination, though it could have been transmitted by telegraph, evidence that M. was then quite a cotton market, so that many farmers were in town, was admissible to corroborate evidence of the telegraph operator at M. that if the message had been received he would have found some means of getting the information to the sendee.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

## 5. TRIAL (§ 82\*)—OBJECTIONS TO EVIDENCE—SPECIFIC OBJECTIONS.

While as a rule a general objection will raise the question of the incompetency of evidence, if, in an action for failure to deliver a telegraph message, defendant desired to object to evidence that witnesses would have given all inquirers information as to the sendee's where-

abouts on the ground that the witnesses did not show that they were in town when the message was received, the court's attention should have been called to that particular objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 194-210; Dec. Dig. § 82.\*]

## 6. TRIAL (§ 84\*)—RECEPTION OF EVIDENCE—GENERAL OBJECTIONS.

Ordinarily a general objection to evidence is sufficient to raise the question of its competency.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-213, 220-222; Dec. Dig. § 84.\*]

Smith, J., dissenting.

Appeal from Circuit Court, Howard County; Jeff. T. Cowling, Judge.

Action by Mrs. Willie Alford against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearons, of New York City, Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and W. C. Rodgers, of Nashville, for appellant. W. P. Feazel, of Nashville, for appellee.

McCULLOCH, C. J. This is an action for damages for mental anguish growing out of the alleged negligence of appellant in failing to deliver a telegram. The complaint alleged: That appellant was a foreign corporation and operated a line of telegraph from Vivian, La., to Ashdown, Ark., and at the latter place connected with a line of telegraph owned by the Memphis, Dallas & Gulf Railway Company from Ashdown to Mineral Springs, Ark. That at 7 a. m. September 30, 1912, appellee's brother, T. C. Clark, delivered to the appellant at Vivian, La., a telegram addressed to appellee at Mineral Springs, Ark., as follows: "Come at once, Arness is very low. T. C. Clark." That the toll for the message was paid, but appellant wholly failed and neglected to transmit and deliver it. That Arness was a brother of appellee and was at the time very low, and that he died the day following the filing of the message and was buried the next day thereafter. Damages were asked for the mental pain suffered in the sum of \$1,500. In its answer the appellant denied that its line connected with a line of telegraph owned and operated by the railway company from Ashdown to Mineral Springs; and denied that it ever entered into any contract with appellee, or any one for her, to transmit and deliver the message in controversy, but only agreed to transmit it as far as its lines went towards its destination; denied that it had been guilty of any negligence in its transmission; and denied the damages. The answer alleged that by the contract with the appellee it was made the agent of the sender, without liability, to forward the message over the line of any other company that might be necessary. The proof on the part of appellee was to

the following effect: That if the message had been delivered promptly she could, and would have gone to her brother, and, had the message, been received at any time before the funeral, that the funeral would have been delayed until after her arrival; but that the message had never been received, and she was not advised of her brother's illness and death until after his funeral; that there was a telegraph line maintained along the Memphis, Dallas & Gulf Railroad from Ashdown to Mineral Springs which received and transmitted messages for the public; that the telegraph operator at Ashdown was the joint operator of the railway company and the appellant; and that these companies had a common office. It was admitted that appellant did not operate its lines into Mineral Springs, and the proof offered by it was to the following effect: That the message was routed through Ashdown to Hope as required by the route book, and that the operator received the message there without delay, but never transmitted it further by telegraph, and mailed it in one of the Western Union envelopes the following morning. The operator at Hope testified that, immediately after the message was received, a telephone call was put in for the telephone operator at Mineral Springs and the information communicated that there was a death message for appellee, the addressee. The operator at Hope testified that inquiry was made several times of the telephone operator at Mineral Springs, and that the message was mailed the next day, no information having been obtained about addressee, and notified the sending office that the message could not be delivered, but the sender was never apprised of that fact. The telephone operator at Mineral Springs testified that she received the call on September 30th, and that she inquired of several business men in town, and also of the postmaster, but received no information as to Mrs. Alford's address. The blank on which the message was written contained the following among other stipulations: "The company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other company when necessary to reach its destination." In rebuttal, appellee offered the evidence of the telegraph operator at Mineral Springs, who testified what his custom was, in the discharge of his duty, upon the receipt of a telegram where the addressee was unknown to him. And this evidence was of such a character as to make it a question for the jury whether the message would have been delivered had it reached the telegraph operator at Mineral Springs in the due course of transmission and the operator had thereafter discharged his duty in making inquiry for the appellee. Appellee did not live in Mineral Springs, but lived in the country six miles from there, and the message, if sent to her over the telephone from Mineral Springs, or if she had been called over the

telephone, could have reached her only through the telephone of a Dr. Holcombe, who was appellee's neighbor, as appellee had no telephone in her home; but Dr. Holcombe testified that it was his custom to call any neighbor when wanted over the telephone. Further in rebuttal, one H. O. Campbell was permitted, over appellant's objection, to testify that, during the latter part of September and the first part of October, Mineral Springs was a good cotton market, and that much cotton was received there during that time. The court also admitted the testimony of Claude Johnson, a rural mail carrier, and Mr. Crump Stewart, a farmer, both of whom lived in Mineral Springs, to the effect that they knew appellee and could have given her address if inquiry had been made of them. The jury returned a verdict in favor of appellee, assessing damages in the sum of \$350, judgment was entered accordingly, and an appeal has been duly prosecuted to this court.

The primary and controlling question in this case is whether appellant telegraph company had the right to change the nature of the message from a telegram to a telephone message and undertake to deliver it from its nearest office to destination by telephone, or whether it should have continued the message and sent it as a telegram to destination over the line of a connecting telegraph company. According to the above recitals, the proof shows that there was a connecting telegraph line from Ashdown to Mineral Springs, the destination of the message, and that if it had been sent by that route it would have been delivered to the addressee. On the other hand, the testimony is sufficient to warrant a finding that the servants of the company at Hope exercised ordinary care to deliver the message by telephone to appellee at Mineral Springs, the point of destination, but failed to discover her. The court refused to instruct the jury to the effect that, if the company exercised ordinary care to deliver the message by telephone from its nearest office at Hope to the destination at Mineral Springs, it would not be liable.

[1] No cases are cited expressly deciding the question now presented. It seems to be well settled, however, by the authorities that a sender of a telegraphic message, where the initial company does not operate a line to the destination, has the absolute right to select the route beyond the destination of the company receiving the message. 2 Joyce on Electric Law, § 788B; Western Union Telegraph Co. v. McDonald, 42 Tex. Civ. App. 229, 95 S. W. 691. This right is recognized by the clause in the contract which expressly stipulates that "the company is hereby made the agent of the sender, without liability, to forward this message over the lines of any other company." If the receiving carrier of the message is, under the contract, to be treated merely as an agent of the sender over the connecting line, it necessarily follows



that the sender has the absolute right to select the route.

Now, the further inquiry is, since it is seen that the sender has the right to select the route, whether in this instance the sender had selected a continuous telegraphic route, or whether it was left with the telegraph company, at its option, to select another route or method—that by way of the telephone.

[2] It seems to us that the only reasonable view is that, where there is a continuous telegraphic route, and the sender files the message with a telegraph company, that, of itself, amounts to a selection of the continuous route, and such selection must be observed by the telegraph company, and if it adopts another route contrary to this selection it does so at its peril.

There is a distinct difference between a telegraph message and a telephone message, so far as the means of transmission is concerned. *Southern Telephone Co. v. King*, 103 Ark. 160, 146 S. W. 489, 39 L. R. A. (N. S.) 402. By the first method the identical written words of the sender are transmitted and delivered in that form; whereas, the ordinary method of communication by telephone is for the carrier to furnish the means of communication and the sender and sendee converse directly.

Mr. Gray, in his work on *Communication by Telephone* (page 182), gives the following as the scope of duty of a telegraph company: "A telegraph company does not, as the government does, undertake to transport and deliver the paper upon which the employer writes the intelligence that he wishes to have communicated. It undertakes to transmit, with the aid of electricity, the intelligence contained in that paper to the place of destination, and there to write it out and deliver it to the person addressed."

In a decision by the Missouri Court of Appeals (*Brashears v. Western Union Telegraph Co.*, 45 Mo. App. 433), the court pointed out this definition by the text-writer, and added that such "is undoubtedly the usual undertaking of a telegraph company, and, in the absence of a special contract to the contrary, anything short of it would be a failure of duty to the sender. The latter has the right to expect and demand that a copy of the message be promptly delivered to the addressee in person, if he is accessible."

In most instances the same result is accomplished if the message is transmitted from the sender to the sendee, and in that case no damage can result. But where both means of communication are open, the sender undoubtedly has the right to choose which method he will employ, and, as before stated, it is clear to us that the filing of a telegraphic message is a selection of that route and mode of communication.

It follows that if appellant ignored the selection thus made by the sender and undertook to send by another method and route, it

is liable, if the forwarding of the message by the route selected by the sender would have accomplished a delivery, even though the company exercised ordinary care in its effort to send the message by telephone. *Western Union Telegraph Co. v. Turner*, 94 Tex. 304, 60 S. W. 432.

The instructions of the court were conformable to this view of the law, and we think the case was correctly submitted to the jury. It is unnecessary to set out the instructions or discuss them at length.

[3] The contract contained a limitation of liability to the sum of \$50, and that is pleaded in this case. But the question is decided adversely to appellant's contention in the recent case of *Western Union Telegraph Co. v. Hearn*, 161 S. W. 1025.

It is insisted that the court erred in admitting the testimony of witness Campbell, as to the cotton market at Mineral Springs at the time the message was sent; and also the testimony of witnesses Johnson and Stewart, to the effect that they could, and would, have given to all inquirers information as to the whereabouts of Mrs. Alford, the appellee.

[4] The testimony of witness Campbell is of very little probative force, but it tended to establish the fact that Mineral Springs were being patronized at that time as a cotton market, which necessarily brought many farmers to town, and this tended to corroborate the testimony of the telegraph operator at Mineral Springs in his statement that, if the message had been received, he could, and would, have found some method of getting the information to Mrs. Alford concerning the message so that it could be delivered to her.

The objection now urged to the testimony of witnesses Johnson and Stewart is that they did not show that they were in Mineral Springs on the day and at the hour when the message was sent, and for that reason their testimony was incompetent.

[5] It may be conceded that the testimony was not competent unless the witnesses were in position at the time to have been inquired of concerning the residence of Mrs. Alford; but we do not think that the objection was made in a way that called the court's attention to it. Each of the witnesses stated that he resided in Mineral Springs on the day that this message was sent; that he was acquainted with Mrs. Alford and knew where she resided; and that, if inquiry had been made of him, he would have given information as to where she lived and how she could be communicated with. They were not asked whether they were in town and on the streets that day, but we think there is a fair inference from their testimony that they meant to say that they were in a position on that day to have given information if inquiry had been made of them. At any rate, we think that fairness to the plaintiff and to the court demanded that attention should have been

called to the fact that objection was made on that ground. Counsel for appellant waited until the final question was asked whether they would have given information concerning the whereabouts of Mrs. Alford if asked, and then they made a general objection without specifying the grounds.

[8] We do not overlook the well-settled rule that a general objection is ordinarily sufficient to raise the question of incompetency of testimony; but the appearance of the objection in this record as a general one convinces us that neither the court nor counsel had in mind the fact that these witnesses had not been sufficiently specific in their statements concerning their presence at a time and place where inquiries would likely have been made of them. If we were to sustain this objection now and reverse the case, it would be upon a point apparently that was not urged below.

Upon the whole, we are of the opinion that the case was fairly tried, and that appellee's case was fully made out so as to warrant the verdict.

Affirmed.

SMITH, J., dissents.

#### CONWAY v. COURSEY.

(Supreme Court of Arkansas. Dec. 1, 1913.)

##### 1. TRIAL (§ 252\*)—INSTRUCTIONS—SUPPORT IN EVIDENCE.

In replevin for logs, alleged to have been cut from plaintiff's land while in the possession of a lessee under a clearing lease, where there was no evidence that plaintiff personally had ratified the written lease by his agent put in evidence, or that he had any knowledge of it until after the timber had been cut and removed, instructions that if his agent had leased the land and plaintiff knew of the lessee's occupancy and received rent, and that if the lessee in good faith sold the timber for clearing purposes, plaintiff could not recover were without support in the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 596-612; Dec. Dig. § 252.\*]

##### 2. LOGS AND LOGGING (§ 3\*)—CLEARING LEASE—RIGHTS OF PARTIES.

An agreement for the rental and clearing of timber land does not convey title to the standing timber so that the tenant may sell it, but the title thereto and the right to remove it remains in the owner, though if the owner does not remove it in apt time the tenant may destroy such timber, by deadening it or otherwise, as is necessary to clear the land.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

##### 3. APPEAL AND ERROR (§ 1031\*)—HARMLESS ERROR—PRESUMPTION OF PREJUDICE—INSTRUCTIONS.

Where it does not clearly appear from the record that an erroneous instruction was harmless, the judgment must be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.\*]

Appeal from Circuit Court, Chicot County; J. R. Yerger, Special Judge.

Replevin by Francis H. Conway against A. T. Coursey. Judgment for defendant as to part of the property, and plaintiff appeals. Reversed.

Appellant, Francis H. Conway, filed a replevin suit before a justice of the peace for the possession of one lot of sawlogs on the yard at Indian Station, Chicot county, Ark., worth \$295. He filed a replevin bond and obtained an order of delivery and took possession of the logs under it. Judgment was rendered in his favor at the trial by the justice of the peace, and an appeal was taken by the appellee to the circuit court, and in the trial there the evidence was substantially as follows:

Appellant testified he owned 380 acres of land in Chicot county, and that the logs replevined came off his land; that he went over his land and had the county surveyor to make an estimate of the timber cut and removed therefrom, and he found that some one had cut about three times as much timber as was embraced in this suit and that all of the land was practically denuded of its timber; that he had never at any time sold any timber to any one nor authorized any one to sell his timber, and that no timber had been disposed of except for the purpose of clearing the land; that he had never given Lewis Keith a written lease for any part of this land, and he had never authorized any one else to do so; that the only leases which he ever made, or authorized, provided that the land should be cleared by deadening the timber, and that no right was given to remove or use any timber except for fence posts and to improve the place, and that no clearing was required to be done except as it became necessary to put the land in cultivation, and that no authority was ever given to any one to sell any merchantable timber.

Mr. Ward testified that he was appellant's representative in renting and clearing the land, but that he had never been given any authority to authorize any use of the timber except for clearing the land and improving it, and that he had received explicit directions from appellant that no timber should be sold; and witness stated that he had never sold any timber nor authorized the sale of any. He admitted, however, the execution of a certain lease which was offered in evidence, and which reads as follows: "This contract entered into this 11th day of March, 1908, by and between Francis H. Conway, party of the first part, and Lewis Keith, party of the second part, witnesseth: Party of the first part agrees to rent party of the second part the John White tract of land, containing eighty-five acres cleared and timbered land for the term of five years, for the sum of seventy-five 00-100 per annum, payable the 1st day of December, each year, 1908, 1909, 1910, 1911, 1912, out of first cotton. Party of the first part also agrees to allow

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

party of the second part the privilege of clearing and cultivating all the land he can during the said terms, and agrees to furnish what wire and staples that may be necessary to fence said lands. Party of the second part agrees to put said land in good cultivating condition and keep all fences in good repair and put up all fences on good posts and on the \* \* \* of said tract with no expense to party of the first part. Also agrees to clear at least forty acres of timbered lands in good cultivating condition during the times before mentioned. We this 11th day of March, 1908, set our hands and seals. [Signed] Francis H. Conway, per W. W. Ward, Agt. [Signed] L. W. Keith. Witness: [Signed] I. M. Worthington, Jr."

Lewis Keith testified that he owned a tract of land adjoining the Conway land which he had leased, and that he sold the timber on his own land for \$150 and sufficient lumber with which to build a house on the Conway lease with the understanding that enough timber should be cut and removed from the Conway lease to furnish the necessary lumber for building the house. Keith testified that appellee paid him the \$150 and immediately commenced cutting and removing timber on the land leased by witness as well as on that owned by him. He further testified that he notified appellee that he had no authority to sell any timber on his lease, and that he had not done so, and that he twice ordered off the cutters and haulers off this lease, and that after he had done so the second time appellee came upon the land with a shotgun and announced his intention to cut the timber; whereupon witness notified Mr. Ward, who in turn notified the appellant, and this suit was immediately begun. Keith further testified that appellee offered to pay him \$50 for the timber cut on this lease, but he declined to receive the money upon the ground that he had not sold the timber nor been authorized to sell it. He further stated that he had never moved upon this lease, nor had he cleared the land as his contract authorized him to do, and that when the controversy arose over the timber he abandoned his contract and made no attempt to clear the land.

Appellee admitted that he had cut and removed 30,000 feet of timber from this lease, but he stated that the other timber replevined came off of Keith's own land and other lands on which he had bought the timber, but he denied that he cut any timber on appellant's land except from the Keith lease. He further testified that 66,000 feet of lumber had been taken from him under order of delivery, and that only 30,000 feet of this had been taken from the Keith lease, and he testified that he paid Keith \$150 in money and agreed to furnish him the lumber to build a house on the Conway land, and for this consideration he was to have the timber on both Keith's land and lease; that he had offered Keith lumber to build his house with, but

Keith declined to receive it, but appellee denied that he had offered to make any other payment to Keith.

There was some other evidence which we think it unnecessary to set out.

The court gave various instructions and, among others, gave at appellee's request and over appellant's objection instruction No. 4, which reads as follows: "You are instructed that if you find from the evidence that W. W. Ward, acting as agent for plaintiff, leased to Lewis Keith the land from which the timber in controversy, or a part thereof, was cut, and plaintiff knew of the occupancy of Keith under said lease and received rent under the terms thereof, and if you further find that the chief consideration for said lease was the clearing and putting in a state of cultivation of 40 acres of said land, the obligation to clear necessarily implied the removal of the timber therefrom, and if you further find that the said Keith in good faith, for the purpose of clearing and improving said land and complying with the terms of his lease, sold the timber off the land to be cleared to the defendant, your verdict will be for the defendant for the timber cut from the Keith land or its value."

The jury returned the following verdict, to wit: "We, the jury, find for the defendant for 36,000 feet of logs at \$10.00 per thousand. [Signed] J. R. Spraggins, Foreman." Judgment was thereupon entered by the court against appellant and the sureties on his bond for 36,000 feet of logs if they can be found, or for the value with interest thereon from the date they were taken under order of delivery issued by the justice. A motion for a new trial was overruled, and an appeal prayed and granted.

N. B. Scott, of Lake Village, Armstrong Barrow, of Pine Bluff, and Cockrill & Armstrong, of Little Rock, for appellant.

SMITH, J. (after stating the facts as above). [1,2] The court erred in giving the instructions set out for two reasons: In the first place, there was no evidence to submit to the jury that appellant ratified or confirmed the written lease introduced in the evidence. There was no evidence that appellant had any knowledge of it until after the timber had been cut and removed. And in the second place, the evidence was undisputed that appellant never at any time sold the timber nor authorized its sale. Indeed, the lease offered in evidence, and under which appellee claimed, is not a sale of the timber and does not purport to be. It is merely an agreement for the rental and clearing of lands, and such leases do not operate to convey title to the standing timber so that the tenant may sell it. In such contracts as the one here set out, the title to the timber and the right to remove it remains in the owner of the land. If the owner of the land does not remove the timber, the tenant has the right to destroy it as it becomes necessary to do so to

clear the land; but such contracts convey no right to sell the merchantable timber as such, and no right to destroy it except as it is necessary to do so to clear the land by deadening the timber or otherwise, which may of course be done if the landlord does not remove the timber in apt time. *Reichardt v. Howe*, 91 Ark. 280, 121 S. W. 347.

[3] This instruction was therefore erroneous, and, as it does not clearly appear from the records that it was harmless, the judgment must be reversed. *St. L. & S. F. R. Co. v. Crabtree*, 69 Ark. 134, 62 S. W. 64; *Neal v. Brandon*, 70 Ark. 79, 66 S. W. 200.

**ST. LOUIS & S. F. R. CO. v. GRIDER.**  
(Supreme Court of Arkansas. Dec. 8, 1913.)

**1. CARRIERS (§ 321\*)—PERSONAL INJURIES—INSTRUCTIONS—CONDITION OF PREMISES.**

In an action for personal injury by falling through a platform at defendant's station, where it appeared that the platform had a plank flooring, and that, while the part where plaintiff was injured had been designed for freight, it was seldom so used, and there was nothing to prevent passengers from going upon it, and that it had a railing to prevent persons walking off, defendant's requested instructions, that if the platform was intended for freight, and there was no necessity for plaintiff to go upon it, it would not be liable for failure to keep it in a reasonably safe condition, and that, if a waiting room with sufficient accommodations exclusive of the platform was furnished, plaintiff, injured while on the platform without necessity, could not recover, were properly refused.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. § 321.\*]

**2. CARRIERS (§ 286\*)—CARRIAGE OF PASSENGERS—CONDITION AND USE OF PREMISES.**

Railroad companies must keep in a safe condition all parts of their platforms and approaches to which the public would naturally resort, and all parts of their station grounds reasonably near to the platform where passengers boarding or leaving trains would ordinarily be likely to go, and especially by those routes and methods which the company has established by its own customs and practice.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.\*]

**3. CARRIERS (§§ 327, 347\*)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—USE OF PREMISES.**

A passenger, injured by falling through a platform while waiting at defendant's station for a train, could not recover therefor if he failed to exercise ordinary care for his own safety, which failure contributed in any degree to his injury; but ordinary care did not require him as a matter of law to remain in a waiting room until the arrival of his train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. §§ 327, 347.\*]

**4. CARRIERS (§ 318\*)—PERSONAL INJURIES—QUESTION FOR JURY—CARE OF PREMISES.**

On evidence in an action for injury from falling through a platform at defendant's station while waiting for a train, *held*, that the jury was warranted in finding that the platform was one which passengers would be likely to use, and that defendant's duty was not

discharged by having a safe waiting room and a safe approach therefrom to the train.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

**5. CARRIERS (§ 320\*)—CARRIAGE OF PASSENGERS.**

On evidence in an action for personal injuries by falling through the depot platform while plaintiff was waiting for a train, *held*, that whether defendant should be charged with knowledge that the platform would be so used was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

Appeal from Circuit Court, Mississippi County; W. J. Driver, Judge.

Action by W. H. Grider against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee instituted this suit in the circuit court of Mississippi county to recover damages for certain injuries received by him by falling through appellant's depot platform at the station of Grider, in said county, March 8, 1912. The suit was tried at the January term, 1913, and resulted in a verdict for appellee for \$2,000, from which the appellant has appealed to this court.

There was no real conflict in the evidence, and no complaint is now made that the damages were excessive. Appellee's testimony was substantially as follows: "I live near Grider station, and went to the depot just across the tracks from my store to take the north-bound train for Osceola. The train was due about 7:30 p. m. but was about 15 minutes late. I came to the station at night and stopped at the store and stood there and talked until about train time, and I walked over to the depot and sat in the waiting room awhile, and the train didn't come, and I got restless. When the train did not come on time, walked out the door, and the train approached there from the south going north. I walked to see if I could see it down the track, and I walked out there and couldn't see any lights, and so I just thoughtlessly wandered around on that side of the platform there that adjoins that other one. There's a railing around all of them which nearly every one that comes to take a train uses, and after I made a few steps on the platform my right foot all at once just went right down, and my whole weight right on it, you know, and then the floor had pulled away (indicating), and I had to crawl up over this sprained foot to keep from rolling under the depot." Appellee further testified that the platform where he was injured was only about five feet from the door of the passenger waiting room, and, although it was constructed as a freight platform, it was seldom used as such; that it was commonly used by passengers who were waiting for trains; and that there was a railing about waist high on its south

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

side which prevented passengers from walking off of it; and that he had many times walked on it in perfect safety, and he supposed it was safe at the time of his injury. Witness lived near the depot, and was frequently a passenger there, and had at one time been the agent at this station, and had seen many passengers standing on this platform. This platform was built to the south end of the depot and was on a level and connected with the platform between the depot and the railroad tracks. Had this railing been on the west end of the platform where appellee was hurt, it would have kept passengers from going on it, while, being at the south end, it prevented passengers who went upon it from walking off of it. There was a lamp on this platform, but it was not lighted at the time of the injury. There was no necessity for appellee to go upon this platform to take the train, and he went there because he was restless and had grown tired waiting for his train, which was behind time. All of the platform which it was essential appellee should use to enter the train was in a safe condition.

The appellee requested, and the court gave, the following instructions:

"(1) It is the duty of railroad companies to exercise ordinary care to keep in reasonably safe condition all portions of their platforms and approaches thereto to which persons purchasing tickets with the view of becoming passengers upon trains would naturally or ordinarily be likely to go.

"(2) If you find from a preponderance of the evidence that, on the date of the alleged injury, defendant was negligent in failing to exercise ordinary care to keep in a reasonably safe condition the approach to, or portion of its platform at Grider station, and further find that from such evidence such approach to or portion of its platform was located where persons purchasing tickets with a view of taking passage on defendant's trains would naturally or ordinarily be likely to resort, and you should further find from such proof that plaintiff on said date had purchased a ticket with the intention of taking passage on defendant's train, and while awaiting such train, and in the exercise of care for his own safety, was injured by stepping upon and having his ankle sprained in such defective platform or approach, you should find for the plaintiff.

"(3) If you find and believe from the evidence that the plaintiff in this case failed to exercise reasonable and ordinary care for his own safety, and such failure on his part in any degree contributed to his injuries, he cannot recover. The burden of proof of contributory negligence is upon defendant, who must establish the same by a preponderance of the evidence unless the same sufficiently appears from proof on part of plaintiff."

Appellant requested two instructions, numbered 1 and 2, but both were refused and they read as follows:

"(1) You are instructed that if you find and believe from the evidence that the platform in question whereupon plaintiff was injured was constructed by the railroad company for the use and accommodation of its patrons in handling and discharging freight and was not intended by the railroad company for the use of passengers in going to and from its trains or to and from its depot, and you further find that it wasn't necessary for the plaintiff to occupy any portion of this platform where he was injured in reaching the depot from the trains or the trains to the depot or his home or place of business from the depot or trains, then the company was not due to keep that portion of the platform intended for the use of freight in a reasonably safe condition, and is not liable to this plaintiff for its failure to do so.

"(2) You are instructed that if you find and believe that the defendant company furnished a waiting room at the station of Grider sufficient to accommodate this plaintiff and the other passengers on the day plaintiff was injured, and also furnished sufficient platform reaching from the depot to the trains, and the plaintiff unnecessarily and in the nighttime and in the darkness of night and without any necessity for so doing went upon the platform provided for the use of patrons in the handling of freight and received the injuries complained of, then he could not recover."

W. F. Evans, of St. Louis, Mo., and W. J. Orr, of Springfield, Mo., for appellant. J. T. Coston, of Osceola, for appellee.

SMITH, J. (after stating the facts as above). [1, 2] We think the court did not err in giving the instructions requested by appellee and in refusing those asked by appellant under the facts in this case. In effect, the instructions requested by appellant told the jury that if the platform on which appellee was hurt was intended for use in handling and discharging freight and was not intended by the railroad company for the use of passengers in going to and from its trains, and there was no necessity for appellee to occupy any portion of the platform in reaching the depot or train, appellant was under no obligation to keep it in a reasonably safe condition and would not be liable for its failure to do so. And further that, if a waiting room with sufficient accommodations, exclusive of the platform in question, had been furnished, and appellee went upon the defective platform in the nighttime when there was no necessity for him so to do, he could not recover. The duty of railroad companies in making their depots and platforms safe is announced in the case of *Texas & St. Louis Ry. Co. v. Orr*, 46 Ark. 182, where the following language was used: "As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the

public do or would naturally resort, and all portions of their station grounds reasonably near to the platform where passengers, or those who have purchased tickets with a view to take passage on the cars, or to disembark from them, would naturally or ordinarily be likely to go; and especially by those routes and methods which the company have established by its own customs and practice, as here. This is well established." A number of cases are there cited in support of the court's declaration of the law. The above statement of the law has been expressly approved in the following cases, several of which quote with approval the exact language of that opinion: *Railroad v. Caldwell*, 93 Ark. 286, 124 S. W. 1034; *Railroad v. Dooley*, 77 Ark. 561, 92 S. W. 789; *St. L., I. M. & S. R. Co. v. Barnett*, 65 Ark. 258, 45 S. W. 550; *Arkansas Midland Ry. Co. v. Robinson*, 96 Ark. 32, 130 S. W. 536.

[3, 4] Appellee's instructions in the present case substantially conformed to the law, as announced in the above-cited cases, and we think were properly given under the facts in this case. These instructions do not give the passenger authority to ramble at will over the premises of the railroad company adjacent to the depot, and they impose upon the carrier the obligation and duty only of making those premises safe which passengers would likely and ordinarily use when waiting to take passage upon trains. The third instruction given at appellee's request properly told the jury that there can be no recovery if the passenger failed to exercise ordinary care for his own safety if such failure contributed in any degree to his injury. Here, the platform appears to have been but a single structure built in part of gravel or silica and of wood, with a plank flooring and all upon the same level, so that passengers used all portions of it alike. And while a part of it had been designed for loading and unloading freight into wagons, it was seldom used as such, and there was nothing to prevent passengers from going upon it, as they did upon other parts of the platform. Indeed, the jury might have found that the railing on the south end was an invitation to passengers for its use, for, had the railing been put upon the west side, it would have kept them off entirely.

Appellee's first instruction told the jury that it was the duty of the railroad company to exercise ordinary care to keep in a reasonably safe condition all platforms and approaches upon which passengers would naturally or ordinarily be likely to go, and we think the jury was warranted in finding that this was such a platform, and that appellant's duty was not discharged by having a safe waiting room and a safe approach therefrom to the train. The railroad company must be charged with the knowledge that passengers might not remain in the waiting

rooms until the arrival of the trains. Nor does ordinary care for one's safety impose such duty upon passengers as a matter of law, so that the failure to remain in a waiting room until the arrival of the train would necessarily constitute negligence. It is true it was said in the case of *Little Rock & Ft. Smith R. Co. v. Cavanese*, 48 Ark. 106, 2 S. W. 505, that "the duty of the carrier to keep its platform and approaches thereto in good condition and to provide safe and convenient means of entrance and departure creates the reciprocal duty on the part of the passengers to occupy the premises provided for their use in waiting for trains and in going to and from the carrier's depot, offices, platform, and trains to use the ways and means provided for that purpose." But the facts of that case were entirely dissimilar from those of the present case, as the injured party in that case had gone to a place where the railroad company could not have anticipated a passenger would go, and where there was no duty to make the place safe. The instructions given do not offend against the law as announced in the cases cited, while the instructions requested by appellant undertake to apply to the facts of this case the law applicable to the facts in the *Cavanese* Case, and they apparently state the law to be that the railway company was under no duty to keep the platform safe if it was designed as a freight platform, and ignores the fact that it was ordinarily and commonly used by passengers as a part of the passenger platform.

[5] It was a question of fact for submission to the jury whether appellee and other passengers had the right to be upon this defective platform and that the railroad company should be charged with knowledge that it would be so used, and the verdict of the jury settled that question of fact.

The judgment of the court below is therefore affirmed.

#### DRAINAGE DIST. NO. 1 OF CROSS COUNTY v. ROLFE et al.

(Supreme Court of Arkansas. Dec. 8, 1913.)

##### 1. APPEAL AND ERROR (§ 659\*)—ESTABLISHMENT—PROCEEDINGS—APPEAL.

The part of the record in proceedings to establish a drainage district, brought up from the county court after the taking of an appeal from a judgment of the circuit court reversing the judgment of the county court establishing the district, cannot be considered by the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2834-2848; Dec. Dig. § 659.\*]

##### 2. DRAINS (§ 86\*)—ESTABLISHMENT—PROCEEDINGS—APPEAL.

An appeal from an order of the county court establishing a drainage district must be granted by the court, and not by the clerk, and the order fixing the amount of the bond which is equivalent to granting the appeal must be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

entered at the term when the final order establishing the district is made.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 44-50; Dec. Dig. § 36.\*]

### 3. DRAINS (§ 36\*) — ESTABLISHMENT — PROCEEDINGS—APPEAL.

The failure to move the circuit court to dismiss an appeal from the county court establishing a drainage district on the ground that the statutory requirements essential to perfecting an appeal were not taken does not operate as a waiver of the defect of the jurisdiction of the circuit court, where there is an entire absence of anything in the record showing an appeal from the county court.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 44-50; Dec. Dig. § 36.\*]

### 4. DRAINS (§ 36\*) — ESTABLISHMENT — PROCEEDINGS—APPEAL.

The circuit court on appeal from an order of the county court establishing a drainage district may, while the case is pending before it, allow the bringing up from the county court of an amendment so as to show the allowance of an appeal and thus establish jurisdiction to review the proceedings.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 44-50; Dec. Dig. § 36.\*]

### 5. DRAINS (§ 36\*) — ESTABLISHMENT — PROCEEDINGS—APPEAL.

Where the Supreme Court reversed a judgment of the circuit court reversing an order of the county court establishing a drainage district, on the ground that there was no valid appeal to the circuit court, and remanded the case for further proceedings, the circuit court could allow the record of the county court to be amended so as to show the necessary facts, conferring jurisdiction on appeal.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 44-50; Dec. Dig. § 36.\*]

Appeal from Circuit Court, Cross County; Frank Smith, Judge.

Proceedings for the establishment of Drainage District No. 1 of Cross County, in which F. D. Rolfe and others lodged a transcript in the Circuit Court, and from a judgment of the Circuit Court reversing the order of the County Court establishing the district, with directions to enter judgment against the petitioners for the district, the district appeals. Reversed for further proceedings.

L. C. Goling, of Memphis, Tenn., for appellant. O. N. Killough, of Wynne, and J. F. Summers, of Augusta, for appellees.

McCULLOCH, C. J. Drainage district No. 1 of Cross county, Ark., was established by an order of the county court of that county made pursuant to a petition of landowners, and all the proceedings appear to have been in conformity with the statutes of this state regulating the establishment of drainage districts. The final order was entered by the county court on June 23, 1911, and thereafter appellees, F. D. Rolfe and others, who were the owners of lands affected by the establishment of the district, lodged a transcript of the proceedings in the circuit court, where the case was heard as on appeal. The judgment of the circuit court was rendered on June 25, 1912. The court, finding that the

proposed improvement was not practicable, reversed the order of the county court, with directions to enter judgment accordingly against the petitioners for the district. An appeal was prosecuted to this court, the same being granted by the clerk of this court on March 13, 1913.

The record lodged here, which contains a transcript of the record and proceedings in the county court, does not show anything about the remonstrance of appellees against the formation of the district nor their appeal from the county court, if any was granted. The record does not show anything about a remonstrance, or an appeal, or any of the steps necessary in taking an appeal, and no question was raised in the trial below as to that defect in the record, and the circuit court proceeded to a trial without objection from any one as if an appeal had been properly taken. This defect in the record was suggested for the first time when appellant's brief was filed, and it is insisted that the circuit court was without jurisdiction and its judgment void because there is no record showing the granting of an appeal or any of the essential steps in that direction. Since the filing of appellant's brief, appellees obtained an order of the county court, entered nunc pro tunc, showing the granting of an appeal on the day the judgment of that court establishing the district was rendered. A copy of that order, together with a copy of the appeal bond and remonstrance against the formation of the district, all duly certified by the clerk of the county court, were filed in the circuit court and have been brought here by writ of certiorari. This was all done, as before stated, since the case has been brought here on appeal. It appears that an appeal was taken to the circuit court from the last order of the county court entering nunc pro tunc the order granting the appeal, and we are now asked to postpone the hearing of the cause until the record of the circuit court on that appeal can be brought here.

[1] It is unnecessary to further postpone the case, for the reason that none of the record brought up from the county court after the appeal was taken from the circuit court to this court can be considered. The transcript of the county court proceedings cannot now be amended so as to bring in matters which were not part of the record in the circuit court at the time that court heard the case. The circuit court could amend its own records in any way necessary to speak the truth, but it cannot make a new record of things which did not exist at the time of the trial in that court; nor can we consider on appeal anything that was not a part of the record at that time. This leaves the record without any showing whatever that an appeal was taken to the circuit court from the county court.

[2] The matter of appeals from orders of

county courts establishing drainage districts was fully considered by this court in the case of *Drainage District No. 7 v. Stuart*, 104 Ark. 118, 147 S. W. 460, and the necessary steps to perfect an appeal were pointed out. In that case we said: "Under the statute, the court must grant the appeal, and not the clerk. The order fixing the amount of the bond, which is equivalent to granting the appeal, must be entered, as before stated, at the term when the final order is made establishing the district. \* \* \* These statutory requirements are essential to jurisdiction, and therefore they cannot be waived. This is a special statutory proceeding, and, the statute having prescribed the manner in which the appeal shall be taken, it supersedes the general statute upon the subject of appeals from the county court, as contained in section 1487 of Kirby's Digest. The statute prescribing the method for taking appeals in these cases must be followed substantially in order to give the court jurisdiction. The decisions of this court holding that a failure to make a motion to dismiss and to have the circuit court rule on the motion is a waiver of the affidavit or some other statutory requirement for an appeal under the general statutes regulating appeals cannot have any application here, for the reason, as stated, that this is a special statutory proceeding and the method prescribed therein is mandatory and jurisdictional, and cannot be waived. \* \* \* The record in this case fails to show that there was a prayer for an appeal which was granted by the county court. This court has often held that, in order to invest a court to which an appeal is taken with jurisdiction, it is necessary that it appear that the appeal was prayed for and granted in the lower court." This decision is decisive of the question now before us, for, if the circuit court did not possess jurisdiction at the time it undertook to render judgment, the judgment is void.

[3] Nor was the defect of jurisdiction waived by a failure to move the court to dismiss the appeal. That point is covered in the opinion in the *Stuart Case*, supra. It may be that the failure to move to dismiss might waive some of the preliminary steps toward granting an appeal, but, certainly, it would not be a waiver of the entire absence of anything in the record showing an appeal. It is unfortunate that the case must be reversed on this ground, for the additional record brought here concerning the orders of the county court indicates that an appeal was, in fact, granted; but there is no escape from the conclusion, if we are to pursue anything like an orderly procedure in judicial administration, that the jurisdiction of the circuit court must be tested by the contents of the record as it stood when the case was tried. It would be an exercise of original jurisdiction for us to go back to the record of the county court now to ascertain what it

disclosed, or should have disclosed, at the time the case was on trial in the circuit court.

[4, 5] The circuit court, while the case was pending there, might have allowed an amendment to be brought in from the county court so as to show the allowance of an appeal, thus establishing the jurisdiction of the circuit court to review the proceedings; and when the case is remanded it is still within the power of the circuit court to allow the record of the county court to be amended so as to show the necessary jurisdictional facts.

The judgment must therefore be reversed; but, inasmuch as the record brought here indicates to us that the necessary amendment has been made in the county court and can be added to the record of the circuit court, the cause will be remanded for further proceedings if the jurisdiction of the court is properly shown upon the corrected record. It is so ordered.

SMITH, J., not participating.

#### BROWN v. ALLBRIGHT et al.

(Supreme Court of Arkansas. Dec. 8, 1913.)

##### 1. MORTGAGES (§ 463\*)—ACTION TO FORECLOSE—EVIDENCE—TIME OF PAYMENT.

Evidence, in an action to foreclose a mortgage, held to show that at the time the mortgagee's second deed to the mortgagor, releasing a condition in the first deed, was executed and deposited in a bank for delivery when the mortgage was paid, there was no time fixed within which payment should be made.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1361, 1363-1368; Dec. Dig. § 463.\*]

##### 2. FRAUDS, STATUTE OF (§ 74\*)—INTEREST IN REAL PROPERTY—CONTRACT TO CONVEY.

Where a mortgagee executed a warranty deed, releasing a condition in a prior deed, and deposited it with a third party for delivery to the mortgagor when the mortgage should be discharged, and thereafter gave his written receipt for \$100 paid on the mortgage, the transaction was not a parol contract for the conveyance of land, within the statute of frauds, but an executed contract, to take effect when the mortgage was paid.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 83, 122-131; Dec. Dig. § 74.\*]

##### 3. ESCROWS (§ 8\*)—RIGHT TO RECALL.

Where a deed evidencing a gift of land to trustees of a church was deposited in a bank, to be delivered on their payment of a mortgage debt to the grantor, the gift would be complete when such payment was made, and, where he subsequently accepted payments on the mortgage debt knowing that they were made on condition that the deed was to be delivered on discharge thereof, he could not withdraw the deed without giving the trustees an opportunity to comply with the condition as to delivery.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. §§ 9, 10; Dec. Dig. § 8.\*]

Appeal from Clay Chancery Court; Chas. D. Frierson, Chancellor.

Action by Abe Brown against J. A. Allbright and others, trustees, etc., with cross-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



complaint by defendants. Decree for plaintiff on condition, and he appeals. Affirmed.

This is a suit by appellant against appellees as trustees of the Methodist Episcopal Church, South, at Peach Orchard, Ark., to foreclose a mortgage on the church lot and house executed by the trustees to appellant. The lot on which the church building was afterwards erected was formerly donated to the church by appellant. This deed, in the habendum clause, contained a provision to the effect that the trustees were to hold the same "so long as the same shall be used and occupied as a Methodist Church." This deed was accepted by the trustees and recorded in April, 1906. Appellant thereafter loaned to appellees \$620, evidenced by promissory notes. In August, 1906, the trustees proceeded to erect a church house on the lot. Some time in 1910 the trustees and some of the other members of the church informed appellant that they were unable to obtain a loan from the Church Extension Board to pay off the mortgage to appellant, and appellant thereupon, according to the testimony for the appellees, executed to them a warranty deed, and placed it in the People's Bank of Peach Orchard, Ark., with instructions to deliver it to the trustees when the mortgage debt was paid. According to the testimony of appellant, he executed the warranty deed and placed it in the bank to be delivered to appellees when the debt was satisfied, but that it was understood and agreed at the time with the trustees that the mortgage debt was to be paid at once. This was in the latter part of the year 1910. On the 14th day of April, 1911, the Ladies' Aid Society of the church paid \$100 on the mortgage debt, which was credited on one of the notes. About the 15th of July, 1912, nothing more having been paid, appellant went to the bank and requested that the deed be delivered to him, which was done, and he destroyed it. In addition to the mortgage debt, appellant had an open account against the church which was not secured by the mortgage. There had been several payments made previous to the execution of the last deed which appellant credited on the open account. The appellant contended that at the time those payments were made nothing was said as to which debt the payments should be applied on. The appellees, on the other hand, contended that the payments were to be applied on the mortgage debt. The appellant credited his open account with certain donations that he had made himself. Appellant asked for foreclosure of the mortgage for the full amount of the mortgage less the credit that had been endorsed thereon. The appellees, in their answer, which they made a cross-complaint, asked that certain payments be credited on the mortgage debt, and not on the account, and that appellant be required to execute and deliver a deed with general warranty to the church lot upon the payment to him of the

balance due on the mortgage debt. The court found that appellees had paid the sum of \$185.50 which had not been credited on the mortgage debt, and that the sum of \$490.80 was due the appellant. The court ordered the property sold if the latter sum was not paid within 20 days, and that before the sale appellant should execute a warranty deed to the church property in favor of the appellees and deliver it to the commissioner appointed to make the sale, and that if appellees should pay the amount of the judgment the commissioner should deliver the deed to them. Other facts stated in the opinion.

F. G. Taylor, of Corning, for appellant. C. T. Bloodworth, of Corning, for appellees.

WOOD, J. (after stating the facts as above). I. The appellant contends that the court erred in finding that the appellees had paid \$185.50 on the mortgage debt, and in holding that this amount should be credited thereon instead of on the open account.

Appellant does not question the correctness of the amount of the payments which were credited on the indebtedness. He only contends that the court erred in placing the credits on the notes instead of letting them remain on the open account where appellant had placed them. But we are of the opinion, after considering the exhibits which were introduced in evidence and abstracted fully in the brief for the appellees, in connection with the testimony of the appellant and of the witnesses on behalf of the appellees, that the court did not err in crediting the amount named on the mortgage debt. These exhibits and the other testimony convince us that the parties understood at the time that these payments were to go on the mortgage debt. The witnesses who made the payments testified that they directed that they be placed on the church debt. Appellant, when asked if the parties directed what application should be made of the payments, said: "I don't know; they told me only just to apply them on the church debt. I don't know that they specified anything particular; only just gave it to me to apply on the business."

While it is true that the testimony shows that the appellant had an open account against the church in addition to the mortgage debt, the chancellor evidently found that the witnesses, when they told the appellant that the money was to go on the church debt, meant the mortgage debt, and we think, taking all the testimony together, that the chancellor was correct in so interpreting the testimony. It could serve no useful purpose to set out at length the testimony of the witnesses concerning this matter, but it suffices to say that the finding of the chancellor on this point is not clearly against the weight of the evidence.

There is testimony from which the chancellor might have found that the notes and

mortgage that were executed on August 10th covered the appellant's open account to that date as well as the cash that he advanced at that time. The mortgage and notes, on their face, show the sum of \$620 which appellees owed appellant, but there was testimony showing that appellees only received from appellant at that time the sum of \$450 in cash; so that the balance must have been used to apply on the open account of appellees with appellant that had accrued prior to that time.

II. The appellant contends that the court erred in requiring appellant to execute a warranty deed to the land embraced in the mortgage.

In regard to the execution and delivery of the second deed, which was a warranty deed without any limitations or reservations, the appellant testified as follows: "I heard rumors that there was complaint about the reservation clause in the (first) deed, and some of them came to me and told me that they wanted the deed changed, and that if I would make a warranty deed they would take it up right away. Mrs. Allen, for one, told me that they would raise the money at once if I would make a good deed. Allbright (one of the trustees) also said that they would raise the money and pay out the mortgage right away if I would make a deed, and my wife and I made a deed to them, and I placed it in the bank at Peach Orchard with the understanding that if they paid the mortgage off the deed was to be delivered to the church people. In the meantime the Ladies' Aid paid \$100 on the mortgage, and the same is credited on the back of the notes. The deed lay in the bank something like 18 months, and the conditions in the church changed from what they used to be so that I went and took the deed down and destroyed it. I considered that they had had ample time to pay it if they intended to." In another place in his testimony he says: "I first fell out with the church when they tried to carry that road business into the church along some time last summer. The preacher came and jumped on me about that road, and after that he preached a sermon that was pointed to reflect on some of the young ladies of the town, and I objected seriously to it and withdrew from the church. The church failed to have the same peace and quiet it did before the circumstances changed to such a degree that I had my doubts that the church would be used as a place of worship, and consequently I withdrew the deed. I had no agreement to put up the deed and just put up the deed with their promise to pay. I now refuse to give them a warranty deed, even though they pay every cent that is due."

The testimony of the trustees and one Mrs. Allen tended to show that they informed appellant that they were unable to raise the necessary subscriptions to pay off the

mortgage debt on account of the reservation in the first deed. They told him that the people understood that he had given the church lot, but they found, upon investigation, that the deed contained this reservation clause which prevented them from getting money from the Church Extension Board to pay off the mortgage. They informed appellant that they were willing to pay the debt if he would make a warranty deed, but that they would not pay any more on it unless he would make a warranty deed. Appellant stated that he had not intended to defraud anybody by the way he drew up the deed, and if they wanted a warranty deed he would make them one and deposit it in the bank, and when they paid the debt off he would authorize any one who was cashier of the bank to turn the deed over to the trustees of the church. He also stated that at that time the Ladies' Aid had \$100 in money, and if they would pay the \$100 and the men of the community \$100 that he himself would donate \$100.

Appellant made a warranty deed, which was satisfactory to the trustees, and deposited it in the bank; the cashier stating that it was his understanding that it was held to be delivered when the mortgage debt was settled. The deed was executed some time in November or December, 1910. On the 14th day of April, 1911, the Ladies' Aid Society paid \$100 on the mortgage debt, which appellant credited on the notes. On the 15th of July, 1912, appellant withdrew the deed from the bank without consulting the trustees or obtaining their consent to its withdrawal. The testimony shows that other sums were paid which he accepted. Mrs. Allen, among other things, stated that they had been informed that appellant had made and deposited the second deed or they would not have been trying to raise the money. They had not endeavored to raise the money before that time because everybody they asked did not want to help until they got a good deed. After the deed was deposited, the people helped more liberally. "There was no time fixed in which payment was to be made."

[1, 2] The preponderance of the evidence shows that at the time the second deed was executed and deposited in the bank there was no time fixed in which the mortgage debt should be paid. The depositing of the deed and the written receipt of the payment of \$100 take the case out of the statute of frauds. It was not a parol contract for the conveyance of land, but, as we construe it, an executed contract by a deposit of the deed which conveyed the title to appellees, to take effect when the mortgage debt was paid. It was evident that at the time appellant made the deposit of the deed with the cashier of the bank he intended that it should pass entirely beyond his control, and it was only necessary, in order to effectual-

ly convey the title to appellees, that they should pay off the mortgage debt.

[3] While it is true that both deeds evidenced gifts of the appellant of the land in controversy, yet the deposit of the deed in the bank to be delivered upon the payment of the debt made the gift complete when that event should occur, and since appellant accepted the payment of \$100, and other payments, knowing that they would not have been made except upon the condition that the second deed was to be delivered upon the payment of the mortgage debt, he could not withdraw the deed without giving the appellees an opportunity to comply with the conditions upon which the deed was deposited in the bank. The grantor, after the appellees had partially complied with the condition upon which the deed was deposited, was under obligation to allow the deed to remain in the bank for them. Says Chief Justice Shaw, in *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154: "Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. \* \* \* Still it will not take effect as a deed, until the second delivery; but, when thus delivered, it will take effect, by relation, from the first delivery." See *Grilley v. Atkins*, 78 Conn. 386, 62 Atl. 337, 4 L. R. A. (N. S.) 816, 112 Am. St. Rep. 152. While a voluntary grantor or donor may revoke his gift at any time before the compliance by the opposite party with the conditions upon which it is to be delivered, yet, when the grantee or donee has partially complied with such conditions to the acceptance of the donor or grantor, the latter cannot then withdraw his donation without giving the donee an opportunity to fully comply. See *Mechanics Nat. Bank v. Jones*, 76 App. Div. 534, 78 N. Y. Supp. 800; *Id.*, 175 N. Y. 518, 67 N. E. 1085.

Appellees, under the evidence, had acquired rights under the deed which could not be forfeited without giving them an opportunity to pay off the mortgage debt.

The decree is therefore correct, and it is affirmed.

SCHUMAN et ux. v. GEORGE, County Judge, et al.

(Supreme Court of Arkansas. Dec. 15, 1913.)

1. COUNTIES (§ 34\*)—JURISDICTION OF COUNTY COURT—DETERMINATION OF COUNTY ELECTION.

The county court has exclusive original jurisdiction to determine the result of an election held on the question of the removal of a county seat.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 34-37; Dec. Dig. § 34.\*]

2. DEEDS (§ 69\*)—VALIDITY—MISTAKE.

Kirby's Dig. § 1122, provides that, before the county court, which has exclusive original

jurisdiction to determine the result of an election held to decide the removal of a county seat, shall make any order carrying the result of an election thereon into effect, the vendor or donor of the new location shall execute and deliver to the county judge a sufficient conveyance in fee simple to the county of the location, without reservation or condition. After the county court had made an order establishing a town as the chosen county seat, and pending a contest over the election, plaintiffs executed a deed donating a site therefor. *Held* that, although the order of the county judge was reversed, the deed was not invalid as having been executed under a mistake of fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 156-164; Dec. Dig. § 69.\*]

3. EVIDENCE (§ 420\*)—PAROL EVIDENCE TO VARY WRITING—DEED.

A condition that a county seat would be located in a certain town could not be attached to the donors' conveyance of a site therefor by a parol agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1728, 1795, 1800, 1804, 1815, 1821, 1929-1944; Dec. Dig. § 420.\*]

4. JUDGMENT (§ 707\*)—PARTIES AFFECTED.

A decree of the chancery court, in a suit instituted by courthouse commissioners against the dedicator of certain land to the public, that such dedication was a mistake, and that the owner intended to convey it to the county for courthouse purposes and setting aside such dedication, did not affect the rights of the public or of any one not a party to the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 707.\*]

5. ESTOPPEL (§ 35\*)—GRANTORS' REACQUIRED TITLE—RIGHTS OF GRANTEE.

Where land was voluntarily conveyed to a county for county seat purposes, any title to the property subsequently acquired by the grantors inured to the benefit of the county.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 84; Dec. Dig. § 35.\*]

Appeal from Little River Chancery Court; Jas. D. Shaver, Chancellor.

Suit by Carl Schuman and wife against N. A. George, as County Judge of Little River County, and others. Decree for defendants, and plaintiffs appeal. Affirmed.

In 1898 Eliza Schuman was the owner in fee simple of 80 acres of land, on which is now situated the town of Rocky Comfort. The railroad station and post office are called "Foreman." The land was situated in Little River county; and in 1898 Eliza Schuman laid it off into lots and blocks for town-site purposes. The west half of block 30 was dedicated to the public. The dedication was made by a deed which was duly acknowledged and is as follows: "Know all men by these presents: That we, Carl Schuman and Eliza Schuman, his wife, owners of the west half of the southeast quarter of section 5, township 12 south, range 32 west, have caused the same to be subdivided in a manner as shown on this plat, and all streets and alleys and the west half of block No. 30, are hereby dedicated to the public."

At its October term, 1901, the county court of Little River county made an order, submitting to the voters of the county the proposition to vote on a relocation of the county

seat, and the towns of Ashdown and of Rocky Comfort were named in said order as two places to be voted for, in addition to the other issues submitted to the voters of Little River county, viz., for removal or against removal from its existing location, at that time at Richmond. Said election was ordered to be held on December 3, 1901, and was duly held at that time. The votes cast in said election were duly canvassed and returned to the county court, and on November 4, 1902, the county court made an order declaring that the town of Rocky Comfort had received the highest number of votes and had become the county seat of Little River county, and commissioners were appointed and ordered to remove the records and all the property pertaining to the county seat to the town of Rocky Comfort. The commissioners complied with the order, and Rocky Comfort became, and was treated as, the county seat until December 3, 1904. An appeal was taken from the order of the county court adjudging Rocky Comfort to be the county seat, and, at the October term, 1903, of the circuit court, it was determined that Ashdown had received the highest and greatest number of votes in said election and thereby became the county seat of Little River county; and it was ordered that the records and all property of the county be removed to Ashdown, and that Ashdown be the permanent county seat of Little River county. On appeal to the Supreme Court, the judgment of the circuit court was affirmed on the 3d day of December, 1904. See *Schuman et al. v. Sanderson et al.*, 73 Ark. 187, 83 S. W. 940. Immediately thereafter the records and all county property were removed to Ashdown, and Ashdown has remained the county seat of Little River county ever since that time.

On the 16th day of February, 1903, the Little River chancery court, in a suit instituted by the courthouse commissioners against Carl Schuman and Eliza Schuman, entered a decree in which it found that the west half of block No. 30 of the town of Rocky Comfort was dedicated to the public by mistake of the draftsman, and that the donor, Eliza Schuman, intended to convey the same to the county of Little River for courthouse purposes. The dedication to the public was annulled and set aside, and the decree of the court provided that Eliza Schuman should, within 30 days, make and execute to the county of Little River a deed to said property. On the 18th day of February, 1903, Eliza Schuman, by warranty deed in common form, conveyed said property to the county of Little River. The consideration recited in the deed was \$1. Thereafter the county took possession of said property and has held possession of it ever since.

On the 24th day of October, 1911, Carl Schuman and Eliza Schuman instituted an action in the chancery court against the town of Rocky Comfort and certain taxpayers of said town, who are alleged to represent the

public. The defendants failed to answer but made default. On the 15th day of June, 1912, the chancery court found that the sole consideration for the conveyance of the west half of block No. 30 in the town of Rocky Comfort to the public was that said plot of ground be used for the purpose of erecting a courthouse thereon, and that said consideration was so mutually understood by and between the plaintiffs and the incorporated town of Rocky Comfort, and the entire public of said town. A decree was entered quieting the title to said property in the plaintiffs; and it was further decreed "that all the rights of the defendants are forever barred, with respect to said property, and that all the title and interest of said defendants is hereby decreed in the plaintiffs."

On the 13th day of September, 1912, N. A. George, county judge of Little River county, made an order for the sale of said property, reciting in said order that it would be to the best interests of the county to sell the same at public auction, and Seth C. Reynolds was appointed commissioner to make the sale. The property was duly advertised and offered for sale, pursuant to said order, on the 14th day of October, 1912, at which sale J. H. Ellis purchased two of the lots. The remaining lots were bid in by various parties; but the county court, at its January term, 1913, disapproved of the sale of all the lots except the two that were struck off to J. H. Ellis, and as to these two lots the county court approved the sale and ordered said commissioner to make a deed to J. H. Ellis for the same when the purchase price was paid.

On the 15th day of March, 1913, Carl and Eliza Schuman instituted this action in the chancery court against the defendant N. A. George, as county judge, Seth C. Reynolds, as commissioner, and J. H. Ellis. The facts above set forth were stated in the complaint. The object and purpose of the bill was to restrain the commissioner from making a deed to J. H. Ellis, to set aside all orders made by the county judge in reference to said property, and to declare the conveyance by plaintiffs to Little River county null and void, and to quiet the title of the plaintiffs to said property.

The evidence on the part of plaintiffs shows that the \$1 consideration recited in the deed of February 18, 1903, from Eliza Schuman to Little River county was never paid and was not intended to be paid, and that the sole consideration for the deed was that the courthouse should be erected on the ground embraced in the deed.

Carl Schuman testified that he was agent for his wife in the transaction, and that if she had known at the time the deed was executed to the county that the county was not in a condition to build a courthouse on the property, and could not legally do so, she would not have executed the deed. He said that both he and his wife knew at the time

the deed was executed that there was a contest pending over the result of the election for the county seat, and said that the deed was given for no other consideration except that it be used as a site for the erection of a courthouse and jail. He was asked this question: "Did Mrs. Schuman then make the deed on condition that the county seat would be located at Rocky Comfort and it would be used as a county site for the erection of a courthouse and jail? Answer: Yes, sir; she did."

The county erected a jail on the property and used it while the county seat was at Rocky Comfort, but a courthouse was never erected on said property. A temporary location for it was secured elsewhere in the town, pending the contest.

The chancellor found that neither of the plaintiffs had any interest whatever in the west half of block 30 in the town of Rocky Comfort, and it was decreed that the complaint of plaintiffs be dismissed for want of equity. The plaintiffs have duly prosecuted an appeal to this court. Additional facts will be referred to in the opinion.

A. H. Scott and J. W. & J. W. House, Jr., all of Little Rock, for appellant. Steel, Lake & Head, of Texarkana, for appellee.

HART, J. (after stating the facts as above). It is first contended by counsel for appellants that the case of Griffith v. Sebastian County, 49 Ark. 24, 3 S. W. 886, is decisive of the present case. There Griffith conveyed to Sebastian county, for the nominal consideration of \$1, lots in Ft. Smith, to be used as a site for the courthouse. The conveyance was made under a misapprehension common to both parties that Ft. Smith had become the county seat, and the anticipated enhancement in value of adjacent lands belonging to Griffith was the real consideration for the deed. It was afterwards decided that the county seat had not been removed to Ft. Smith but remained at Greenwood. Griffith filed a bill to cancel the deed. The court held that the deed was found on an assumption as to the removal of the county seat, which was a mutual mistake of the parties, against which Griffith was entitled to relief in equity. Here, as in the Griffith Case, the real consideration for the deed was the anticipated enhancement in value of adjacent property belonging to Mrs. Schuman, but the other facts are essentially different. In the Griffith Case the order of the county court establishing the courthouse at Ft. Smith was absolutely void, and on that account the court held there was a mutual mistake which entitled the donor of the ground for county seat purposes to relief in equity, and the deed was ordered canceled.

[1, 2] The county court has exclusive original jurisdiction to determine the result of an election held to decide the removal of a

county seat. *Russell v. Jacoway*, 33 Ark. 191. Hence it will be seen that the order of the county court establishing the county seat in the present case at the town of Rocky Comfort was not a void order but was a valid one. Of course it was subject to review on appeal and, if erroneous, would be reversed or set aside. Carl Schuman, who acted as agent for his wife, knew that a contest was pending when his wife executed the deed to the county. Section 1122 of Kirby's Digest provides that, before the county court shall make any order carrying into effect the will of the majority voting for the removal of the county seat, the vendor or donor of the new location shall make, or cause to be made, and deliver to the county judge, a good and sufficient deed, conveying to the county the land or location so sold or donated, in fee simple, without reservation or condition. This statute was in force when Mrs. Schuman executed the deed to the county.

In the case of *Rogers v. Sebastian County*, 21 Ark. 440, the court, in construing this statute, held that the commissioners had no power to receive any donation of land for a courthouse site with a reservation or limitation expressed in the deed, and that this the donor knew, or was obliged to know; it being the public law. As above stated, Schuman knew, when the deed was executed by his wife to the county, that there was a contest pending over the result of the election for the removal of the county seat, and that the decision of the county court locating it at the town of Rocky Comfort was subject to be reversed on appeal. The county court was within its jurisdiction in making the decision, and the order of the court establishing the county seat at Rocky Comfort was valid and made Rocky Comfort the county seat, unless the order was reversed on appeal. Therefore we hold that the deed was not executed under a mistake of fact. Neither do we think that the case of *Gaskins v. Williams*, 235 Mo. 563, 139 S. W. 117, 35 L. R. A. (N. S.) 603, is authority for the position assumed by counsel for appellants. There the dedication was made under a statute which provides that a duly acknowledged, certified, and recorded plat shall vest the fee of such parcels of land as are therein named, described, or intended for public use in such city, town, or village, when incorporated, in trust for the uses therein named, expressed, or intended, and for no other use or purpose. According to the designation in the plat in that case, the block was dedicated to the county for courthouse purposes, and it was so expressed on the face of the plat. The court said that the statute referred to had been construed by the court to limit the use to the use expressed in the dedication. The court, therefore, held that under the statute the county held the block for courthouse purposes, and for no other purpose. Thereafter, and before the courthouse was erected on the property, the county seat was located at

another place, and the Supreme Court of Missouri held that, as a practical proposition, the execution of the trust had become impossible, and that inasmuch as there was no absolute ownership in the county, and as it had become impossible for the county to execute the trust by using the block for courthouse purposes, the land reverted to the heirs of the original donors. As we have already seen, our statute is entirely different. It provides that the donor of the new location shall make and deliver to the county judge a good and sufficient deed, conveying to the county the land or location so donated, in fee simple, without reservation or condition. The deed required to be executed under this statute being an absolute deed, there can be no reversion to the grantor, and it could only be canceled, as was done in the Griffith Case, for mutual mistake of the parties.

[3] Here, as we have already seen, there was no mutual mistake of the parties, and Schuman stated, in response to a direct question asked by his counsel, that the deed was made on condition that the county seat would be located at Rocky Comfort. Under the rule announced in the case of *Rogers v. Sebastian County*, supra, this condition was void, even if written in the deed, and the court there held that no such condition could be attached by parol agreement.

It follows that the chancellor was right in holding that neither of the plaintiffs had any interest whatever in the property in controversy. It will be noted that in 1898 the property, by deed, was dedicated to the public, and the record shows that the dedication was impliedly accepted. A town was platted, and lots were sold on the faith of this dedication, and we do not attempt to decide as to the rights of parties who have purchased lots adjacent to the property in question, for these parties are not before the court.

[4] It is certain that the decree of the chancery court of February 16, 1903, did not affect the rights of any of these parties, because the only parties to that suit were the plaintiffs in this action and the courthouse commissioners. The public was not represented at all. The suit was instituted by the courthouse commissioners against Carl and Eliza Schuman, and the decree was rendered upon the pleadings, without any proof being taken, and the decree could not affect the rights of any one not a party to the suit. It will be noted that the dedication to the public was made before the election for a relocation of the county seat was ordered. Hence it may be said that that decree was of no effect whatever, and that the deed made by plaintiffs to the county on the 18th day of February, 1903, was the voluntary act of the plaintiffs.

[5] If they subsequently reacquired title to the property by the decree of June 15,

1912, referred to in the statement of facts, then their title inured to the benefit of the county. *Horsely v. Hilburn*, 44 Ark. 458. If that decree did not reinvest title in the plaintiffs (a question which we do not decide because it is not put in issue in this case), then the title remains in the public, and the plaintiffs have no title to the property in question.

Therefore the decree of the chancellor dismissing the plaintiff's complaint for want of equity was correct, and it will be affirmed.

#### LOEWER v. LONOKE RICE MILLING CO.

(Supreme Court of Arkansas. Dec. 15, 1913.)

##### 1. PLEADING (§ 367\*)—COMPLAINT—MAKING MORE DEFINITE AND CERTAIN.

Where, in an action by a corporation against a former employé who was also a director, the complaint alleged that without its knowledge, and for the purpose of defrauding it, he directed its bookkeeper to credit him with divers and sundry amounts to which he was not justly entitled, among which were certain items specifically mentioned, and an account exhibited with the complaint showed the amount for which it asked judgment, the complaint in connection with the account sufficiently advised defendant of the specific items which he was alleged to have had credited to himself on the corporation's books, and his motion to make the complaint more specific was properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173-1192; Dec. Dig. § 367.\*]

##### 2. ACCOUNT STATED (§ 12\*)—SURCHARGING AND FALSIFYING.

An account in which items have been entered or omitted through fraud, mistake, accident, or undue advantage may be falsified or surcharged even after there has been a settlement and payment of the balance found due.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 73-76; Dec. Dig. § 12.\*]

##### 3. ACCOUNT STATED (§ 12\*)—SURCHARGING AND FALSIFYING.

One seeking to falsify or surcharge an account for fraud, mistake, accident, or undue advantage must proceed within a reasonable time after the discovery of the fraud.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 73-76; Dec. Dig. § 12.\*]

##### 4. ACCOUNT STATED (§ 19\*)—SURCHARGING AND FALSIFYING.

One seeking to falsify or surcharge an account for fraud, after a settlement and payment of the balance found due, has the burden of establishing the fraud by clear and convincing evidence.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.\*]

##### 5. ACCOUNT STATED (§ 19\*)—SURCHARGING AND FALSIFYING.

In an action by a corporation against a former employé and director, evidence held to show that credits on the corporation's books in favor of defendant, upon which a settlement between him and the corporation's bookkeeper was based, were entered by the bookkeeper at defendant's direction, without the knowledge or consent of the other directors.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91-93; Dec. Dig. § 19.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

# 6. ACCOUNT STATED (§ 12\*)—SURCHARGING AND FALSIFYING.

Where the credits on a corporation's books in favor of an employé, who was also a director, upon which a subsequent settlement between such employé and the company's bookkeeper was based, were entered by the bookkeeper by direction of such employé without the knowledge or consent of the other directors, the settlement was not conclusive, and the account was properly opened for the purpose of correcting such credits.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 73-76; Dec. Dig. § 12.\*]

# 7. CORPORATIONS (§ 308\*)

In an action by a corporation against a former employé, where it appeared that under the contract of employment he was to be paid one-half of the profits on binder twine sold by him up to the date of the contract, that thereafter the corporation's bookkeeper made a statement showing the profits up to that time, by which it appeared that the employé was entitled to \$80, and there was no testimony that this was not the amount of his profits up to that date, though an account which included profits and losses subsequent to that date showed a much less profit, he was entitled to credit for \$80.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

# 8. CORPORATIONS (§ 314\*)—AGENTS AND EMPLOYÉES—PERSONAL INTEREST IN TRANSACTIONS.

A person employed by a corporation to buy rice for it could not act for it in the sale of rice owned by him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. § 314.\*]

# 9. CORPORATIONS (§ 432\*)—OFFICERS—AUTHORITY—SUFFICIENCY OF EVIDENCE.

In an action by a corporation against a person formerly employed to buy rice for it, evidence held to show that the corporation's manager, who purchased defendant's one-half interest in a crop of rice for 10 cents a bushel more than had previously been paid for the other one-half interest, was authorized to make such purchase.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.\*]

# 10. CORPORATIONS (§ 313\*)—OFFICERS AND AGENTS—DUTIES TOWARD CORPORATION.

A director of a corporation, also employed by it on a salary to purchase rice for it, was bound to deal with it in the utmost good faith, and to buy rice for it and not for himself.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1387; Dec. Dig. § 313.\*]

# 11. CORPORATIONS (§ 519\*)—OFFICERS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by a corporation against a person formerly employed to buy rice for it, evidence held to show that a crop of rice, on which he claimed to be entitled to a profit on the theory that, on the corporation's repudiation of the purchase, he assumed it himself and subsequently sold the crop to the corporation, was purchased for the corporation and that it did not repudiate the purchase.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2088-2089, 2091, 2093; Dec. Dig. § 519.\*]

# 12. CORPORATIONS (§ 314\*)—AGENTS AND EMPLOYÉES—PERSONAL INTEREST IN TRANSACTIONS.

A person employed by a corporation to buy rice, and who did purchase a crop of rice for it, could not resell it to the corporation at a profit

it unless it clearly appeared that it repudiated his purchase thereof and affirmatively consented to treat it as a purchase by him personally.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. § 314.\*]

# 13. CORPORATIONS (§ 308\*)—COMPENSATION—PERFORMANCE OF SERVICES.

A contract between a corporation and a person employed to buy rice and to render such other assistance as would be necessary, for a period beginning July 1st, and ending April 1st, at a salary of \$1,000 for that time, further provided that his time was extended beyond April 1st to the end of the milling season, if necessary. He discharged his duties as buyer to the end of the buying season, which lasted five months, and was then instructed not to buy any more rice; and, though he thereafter entered the employment of another party, he performed some services for the corporation which it accepted, and it did not appear that he was called upon to render assistance in any other capacity than that of buyer. Long after the close of the season, and after he had entered into a contract with other parties, he was credited on the corporation's books with the full amount of his salary. Held, that he was entitled to the full salary, and not merely to five-ninths thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

# 14. CORPORATIONS (§ 308\*)—COMPENSATION—AMOUNT.

A person employed to buy rice and render other assistance, who by his contract was to receive 25 per cent. of the net profits on seed rice, was only entitled to such percentage of the profits on seed rice sold by him, and not on seed rice sold by the employer through other employes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.\*]

Appeal from Lonoke Chancery Court; Jno. E. Martineau, Chancellor.

Action by the Lonoke Rice Milling Company against Henry Loewer. From a judgment for plaintiff, defendant appeals. Modified.

Appellee is a corporation engaged in the business of rice milling at Lonoke. On May 21, 1909, appellant "was employed as rough rice buyer, and to render such other assistance as would be necessary during the period beginning July 1, 1909, and ending April 1, 1910, at a salary of \$1000 for said time." The contract further provided "that he be allowed 25 per cent. of the net profits on seed rice, the amount of seed rice handled to be left to the manager and the directors." The contract further provided as follows: "That he (Loewer) be paid one-half of the profits on twine sold to this date, the mill to get all profit from twine sold after this date." And, further, "Mr. Loewer's time is extended beyond April 1st on to the end of the milling season if necessary. The amount due him is to be paid at the end of the season, except he is to be allowed to pay one-half on his assessment for stock in cash and credit him with balance out of amount due him on salary. Mr. Loewer is to pay his own expenses while in our employ except

when out of our district. The quantity of rice to be bought and price to be fixed by the directors."

The appellee brought this suit against the appellant on an itemized account which it made an exhibit to its complaint and, after setting up the contract, appellee alleged that on the 1st day of December, 1909, appellant quit appellee's employment and went to work for other parties at a salary of \$200 per month; that during the time of the employment appellant was a director of the plaintiff corporation, and that while so employed and without the knowledge of the appellee and for the purpose of defrauding it, he directed its bookkeeper to credit him with divers and sundry amounts to which he was not justly entitled, among the items there being \$798 rebate on the Leroy rice crop, \$407.36 on the Schenebeck rice crop and \$1000 on his salary, and \$80.00 on binder twine, when he was only entitled to a credit on the binder twine account of \$19.29. Appellee alleged that it was not aware of such false entries until it had its books audited, and that it was entitled to the sum of \$3,920.06, as shown by the itemized statement, which it claims shows the correct amount due appellee and for which it prayed judgment.

The appellant, after filing a motion to make the complaint more specific, which was overruled, answered, denying that his employment was to extend longer than the rice season, which he alleged would expire January 1st. He denied the allegations of fraud, set up that all the items credited to him on the books were correct, and that the same were acquiesced in and approved by appellee and its authorized agents; alleged that the officers and directors made daily visits to the office where the books were kept and made personal investigation of the books and had full knowledge of the condition of appellant's account and each item thereof; alleged that he purchased the rice crop of Schenebeck in gross for the sum of \$3,500 and reported that fact to the appellee, and that appellee refused to ratify the contract, and that appellant personally assumed the same and afterwards sold same to appellee for \$1 per bushel, which amounted to about \$3,900. He denied that he ordered the bookkeeper to enter the credits on appellee's books, and alleged that the credits of which appellee complains were made at the direction of the appellee, and that he was entitled to such credits.

By way of cross-complaint, appellant alleged that he continued to work for appellee under the contract from July 1, 1909, until he had fully complied with his contract, although appellee ordered him to discontinue buying rice December 1, 1909. He alleged that he was entitled to the full amount of the salary named. Alleged that on December 11, 1909, the account between him and appellee showed a balance due appellant of

\$223.78 and that appellee gave him a check for that amount and that this was a full and complete settlement, except that there was not included in this settlement the amounts due appellant for salary or profits on seed rice. He alleged that appellee paid him on his salary \$500 on March 1, 1910, and \$500 on April 26, 1910, and that at each time he requested an itemized statement and appellee failed to furnish it to him. He specified that there was due him from appellee the following sums: On Leroy rice crop, one-half profit, \$798.00; on Schenebeck rice crop, \$316.00; advanced by him on Schenebeck rice crop, \$2,544.90; one-half profits on binder twine, \$80.00; one-fourth profits on seed rice, \$1,694.37, making a total of \$5,333.00, for which amount he prayed judgment.

The matters at issue between the parties on the pleadings and the testimony presented by this somewhat complicated record could have been more easily and correctly determined, perhaps, had the matters and issues been referred to a master to state an account, but the chancery court did not see proper to do that and considered the testimony at first hand and rendered a written opinion in which he took up various contested items between the parties and made his findings thereon, and after entering the debits and credits as same were determined from the testimony, entered a judgment in favor of the appellee in the sum of \$2,109.86 with interest thereon from July 1, 1910, at the rate of six per cent. per annum, which amounted, at the time of the rendition of the decree, to the aggregate sum (including interest and principal) of \$2,457.88, and from this decree appellant duly prosecutes this appeal.

C. F. Greenlee and G. Otis Bogle, both of Brinkley, and Manning, Emerson & Morris, of Little Rock, for appellant. Trimble & Trimble, of Lonoke, for appellee.

WOOD, J. (after stating the facts as above). Appellant urges that the judgment should be reversed for the following reasons: First, because the court erred in not sustaining the motion to make the complaint more specific; second, because the settlement and payment made December 11, 1909, was conclusive of all claims prior thereto; third, because the court erred in its finding on the binder twine account; fourth, the Leroy rice account; fifth, the Schenebeck rice account; sixth, appellant's salary; and, seventh, the seed rice account. We will consider these in the order named.

[1] I. Appellant asked that the complaint be made more specific "by specifically stating each item which it claimed appellant had converted to his own use, and by specifying the divers and sundry amounts which it alleged appellant had had credited to himself to which he was not entitled, and specifically stating the amount for which appellee claimed judgment." The account exhibited with amended complaint showed the amount for



which appellant asked judgment. Among the "divers and sundry amounts" which appellee alleged that appellant had procured to be credited upon his account with appellee were the following items: "\$798 rebate on Leroy rice crop, \$407.38 rebate on Schenebeck rice crop, \$1,000 on salary, and \$80 on binder twine." The above items, in connection with the itemized statement of account, made an exhibit to the amended complaint, were sufficient to advise appellant of the specific items which he is alleged to have had credited to himself on the books of appellee. The court did not err in overruling the motion to make more specific.

[2-4] 11. An account in which items have been entered or omitted through fraud, mistake, accident, or undue advantage may be falsified or surcharged even after there has been a settlement and payment of the balance found due. But one who seeks to falsify or surcharge an account for fraud, etc., must proceed within a reasonable time after the fraud has been discovered, and the onus is upon him to establish the fraud by clear and convincing evidence. *Roberts v. Totten*, 13 Ark. 609; *Lawrence v. Ellsworth*, 41 Ark. 502; *Weed v. Dyer*, 53 Ark. 155, 13 S. W. 592; *Lanier v. Union Mortgage Banking & Tr. Co.*, 64 Ark. 39, 40 S. W. 466; *Fletcher v. Whitlow*, 72 Ark. 234-240, 79 S. W. 773; 1 Cyc. pp. 460-467.

[5, 6] The facts concerning the alleged settlement by the payment made December 11, 1909, are substantially as follows: W. B. Hudson was the bookkeeper of appellee at that time. He testifies: "We gave Mr. Loewer \$223.78 to balance his account, including that stock; also credits for the Leroy Planting Company, and for the Schenebeck business. Up to that time (December 11, 1909) Loewer owed the mill nothing. Mr. Loewer and I had a settlement on that day." And further on he says: "We balanced off on January 5, 1910, and he was credited for the Leroy Planting Company and also for the Schenebeck business."

The appellant testified, concerning this alleged settlement, as follows: "I had a settlement with the company December 11, 1909. The mill was then indebted to me in the sum of \$223.78, which was paid by check. I asked for a statement when we settled December 11, 1909. Hudson promised he would make it out, but he never did."

If the above were all the testimony, the appellant would be correct in his contention that the payment of December 11, 1909, was a complete and final settlement to that date. But Hudson, the bookkeeper, testified further as follows: "I was directed by Loewer to make these entries on the books. He went over the account with me when we made the settlement. He was superintendent of the mill and the rough rice buyer. He was supposed to tell me all trades made in buying rough rice. I got all my instructions from Loewer. All entries were made at

his request. I was working for the company, and Mr. Loewer was a director. I was under his directions."

The appellant, in his testimony, does not deny that he directed the bookkeeper to enter the above items to his credit on the books of appellee. As to the Schenebeck crop, he says: "The mill was to take it at \$1 per bushel, and I told Mr. Hudson to figure up what was coming to me and give me credit for it"—thus affirmatively corroborating Hudson's testimony that the credit was entered at appellant's request. C. G. Miller, one of the directors of appellee, testified as follows: "The board never authorized Hudson to settle with Loewer for his salary of \$1,000. We contended that we did not owe it. We never authorized the credit on seed rice or on the Leroy rice crop. Loewer had overdrawn his account, and he had had false entries made. The books for 1909, 1910, and 1911 were audited in 1911."

W. W. McCrary, another director, testified: "The board did not authorize Loewer to enter up the credits that were entered on the books or to draw funds on his salary. He never consulted with the directors as to the debits and credits placed on the books in regard to the Schenebeck and Leroy deals. Wheat and I went to the mill every day and went over the mail, but did not look over the books. We discovered the entries made at the direction of Loewer as to the rebate on the Leroy crop, the Schenebeck crop, and the twine account when we had the books audited by Mr. Kuhn."

Under the above testimony, to permit the payment of December 11, 1909, to go as a final settlement of all items of account prior to that date would be tantamount to allowing appellant to make the settlement without consulting appellee. In other words, appellant made the settlement for appellee with himself; for the bookkeeper says that in entering up these credits to appellant on the books of appellee he acted under the directions of the appellant. The appellee, under the testimony, is contending that appellant was not entitled to these credits, and that the bookkeeper was not authorized to enter them on the books because they were false. Then to treat a settlement based thereon as final would shut out inquiry and enable appellant to perpetrate a fraud upon appellee.

Since the other directors challenge the correctness of the credits and deny that appellant was entitled to them, and show that they were entered by the bookkeeper upon appellant's directions and without authority from appellee, and since they further testify that they had no knowledge that the bookkeeper had entered up these credits to appellant until the books were audited in 1911, we are of the opinion that the court was correct in holding, under the familiar principles of law above announced, that the alleged settlement of December 11, 1909, and the payment made on that date were not conclusive

of the matter of account between appellant and appellee up to that time. The court properly opened the account for the purpose of correcting the items of credit above mentioned which appellee alleged were erroneous. That the appellee had no voice or part in the alleged settlement is established by clear and convincing testimony. In so holding, we do not overlook the testimony in the record tending to show that, "after Hudson was made bookkeeper, Wheat and McCrary came into the mill every morning and went over the business of the day before; that they went over the accounts and saw what was paid for rice, how much was bought, etc.; that they had before that time had trouble with Apple, the former bookkeeper, and had taken in hand the financial part of it to keep it straight after Hudson came in;" nor the testimony tending to show that Loewer had nothing to do with the keeping of the books at the mill and that he was not the superintendent of the mill. This testimony does not contradict the testimony of the bookkeeper and of appellant himself, showing that the credits were entered at appellant's instance; nor does it contradict the positive testimony of the other directors that they had no knowledge that such credits were entered. The testimony therefore was not relevant on the issue of the finality of the settlement. The testimony, however, tending to show that the other directors of the appellee had the opportunity to know of these credits at the time or soon after they were made, is relevant on the issue as to whether or not the credits were correct, and we come now to that question.

[7] III. The record shows that appellant was to get one-half of the profit on binder twine sold up to the date when appellant was employed by appellee, to wit, May 24, 1909. While appellant was employed on the above date, his service was not to begin until July 1, 1909.

Appellant testified that there was due him for commission on the binder twine account the sum of \$80. The bookkeeper of appellee was asked to make a statement showing the profits made on binder twine up to the time appellant was employed by the appellee, and he made a statement showing that on December 4, 1909, appellant was credited on the books of appellee with commissions on binder twine account in the sum of \$80. There is no testimony to show that this credit did not represent the correct amount of appellant's commission on binder twine up to the date that the contract was entered into. This was the credit as shown in the original account. That was introduced in evidence; but in another exhibit which was afterwards introduced appellant was credited with a commission of \$80 on binder twine account as of December 4, 1909, and was charged back with the same amount of commission as on July 1, 1910; but it was admitted by appellee that this binder twine account was er-

ror. And in still another account, which is designated as "Loewer's account as corrected," appellant is credited as of December 4, 1909, with commissions on binder twine account, \$19.29. The latter sum is the amount of commission on binder twine that the court allowed the appellant. This was ascertained, as shown by the twine account in the record, by taking into consideration the profit and loss on twine account from August 11, 1909, to July 1, 1910, which was \$38.57. But, under the contract, appellant was to have one-half of the profits, as we have stated, on the twine that had been sold up to the date when his contract was entered into, and he testifies, and there is nothing to show to the contrary, that on July 1, 1909, when he entered appellee's service and also at the time the credit of \$80 commission on binder twine was entered in his favor, the bookkeeper figured it up for him, and he was entitled to that sum. The court therefore erred in not allowing him that amount.

[8, 9] IV. Appellant and one Martin were equal partners in the Leroy Rice Planting Company. Appellant therefore owned a one-half interest in what we will hereinafter call the "Leroy rice." As to this rice he could not represent both himself and the appellee in making the sale, for he was the seller and appellee the purchaser. He testified that his partner was willing to sell his share of the crop at 90 cents per bushel, but that he (appellant) was unwilling to sell his interest at that price. There were 3,490 bushels of the Leroy rice. It was all delivered to appellee's mill as one lot. Appellant informed one Hoetzel, who was the manager of the mill at that time, that he could buy Martin's share of the rice at 90 cents, and Hoetzel bought it at that price. Appellant's half went in, but he told the bookkeeper that he was not selling his at that time. Afterwards the price went up to \$1, and he sold his rice to Hoetzel. It was worth \$1 at that time. Appellant and Hoetzel had just bought for appellee the Herron rice at that price, and appellant states that he could have sold his rice at that time to the Wheatley Rice Mill at \$1.02 per bushel. His rice was an excellent quality and well worth the price that he sold it for. Hoetzel, who acted for the appellee in buying this rice, testified that he was in the employ of appellee as manager of the mill; he supervised the buying of rough rice and sold clean rice. Loewer, in buying rice, was under his instructions. The first agreement of the directors was that not more than 90 cents was to be paid for rice, and they bought all they could get at that price. Then prices went up and they had to pay more, but not until the matter was taken up with the members of the board. He says the Leroy rice was all hauled in as one lot. He bought Martin's part at 90 cents. There was no trade at that time with Loewer. Witness bought Loewer's rice ten days later at \$1 per bushel. He paid Loewer no

more for his rice than he would have paid anybody else at that time. They were paying in the market as much as \$1.05 for rice of the same grade as they paid Loewer \$1 for.

The testimony of the directors, on the other hand, was to the effect that they had not authorized Hoetzel to buy rough rice, and that they had fixed the price of rough rice to be purchased by Loewer at not more than 90 cents per bushel, unless otherwise instructed by the board.

Appellant testified that the bookkeeper had given him credit on the books for a part of Martin's rice, but that he was not entitled to that and did not ask for it, and he asked him to charge it back to appellant.

Hudson, the bookkeeper, testified that the books showed that the entire crop of the Leroy rice was purchased at 90 cents per bushel for the Honduras and 75 cents per bushel for the Japan, but that later the appellant directed him to credit on his account the sum of \$798; the same being a rebate on the Leroy rice crop, and he being allowed 10 cents per bushel on all the Honduras rice. He states that this entry was made without the knowledge or consent of the board of directors.

The directors testify that they never authorized Loewer to take such a credit, and that afterwards when they took up the matter with Loewer with a view of adjusting the same, he then stated that his credit should have been only \$349, inasmuch as he had only a half interest in the Leroy rice crop and his part of that crop was 3,490 bushels.

Hudson, the bookkeeper, testified that appellant never told him that he was not selling his half of the Leroy rice crop. The books showed that at the time of that sale the entire crop was sold to the mill and entered one-half to the Leroy Rice Planting Company and one-half to appellant at 90 cents. The rebate of \$700 was entered at appellant's request. He gave him a credit of 10 cents per bushel. The credit was not made by error. Appellant asked for the rebate of 10 cents per bushel on the whole, not half, of the Leroy crop. "He came back and said it was error and had me charge him with the difference."

One of the directors testified that, if appellant held his half of the Leroy rice back and sold his half afterwards to the appellee, at the time of such sale the price of rice had gone down and he should have obtained less than he claims.

The testimony of the directors was to the effect that appellant did not consult with the board with reference to selling his half of the Leroy rice crop to appellee. The board did direct him to pay more than 90 cents for other crops.

It is difficult to reconcile the conflicts in the testimony as to the credit of \$349 in favor of appellant appearing on the books of appellee, entered as a rebate in favor of ap-

pellant, soon after the sale of the Leroy rice crop to appellee. This credit also appears in the statement filed with appellee's original complaint; but in the "corrected statement of account" filed with the amended complaint, "to correspond with the proof," the credit does not appear, and the chancery court held that the item of \$349 entered as a credit to appellant on the Leroy rice crop should be eliminated.

The burden of proof was on the appellee to falsify the account as taken from its books of original entry concerning this item, and we are of the opinion that the testimony is not of such clear and convincing character as to show that this was a false credit. On the contrary, we are of the opinion that the preponderance of the evidence is in favor of the appellant's contention that he should be allowed this credit. He was the seller of his own rice, and not the buyer, and the party with whom the transaction was made, and who assumed to represent the appellee, corroborates appellant in his statement as to the sale of the Leroy rice. While the testimony for the appellee tended to show that Hoetzel, the manager, had no express authority to make such purchase, yet the fact remains that he and appellant both testify that he did have authority to make it, and the proof is undisputed that he made other purchases of rough rice about that time; some of these being from other directors of appellee.

Both appellant and Hoetzel, the manager, who negotiated with appellant for the purchase of the Leroy rice, testified that they talked with the president, Mr. Wheat, concerning these transactions, and it was shown that Wheat and Hoetzel bought rice at that time for appellee at from 97 cents to \$1.06 per bushel. Among the rice so purchased was Wheat's rice at 97 cents per bushel, and the proof shows that this rice was a grade lower, and was worth several cents less per bushel, than appellant's rice.

The preponderance of the evidence shows that Hoetzel did have authority to make the purchase from appellant, and, this being true, there is no conflict as to the purchase of appellant's rice at the price of \$1 per bushel as he contends. The court therefore erred in eliminating the credit of \$349 in favor of appellant on the Leroy rice crop.

[10-12] V. The Schenebeck rice crop stands on an entirely different footing from the Leroy rice crop. It was the duty of appellant to buy that rice for appellee and not for himself. This transaction must be scrutinized with the greatest care, for appellant was not only employed by the appellee to buy rough rice for it, but he was at the same time a director of the appellee, and in his relation both as the employer's agent and as a director of the company he was bound to deal with it in the utmost good faith. See 10 Cyc. p. 790, and cases cited in note; 2 Thompson on Corp. pp. 1223, 1224.

Appellant claims that he bought 3,907

bushels of rice from one Schenebeck for which he paid \$3,500. To the contract of purchase he signed appellee's name as well as his own name individually. At that time he paid \$10 of his own money to bind the contract, but his own evidence shows that he afterwards collected this \$10 from the appellee. The rice was shipped to appellee with bill of lading attached, and the same was paid by appellee. After he purchased the rice, he notified the directors that he had made some good money for the rice mill by purchasing rice at a bargain. Appellant afterwards paid on the last shipment of this rice the sum of \$2,544.90, same being paid by his own check on the bank of Lonoke, which sum was included in an amount credited on books of appellee as "Schenebeck crop balance."

Appellant testified concerning this transaction that the mill was to take it at \$1 per bushel. The contract was signed like all other contracts by him for the milling company, for he wanted the milling company to have the benefit of it. He "reported the transaction to Hoetzel, and Hoetzel said he reported it to the directors." "Hoetzel refused to accept the contract the day after I bought it," says appellant. "I told Schenebeck, when he brought the rice in, that the mill had refused to ratify the contract, and that he would have to look to me for the money. The first shipment of the rice was to the Lonoke Rice Milling Company and they paid for it. I was at the mill when the last shipment came in and gave my check for it. They had no money at the time. I had money to my credit."

Hoetzel testified that Loewer reported to him that he had bought the Schenebeck rice crop and had given \$3,500 for it, and that he (Hoetzel) told Loewer that appellee could not take it. He discussed it with the board, and they thought as witness did, but left it to witness. Witness told Loewer that they could not ratify the contract but would pay \$1 per bushel. "He said that was all right. We told him if there should be either profit or loss he would have to stand it."

The directors McCrary and Miller testified that Hoetzel had no authority to pay Loewer \$1 per bushel for the Schenebeck crop. The board ratified the contract of buying the Schenebeck rice in the field by paying a part of the consideration, and as soon as Loewer came in he was paid the \$10 which he had paid out to bind the contract. The rice was sent to the mill with draft attached. The board did not authorize Loewer to take the profit over and above \$3,500. The board did not authorize Loewer to buy rice for himself; did not refuse to purchase the Schenebeck crop at \$3,500. Hoetzel was discharged from appellee's employment. Hoetzel, however, denied that he was discharged, but said that his contract was up and he did not ask for re-employment.

The bookkeeper testified that Loewer represented that he had purchased the Schenebeck rice and that he was entitled to what profit there was above \$3,500. "This, to my knowledge," says he, "was not submitted to the board of directors. The \$407.38 rebate is the difference, the profit, between \$3,500 and \$3,907.38. Loewer told me to credit him with the difference, which I did."

The chancery court was clearly correct in finding that the appellant was not entitled to this credit. The fact that he executed the contract in the appellee's name for the purchase of the Schenebeck rice, which it was his duty to do, and that he sent the bill of lading with draft attached to the appellee for payment, and the fact that he collected from appellee the \$10 that he had advanced to insure the bargain, are all strong circumstances tending to show that the purchase was made for the appellee, and there is no testimony to warrant the conclusion that appellee refused to ratify the purchase. Therefore appellant had no right to set up an interest in this purchase antagonistic to that of his employer and, without the knowledge and consent of the directors of the company, to have the credit representing the profits on this transaction entered on his private account. This would be enabling appellant to take advantage of his relation to make a secret profit for himself, to which the appellee, under the contract, was justly entitled.

Appellant, under the proof, could not assume to buy the Schenebeck crop for the appellee, and then make a profit out of the transaction by selling the same crop to the appellee, without the clearest proof that appellee had first repudiated the purchase from Schenebeck and had affirmatively consented to treat the same as the purchase of appellant. Appellant undoubtedly was acting as appellee's agent in the purchase of this crop, and appellee would have been liable to Schenebeck for it had he not been paid.

[13] VI. Under the contract Loewer was entitled to a salary of \$1,000 for his services as rough rice buyer, beginning July 1, 1909, and ending April 1, 1910, or a period of nine months, with the provision that his time was to extend beyond April 1st to the end of the milling season if necessary. A decided preponderance of the evidence tends to show that appellant discharged his duties as rough rice buyer to the end of the season—that is, for a period of five months beginning July 1, 1909—and the testimony tends to show that at the end of this season he was instructed not to buy any more rice as the season had been a disastrous one. Long after the season had closed and after appellant had quit the employment of the appellee and entered into a contract with other parties, appellant was credited on the books of the appellee with the amount of his salary, \$1,000. At that time no objection was made because appellant had quit the service of appellee.

Appellant, notwithstanding he had entered the employment of another, testified that he held himself in readiness to buy rice for the appellee if it called upon him to do so. The testimony nowhere shows that the appellee called upon him after that time to buy any rice.

While the contract specified that appellant was to render "such other assistance as would be necessary" to the end of the milling season, there is testimony tending to show that appellant did serve appellee, after it had instructed him not to buy any more rice, in making sales of seed rice, and that his services in that respect were accepted.

It is manifest from the contract, taken in connection with the other testimony, that the principal service that appellant was to render appellee was in the capacity of rough rice buyer. If "his assistance in any other capacity" was deemed necessary, it was the duty of the appellee to have called upon him for such assistance. Under the contract it was for appellee to determine what other assistance, if any, was necessary, and the record does not disclose that appellee notified appellant that any other assistance than that of buying rough rice was necessary during the period covered by his contract. It is true there is some testimony tending to show that when not away from the mill Loewer was to be there in the capacity of superintendent, and that when the manager was away he was to look after the running of the mill. But there is no evidence to show that appellant failed to discharge any of the duties he was called upon to perform under his contract during the period for which he was employed. But appellant shows that he was ready, after the rough rice buying season had closed, to render any assistance to appellee that it should deem necessary.

The appellant was entitled to his salary. The court therefore erred in reducing appellant's salary to \$555.55. He should have been allowed the full amount of his salary, and he is entitled to a credit therefor, in addition to what the court found, of \$444.45.

[14] VII. The contract provided that appellant was "to be allowed 25 per cent. of the net profits on seed rice, the amount of seed rice handled to be left to the manager and the directors." The court construed this contract to mean that appellant was to be allowed 25 per cent. of the net profits on seed rice sold by him, and that it did not include profits on seed rice sold by appellee through employes other than appellant. While the contract is not entirely free from ambiguity on this point, we are of the opinion that the court correctly construed it and did not err in holding that appellant was only entitled to \$699.65 as one-fourth of the profits on the seed rice sold by him.

VIII. The appellee, in its account, charges appellant with the sum of \$50 for rice sold J. D. Edmonds. The appellant and Edmonds both testified that Edmonds bought only 30 bushels of rice, paying \$1.25 per bushel, making \$37.50. The appellant therefore should only be charged that sum.

IX. The court entered a decree in favor of appellee for \$2,109.86, exclusive of interest. Appellant does not specifically allege any errors in this decree other than those discussed in its brief. Therefore we must assume that the decree of the court was correct in all other particulars except those in which we have found error to exist.

The errors entering into the decree against appellant, as above ascertained, are as follows: On binder twine, \$60.71; on Leroy rice crop account, \$349; on salary, \$444.45; and on rice sold to J. D. Edmonds, \$12.50—making a total of \$866.66. The decree therefore will be modified by eliminating these errors, and a decree will be entered here in favor of the appellee for \$1,243.20, with interest from July 1, 1910, and the costs of appeal will be adjudged against appellee.

### BOYLE v. STATE.

(Supreme Court of Arkansas. Dec. 1, 1913.)

#### 1. CRIMINAL LAW (§ 553\*)—EVIDENCE—SUFFICIENCY—CREDIBILITY OF WITNESSES.

Objections to witnesses for the state, that they were employed by the police department of a city to act as detectives in securing testimony to convict accused, that the witnesses were paid for their services in procuring testimony, and that, to secure the conviction of accused, one of the witnesses had resorted to infamous conduct, and had induced others to engage with him in such conduct, merely go to the credibility of the witnesses, and a conviction supported by their testimony will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.\*]

#### 2. PROSTITUTION (§ 1\*)—OFFENSES—STATUTORY PROVISIONS—"PANDERING."

The statute making any person who, by promises, threats, fraud, or artifice, entices or procures any female to enter any place in which prostitution is practiced for the purpose of prostitution guilty of pandering prohibits the procuring of females for the purpose of prostitution, and the question whether any female procured was virtuous or not is immaterial, and one taking a female to a place where prostitution is practiced for the purpose of prostitution is guilty, whether she went voluntarily or not.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

#### 3. PROSTITUTION (§ 4\*)—OFFENSES—STATUTORY PROVISIONS—EVIDENCE.

Evidence held to justify a conviction of pandering, punishable by the act of 1913.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.\*]

#### 4. PROSTITUTION (§ 4\*)—PANDERING—EVIDENCE—ADMISSIBILITY.

Where, on a trial for pandering, the state showed that the house occupied by accused was used and had been used continuously for some time prior to the alleged offense and until that

time as a disorderly house, the testimony of witnesses living at the house and of those having an opportunity for observing the facts, that up to the time when prosecutrix was taken to the house it was not used as a disorderly house, was relevant.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.\*]

**5. PROSTITUTION (§ 1\*) — PANDERING — EVIDENCE—SUFFICIENCY.**

To warrant a conviction of pandering, the proof must show that men and women actually resorted to the house to which prosecutrix was brought for immoral purposes, and that the house was a place in which prostitution was encouraged or allowed, and that she was taken there for the purpose of prostitution, and the reputation of the house for bawdy purposes is not alone sufficient.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

**6. PROSTITUTION (§ 4\*)—EVIDENCE—ADMISSIBILITY.**

Where, on a trial for pandering, the state proved that accused was engaged only in the business of maintaining a disorderly house, to which prosecutrix was brought, evidence that accused, before and at the time of the alleged offense, was engaged in the business of invention and of securing patents was admissible.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.\*]

**7. CRIMINAL LAW (§ 372\*)—PROSTITUTION (§ 4\*)—EVIDENCE—ADMISSIBILITY.**

On a trial for pandering, evidence that accused had on other occasions than the one in question taken other females to his place for the purpose of prostitution and evidence of his manner towards females on the street corners and at stores was admissible on the issue whether he was indulging in the practice of procuring females to enter a disorderly house.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.\* Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Garland County; Calvin T. Cotham, Judge.

Jack Boyle was convicted of crime, and he appeals. Reversed, and cause remanded for new trial.

The Legislature of 1913 passed an act in relation to pandering, which provides, among other things, "that any person who by promises, threats, violence, by any device or scheme, by fraud or artifice \* \* \* shall take, place, harbor, inveigle, entice, persuade, encourage or procure any female person to enter any place in this state in which prostitution is practiced, encouraged or allowed for the purpose of prostitution, shall be guilty of pandering, and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than ten years." Laws 1913, p. 407.

Appellant was indicted under the above statute; the indictment charging him, substantially in the language of the statute, of procuring by promise, device, scheme, artifice "Birdie Taylor, a female, to enter a certain house in the city of Hot Springs known as the French Flats, a place where prostitution was then and there practiced, en-

couraged, and allowed, for the purpose of prostitution."

The state introduced testimony tending to prove that the appellant had rooms in a building known as the French Flats in the city of Hot Springs that he rented for the purpose of prostitution. One witness testified that he rented a room from the appellant, and appellant asked him if he knew where witness could get a girl, and appellant replied that he knew where he could get one girl or a hundred; that appellant and witness started out on Central avenue looking for a certain girl whose name was Birdie Taylor. They met her on the street, and appellant introduced the witness and the girl under assumed names. Appellant told the girl that witness was his friend, and that he wanted her to meet the witness. The girl asked appellant whether she should meet the witness over at appellant's house, and appellant told her that would be all right. They made arrangements to meet at appellant's place on Tuesday. Witness went up to appellant's room, and a girl was in there with appellant. Appellant showed witness the room, and left everything in readiness for witness and the girl. Witness hired this room from the appellant, and met the girl there, and also met a certain other girl there on another occasion for the purpose of prostitution. Witness paid not only the room rent but a dollar extra to appellant on each occasion that he met the girls.

The court permitted, over the objection of appellant, testimony to go to the jury tending to show that appellant, on other occasions, had taken other girls and women to his house, and to show the conduct of appellant on the corners of the streets and about certain stores, engaging certain women and girls in conversation, and as to his manner and deportment in introducing himself to them, and about his having accompanied other girls on various occasions prior to the offense charged herein to his rooms at the French Flats. It is unnecessary to go into detail in setting out this testimony.

The court permitted a witness, over the objection of appellant, to testify that the house in which appellant lived had a bad reputation, and that witness was told that it was an assignation house. There was testimony on behalf of the state tending to show that the reputation of the house that appellant was keeping was that of an assignation house. Witnesses on behalf of the state were permitted to testify that appellant had no other occupation than that of keeping the assignation house. A witness was introduced who testified that he roomed with Jack Boyle at the French Flats from April 18 to May 14, 1913; that prostitution could not have been practiced in the house during witness' stay there without witness'

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

knowledge, unless it was carried on very secretly. The witness was not allowed to testify that during his stay there the appellant had not permitted prostitution to be practiced in the house. The witness was asked to state whether prostitution was practiced, encouraged, or allowed in said house during the time he was there, and he would have answered that it was not; that Jack Boyle did not encourage or allow prostitution in the house while witness was there. He remarked in the presence of witness that he preferred not to have ladies in the house. The court would not permit this testimony to be introduced, to which appellant duly excepted.

Appellant offered to prove by a certain witness that she applied to appellant for a room in the house where the offense charged is alleged to have been committed; that defendant stated to the witness that he did not desire to rent his rooms to women; said that she could have the room, but he wanted it understood that she could not have men calling on her there at that place while she was an occupant of the room; that appellant, after engaging in conversation with her for some time, finally stated as follows: "I believe I will rent you a room because you look all right to me." Appellant further offered to prove by this witness that she rented a room from the appellant prior to the date of his arrest; that while she occupied this room she had an opportunity to observe the character of the place, and that the flat was used for renting rooms; that there were no vacant rooms while witness was there; that she had not observed any misconduct upon the part of the appellant or upon the part of any one there to indicate that the house was used for prostitution, or that it was a place where prostitution was carried on; that witness would testify that appellant, besides keeping a rooming house, was working on some patents in the kitchen.

Appellant, in his brief, does not point out or insist on any specific error in the instructions of the court, and therefore we assume that they are correct, and do not set them out or comment upon them. Appellant appeals from a judgment of conviction sentencing him to the penitentiary for a period of two years. Other facts stated in the opinion.

Rector & Sawyer, of Hot Springs, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). [1] The appellant contends that the judgment should be reversed, because it was shown that one of the principal witnesses for the prosecution was employed by the police department of Hot Springs to act as a detective in securing the testimony to convict appellant, that this witness and other witnesses had been paid for their services in procuring testimony, and that, in order

to secure the conviction of appellant, one of the principal witnesses against him had resorted to disgraceful and infamous conduct in order to find out the alleged facts to which he testified, and had induced others to engage with him in such disreputable conduct. But the objection which appellant urges to the character and conduct of the witnesses goes only to their credibility, and therefore was for the jury, and not for this court. The testimony is sufficient here to sustain the verdict.

[2] The statute is comprehensive in its terms. It is leveled at the nefarious practice of procuring females to be used for the purpose of prostitution. The crime is designated in modern criminal statutes as "pander," or "white slave traffic." While doubtless the purpose of the lawmakers primarily was to protect females who are already virtuous from the multifarious and wicked devices and schemes of the panderer, or one who for hire would seek to make traffic and commerce of females, and thus destroy their virtue and make them prostitutes, yet in order to effectuate this purpose the act, in terms, was made broad enough to include those who, by any method mentioned in the statute, procure any female, whether virtuous or not, to engage in illicit sexual intercourse. It was only by making the law thus comprehensive and drastic in its terms that the Legislature could most successfully carry out its purpose to prevent the prostitution of females. It is therefore wholly immaterial under the law whether the female procured for the purpose of illicit sexual intercourse was at the time virtuous or not. The statute, in terms, prohibits the procuring of *any female* for the purpose of prostitution. There is a provision in the statute directed against the procuring of females to become prostitutes, and then preventing the procuring of females to enter any place in which prostitution is practiced for the purpose of prostitution.

[3] The contention, therefore, of appellant that the offense is not committed where the woman involved exercises her own discretion and goes voluntarily to the place of prostitution is not well taken, and the fact that the girl whom appellant is alleged to have procured to enter the place of prostitution was already of easy virtue and went voluntarily under the promises and by the persuasion and encouragement of the appellant is wholly immaterial. If he took her to a place where prostitution was practiced for the purpose of prostitution, whether she went voluntarily or not, he was guilty under this statute. The evidence adduced, if believed by the jury, was sufficient to warrant them in returning a verdict against him.

[4, 5] The court erred, however, in excluding from the jury the testimony which appellant offered tending to show that the house where it is alleged the female involv-

ed was taken was, for some time before that, and at that time, not a place of prostitution and a place where prostitution was encouraged or allowed. The testimony of the witnesses who lived at the place and of those who had opportunity for observing and knowing the facts tending to show that up to the time when Birdie Taylor was taken to the house it was not used as a house of prostitution, and that illicit sexual intercourse was not allowed to take place there, was competent and relevant testimony and was not cumulative. This testimony tended directly to rebut the testimony introduced on behalf of the state tending to show that the house was used and had been used continuously for some time prior to the alleged offense and until that time as a house of prostitution. It was necessary for the state to show, under the charge made in the indictment, that the house to which Birdie Taylor was taken was a place in which prostitution was practiced, encouraged, or allowed, and that she was taken there for the purpose of prostitution. For this purpose the court correctly permitted testimony to go to the jury showing that the house had the reputation of being a bawdy house or a house of assignation. But the reputation of the house for bawdry or assignation purposes was not alone sufficient to convict. It was a circumstance for the jury to consider. To warrant conviction, the proof would also have to show that men and women actually resorted there for illicit intercourse. See 14 Cyc. 410; *State v. Brunell*, 29 Wis. 435; *Lismore v. State*, 94 Ark. 210, 126 S. W. 853.

This proof being competent on the part of the state to show the guilt, it was certainly also competent on the part of the defense to show to the contrary, which the excluded evidence tended to do. The court should not have permitted the witness to testify that a certain party told him that the place had a bad reputation. This was purely hearsay.

[6] The court also should have permitted the testimony offered tending to show that appellant, before and at the time of the alleged offense, was engaged in the business of invention and of securing patents for his inventions. This testimony tended to rebut the proof introduced on the part of the state tending to show that the appellant was engaged only in the business of maintaining a place of prostitution.

[7] The court did not err in permitting the testimony tending to prove that appellant had on other occasions taken other females to his place for the purpose of prostitution, nor the testimony tending to show his manner and conduct towards females on the street corners and at stores. This was relevant to the issue of whether or not he was indulging in the practice of procuring

females to enter his house or rooms for the purpose of prostitution.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v.  
REILLY.

(Supreme Court of Arkansas. Nov. 17, 1913.)

1. RELEASE (§ 17\*)—VALIDITY—FALSE REPRESENTATIONS.

One who signed a release of a claim for personal injuries, in reliance on false statements by the agent of the wrongdoer, without reading the release, was not bound thereby.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 32; Dec. Dig. § 17.\*]

2. RELEASE (§ 57\*)—VALIDITY — SUFFICIENCY OF EVIDENCE.

Evidence in a passenger's action against a railroad company for personal injuries, held to sustain a finding that plaintiff's signature to a release of her claim against defendant was obtained by fraud.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 106-108; Dec. Dig. § 57.\*]

3. APPEAL AND ERROR (§ 999\*) — VERDICT — CONCLUSIVENESS ON APPEAL.

A verdict for plaintiff must be tested by taking the view of the testimony most favorable to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.\*]

4. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS.

The refusal of requested instructions was not prejudicial error, where other instructions were given correctly covering the same subject.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

5. VENUE (§ 36\*)—CHANGE—CIVIL ACTIONS.

Acts 1909, p. 751, providing that the venue of civil actions shall not be changed unless the court finds that the same is necessary to obtain a fair trial, applies to all civil actions.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 54, 55; Dec. Dig. § 36.\*]

6. VENUE (§ 72\*)—CHANGE FOR PREJUDICE—DISCRETION OF COURT.

While the court has a certain discretion in weighing the evidence on a motion to change the venue because of local prejudice, it cannot arbitrarily refuse a change if the evidence shows that a fair trial cannot be had.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 127; Dec. Dig. § 72.\*]

7. VENUE (§ 42\*)—CHANGE — DISCRETION OF COURT.

Under Acts 1909, p. 751, providing that the venue of civil actions shall not be changed unless the judge finds that the same is necessary to secure a fair trial, upon finding that a fair trial may be had in the county of the venue, the judge has no discretion to order a change.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 64; Dec. Dig. § 42.\*]

8. VENUE (§ 72\*)—CHANGE—PROCEEDINGS.

A statement by the judge, when defendant offered to produce as many as 20 or more persons to sign an affidavit supporting the change of venue, that it would do no good, as a request of 200 persons would not compel him to make an order he did not think was correct, was not a refusal to hear more testimony on the ques-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tion, but merely meant that the number of affiants would not control the court's judgment.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 127; Dec. Dig. § 72.\*]

9. VENUE (§ 72\*)—CHANGE — DISCRETION OF COURT—NUMBER OF WITNESSES.

The court has some discretion in determining how many witnesses he will hear on a motion to change the venue because of local prejudice.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 127; Dec. Dig. § 72.\*]

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Action by Edna Reilly against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Thos. B. Pryor, of Ft. Smith, for appellant. Sam R. Chew, of Van Buren, for appellee.

MCCULLOCH, C. J. This is an action instituted by appellee in the circuit court of Franklin county, Ozark district, against appellant, to recover for personal injuries alleged to have been sustained while appellee was a passenger on one of appellant's trains. Appellee resided, at the time the injury occurred, in Desha county, Ark., and was en route home from Coffeyville, Kan. The train on which she was a passenger collided with another train in the railroad yards at Van Buren, Ark., and her foot was injured. She was, by the verdict of the jury, awarded damages in the sum of \$540, and it is not claimed that the verdict is excessive, if she is entitled to any recovery at all. Appellee was a married woman, and had her infant in her arms, but was otherwise unattended on the journey. Shortly after the injury occurred, appellant's claim agent boarded the train and obtained releases from many of the passengers, including appellee. She signed a release purporting to be a settlement in full, in consideration of the sum of \$40, of compensation for her personal injuries and for damages to her baby buggy, and also the injuries sustained by her infant. The instrument also purported to be a settlement of the claim of appellee's husband on account of her injuries, and the name of her husband was signed thereto. There is a conflict in the testimony whether appellee signed her husband's name, but she admits that she signed her own name. She testified, however, that the claim agent induced her to sign by representing that it was only a settlement of the claim for the baby's injuries and for the damage to the buggy. This release was pleaded in bar of the right to recover damages, and constitutes the only issue of fact in the case. Negligence of the company with respect to the collision which caused the injury is not disputed.

[1] The law applicable to this feature of the case is settled in *Railway v. Smith*, 82 Ark. 105-114, 100 S. W. 884, 888. In that case a release was pleaded, which purported

to cover all of the plaintiff's claim on account of injuries received in a collision. She testified that the settlement only covered compensation for delay and inconvenience, and did not embrace compensation for personal injuries. In disposing of the question, we said: "It was not correct to say that plaintiff was bound by the writing, even without knowledge of its contents, if she failed to read it over. If she was induced, on account of reliance on the false statements of the agent, to sign it without reading it, she was not bound by it. The fraud of the agent, if he in fact misrepresented its contents, vitiated it."

A very similar case is *Bliss v. New York*, etc., R. R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504, which involved a claim for personal injuries, and a release was pleaded. The plaintiff testified that he had accepted the payment of compensation for damages to his wearing apparel, but that nothing was said about pay for personal injuries, and he signed the release without reading it. The court held that "if it was understood at the time that the payment was received only for the injury to his clothing, and that no claim for personal injury was settled for or released, and if the release and receipt were by fraud so phrased as to cover the claim also, and if they are avoidable by reason of the fraud so far as the claim for personal injury is concerned, the plaintiff was under no obligation to return the money received by him."

[2, 3] The testimony of appellee was sufficient to make a case for the jury on the question of fraud in inducing her to sign the release. The settlement was made a short time after the collision and while appellee, according to her testimony, was laboring under great nervous strain. Her infant was injured about the head, and she was greatly distressed and excited. The collision occurred about 1 or 2 o'clock in the morning, and the settlement was effected about daybreak, before the train left the yards at Van Buren. Appellee did not know at that time that she had received any personal injuries herself, and stated to the claim agent that she was not injured. He proposed to pay \$40 for the baby's injuries and for damage to the buggy, and she accepted it. The agent induced her to believe that it covered no other injuries, and she signed the release upon the faith of those representations. She admits that the agent read the release to her, and that she may have read it herself, but that she was so excited at the time that she did not comprehend its meaning, and relied entirely on the statements of the claim agent. She cashed the check when she passed through Little Rock later in the day, but still did not know that it was intended to cover her own injuries, and did not realize that she had received injuries to amount to anything. The extent of her injuries, she testified, was de-

veloped later. That state of the case was disputed by the claim agent and other witnesses introduced by appellant, but we cannot settle that conflict in the testimony. That has been done by the verdict of the jury.

We must test the verdict in the light of the testimony most favorable to appellee. It was legally sufficient to sustain the verdict, and, upon well-established principles, we must treat the issue as settled.

[4] Error is assigned in the refusal of the court to give certain requested instructions on that issue. But we find that other instructions were given which correctly covered the same subject, and there was no prejudice in the court's refusal to give those requested by appellant.

There is one other question presented for review. That is the assignment of error in the court's refusal to order a change of venue. Appellant presented a petition, verified by one of its attorneys and supported by the oath of several others, conceded to be credible persons. Evidence was adduced, pro and con, on the issue whether the alleged ground for change of venue in fact existed. The court found that a fair and impartial trial of the case could be obtained in that county and district, and denied the prayer of the petition. The statute authorizes the court in all civil cases, when a change of venue is asked, to investigate the alleged grounds set forth in the petition, and it provides that "the venue of civil actions shall not be changed unless the court or judge to whom the application for change of venue is made finds that the same is necessary to obtain a fair and impartial trial of the cause." Acts 1899, p. 751.

[5, 6] This applies to all civil actions. *Railway v. Transmier*, 153 S. W. 817. The statute means, of course, that the court must hear evidence on the subject and be governed by it in reaching a conclusion on the issue whether or not a fair and impartial trial can be obtained in the county. The court has a certain amount of discretion in weighing the evidence, but cannot arbitrarily refuse to grant a change of venue when the evidence establishes the fact that a fair trial cannot be obtained there.

[7] Much has been said in the argument about the remarks of the trial judge in rendering his decision on the question of a change of venue. It is contended that the judge misconceived the law on the subject, and refused to grant the change because he thought it was beyond his power to do so in any case. The remarks are brought forward in the record, and after consideration of same we are of the opinion that the judge did not misconceive the law on the subject, and that he meant to express his finding, from the evidence, that a fair trial of the case could be obtained in that county and district. It is true he stated that he had no discretion in

the matter, but was bound to refuse the change of venue under the circumstances. Our construction of his language in that respect is that what he meant to say was that, after finding that a fair trial could be had in that county and district, his discretion was gone, and that the statute compelled him to refuse to order the change. He was correct in that, because the statute does expressly make the right to obtain a change of venue depend upon proof that a fair trial cannot be had.

[8] Another point is made upon the offer of appellant to produce as many as 200 more persons to sign the affidavit supporting the change of venue, and the court's reply that that would do no good, as a request of 200 persons, would not compel him to make an order that he did not think was correct. It is argued that this shows that the judge refused to hear more testimony on the subject. We do not so construe his remarks, but think he merely meant that the number of affiants would not control his judgment against the testimony adduced. Appellant did not offer to introduce any more witnesses to support the petition for change of venue, but, on the contrary, the court heard all the evidence that was offered.

[9] Of course, the court has the right to exercise some discretion in determining how many witnesses will be heard on an issue of this kind, and that discretion will not be controlled unless there is an arbitrary abuse of it. We find nothing in this record that indicates a misconception on the part of the trial judge of his duty with respect to change of venue, nor that he abused his discretion in giving a fair hearing of the matter before reaching a conclusion.

Judgment affirmed.

ST. LOUIS, I. M. & S. R. CO. v. THURMAN.  
(Supreme Court of Arkansas. Nov. 17, 1913.)

1. CARRIERS (§ 320\*) — INJURIES TO PASSENGERS—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a passenger by the derailment of a car in which he was riding, the question of the carrier's negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1118, 1120, 1149, 1153, 1160, 1167, 1170, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

2. CARRIERS (§ 317\*) — INJURIES TO PASSENGERS—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a passenger by the derailment of a car in which he was riding, the passenger showed that the track was out of repair, and that it remained in the same condition for five months or more, except for the fact that new ties had been put in immediately after the accident, evidence as to the condition of the track about five months after the accident, showing that it was then in bad condition, was admissible to show the condition of the track at the time of the accident.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**3. TRIAL (§ 250\*)—INSTRUCTIONS—ISSUES.**

Where, in an action for injuries to a passenger by the derailment of a car, no issue was raised on a failure to keep a lookout, and the undisputed evidence showed that a proper lookout was kept, an instruction that, though the roadbed, track, and engine were in perfect condition, yet if the engineer could, by the exercise of proper care, have seen obstructions ahead in time to have stopped the train, a verdict for the passenger was authorized was erroneous because diverting the jury from the real issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.\*]

**4. APPEAL AND ERROR (§ 882\*) — QUESTIONS REVIEWABLE—INSTRUCTIONS.**

A party requesting an instruction cannot complain of an instruction given containing the error repeated in the instruction requested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**5. TRIAL (§ 217\*)—INSTRUCTIONS — CAUTIONARY INSTRUCTIONS.**

An instruction that one may bring his action in a county other than the county where the injury complained of occurred, and is entitled to have his case tried according to the law and the evidence, is a proper cautionary instruction, where the court's attention is called to a newspaper article published during the week of the trial with reference to the trial of cases brought in counties other than those where the injuries complained of occurred.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 488, 485; Dec. Dig. § 217.\*]

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Action by John M. Thurman against the St. Louis, Iron Mountain & Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Thos. B. Pryor, of Ft. Smith, for appellant. Sam R. Chew, of Van Buren, and Bratton & Fraser and Davis & Pace, all of Little Rock, for appellee.

WOOD, J. While appellee was a passenger on appellant's train running from Little Rock to Coffeyville, Kan., the car in which he was riding was derailed and overturned, causing appellee serious bodily injuries, damages for which he seeks to recover in this action. He alleges that appellant carelessly and negligently ran its train at an unusual and unsafe rate of speed, considering the condition of the track at the place where the injury occurred. That it negligently and carelessly constructed and maintained its roadbed and track at the place where the injury occurred, and carelessly and negligently constructed and maintained its engine and cars, all in such manner as to cause the derailment of the train, and thereby produce the injury of which appellant complains. The appellant denied all the material allegations of the complaint. A motion for a change of venue was made and overruled by the court. The verdict and judgment were in the sum of \$15,000. The amount of the verdict is not challenged here.

[1] The undisputed evidence showed that

appellee was injured, while a passenger upon appellant's train, by reason of the derailment and overturning of the car in which appellee was riding. Appellant adduced evidence, which it is unnecessary to set out in detail, tending to show that the tracks where the injury occurred were in perfect condition, and that its engine and cars were in perfect condition. In other words, the testimony on behalf of appellant tended to rebut the charges of negligence set up in the appellee's complaint, and to overturn the presumption of negligence arising from the injury caused by the running of appellant's train.

Appellant undertook to show that the injury was caused by obstructions placed upon its track by two small boys. Its porter, who was riding on the cowcatcher, testified that immediately before reaching the point of derailment, his attention was attracted to some rocks that were upon the rail; that he looked ahead and saw some iron bolts and some nuts upon the rails and between the joints of the rails; that as soon as the front wheels of the engine struck the bolts it caused the wheels to derail.

The engineer testified that he "discovered things on the rails on each side. They looked to him about the size of these little snow-birds sitting on the track." He was keeping a lookout. He supposed that these things caused the engine to derail.

Witness testified, without objection, that the engineer, while crawling out from under the engine just after the wreck occurred, stated that there was something on the track that threw him off.

There was other testimony tending to show that the train was derailed by reason of small nuts and bolts being placed on the track. Witnesses testified that if the track was in perfect condition, then these nuts and bolts placed on the rail were calculated to derail the train. They examined certain spikes and nuts, and the bright scars and marks on them that indicated conclusively that they had been mashed by the cars.

The train dispatcher's records were introduced, showing that seven trains had passed over the track on the day of the derailment prior to the wrecked train. One of these passed three hours before the wreck occurred. The engineers of these trains testified that the track was in first-class condition.

In addition to this testimony, the appellant introduced evidence showing that John Escue and John Johnson, two small boys, had been indicted by the grand jury of Crawford county for the crime of wrecking this train, and that these boys, on a preliminary hearing before a justice of the peace on said charge, had admitted placing these obstructions upon the rail. Other witnesses testified that they had heard these boys admit that they had placed the obstructions upon the track which derailed the train.

On the other hand, the appellee introduced testimony tending to show that the track at the place where the injury occurred, at the time of such injury, was out of repair. The testimony of several witnesses tended to show that at the place where the wheels first left the rails there were rotten ties, five or six in number. The indications on the ties showed that the rails had spread. The rails had sagged down into the ties and cut outward from the tracks in such manner as to show that they had spread. The track at the place was examined, both at the time of the wreck and some time afterwards, by witnesses who testified that a large portion of the ties were so rotten that they would not hold a spike. From the place where the train first left the track to the yard-limit board witnesses had pulled from 25 to 50 spikes out of the ties with their fingers. In some of the ties there were no spikes at all. In most of the ties the spikes were not driven down to the rail but were up an inch or more from the rail and not binding same firmly. Some of the ties that were in the track at the time when and at the place where the wreck occurred were gathered up and were exhibited to the jury in evidence.

The boys that were accused of having placed the obstructions on the track were witnesses, and denied having anything to do with wrecking the train; and they showed that their confessions and statements were caused by threats and inducements held out to them by one Cathey Pitcock, which they detailed. There was also testimony tending to corroborate the testimony of these boys, showing that they were not on the track at the time when the train was wrecked, and that they had nothing to do with wrecking the same.

The appellant contends that the court should have directed a verdict in its favor upon the undisputed evidence, but the question of appellant's negligence was for the jury, and the court did not err in refusing its prayer for a directed verdict.

[2] The appellant urges that the court erred in admitting the testimony of a witness as to the condition of the track a few days before the trial, showing that same was in bad condition at that time. The trial was had on the 26th of February, 1913. The wreck occurred September 26, 1912. The court, in ruling on the objection, stated that the testimony would be admitted "only for the purpose of enabling the jury to arrive at the condition of the track immediately before and after the derailment." The court, in admitting other testimony as to the condition of the track two or three weeks after the wreck, stated that he admitted the testimony showing the condition of the track, before the time and after the time the wreck occurred, for the purpose of enabling the jury to determine what the condition of the track was at the time of the wreck, and for no other purpose whatever. There was oth-

er testimony tending to show that the track was in the same condition at the time of the wreck as it was in when visited by witness Adams five months subsequent to the wreck; that these conditions had continued from the time of the wreck except for the new ties that had been put in the track immediately after the wreck.

In *Little Rock & Ft. Smith Ry. v. Eubanks*, 48 Ark. 460-474, 3 S. W. 808, 813 (3 Am. St. Rep. 245), we held that: "Where a defective track is alleged to be the cause of the casualty, it is often impracticable to adduce evidence as to the condition of the track at the precise moment the casualty occurred. It is enough to prove such a state of facts shortly before or after as will induce a reasonable presumption that the condition is unchanged." See, also, *St. Louis, I. M. & S. R. Co. v. Freeman*, 89 Ark. 331, 116 S. W. 678. The testimony, under the above rule, was competent. Other testimony than the testimony objected to tended to prove that the same condition testified to by the witness had existed from the time of the casualty, and it would be unreasonable to conclude that railroad ties that were in first-class condition at the time the wreck occurred could deteriorate so rapidly as to be rotten within five months thereafter. It might be said as a matter of common knowledge that such is not the nature of railroad ties. It would take longer than five months for the disintegration of the timber out of which railroad ties are made.

[3] Appellant bases certain assignments of error upon the rulings of the court in granting and refusing prayers for instructions. Among these, the most important is the granting of appellant's prayer No. 10, which in effect told the jury that even if they found the roadbed, track, and engine in perfect condition, yet, if the engineer could by the exercise of proper care have seen the obstructions ahead in time to have stopped the train, they might find for the plaintiff. No issue was raised in the pleadings based upon a failure to keep the lookout required by statute, and the undisputed evidence showed that the proper lookout was kept. Therefore the above instruction should not have been given, as it "was calculated to confuse the jury and divert their minds from the real issue." *Railway Co. v. Woodward*, 70 Ark. 443, 69 S. W. 56. "It is error to submit as issues to the jury matters about which there is no dispute." *El Dorado & Bastrop Ry. Co. v. Whatley*, 88 Ark. 20, 114 S. W. 234, 129 Am. St. Rep. 93, and cases cited.

[4] But appellant asked, and the court gave, the following: "If you find from the evidence that the track at the point where the derailment occurred was in good condition immediately before the derailment, and that the engine was in good condition, and was being operated in a careful manner, reasonably consistent with the mode of operation of trains, and that said train was caused to be

derailed on account of iron bolts, nuts or other obstructions being placed upon the track by a stranger, then your verdict should be for defendant." Appellant cannot complain of the instruction given at the instance of appellee, since the same error was repeated in an instruction asked by it. *St. Louis, I. M. & S. R. Co. v. Lamb*, 95 Ark. 209, 128 S. W. 1030; *C., R. I. & Pac. R. Co. v. Smith*, 94 Ark. 528, 127 S. W. 715; *Lindsey v. St. L., I. M. & S. R. Co.*, 95 Ark. 541, 129 S. W. 807; *Little Rock & M. Ry. Co. v. Russell*, 88 Ark. 175, 113 S. W. 1021; *Choctaw Okla. & Gulf Rd. Co. v. Hickey*, 81 Ark. 579, 99 S. W. 839.

We have carefully examined the other assignments of error as to the granting and refusing prayers for instructions, and find that such of the refused prayers as were correct the court covered in other instructions given, both at the instance of appellant and appellee. There was no error in any of the other instructions given, and the record upon the whole is free from prejudicial error in the rulings of the court upon the instructions.

The assignment of error in the refusal of the court to order a change of venue is based upon the same facts as in the case of *St. L., I. M. & S. R. Co. v. Reilly*, 161 S. W. 1052, opinion handed down this day by the Chief Justice, and that case on this point rules this.

[8] Just before reading the instructions to the jury, the court made the following remarks: "Gentlemen of the Jury: Counsel for the plaintiff have called my attention to an article which appeared in one of the town papers this week, in regard to the trial of cases which are brought in counties other than the counties where the injuries occurred, and they want to know whether the jurors have read the article or articles, and, if so, they want the court to instruct you that you will not be governed by anything except the law and evidence if you should have read the article. It is a lawful right that a party has to bring his suit here, and when he brings it here he is entitled to have it tried by the law and the evidence exactly like he would if he lived in the county and in no other way. We are assembled here for the purpose of trying cases according to the law and the evidence, and no extraneous or outside matter should be allowed to influence the judge or jurors, or any person connected with the administration of the law, to do other than the law and evidence require in the case." The court informed the jury as to the purport of the newspaper article, and cautioned them not to allow any "extraneous or outside matter" to influence their verdict. The remarks, under the circumstances developed, were proper. They were cautionary, and were intended, and their effect could only have been to hold the jury to a consideration only of the law and

evidence of the case in hand, and to free them of any possible prejudice from outside sources.

Finding no reversible error in the record, the judgment must be affirmed; and it is so ordered.

## WOOD et al. v. DRAINAGE DIST. NO. 2 OF CONWAY COUNTY et al.

(Supreme Court of Arkansas. Dec. 8, 1913.)

### 1. DRAINS (§ 57\*)—DAMAGES FROM CONSTRUCTION—LIABILITY.

Acts 1909, p. 829, authorizes the establishment of drainage districts and provides for the appointment of commissioners who shall have control of the improvement in their district. Section 7 provides that the commissioners shall assess all damages accruing to any landowner by reason of the proposed improvement, including all injury to land taken or damaged. Section 8 authorizes any property owner dissatisfied with the assessment of damages by the commissioners to give notice that he demands an assessment of his damages by a jury and requires the commissioners thereupon to institute suit to condemn the lands taken or damaged. *Held*, that a drainage district has only such power and only such liabilities as are prescribed by the statute creating it; and as it has no property out of which a judgment for tort could be satisfied, and no power to levy assessments for the satisfaction of such judgments, it is not liable for negligence in the construction of a drainage ditch resulting in damages to land in the vicinity.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.\*]

### 2. DRAINS (§ 17\*)—DAMAGES FROM CONSTRUCTION—LIABILITY.

Under Acts 1909, p. 842, § 16, authorizing the establishment of drainage districts, which provides that no member of any board of improvement shall be liable for any damages sustained by any owner in the prosecution of the work under his charge, unless he shall have acted with a corrupt and malicious intent, the commissioners of a drainage district are not liable for injuries to property caused by negligence in the construction of a drainage ditch.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 11, 12; Dec. Dig. § 17.\*]

### 3. DRAINS (§ 57\*)—DAMAGES FROM CONSTRUCTION—LIABILITY.

Persons contracting with a drainage district for the construction of a drainage ditch are liable for injuries to property caused by their negligence in the construction of the ditch under the plan adopted and the contract with the drainage commissioners.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.\*]

### 4. PLEADING (§ 367\*)—MODE OF OBJECTION—DEMURRER OR MOTION.

Where the substantial facts constituting a cause of action are stated in the complaint or can be inferred by reasonable intendment from the matters set forth, though imperfectly or indefinitely alleged, the proper mode of correcting the defect is not by demurrer but by motion to make more definite and certain.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.\*]

### 5. PLEADING (§§ 8, 48, 192, 193\*)—MODE OF OBJECTION—DEMURRER OR MOTION.

Under the Code requirement that the complaint shall contain a plain and concise statement of the facts constituting the cause of action, every essential element of the cause of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
161 S.W.—67

action must be stated, and mere abstract conclusions of law may not be pleaded, and defects in these respects may be reached by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68, 105, 106, 408-435; 437-443; Dec. Dig. §§ 8, 48, 192, 193.\*]

**6. DRAINS (§ 57\*)—DAMAGES FROM CONSTRUCTION—COMPLAINT—SUFFICIENCY.**

In an action for injuries to property claimed to have been caused by water seeping from a drainage ditch which was being constructed, a complaint alleging that as the work progressed dams were constructed across the ditch and water pumped into that part of the ditch between the dam and the place where the work of excavation ended, but stating no facts showing that this was the result of negligent or improper construction, and not alleging that the dredging machinery was not placed on a boat and floated along on the water of the canal to facilitate the work of excavation, or that this would be an improper or unskillful construction of the ditch, was insufficient, as the mere fact that water was allowed to stand in the canal during construction did not constitute negligence.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 67, 69; Dec. Dig. § 57.\*]

**7. PLEADING (§ 8\*)—CONCLUSIONS—NEGLECT.**

In an action for injuries to property claimed to have been caused by water seeping from a drainage canal which was being constructed, a complaint alleging a delay on the part of the contractor in completing the canal beyond the time allowed by the contract, but stating nothing further to show that this constituted negligence, was insufficient; the allegation that the delay was negligent being a mere conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Conway County; Hugh Basham, Judge.

Action by W. L. Wood and another against Drainage District No. 2 of Conway County and others. From a judgment for defendants on demurrer, plaintiffs appeal. Affirmed.

W. P. Straff, of Morrilton, for appellants.  
Wm. L. Moose, of Little Rock, for appellees.

HART, J. W. L. Wood and Frank Pryor instituted this action in the circuit court against drainage district No. 2 of Conway county, Ark., T. C. Hervey, J. S. Moose, and T. J. Kissire, commissioners of said district, Napanee Drainage Company, and Frank Reed. The complaint alleges that W. L. Wood is the owner of cultivated lands situated within said district, and that during the year 1912 Frank Pryor, as his tenant, undertook to raise a crop of corn and cotton on said land. The complaint further alleges: "That on the ——— day of ———, 1910, the said commissioners, acting for and representing the said drainage district No. 2, in their official capacity, contracted with the defendant Napanee Drainage Company, a partnership composed of Harry Green, Willis Reed, Frank Reed, and Arthur Rosenberg, for a valuable consideration to dig, excavate, and construct a large drainage canal across and in said drainage

district, which said drainage canal passed across, over, through, contiguous, and near the above-described land, which said contract so entered and made provided that said canal should be completed on or by the 1st day of March, 1912; that said defendant Frank Reed, managing the business of the partnership of which he was a member, as above alleged, had charge of the construction thereof and has been in the actual superintendency, control, management, and direction thereof; that the said defendant partnership, Napanee Drainage Company, failed to comply with its said contract and to complete the said canal within the time provided therein, thereby negligently and unnecessarily delaying the draining of said land and holding large bodies of water therein in said district, which is still held, to the damage and detriment of the above-described land of the plaintiffs; that during a long period of time extending from March 1, 1912, until July 10, 1912, along said canal excavation, across and contiguous to the land of this plaintiff, said defendants constructed, and the said defendant Frank Reed, operating under defendant's contract and by the authority of the said drainage district No. 2, through its directors as aforesaid, has negligently maintained in said artificial canal, large bodies of water collected and gathered therein, and has negligently maintained dams and embankments across the same, thereby establishing artificial ponds or pools into which was pumped from the canal proper large quantities of water to a height equal to and above the surface of the surrounding country and this plaintiff's land, and negligently maintained said bodies of water for long periods of time between the 1st of March and the 10th of July, 1912, on such high level as to cause the same to seep through and overflow and saturate the said land of the plaintiff, above described, with water to such an extent as to totally destroy its use and usable value for agricultural purposes and to make it uncultivable for the year 1912 and to totally destroy the crop of corn and cotton and the products thereof planted, to be planted, and to be grown upon said land for the year 1912, and to the plaintiff's damage in the sum of \$500."

The court sustained a demurrer to the complaint, and, the plaintiffs electing to stand on the complaint, judgment was entered against them. They have duly prosecuted an appeal to this court.

[1] Section 22, art. 2, of our Constitution, provides that private property shall not be taken, appropriated, or damaged for public use without just compensation therefor. The drainage district in question was organized under an act to provide for the creation of drainage districts in this state, approved May 27, 1909. Acts of 1909, p. 829. The act in question recognizes the section

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

of the Constitution quoted above. Under the act, after the petition required by the statute has been filed, and the county court has determined upon the establishment of the drainage district, and the plan for its construction has been adopted, commissioners are appointed, who shall have control of the improvement in their district. Section 7 provides that the commissioners shall assess all damages that will accrue to any landowner by reason of the proposed improvement, including all injury to land taken and damaged. Section 8 provides that any property owner who may be dissatisfied with the assessment of damages in his favor by the commissioners may give the commissioners, in 30 days after they have filed their assessment, notice that he demands an assessment of his damages by a jury, and it shall then be the duty of the commissioners to institute suit in the circuit court to condemn the lands that are thus taken or damaged in making said improvement.

In the case of *Newgass v. Railway Co.*, 54 Ark. 140, 15 S. W. 188, which was a condemnation suit by a railroad company, the court said: "If the appropriation of the part and its use, as a railroad resulted in flooding the remainder of appellant's lands, the damage so occasioned should be included in the assessment; but no account should be taken of injuries thereafter to result from an improper construction or maintenance of the bed, for the condemnation does not authorize either, and the corporation that condemns the land will be liable for such injuries as may thereafter result therefrom."

We have also held in condemnation proceedings by railway companies that where, at the time of the trial, it is shown that the railroad has been constructed over the land sought to be condemned and damages have resulted to the landowner from faulty or improper construction, such damages may be recovered in the condemnation proceeding; but they are not allowed because they are a part of the compensation allowed the landowner for property taken or damaged within the meaning of the Constitution, but are allowed because the railroad company may not injure the property of others by the negligent or unskillful exercise of a right without a corresponding liability; and they may be recovered in the same action because the law does not favor splitting up causes of action.

In the case of *Board of Improvement of Sewer District No. 2 v. Moreland*, 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957, we held that improvement districts in cities and towns are quasi public corporations, having no powers, duties, or liabilities except as expressly conferred by statute, and that they are not liable for negligence whereby an employé is injured while engaged in the construction of the improvement.

In *Nugent v. Levee Commissioners*, 58

Miss. 197, it was held that a board of levee commissioners was not liable in tort for damages arising from the improper construction of a levee. In that case the court said: "The levee commissioners are simply public officers clothed with a corporate capacity solely for the convenience of administration, and are endowed with no representative character, as respects the taxpayers; and, if they had such character, it would be strictly limited to those duties which by law they were authorized to perform. \* \* \*

In all the cases on the subject of the liability of these corporations, it is admitted that the liability in each case depends on the true construction of the statute creating the corporation. The difference in the cases seems to be in the mode of arriving at the intention of the Legislature. In some it is held that the liability arises from the constitution of the body and the business it is charged with, if there be no restrictive language; in others it is said there ought to be an express provision for liability before it can attach. In this case the meaning of the act seems to be clear. The tax is levied, as expressed in the statute, 'for the purpose of repairing and constructing the levees and for carrying into effect the object and purpose of securing the counties of Bolivar, Washington, and Issaquena from overflow from the Mississippi river.' This does not include the very different object of paying damages for the default and misconduct of the persons charged with the execution of the act. This expression of the purpose of the tax in the act is an exclusion of all other purposes. If such damages were chargeable on the fund, their payment might prevent the accomplishment of the purpose for which the tax was levied. The whole fund might be consumed in compensating landowners for a failure to receive that protection from the levees which they were designed to afford. The taxes levied, instead of being a fund for securing this protection, would be converted, as was said by Lord Mansfield in an analogous case, into the capital of an insurance company to indemnify against losses from floods. The taxpayers would become insurers against damages, instead of contributors to a fund to be used in preventing the recurrence of damages. To entail so alarming a liability on property holders without their free consent ought to require a very plain expression of the legislative will, if indeed there be any power in a free government thus to deal with the property and business of the people. That a taxpayer living in the district should, on account of the negligence or misconduct of the persons administering the powers of the corporation, or their agents or employes, fail to receive the protection from overflow, to secure which he was taxed, is indeed a hardship; but we are not authorized to remove this hardship by the imposition of a burden on his cosufferers. He must be left to his remedy against those by whose

misconduct he was injured, whose liability for their own acts and omissions is to be determined by the rules of law applicable to such cases." See, also, *Hensley v. Reclamation District*, 121 Cal. 96, 53 Pac. 401; *Thompson et al. v. Board of Commissioners of Polk County*, 38 Minn. 180, 37 N. W. 267; 14 Cyc. 1057.

So here it may be said that the drainage district has only such power and has only such liabilities as are prescribed by the statute creating it. The district has no property out of which a judgment for tort could be satisfied. It is true it has the power to levy assessments, but this can be done only for the purposes provided in the act. And the statute does not give it any power to levy assessments for the satisfaction of judgments for tort against it. Therefore we hold that the district was not liable, under the allegations of the complaint.

[2] Neither are the commissioners of the district liable. Section 16 of the act provides that no member of any board of improvement shall be liable for any damages sustained by any one in the prosecution of the work under his charge, unless it shall be made to appear that he has acted with corrupt and malicious intent. Thus it will be seen that the statute exempts the commissioners from damages which result from the faulty or improper construction of the improvement. We held that the commissioners of a board of improvement were not liable under a similar statute. *Board of Improvement Sewer District No. 2 v. Moreland*, 94 Ark. 380, 127 S. W. 469, 21 Ann. Cas. 957.

[3] But it by no means follows that the contractors are not liable. Section 13 of the act provides that no work exceeding \$1,000 shall be let without public advertisement; and from the allegations of the complaint it appears that the defendants the Napanee Drainage Company and Frank Reed were concluding the work under contract with the commissioners of the drainage district, and they are therefore independent contractors. They had a right to construct the improvement under the plan adopted and under the contract made with the drainage commissioners; but if, in the exercise of that right, by negligence, they injured the property of another, they are liable. *Nugent v. Board of Commissioners*, supra; *Thompson v. Board of Commissioners of Polk County*, supra.

[4-7] This brings us to the question of whether the complaint states a cause of action against them. Since the adoption of our Code, it has been uniformly held that if the substantial facts which constitute a cause of action are stated in the complaint or can be inferred by reasonable intentment from the matters set forth, although the allegations of these facts are imperfect or indefinite, the proper mode of correcting the deficiency is not by demurrer but by motion

to make more definite and certain. Our Code, however, requires that the complaint should contain a plain and concise statement of the facts constituting the cause of action. Every essential element of the cause of action must be stated, and it is not allowable to plead mere abstract conclusions of law. Such defects may be reached by demurrer. *Southern Orchard Planting Co. v. Gore*, 83 Ark. 78, 102 S. W. 709. It appears from the allegations of the complaint that, as the work of digging the ditch, or canal, progressed, dams were constructed across it and water was pumped into that part of the canal between the dam and the place where the work of excavation ended. The complaint does not state any facts which show that this was the result of negligent or improper construction of the ditch. It may be that the dredging machinery was placed upon a boat and the boat floated along on the water of the canal to facilitate the work of excavation. And presumably this was what was done in the present case. There is no statement of facts that shows that such action on the part of the contractors would be an improper or unskillful construction of the ditch. The complaint does allege that the work of constructing the ditch was let to the Napanee Drainage Company, and that Frank Reed was its manager, in charge of the work, and that the contract provided that the canal should be completed on or by the 1st day of March, 1912, and that, by the negligence of the defendant, water was allowed to stand in the canal between the dam and the place where the excavation ended until July 10, 1912, and that plaintiffs' land was damaged by the water seeping through on it. The mere fact that water was allowed to stand in the canal while the same was being constructed does not constitute negligence, nor does the further fact that the canal was not completed within the time designated in the contract show negligence. This allegation does not state facts sufficient to constitute negligence and is a mere conclusion of law on the part of the pleader. It may be that the completion of the canal was delayed on account of the weather or some other unforeseen cause. In any event, the complaint itself does not state any facts in regard thereto which would constitute negligence.

Therefore the court was right in sustaining the demurrer to the complaint, and the judgment will be affirmed.

#### MONTGOMERY v. SOUTHWEST ARKANSAS TELEPHONE CO.

(Supreme Court of Arkansas. Dec. 15, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 34\*)—DISCRIMINATION—PENALTIES—CONSTRUCTION OF STATUTE.

Kirby's Dig. § 7948, authorizing recovery of penalties from a telephone company for dis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



crimination, is merely declaratory of the common law, for the purpose of preventing discrimination, with penalties added.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.\*]

### 2. TELEGRAPHS AND TELEPHONES (§ 34\*)—DUTIES—DISCRIMINATION.

While telephone companies may in good faith determine the limits within which they will carry on their business, they are common carriers and obligated as such to give the same service on the same terms to all who apply therefor, without partiality or unreasonable discrimination.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.\*]

### 3. TELEGRAPHS AND TELEPHONES (§ 34\*)—PENALTY FOR DISCRIMINATION—RIGHT TO RECOVER.

Where a telephone company operating a telephone exchange in a city, contracted without legal obligation to do so, to connect with a rural line, and provided exchange service therefor, and where a person living outside the city and entitled to such service under the contract moved within the limits established by the telephone company for operating its telephone exchange in the regular manner, and connected a phone in his new residence with the rural line, the telephone company could not be held liable under Kirby's Dig. § 7948, prescribing penalties for discrimination by telephone companies, for its refusal to give him telephone service at his new residence by way of the rural line.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.\*]

Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge.

Action by D. J. Montgomery against the Southwest Arkansas Telephone Company. From judgment for defendant, plaintiff appeals. Affirmed.

This is a suit by appellants against appellee for the recovery of the statutory penalty, under section 7948 of Kirby's Digest, for an alleged discrimination against them in refusing them telephone service. The complaint alleges that appellee is a corporation, organized under the laws of this state, and that it owns and operates a telephone exchange in the city of Prescott; that on the 1st day of March, 1912, appellants lived in the country, about four miles distant from the city of Prescott; that, in connection with several of their neighbors, appellants entered into a written contract with appellee, whereby appellee, for the sum of \$18 per annum, agreed to erect and maintain its poles to the corporation line of the city of Prescott, and to permit appellants, and four of their neighbors who had signed the contract, to erect a telephone wire from their residences in the country to appellee's wire at the corporate limits of the city of Prescott, and there connect with it; that appellee, for the consideration named in the contract, was to furnish appellants, and the four others who signed the contract, telephone service on this party line; that appellants paid their part of the rent on said line from the 1st

day of March, 1912, to the 1st day of March, 1913, and fully complied with all the appellee's rules and regulations in regard thereto. That appellee refused to permit appellants to have connection on said telephone line from the 6th day of November, 1912, to the 26th day of December, 1912. Appellee filed an answer, in which it admitted that it entered into the contract with appellants and others for a party line to their residences in the country, but alleged that later, without its knowledge, appellants moved and established their residence just outside the corporate line of the city of Prescott, but really inside the city limits, and, without appellee's knowledge and consent, strung a wire from their residence, and attached the same to the party line running to their former residence in the country. Appellee alleges that it maintains and operates a telephone exchange in the city of Prescott, and in its immediate suburbs, and that parties living within these limits are required to pay \$1.50 per month for telephone connections. On the trial of the case, it was proved that appellants' present residence is about 50 feet from the corporation line of the city of Prescott, and that appellants moved into this residence in July, 1912, and that before that time they lived something like four miles in the country. Appellants offered to introduce in evidence the written contract made by themselves and certain of their neighbors with appellee, on March 1, 1912, while they lived out in the country. The court refused to permit this contract to be introduced in evidence, and appellants duly saved exceptions thereto. Judgment was rendered in favor of appellee, and to reverse that judgment this appeal is prosecuted.

J. O. A. Bush, of Prescott, for appellant. Thos. O. McRae, W. V. Tompkins, D. L. McRae, and Chas. H. Tompkins, all of Prescott, for appellee.

HART, J. (after stating the facts as above). [1] This suit was instituted under section 7948 of Kirby's Digest. The section in question is merely declaratory of the common law for the purpose of preventing discrimination, with penalties added. *S. W. Tel. & Telegraph Co. v. Danaher*, 102 Ark. 547, 144 S. W. 925. See, also, *Home Tel. Co. v. Peoples' Tel. & Telegraph Co.*, 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550, and cases cited; *Bradford v. Citizens' Telephone Co.*, 161 Mich. 385, 128 N. W. 444, 137 Am. St. Rep. 513.

[2] Telephone and telegraph companies are common carriers of intelligence, and must give the same service on the same terms to all who apply therefor, without partiality or unreasonable discrimination. *S. W. Tel. Co. v. Danaher*, 102 Ark. 547, 144 S. W. 925; *Home Tel. Co. v. Peoples' Tel. & Telegraph Co.*, supra, and cases cited. Telephone com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

panies may in good faith determine for themselves the limits within which they will carry on their business. 37 Cyc. 1653; Cumberland Tel., etc., Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210; Delaware & A. Telegraph & Telephone Co. v. State of Delaware ex rel. Postal Tel. & Cable Co., 50 Fed. 677, 2 C. C. A. 1.

[3] According to the allegations of the answer, appellee owned and operated a telephone exchange in the city of Prescott, and this included the thickly populated territory adjacent to the corporate limits. Within the limits which it established, under the statute, appellee was required to give the same service, on the same terms, to all who applied therefor, without partiality or unreasonable discrimination. It could not be required to extend its line or service beyond the limits which it had established. The act of appellee in making the contract of March 1, 1912, with appellants and others, whereby it agreed to furnish them telephone service on a party line, was a mere privilege which it might grant to them, but it could not have been compelled to have executed such a contract. This, we think, is clear from the principles decided in the cases cited above, and it was expressly so decided in the case of Younts v. Southwestern Tel. & Tel. Co. (C. C.) 196 Fed. 200. See, also, Crouch v. Arnett, 71 Kan. 49, 79 Pac. 1086.

As long as appellants lived in the country, they had a right to telephone service over the party line during the life of their contract with the telephone company; but the present suit is not based on contract, but was instituted to recover penalties imposed by section 7948 of Kirby's Digest, for unlawful discrimination. When appellants moved from their residence in the country, outside of appellee's telephone zone, into their residence in the suburbs of the city of Prescott, they brought themselves within the limits established by the telephone company for maintaining and operating its telephone exchange. All persons who comply with the reasonable rules of a telephone company, and who come within the same class, are entitled to telephone service within the established limits of the telephone company; and it is for discrimination against such persons that the penalties of the statute are directed. When appellants moved into the limits established by appellee for conducting its business, they brought themselves within the class whom appellee was bound to serve without partiality or unreasonable discrimination, if proper application was made therefor. Appellants do not show that they applied for telephone service upon the same terms as those who live within the established limits, but they demanded service under the contract they had made with appellee while they lived in the country. When they lived outside of appellee's telephone

zone, they could not compel appellee to give them telephone service, and for that reason could not recover the penalties denounced by the statute. At most, they could have only sued appellee for damages for breach of contract; and we do not decide whether they could have even maintained such action, for it might be said that, having moved away from their former residence in the country, they placed themselves in a position where they could not use the party line which they had contracted for, and on this account there would be no breach of contract on the part of appellee.

The court did not err in refusing to permit appellants to introduce the contract above referred to in evidence; and, even if it had been admitted in evidence, under the views we have expressed, the result would have been the same. Therefore the judgment will be affirmed.

#### WESTERN UNION TELEGRAPH CO. v. WESTBROOK.

(Supreme Court of Arkansas. Dec. 1, 1913.)

##### 1. TELEGRAPHS AND TELEPHONES (§ 37\*)—DELIVERY—WHAT CONSTITUTES.

A message addressed to two persons jointly may be delivered to either, and a delivery to one is a delivery to the other.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 23, 24, 29, 30, 32; Dec. Dig. § 37.\*]

##### 2. TELEGRAPHS AND TELEPHONES (§ 38\*)—DELIVERY OF MESSAGES—FREE DELIVERY LIMITS.

A person living a mile and a half from a town having a population of less than 5,000 is beyond the free delivery limits of a telegraph company establishing free delivery limits within a radius of half a mile from its office, and a delivery of a message by promptly placing it in the post office, addressed to the addressee, is sufficient where the company has no authority from the sender to incur special delivery expenses.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.\*]

##### 3. TELEGRAPHS AND TELEPHONES (§ 38\*)—DELIVERY OF MESSAGES—FREE DELIVERY LIMITS.

Where the addressee of a message resided beyond free delivery limits, and the messenger looked around the town to find some one by whom he could send the message to the addressee and, failing to find any one, deposited it in the post office after advising the postmaster of its presence and contents and requesting a prompt delivery, the company was, as a matter of law, not guilty of any breach of duty in failing to deliver the message; the sender conferring no authority for special delivery expenses.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.\*]

##### 4. TELEGRAPHS AND TELEPHONES (§ 38\*)—DELIVERY OF MESSAGES—FREE DELIVERY LIMITS.

Where the operator at the destination of a message advised the operator at the initial point of the fact that the addressee resided be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

yond free delivery limits, and the sender, on being informed of the facts, expressed satisfaction with the mailing of the message, the company was without authority to incur special delivery expenses and as a matter of law was not guilty of any breach of duty, notwithstanding its rule providing for special messenger service on the sender guaranteeing the delivery charges.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.\*]

Appeal from Circuit Court, White County; Eugene Lankford, Judge.

Action by Rosa Westbrook against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

Appellee alleged in her complaint: That appellant was a corporation, operating a line of telegraph from Saltillo, Tex., to Beebe, Ark., and that on January 4, 1912, one Walter Everett delivered to the defendant company at Saltillo a message directed to her at Beebe, advising her that her husband, who was then at Saltillo, was very ill, and that on the next day the said Everett delivered another message to the defendant directed to appellee in the following words: "Bert died to-day. Interment here tomorrow unless you advise to the contrary." That the said Everett paid the customary price for the transmission and delivery of said messages to the appellant, but they were not delivered within a reasonable time or within any other time. That her husband died on the 5th of January, 1912, and was buried without her knowledge of even his serious illness. That, if the telegram had been properly transmitted to her, she could and would have attended her husband in his last illness and have brought his remains to her home at Beebe, where she could have attended his funeral. She alleged that, because of appellant's negligence in failing to transmit and deliver the message, she suffered great grief and mental anguish and prayed judgment in the sum of \$2,999. The answer denied all negligence but admitted receipt of the messages, and alleged they were promptly transmitted and that appellant was guilty of no negligence in their delivery, and alleged further that appellee could not have reached her husband before his death, but that the messages were delivered in time for her to have given directions about his funeral and to have attended it at Saltillo, or to have made arrangements for it at Beebe.

There appears to have been no controversy as to what happened at Saltillo. Mr. Everett sent four messages, the first of which was dated 3:30 p. m. of January 4, 1912, and was addressed to appellee individually and read as follows: "Bert Westbrook seriously ill. Answer." A second telegram was sent at 3:47 p. m. on the 5th and was addressed to John and Rosa Westbrook, Beebe, Ark., and

read as follows: "Bert dying. Answer collect." The third telegram, which has been set out in full, was addressed to John and Rosa Westbrook and advised them of the death and day of the interment unless instructions to the contrary were received. That telegram was dated 4:30 p. m. of the 5th. A fourth and last telegram was sent by Everett on the 6th acknowledging the receipt of a telegram sent to him by John Westbrook in regard to the funeral arrangements. The complaint sets out the first and third telegrams and makes no mention of the second, although appellee denied receiving any of them.

The evidence in the case was substantially as follows:

One Armspough testified that he was the appellee's father and that she was living with him during the month of January, 1912, and had been for some time prior thereto, and that he was well known in and around Beebe, and that he got the telegram addressed to Mrs. Westbrook out of the post office on the morning of January 6th, between 8 and 9 o'clock, and that the envelope showed that it had been mailed at ——— p. m., January 4, 1912, and the first they had ever heard of any of the telegrams was on the night of the 5th, when they were advised by a negro named Love of the first telegram and its contents. Witness lived three-quarters of a mile beyond the corporate limits of the town of Beebe and something more than a mile from the telegraph office.

Appellee testified that she only received the telegrams herein designated as the first and third, and that the first telegram was delivered to her on the morning of the 6th, and the other during the afternoon of that day. She testified that had she received these telegrams she could and would have gone to her husband. And there is some evidence, in addition to her own, which makes it appear not impossible, although highly improbable, that she might have reached her husband before the time of his death, which was shown to have occurred at 3:30 p. m. on the 5th, had the first telegram been delivered immediately after its receipt in Beebe; but she could have reached Saltillo before his funeral, which occurred on the 6th.

John Westbrook, who was one of the addressees in the second and third messages, testified at first that he received both of those messages during the afternoon of the 6th and that on the 7th he sent a message to Mr. Everett saying: "Bury Bert nicely; I will pay expenses." But upon cross-examination admitted that he had in fact received both messages about 5 p. m. on the evening of the 5th, although he still contended he had gotten them on that date through the post office and not from the telegraph operator.

The evidence upon the part of the appellant was to the following effect:

Garrison, the operator at Beebe, testified that upon receipt of the message addressed to Mrs. Rosa Westbrook individually, which was received at his office in connection with one addressed to John Westbrook individually, he went to the store of a man named John Westbrook and gave him the telegram bearing that address and, upon its being torn open and read, Westbrook advised him who the addressees were. Thereupon the operator went to his office and inclosed the telegram in an envelope addressed to appellee and gave it to his porter with directions to make inquiry about town for the addressees and to deliver if he could, or send the telegram to her if he saw an opportunity to do so, and, if not, to mail the telegram at the post office. The witness wired the operator at Saltillo to the following effect: "Your two messages date Westbrook signed Everett undelivered. Parties live two miles in the country. Have mailed copies." This witness further testified that, while he was receiving the message stating that deceased was dying, John Westbrook, the deceased's brother, came into his office and began writing a telegram, but, before he had finished doing so, witness gave him the telegram he had just received and Westbrook left the office without finishing the telegram; that within a few minutes Westbrook came again into his office while witness was receiving the third telegram containing the notice of deceased's death; and that this telegram was delivered in the office immediately upon its receipt. This witness testified that Westbrook returned again and at 8 a. m. on the morning of the 6th sent to Everett the telegram containing the directions in regard to the burial and the promise to pay the expense thereof.

The assistant postmistress testified that the porter mailed two telegrams on the evening of the 4th, one addressed to the appellee, Rosa Westbrook and the other to John Westbrook, and asked her to assist him in delivering them as soon as possible.

The porter testified that he knew appellee but did not expect to find her in town on the afternoon of the 4th because of the severity of the weather; but he thought he might find some one to whom he could deliver the message; and that, after spending about 25 minutes in that attempt, he deposited the telegram in the post office. A negro named Pleas Love testified that Mr. John Westbrook, who lived in the city of Beebe, and to whom the telegram had been first erroneously delivered by the operator, asked witness to notify appellee of the telegram and its contents, and witness stated that he passed the home of Mr. Armspough about 5 o'clock in the afternoon of the 4th and told Armspough of this message and its contents. The witness is very positive as to the date, but the jury evidently did not believe his statements.

The operator at Saltillo testified that, after receiving the message from the operator at Beebe advising him of the nondelivery of the telegrams and stating the reasons therefor, he immediately called Mr. Everett, the sender of the telegrams, over the phone and told him what had been done, and that Mr. Everett had said that it was satisfactory to him to have the telegrams mailed, and there was no request to have them delivered in the country nor offer made to pay the charges for doing so. He testified further that, when the messages addressed to John and Rosa Westbrook jointly were sent by him, he advised the operator at Beebe the expense of their delivery would be guaranteed, but he was almost immediately notified by the operator at Beebe that there would be no charge for delivery as the messages had been delivered directly upon their receipt. The telegram advising to that effect was received at 5 o'clock on the evening of the 5th.

Mr. Everett, the sender of the messages, testified that he was foreman of the mill at which deceased was working at the time of his illness, and that deceased had pneumonia and died after an illness of five days; that deceased was known to him as Harry Jones, and his name was so written on the time book; but that he found from some letters and scraps of paper on the person of the deceased showing what his true name was and where his family lived, and that he sent the messages herein mentioned. He testified further that he received the message from John Westbrook on the 6th directing him to "bury Bert nicely" and promising to pay the expenses of the funeral. He testified further that these expenses had never been paid, although appellee had promised to pay him out of the proceeds of this litigation.

The proof showed that Beebe was a town of less than 5,000 people, and that under the rules of the appellant company, which numerous cases in this and other states have held to be reasonable, a free delivery was not required beyond a radius of a half mile from the telegraph office, and both Mrs. Westbrook and her brother-in-law John Westbrook lived at a greater distance than that beyond the corporate limits of Beebe.

Appellee introduced in evidence rule No. 51 of the appellant company which governs special deliveries and the charges therefor, and which reads as follows: "If the service of a special messenger be required, and the special delivery charges have not been provided for, the sending office will promptly notify by telegraphing the cost of delivery, and that office will endeavor to collect the charges from the sender, who, if he pay or guarantee the delivery charges, will also pay for the message ordering a special delivery or guarantee the collection of the total thereon. If the sending office be unable to collect, or if a reply from the sending office be not promptly received, a copy of the message will be mailed to the addressee, and, if

another copy be afterwards delivered, the word 'duplicate' will be plainly written across its face."

Geo. H. Fearons, of New York City, and Rose, Hemingway, Cantrell & Loughborough and E. L. McHaney, all of Little Rock, for appellant. S. Brundidge, of Searcy, for appellee.

SMITH, J. (after stating the facts as above). We have set out the evidence in extenso because of the view we take of it, and for the same reason we regard it unnecessary to set out or discuss the instructions in this opinion. Appellee complains of the alleged negligent failure to deliver the messages, one addressed to her individually and the other to her and John Westbrook jointly; the one advising her of her husband's illness, the other of his death. The first message she claims not to have been received until the morning of the 6th, and the other one not until the afternoon of that day.

[1] But a joint message may be delivered to either of the addressees, and a delivery to John Westbrook was a delivery to appellee of the message addressed to her and to him.

[2] It is true John Westbrook did at first testify that the joint messages were not delivered until the afternoon of the 6th, and he contradicts the operator's statement that the delivery occurred in telegraph office; but, although he says he received the messages through the post office, he does admit on cross-examination, after his recollection has been refreshed, that the messages were delivered to him on the afternoon of the 5th, and within a short time after their receipt for transmission at Saltillo. This brother lived a mile and a half from the town of Beebe, which was of course beyond the free delivery limits, and, although the messages were put in the post office, this proved to be a very expeditious method of delivering them to him.

[3] Nor does the proof show any negligence in failing to deliver the first telegram. Appellee resided beyond the free delivery limits, and there is nothing in the record to indicate that a delivery of the message could have been made within these limits. The evidence is undisputed that the weather was very inclement, and the colored porter, who knew appellee, testified that he had no hope of finding her in town on such a day but that he looked around the town to find some one by whom he could send the message to the country, and, failing to find any one, he deposited the telegram in the post office, after advising the postmistress of its presence there and of its contents and after requesting that she deliver it as soon as possible.

[4] Nor do we think there was any negligent failure to observe the rule 51 offered in evidence. This rule was substantially

complied with. Immediately upon learning that appellee lived in the country, the operator at Beebe advised the operator at Saltillo of the conditions and of what he had done, and the operator at Saltillo immediately called Everett, the sender of the message, over the telephone, and Everett said it was satisfactory to him for the messages to be mailed in the post office. Under these circumstances appellant would have had no authority to incur any expense in the delivery of this message, and we think, as a matter of law, that appellant was guilty of no breach of duty in failing to deliver this message. *King v. West. Union Telegraph Co.*, 89 Ark. 402, 117 S. W. 521.

The court below should therefore have directed a verdict in appellant's favor, and for its failure so to do the judgment must be reversed, and the cause will now be dismissed.

# BRINKLEY CAR WORKS & MFG. CO. v. COOK.

(Supreme Court of Arkansas. Dec. 1, 1913.)

## 1. CONTRACTS (§ 71\*)—CONSIDERATION—SUFFICIENCY.

An agreement not to exercise a legal right is a sufficient consideration to support a contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 295, 296, 298, 316-324; Dec. Dig. § 71.\*]

## 2. FRAUDS, STATUTE OF (§ 23\*)—ANSWERING FOR DEBT OF ANOTHER—ORIGINAL OR COLLATERAL PROMISE.

A promise by a third person to pay the pre-existing debt of another, founded on the original liability, without any new consideration to support it, is a collateral undertaking, and within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.\*]

## 3. FRAUDS, STATUTE OF (§ 33\*)—ANSWERING FOR DEBT OF ANOTHER—ORIGINAL INDEBTEDNESS.

Where plaintiff sold lumber for buildings, and the purchaser on request for payment stated that defendant was indebted to him, and requested plaintiff to collect from defendant, and defendant, before the expiration of the time for filing a lien, requested plaintiff not to file a lien, and promised to pay the debt if no lien was filed or action brought against the purchaser, in reliance upon which the plaintiff forebore to and lost its right to enforce its lien, the defendant's promise was an original undertaking upon a new consideration, and was not required to be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 50-53, 56; Dec. Dig. § 33.\*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by the Brinkley Car Works & Manufacturing Company against W. P. Cook. From an order sustaining a demurrer to the complaint and dismissing it upon plaintiff's refusal to amend, plaintiff appeals. Reversed and remanded, with direction to overrule the demurrer.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appellant was the plaintiff below, and alleged in its complaint the following facts: "That during August and September, 1911, it had sold and delivered to one Ben Hirsch certain lumber of the value of \$352.65 for the purpose of erecting buildings on his farm. That when plaintiff requested payment from said Hirsch for said lumber, he stated that defendant Cook was indebted to him in a sum in excess of the amount which he owed to plaintiff, and requested the plaintiff to collect the amount from said defendant. That before the time had expired for filing a lien on the building and land of said Hirsch, defendant requested plaintiff not to file a lien or bring action against said Hirsch for the payment of said sum, due for the lumber as aforesaid, and promised plaintiff to pay said debt if action was not brought against said Hirsch. That, relying upon the promise of defendant to pay said debt, plaintiff did not file a lien or bring action against said Hirsch for the payment of said debt. That said Hirsch has since sold the land on which the improvements were made with said lumber, and has left the State of Arkansas." The complaint further alleged a demand for payment by appellant and a refusal to pay by appellee. The court sustained a demurrer to the complaint and dismissed it, upon appellant's refusal to amend, and this appeal is taken from that order.

C. F. Greenlee, of Brinkley, for appellant.  
Thomas & Lee, of Clarendon, for appellee.

SMITH, J. (after stating the facts as above). [1-3] An agreement not to exercise a legal right is a valid consideration to support a contract. *Lay v. Brown*, 151 S. W. 1001. And the agreement alleged in the complaint was a new and original consideration, moving between the newly contracting parties, which takes the promise to pay Hirsch's debt from without the statute of frauds.

The controlling question in cases involving an agreement to pay the debt of another is whether the agreement so to do is original or collateral. "A promise by a third person to pay the pre-existing debt of another founded upon an original liability, and without any new consideration to support it, is a collateral undertaking, and within the statute of frauds." *Kurtz v. Adams*, 12 Ark. 174; *Chapline v. Atkinson*, 45 Ark. 67, 55 Am. Rep. 531; *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318.

But the facts alleged in the complaint are that, subsequent to the making of the original debt, the appellant refrained from pursuing a statutory remedy to enforce the payment of its debt, and by so doing lost the lien given it by the statute, and this indulgence was extended at appellee's request and in consideration of his promise to pay the debt. This promise was therefore an original undertaking upon a new considera-

tion, and was not required to be in writing, and the demurrer should have been overruled. *Zimmerman v. Holt*, 102 Ark. 407, 144 S. W. 222, and cases there cited.

The judgment of the court below will therefore be reversed, and the cause remanded, with directions to overrule the demurrer.

STATE v. CHICAGO, R. I. & P. RY. CO.  
(Supreme Court of Arkansas. Dec. 1, 1913.)

1. INDICTMENT AND INFORMATION (§ 106\*)—  
STATUTORY OFFENSES.

An indictment charging a statutory offense must allege all of the elements essential to the offense.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 286-288; Dec. Dig. § 106.\*]

2. RAILROADS (§ 255\*)—OPERATION—OFFENSES.

Acts 1907, p. 353, § 1, requiring railroad companies at all junctions where two or more trains connect to have all passenger trains depart only from the depot, and section 2, requiring all companies to have on duty at such depot a crier who shall cry the departure of all trains, only requires that a railroad company have a crier at a junction where the trains of two or more railroads arrive or depart at or near the same time, and hence an indictment for violating the statute was bad where it did not allege that the station was a junction where two or more trains connect.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 773-788; Dec. Dig. § 255.\*]

Appeal from Circuit Court, White County;  
J. M. Jackson, Judge.

The Chicago, Rock Island & Pacific Railway Company was indicted for failure to maintain a station crier pursuant to statute, and, from a judgment sustaining a demurrer to the indictment, the State appeals. Affirmed.

Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.  
Thos. S. Buzbee and Jno. T. Hicks, both of Little Rock, for appellee.

HART, J. The state has appealed from the judgment of the circuit court of White county sustaining a demurrer to the following indictment: "The grand jury of White county, in the name and by the authority of the state of Arkansas, accuse the Chicago, Rock Island & Pacific Railway Company of the crime of failing to provide a station crier, committed as follows, to wit: That the said Chicago, Rock Island & Pacific Railway Company, the same being a railroad corporation owning and operating a line of railroad through the state of Arkansas, in the county and state aforesaid, on the 1st day of February, 1912, did then and there willfully and unlawfully fail, refuse, and neglect to provide at its station at Higginson, White county, Arkansas, the same being a junction point with the St. Louis, Iron Mountain & Southern Railway Company, a station crier whose duty it was to cry out the departure of its

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

passenger train No. 609, the destination thereof, and the track from which it would depart, contrary to the statute in such case made and provided, against the peace and dignity of the state of Arkansas."

The indictment was returned under the following statute:

"Section 1. That all railroad companies operating railroads in this state shall, at all junctions where two or more trains connect require that all trains carrying passengers departing from such junction shall depart only from the station house or depot at such junction.

"Sec. 2. That all railroad companies operating passenger trains in this state shall provide and have on duty at such depot or station a crier, whose duty it shall be to cry out at such depot or station the departure of all trains, the destination, and the track from which any such train will depart; that such crier shall cry out such departures a sufficient time before the departure of any such trains as to give passengers ample time to reach such trains."

"Sec. 4. That in case of the failure of any railroad company, as herein provided by section 1, fail, refuse, or neglect to provide such crier as herein provided, shall be deemed guilty of a misdemeanor, and subject to a fine of from twenty-five dollars to one hundred dollars, and that the failure to cry out the departure of each train shall constitute a separate offense." Acts of 1907, p. 353.

[1] An indictment for a statutory offense must state all the elements essential to constitute the offense. *Haupt v. State*, 100 Ark. 409, 140 S. W. 294, Ann. Cas. 1913C, 690; *Parker v. State*, 98 Ark. 575, 137 S. W. 253.

Article 17, § 1, of our Constitution, provides that every railroad company shall have the right, with its road, to intersect, connect with, or cross any other road, and shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination. Section 4 of the act under which the indictment was found directs the penalties of the act against railroad companies coming within the provisions of section 1 of the act.

[2] It will be noted that the act does not provide that all railroad companies operating railroads in this state shall, at all junctions where it connects with one or more lines of railroad, provide and have on duty at its station a crier whose duty it shall be to call out the departure of all passenger trains, etc.; but it provides for a crier at all junctions where two or more trains connect. The object and purpose of the statute is for the protection of passengers and to prevent confusion in embarking on trains. We think the words "at all junctions where two or more trains connect" mean a junction where the trains of two or more railroads, when on schedule time, arrive and depart at or near

the same time. The object and purpose of the statute will then be carried out by having a crier to call out the departure of the trains, and the track from which they leave, so that passengers alighting from a train on the line of the initial carrier may safely embark on the train of the connecting carrier.

The indictment under consideration does not allege that Higginson was a junction where two or more trains connect, and, as we have already seen, this was an essential element of the offense.

Therefore the judgment of the circuit court was correct, and it will be affirmed.

#### BRUDER v. STATE.

(Supreme Court of Arkansas. Dec. 8, 1913.)

##### 1. CRIMINAL LAW (§ 594\*)—APPEAL—DISCRETION OF TRIAL COURT—CONTINUANCE.

Accused requested a continuance on the ground of the absence of witnesses, two of whom were nonresidents, and one of whom was not shown to be a resident, and there being no showing that the voluntary attendance of one of such witnesses could have been secured, and no excuse for not taking his deposition. *Held*, that the refusal of a continuance was not such an abuse of the trial court's discretion as to manifestly operate as a denial of justice and constitute ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.\*]

##### 2. JURY (§ 75\*)—EXCUSING JUROR—AUTHORITY OF COURT.

It is within the discretion of the trial court to excuse a juror on account of sickness.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 384-390; Dec. Dig. § 75.\*]

##### 3. WITNESSES (§ 349\*)—CROSS-EXAMINATION—IMPEACHMENT.

Where a witness for defendant testified that on the day prior to the killing defendant had no gun and wanted to borrow one because he was afraid to travel from the car line to his house, it was proper to cross-examine him as to whether he had married the keeper of a house of prostitution and had been divorced from her, and as to whether a scar on his face was the result of a fight in her house.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349.\*]

##### 4. WITNESSES (§ 257\*)—REFRESHING MEMORY—SUBMITTING WITNESSES' MEMORANDUM TO JURY.

In a trial for homicide committed in a saloon, where an eyewitness cross-examined by defendant's counsel as to the width of the counter, shelving, etc., in the saloon, refreshed his memory by referring to a memorandum of measurements he had himself made of his own accord, the refusal to permit the defendant to have such memorandum submitted to the jury's inspection was not error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. 892; Dec. Dig. § 257.\*]

##### 5. WITNESSES (§ 317\*)—CREDIBILITY—EFFECT OF FALSE TESTIMONY.

In a trial for homicide it was error to instruct that, if the jury believed any witness to have sworn falsely to any material fact, they might disregard the whole or any part of his testimony; it being necessary that it be willfully done.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. § 317.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

**6. WITNESSES (§ 379\*)—IMPEACHMENT—CONTRADICTIONARY STATEMENTS.**

A witness may be impeached by the party against whom he is produced by contradictory evidence by showing that he has made statements differing from his present testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. § 379.\*]

**7. WITNESSES (§ 338\*)—IMPEACHMENT—REPUTATION OF WITNESS.**

A witness may be impeached by the party against whom he is produced by evidence that his general reputation for truth and morality renders him unworthy of belief.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1114, 1115, 1118; Dec. Dig. § 338.\*]

**8. CRIMINAL LAW (§ 553\*)—TRIAL—WEIGHT OF EVIDENCE.**

It is the duty of the jury to receive and consider the testimony of a witness, notwithstanding his impeachment, if they believe his testimony to be true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.\*]

**9. CRIMINAL LAW (§ 1043\*)—APPEAL—OBJECTIONS—INSTRUCTIONS—CREDIBILITY OF WITNESS.**

In a trial for homicide, the court correctly charged as to the impeachment of a witness by the party against whom he is produced by evidence as to his statements contradictory to his testimony and by evidence of his general reputation rendering him unworthy of belief, and that the jury should receive and consider the testimony of a witness, notwithstanding his impeachment, if they believed it to be true, and then erroneously instructed that, if the jury believed any witness had sworn falsely to any material fact, they might disregard the whole or any part of his testimony. *Held*, in the absence of any specific objection to the erroneous instruction, the objection going only to the instruction as a whole, that the partial error was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.\*]

**10. CRIMINAL LAW (§ 823\*)—TRIAL—INSTRUCTIONS—THEORIES OF CASE.**

In a trial for homicide, where it was defendant's theory that he had been assaulted by deceased with a murderous intent when he entered his saloon, and hence was under no obligation to retreat, an instruction as to the duty to retreat, predicated upon the evidence for the state, was not erroneous, where defendant's theory was fully covered by other charges, since all phases of the case need not be contained in one charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

**11. HOMICIDE (§ 54\*)—DEGREES—MANSLAUGHTER.**

Where the accused shot and killed under the belief that he was about to be assaulted, but acted too hastily and without due care, and therefore was not justified in taking life under the circumstances, accused was guilty of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 78; Dec. Dig. § 54.\*]

**12. HOMICIDE (§ 300\*)—INSTRUCTIONS—DEGREE OF OFFENSE.**

In a trial for homicide, an instruction that, before defendant could justify the killing upon the ground of self-defense, it must have appeared to him at the time as a reasonable person that the killing was necessary to save his

life or to prevent great bodily harm, that, if there was no such danger, his negligent though honest belief that there was would not excuse him, and as to his duty to avoid the necessity of killing by all reasonable means, dealt exclusively with the question of justification and was not objectionable as declaring that if there was really no danger to defendant he would be guilty of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

**13. CRIMINAL LAW (§ 711\*)—TRIAL—TIME FOR ARGUMENT.**

Before beginning argument in a homicide case, the court and counsel agreed on four hours for each side, that each of defendant's counsel should have two hours, but counsel opening for defendant did not use 25 minutes of his allotted time. *Held*, that because of the agreement defendant could not complain that the court did not grant his other counsel the right to use the time that had been allowed to and not used by his opening counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1657; Dec. Dig. § 711.\*]

Appeal from Circuit Court, Scott County; Daniel Hon, Judge.

John Bruder was convicted of murder in the second degree, and he appeals. *Affirmed*.

The defendant, John Bruder, was indicted for murder in the first degree, charged to have been committed by shooting Tony Bly. The facts proved by the state, briefly stated, are as follows:

The deceased, Tony Bly, was the proprietor of a saloon in the city of Ft. Smith, in Sebastian county, Ark., and was killed in it by the defendant shortly after 5 o'clock in the afternoon of the 23d day of January, 1913. The defendant had been in the saloon earlier in the afternoon, in the absence of the deceased, and had assaulted one of deceased's customers and beat him up. Between 3 and 4 o'clock in the afternoon, after the deceased had returned to his saloon, the defendant again entered it. Deceased was behind the counter, and called the defendant to him and told him that he understood that he had had some trouble there, and said that he did not want him to come in his place any more raising trouble with his customers. He told the defendant he was trying to run a decent place, and that if he came in there any more and beat up any of his customers he was going to take a gun and kill him. Defendant told him that if he felt that way about it he would not come in any more, and, after shaking hands, the defendant left the saloon. Later, he returned to the sidewalk in front of the saloon, and stood around and walked up and down the sidewalk for a while. He raised on tiptoes and looked in at the front window of the saloon, and then walked off. He then returned and walked into the saloon, and drawing an automatic revolver out of his overcoat pocket, shot the deceased five times. When the defendant began to shoot, the deceased threw up his hands and began to back off. The deceased was behind the counter, and continued to back

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



with his hands upraised until he fell to the floor.

One of the witnesses for the state says: That he was standing, talking to the deceased, when the defendant came in. That he heard some one say, "Tony, did you say you would kill me?" That he looked around and saw the defendant there. That he then heard Bly say: "Yes, I said I would kill you if—" and that he did not hear the rest of the sentence. That defendant was standing there with his hand in his overcoat pocket, and jerked out his pistol and began to shoot at the deceased, and shot five times in rapid succession. That the deceased made no hostile demonstrations towards the defendant, but raised his hands and began to back away. The deceased died a few days later from the effects of the gunshot wounds. Several eyewitnesses to the killing testified that the deceased made no hostile demonstrations whatever towards the defendant, and that he was unarmed.

John Bruder, the defendant, testified for himself: "I was drinking heavily on the day that I shot deceased, and had been for several days prior thereto. On the afternoon of the killing, as I walked out of the saloon, Bly, who was sitting behind the little office, said to me: 'If you come in here again, I am going to kill you.' I asked him what he meant, and he repeated his statement. I shook hands with him and walked out. I was not mad, and did not know that he was. I had tried to borrow a pistol before this from Mack Dean. I told him I was staying out at my brother's house, which was situated away from other houses, and I needed a pistol to protect me. Later I met another friend, who told me where I could get a pistol, and I went over there and got it. A young man whom I did not know had told me that he would go out to the house and stay all night with me, and I started out to find him. I looked in the door of Bly's saloon for him and did not see him. Afterwards, I came back and looked in again, and changed the pistol from my pants pocket to my overcoat, because it was rubbing my leg. While I was standing there in front of the deceased's saloon, some one came out and told me they wanted to see me in the saloon. I asked him who wanted to see me, and he replied that it was Tony Bly. I told him that Tony was mad at me and half crazy, and he said that was all over and Tony wanted to apologize. I looked in and saw Tony, and he motioned to me to come in. I went in, and he was standing behind the counter. I said to him: 'What do you want, Tony? You said you were going to kill me.' He replied, 'Yes, that is what I said, and I am going to do it,' and he reached for his gun. When he did that, I commenced shooting. I had an automatic pistol, and do not know how many times I shot." Cross-examination: "When Tony said he was going to kill me, he reached behind him, and I do

not know whether he reached for his pocket or reached for the shelving. I reached across the counter to do the shooting."

In rebuttal, the state introduced a number of witnesses who testified that they knew the reputation of the defendant for truth and morality in Ft. Smith, where he lived, and that it was bad.

The jury returned a verdict of guilty of murder in the second degree, and fixed the defendant's punishment at a term of 21 years in the state penitentiary.

Cravens & Cravens, of Ft. Smith, for appellant. Wm. L. Moose, Atty. Gen., and Jno. P. Streepey, Asst. Atty. Gen., for the State.

HART, J. (after stating the facts as above). [1] The first assignment of error relied upon by the defendant for the reversal of the judgment of conviction is that the court erred in refusing to grant him a continuance. The motion states: That T. V. Sprinkles and Chance Rodgers would testify that, immediately prior to the killing, they were standing in front of deceased's saloon, when some young white man came out of the saloon and told the defendant that deceased wanted him to come in the saloon, and that Bruder replied: "I do not want to come in because Tony is mad and half crazy." That the man then said, "Tony is all right now and wants you to come in." And Bruder replied, "Well, if he is all right and wants to see me, I will go in," and immediately he went into the saloon. That defendant is informed and believes that the witness Sprinkles is at his home in Poteau, Okl., confined by illness, and is unable to attend court. That the witness Rodgers is at his home at Stigler, Okl.; but that both of said witnesses can and will be present at the next term of the court. A certificate of a physician was introduced, to the effect that Sprinkles was under his care and was too sick to attend the trial. The motion for continuance also stated: That W. L. Peevey would testify, if present, that just before the shooting he heard the deceased tell some young man whom he did not know to go out in front of the saloon where Bruder was and tell him to come inside. That Peevey was duly served with a subpoena in this case, and that his home was in Crawford county, Ark. One of defendant's attorneys testified that he had taken the affidavit of Peevey as to what his testimony would be; that he had pointed Peevey out to a deputy sheriff in the city of Ft. Smith; that the witness had been duly served with a subpoena; and that he had seen Peevey in Ft. Smith not longer than a week before the trial. In regard to the witness Rodgers, it may be said that no excuse whatever is shown by the defendant for his nonattendance at the trial, and no testimony is given tending to show that he could be procured at the next term of the court if the case was continued. Rodg-

ers was a nonresident of the state of Arkansas, and his attendance at the trial could not be compelled under the process of the court. Sprinkles was also a nonresident of the state, and was therefore beyond the jurisdiction of the court. It is true that a certificate of a physician was presented to the court, showing that the witness was sick and unable to attend court; but this is not sufficient to show that his voluntary attendance at court could have been procured. His deposition might have been taken, under the statute, and no excuse for not doing so is shown. The court offered to permit defendant to read the affidavits of both these witnesses, taken by his attorney at Ft. Smith some time prior to the trial. The defendant proved by a lawyer in attendance at court that he had known Lon Peevey for about ten years; that he lived south of Alma and was a farmer; that it had been four or five years since he saw him last; and that he did not know where he is now. The witness was a resident of Ft. Smith, and said that he had not seen him in Ft. Smith lately. There is nothing to show that Lon Peevey was the same person as W. L. Peevey, who had been subpoenaed to attend the trial of this case. For aught that appears from the record, the W. L. Peevey that was subpoenaed as a witness in this case may have been a nonresident of the state and beyond the jurisdiction of the court. At least, there is nothing in the record to show that he lived within the jurisdiction of the court, or that his attendance could have been procured if the case had been continued. It is well settled in this state that the continuance of a trial in a criminal case is within the sound discretion of the trial court, and that the refusal of the trial court to grant a continuance will never be ground for a reversal of a judgment of conviction unless it clearly appears that there has been an abuse of such discretion and that it manifestly operates as a denial of justice. *Miller v. State*, 94 Ark. 538, 128 S. W. 353; *Jackson v. State*, 44 Ark. 496.

[2] It is next assigned as error that the court erred in excusing J. A. Wagoner, a juror who had been accepted by both sides to try the case. Wagoner was the fifth juror selected, and at the time of his selection the defendant had exercised only seven peremptory challenges; but, at the time he was excused by the court, eight jurors had been selected, and the defendant had exercised fifteen peremptory challenges. The juror became suddenly ill after he had been accepted, and, on account of his illness, was excused by the court. We have held that it was within the discretion of the court to excuse a juror on account of sickness. *Caughron v. State*, 90 Ark. 462, 139 S. W. 315. Therefore the court did not err in excusing the juror.

[3] It is next contended by counsel for de-

fendant that the court erred in permitting cross-examination of witness Dean concerning his residence and association. Mack Dean had testified for the defendant that he had seen him several times on the day of the killing and had been in his company frequently for several days prior thereto; that the defendant was very drunk on the day of the killing, and had been drinking heavily for several days; that defendant had told him on a day prior to the killing that he did not have any gun and wanted to borrow one because he was afraid to travel from the car line to the house where he slept. In response to questions asked him on cross-examination, the witness testified that he had married a woman who ran a whorehouse and later had been divorced from her; that a scar which was on his face was the result of a fight in the whorehouse. It is always competent to interrogate a witness on cross-examination touching his present or recent residence, occupation, and association. *Hollingsworth v. State*, 53 Ark. 387, 14 S. W. 41.

[4] The next assignment of error is that the judgment should be reversed because the court refused to compel Trice, a witness for the state, to show a memorandum to defendant's counsel. Trice was an eyewitness to the killing, and was by occupation a carpenter. It appears that while he was being cross-examined by defendant's counsel in regard to the width of the counter, shelving, etc., in the saloon where the killing occurred, he refreshed his memory by referring to a memorandum of measurements which he had himself made. The questions and answers show that the witness was referring merely to a memorandum of some figures he had made of his own accord of the width of the counter, shelving, etc., in the saloon. Under these circumstances, the court did not err in refusing to permit the defendant to have said memorandum submitted to the jury for their inspection. 1 *Wigmore on Evidence*, § 673.

[5-8] It is next insisted by counsel for defendant that the court erred in giving instruction No. 17, at the instance of the state, which is as follows:

"A witness may be impeached by the party against whom he is produced, by contradictory evidence, by showing he has made statements different from his present testimony, or by evidence that his general reputation for truth or morality renders him unworthy of belief.

"But the jury are the sole judges of whether the witness has been impeached, and if an impeached witness is corroborated the jury may still take his testimony, notwithstanding the impeachment, and are judges of his credibility, and may take and consider it, if they believe he has sworn truthfully although he is impeached.

"If the jury believe any witness has sworn

falsely to any material fact, they may disregard the whole or any part of his testimony."

The objection urged to the instruction by the defendant is that the third paragraph warranted the jury in disregarding testimony it believed to be true if it came from a witness whom the jury believed had sworn falsely to some other material fact. They cite, in support of their contention, *Frazier v. State*, 56 Ark. 242, 19 S. W. 838; *Taylor v. State*, 82 Ark. 540, 102 S. W. 367; *Bloom v. State*, 68 Ark. 337, 58 S. W. 41. It is true that an instruction standing by itself in substantially the same form as the third paragraph of instruction No. 17 was condemned in the cases cited by defendant. The reason given was that, before you can disregard the testimony of a witness for false swearing, the false swearing must be willfully done; and, moreover, the instruction might be construed as warranting the jury in disregarding the testimony which it believed to be true, if it emanated from a witness who had sworn falsely to some other fact. In the case of *Darden v. State*, 73 Ark. 315, at page 320, 84 S. W. 507, at page 508, the court said: "The exception to the instruction given by the court on his own motion and copied in this opinion was general. The objection urged against it in this court is that the court said a reasonable doubt is one for which a juror could give a reason, if called upon to do so. If this be a defect, which we think it was, it should have been reached by a specific objection. It is one the court would have doubtless readily remedied if its attention had been called to it. The objection extended to the whole instruction, consisting of four paragraphs, and, one or more of these being sufficient, it should not have been sustained. See *St. L., I. M. & S. Ry. Co. v. Barnett*, 65 Ark. 255 [45 S. W. 550]."

In the application of the rule there announced to the present case, we do not think the judgment should be reversed for the error complained of. No specific objection was made to the instruction, but only an objection made to it as a whole. The instruction is in three paragraphs. The first paragraph is a correct declaration of the law. No objection is urged by the defendant to the second paragraph, and we can perceive none to it that would not have been cured by a specific objection. The first part of the second paragraph of the instruction tells the jury, if an impeached witness is corroborated, the jury may still take his testimony, notwithstanding the impeachment. This was wrong, because it was the duty of the jury to receive and consider the testimony of the witness, notwithstanding his impeachment, if they believed his testimony to be true; and the jury are, in effect, told this in the latter part of the paragraph. In effect, the second paragraph told the jury that they were the judges of the credibility of the witnesses, and that they must take and consider

the testimony of any witness, if they believe he has sworn truthfully, although he may be impeached in one of the manners provided by law. The third paragraph of the instruction, if standing alone, would be objectionable, under the rule laid down in the cases cited by counsel for defendant, *supra*, and would be reversible error; but when we consider that the objection extended to the whole instruction, consisting of three paragraphs, and that the remaining paragraphs were not open to any valid objection, we are of the opinion, under the rule announced in the case of *Darden v. State*, *supra*, the objection to the third paragraph of the instruction should not be sustained and the judgment reversed, for the reason that the defect contained in it should have been met by specific objection. We think that, when the whole instruction is read together, it, in effect, tells the jury that they are the judges of the credibility of the witnesses, although one or more of them had been impeached, and that if they believe a witness has sworn falsely in part and truthfully in part they should reject that portion which they believe to be false and accept that part they believe to be true. See, also, *Bennett v. State*, 95 Ark. 107, 128 S. W. 851.

It is next contended by counsel for defendant that the court erred in giving instruction No. 12, which is as follows: "No one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, or in a mortal combat, is justified or excused in taking the life of the assailant, unless he is so endangered by such assaults as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and must have employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. He cannot provoke an attack or bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary on the ground of self-defense. He cannot invite or voluntarily bring upon himself an attack with the view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He cannot take advantage of a necessity produced by his own unlawful and wrongful act. After having provoked or invited the attack, or brought on the combat, he cannot be excused or justified in killing his assailant for the purpose of saving his own life, or preventing a great bodily injury, until he has, in good faith, withdrawn from the combat, as far as he can, and done all in his power to avoid the danger and avert the necessity of the killing."

"The court charges you that a necessity, either actual or apparent, as explained in the instruction in this case, is the sole ex-

cuse which will justify the taking of human life."

[10] It is conceded by counsel for defendant that this instruction is taken from *Carpenter v. State*, 62 Ark. 286, 86 S. W. 900; but it is contended that the instruction is erroneous because, according to the testimony of the defendant, he was assaulted by the deceased with a murderous intent when he entered the saloon, and he was therefore under no obligation to retreat. The instruction, as given, was predicated upon the evidence adduced in behalf of the state. The theory of the defendant was fully covered by other instructions given by the court, and it is well settled that all phases of a case cannot, and need not, be contained in one instruction. Therefore the court did not err in giving this instruction.

[11, 12] It is also contended by counsel for defendant that the court erred in giving instruction No. 11, which is as follows:

"Before the defendant can justify the killing of deceased upon the grounds of self-defense, it must appear to him at the time as a reasonable person that the danger of losing his own life or receiving a great bodily injury at the hands of the deceased was so urgent and pressing that the killing was necessary to save his own life, or prevent his receiving great bodily injury. He must have acted with due caution and circumspection. If there was no danger, and his belief of the existence thereof be imputable to negligence, he is not excused, however honest the belief may be. He must have used all reasonable means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing the deceased.

"It must also appear that the deceased was the assailant, and began the encounter which resulted in his death, or that defendant had really and in good faith endeavored to decline any further contest before the mortal injury was given.

"If the defendant willfully and of his malice aforethought, and after premeditation and deliberation, killed the deceased, Tony Bly, while laboring under a sense of wrong or some indignity, real or fancied, that the deceased had done him, he would be guilty of murder in the first degree."

They say that the first paragraph of this instruction told the jury in substance that, if there was really no danger to the defendant at the time of the killing, no matter how honest such belief of danger was in his mind, if such belief was imputable to negligence, the defendant would be guilty of murder. We do not think the first paragraph of the instruction conveyed any such impression upon the minds of the jury. That paragraph of the instruction dealt exclusively with the question of justification, and did not, in any way, touch upon the subject of murder, or

even manslaughter. This court has held that where a jury believes that the defendant shot under the belief that he was about to be assaulted, but that he acted too hastily and without due care, and was therefore not justified in taking life under the circumstances, he is guilty of manslaughter. *Allison v. State*, 74 Ark. 444, 86 S. W. 409; *Brooks v. State*, 85 Ark. 376, 108 S. W. 205. But, as we have already stated, the court, in the first paragraph of the instruction, was dealing exclusively with the question of self-defense, and in other instructions given defined manslaughter and told the jury under what circumstances the defendant would be guilty of that offense. We do not think the court erred in giving this instruction.

[13] Finally, it is insisted by counsel for defendant that the judgment should be reversed because the court arbitrarily curtailed the time allowed the defendant's counsel within which to argue the case. Before beginning the argument, the court and attorneys agreed on 4 hours on each side, which the attorneys stated to the court they would divide as follows: That W. A. Bates, for the prosecution, should take 1 hour, and A. A. McDonald and Paul Little, for the prosecution, 1½ hours each; and for the defendant, T. N. Sanford and Ben Cravens 2 hours each. T. N. Sanford opened for the defendant, and lacked 25 minutes of consuming the 2 hours allotted to him for his argument. Mr. Cravens, the other counsel for the defendant, requested the court to allow him in his argument to use the time remaining to Mr. Sanford, which the court refused to do. Counsel for the defendant, having specifically agreed to the amount of time that was to be used by each one in making his argument to the jury, are not now in an attitude to complain that the court refused to allow Mr. Cravens to use the time which had not been consumed by Sanford in his opening argument for the defendant. If the court had allowed 4 hours to the defendant, then he would not have had any right to direct how much of this time should be consumed by each attorney; but the attorneys would have the right to divide the time as best suited them. But, for the reason that they agreed in advance as to how much time should be consumed by each of them, the defendant is not now in an attitude to complain that the court did not grant Cravens the right to use the time that had been allotted to Sanford.

Other assignments of error have been urged upon us for a reversal, but we do not deem it necessary to discuss them. We have considered them carefully, and have reached the conclusion that the case was fairly tried upon proper instructions given by the court, and that the evidence warranted the verdict.

Therefore the judgment will be affirmed.

## ROSS v. VELTMANN et al.

(Court of Civil Appeals of Texas. San Antonio. Dec. 10, 1913. Rehearing Denied Jan. 7, 1914.)

## 1. INJUNCTION (§§ 163, 188\*)—RESTRAINING ORDER—DISSOLUTION—CHANGED CONDITIONS.

Where, after the issuance of a temporary restraining order, a sworn answer is filed showing changed conditions that no longer entitle complainant to an injunction, the court may properly dissolve the same, taxing against defendant the costs incident to the proceedings so far as necessary to give complainant the relief to which she is entitled; complainant's further rights depending upon the changed conditions.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371, 408; Dec. Dig. §§ 163, 188.\*]

## 2. HIGHWAYS (§ 30\*)—ESTABLISHMENT—NOTICE—RECORD.

It is not essential to the legality of proceedings for the establishment of a highway that the character of the notice given be made a matter of record, but it is sufficient if a proper notice is given or notice has been waived.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 60-70; Dec. Dig. § 30.\*]

## 3. INJUNCTION (§ 118\*)—PLEADING—REQUISITES.

In a suit for an injunction, the rule that the allegations of the petition must be taken most strongly against complainant is re-enforced by the further requirement that the material and essential elements which entitle complainant to relief shall be sufficiently certain to negative every reasonable inference arising from the facts so stated, that complainant might not, under other supposable facts connected with the subject, be entitled to such relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.\*]

## 4. HIGHWAYS (§ 38\*)—ESTABLISHMENT—NOTICE OF HEARING—OBJECTIONS—WAIVER—APPEARANCE.

An objection to notice of intention to lay out a highway, in that it was signed by only one member of the jury of view, was waived by the landowner's appearance pursuant to the notice.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 93-97; Dec. Dig. § 38.\*]

## 5. HIGHWAYS (§ 41\*)—ESTABLISHMENT—REPORT OF VIEWERS.

Where the jury of view in highway proceedings were only authorized to lay out a third class road, their report was not fatally defective because it recited the laying out of a "road" instead of a "third class road," since no other kind of a road could be legally established thereunder.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 90, 108-131; Dec. Dig. § 41.\*]

## 6. HIGHWAYS (§ 41\*)—ESTABLISHMENT—VIEWERS' REPORT—HEARING BY COMMISSIONERS' COURT.

In proceedings for the establishment of a third class road, the law does not require notice to the landowner of the date of the hearing by the commissioners' court, on the report of the jury of view, since the owner, having received notice from the jury, must follow up the proceedings in the court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 90, 108-131; Dec. Dig. § 41.\*]

## 7. HIGHWAYS (§ 41\*)—ESTABLISHMENT—VIEWERS' REPORT—HEARING BY COMMISSIONERS' COURT.

In proceedings to establish a third class road, it was not necessary that the commissioners' court should pass on the report of the jury of view at the first term, or at a regular term, of such court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 90, 108-131; Dec. Dig. § 41.\*]

## 8. HIGHWAYS (§ 41\*)—ESTABLISHMENT—VIEWERS' REPORT—HEARING—ORDER—MODIFICATION—NOTICE TO LANDOWNER.

Where an order of the commissioners' court, adopting the report of the jury of view in third class highway proceedings, was held by the district court, at the suit of a property owner, to be defective in certain particulars, it was not necessary that such landowner be notified of the court's intention to pass a new order to cure the defect.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 90, 108-131; Dec. Dig. § 41.\*]

## 9. INJUNCTION (§ 122\*)—SUPPLEMENTAL PETITION—VERIFICATION.

Where a supplemental petition in an injunction suit alleged a new ground for injunctive relief, it should have been verified.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 262-268; Dec. Dig. § 122.\*]

Appeal from District Court, Kinney County; W. C. Douglas, Judge.

Suit by Virginia Ross against Jos. Veltmann and others. Decree for defendants, and complainant appeals. Affirmed.

Martin & Martin, of Uvalde, for appellant.

MOURSUND, J. On May 21, 1913, appellant submitted to Hon. W. C. Douglas, judge of the Sixty-Third judicial district, her petition, under oath, praying that upon final hearing an order of the commissioners' court of Kinney county, establishing a road across a section of land owned by her, be vacated and annulled, and that a temporary injunction issue restraining Jos. Veltmann, county judge of Kinney county, Hans Petersen, Albert Schwandner, L. N. Lewis, and A. M. Slaton, the other members of the commissioners' court of said county, and T. F. Scarborough, from interfering with her fence and opening up said road. The order establishing the road was alleged to be void on the grounds: (1) The road was classified as a "community road." (2) The width of the road was not stated. (3) The notice received by plaintiff from the jury of view gave plaintiff no notice that a community road was to be laid out across her land. (4) No road overseer was appointed by the court who would be authorized to apportion hands to work the road. (5) The jury of view was appointed to lay out a third class road through plaintiff's land, but the court classified and established a community road. It was further alleged that defendant Scarborough had been employed by the commissioners' court to remove plaintiff's fences and open up the road. Judge Douglas granted a temporary restraining order, but refused to grant a temporary injunction.

tion until a hearing could be had after notice to defendants, stating in his order that the petition showed, by allegation and inference, that all requirements necessary to legally lay out a third class road had been complied with, except that no classification was made of the road, and no width ascribed to it, and that if this was correct, it would be his duty to forbid the opening of the road until the two requisites named were complied with. He concluded that the classification as a community road was no classification because such a road is not recognized by statute, and that no "neighborhood road" was authorized because the road did not follow section lines.

On June 7, 1913, the defendants answered by general demurrer, three special exceptions, a general denial and a special answer, containing the following allegations: That at the regular February term, 1913, of said commissioners' court, said court upon its own motion passed an order to establish a third class road, leading from the town of Brackett to the Tom Perry ranch, and appointed a jury of view to lay out and survey said road, the names of the members of the jury of view being stated; that proper and legal notices were issued to said members of the jury of view, and legally served upon them by the sheriff of Kinney county and due return made thereon, said notices being attached to and made part of the answer; that four members of the jury of view, naming them, subscribed the oath prescribed by law, their said oaths being also attached to the answer; that before said jury of view laid out and surveyed the road complained of by plaintiff Scarborough, one of the members of the jury of view issued to J. E. Fritter, the agent of plaintiff, the proper and legal notice required by law to be given to owners of land over which the road to be established would run or be likely to run, stating at the time the date when the jury of view would lay out and survey said road, an affidavit of said Scarborough to that effect being attached to the answer; that on February 28, 1913, said four members of the jury of view proceeded to survey and lay out the road, and made their report, a copy of which was attached, in which the road was described; that when said jury of view met to assess the damages to the landowners over whose lands said road was laid out, Fritter, plaintiff's agent, was present and failed and refused to submit any claim for damages; that on May 12, 1913, the report of the jury of view was approved by the commissioners' court of Kinney county, the field notes of the road recorded in the minutes of said court, damages allowed plaintiff in the sum of \$15, and the road classified as a "community road," but on June 2, 1913, said court in special session rescinded and annulled said order, and passed an order approving the report of the jury of view, establishing and classifying the road as

a "third class road" and allowing plaintiff \$15 as damages. A certified copy of the order attached to the petition shows that the width of the road was fixed at 30 feet. It was further alleged that a warrant had been drawn in favor of plaintiff for \$15 and placed in possession of the county treasurer of Kinney county subject to her demand. On June 16, 1913, plaintiff filed her first supplemental petition, consisting of a general demurrer to defendants' answer, various special exceptions thereto, and an answer to the effect that plaintiff had no notice of the intention of the commissioners' court to pass the order entered on June 2, 1913, and had no opportunity to contest the same, wherefore she prayed as in her original petition, and in the alternative for all costs because of the proceedings taken by the commissioners' court after the filing of her petition. Upon consideration of the case as made by the additional pleadings, and after hearing argument, the judge refused the temporary injunction, and dissolved the temporary restraining order. Plaintiff appealed.

[1] The contention made by appellant's petition, briefly stated, was that the order establishing a community road was null and void, both because no such road is known to our statute, and because there was no order appointing a jury of view to lay out that kind of road; and the notice given appellant by the jury of view did not disclose that a community road was to be laid out. These contentions were sustained by the court. Later it was made to appear to the court by sworn answer that a new order had been entered by the commissioners' court, establishing a third class road upon the same report of the jury of view, whereupon he refused to grant a temporary injunction, and dissolved the temporary restraining order. Even when a temporary injunction has been granted, if it be made to appear by sworn answer that the conditions have changed and no longer entitle plaintiff to an injunction, the judge is authorized to dissolve the injunction. *Allen v. Abernathy*, 151 S. W. 348.

[2] As was correctly held by Judge Douglas, the matter then resolves itself into a matter of costs. Plaintiff has been protected from unlawful acts, and the costs incident to the proceeding, in so far as it gave plaintiff the relief to which he was entitled, should be taxed against defendant. Any further rights asserted by plaintiff must be based upon conditions then existing, and it must appear that such conditions still entitle plaintiff to relief by injunction; otherwise the appellate court will not set aside the dissolution of the injunction. The question to be considered upon this appeal is whether plaintiff is entitled to have a temporary injunction restraining the opening and laying out of the road established and classified as a third class road by the order of June 2, 1911. Several contentions are made by appellant in this connection, one of which is

that appellees' answer contained no allegation stating the character of notice given plaintiff's agent by the jury of view, but merely a conclusion that the written notice given plaintiff's agent was "the proper and legal notice required by law," and that therefore the subsequent proceedings are not legal. It is not necessary to the legality of the proceedings that the character of the notice be made a matter of record. *Sneed v. Falls County*, 91 Tex. 168, 41 S. W. 481. If sufficient notice was given, or notice was waived, the further proceedings are authorized to be taken. It will be noticed that in plaintiff's petition it is admitted that notice was given, but it is expressly denied that the same was of the proposed laying out of a community road. It is also alleged that the order appointing a jury of view directed the laying out of a third class road. The natural inference arising from these allegations is that the notice given by the jury of view was that a third class road would be laid out, and such inference is not negatived in any of plaintiff's pleadings, nor shown to be untrue by any allegations of defendants' pleadings.

[3] The rule with regard to pleadings in injunction suits is as follows: "The rule of pleading that the statements of a party are to be taken most strongly against himself is reinforced in injunction suits by the further requirement that the material and essential elements which entitle him to relief shall be sufficiently certain to negative every reasonable inference arising upon the facts so stated, from which it might be deduced that he might not, under other supposable facts connected with the subject, thus be entitled to relief." *Cillis v. Rosenheimer*, 64 Tex. 246; *Schlinke v. De Witt County*, 145 S. W. 665; *Weaver v. Emison*, 153 S. W. 923.

[4] It is clear that the record discloses no charge of illegality in the proceedings because of failure to give notice of the intention to lay out a third class road, and on the contrary that the inference from the facts stated is that such was the character of the notice given. It further appears from the answer and the affidavit of a member of the jury of view, thereto attached, that such notice was in writing, and that it brought on negotiations between said agent and the jury of view, and at the request of the agent the jury of view did not meet to assess damages until he returned from San Antonio, and when it met he was present, but declined to state what damages plaintiff claimed, if any. The record discloses no illegality in the notice on the ground of not stating, or misstating, the character of the road to be laid out, and if the notice be insufficient because signed by only one member of the jury of view, such defect is waived by appearance pursuant to the notice. *Railway v. Baudat*, 18 Tex. Civ. App. 599, 45 S. W. 939.

[5] The jury of view made their report, and only one objection is urged thereto, namely, that they reported the laying out of

a "road" instead of a "third class road." As they were only authorized to lay out a third class road, and no other kind of road could be legally established upon the report as a basis, we do not regard the objection as fatal, and hold that the report was sufficient in law to authorize the establishment of a third class road. *Railway v. Baudat*, supra.

[6-8] The question then arises whether the commissioners' court complied with the law in its proceedings, taken after such report was filed. The law does not require notice to the landowner of the date when the commissioners' court will pass upon the report of the jury of view. The owner, having received notice from the jury of view, must follow up the proceedings in the commissioners' court, and it is not necessary to give him notice of the time when the court will take up the matter. At the regular May term the court entered an order which plaintiff contended, and still contends, was a nullity, and which Judge Douglas held to be null and void when first passing upon the petition. The commissioners' court was not required to pass upon the matter at the first term, nor at a regular term. *Terrell v. Tarrant Co.*, 8 Tex. Civ. App. 563, 28 S. W. 367. It was not necessary to notify plaintiff of the intention of the court to pass a new order, pursuant to the suggestion of the district judge in his order granting the temporary restraining order, nor does it appear that plaintiff ever filed any objections to the report of the jury of view, or asked to be heard, nor that she was prevented from perfecting an appeal, if she was entitled to appeal without having made any claim for damages.

[8] It further appears that the supplemental petition, in which a want of notice of such intention is pleaded, was not sworn to, and, being a new ground alleged for the purpose of securing relief by injunction, it appears that the same should have been sworn to.

Although the jury of view allowed no damages, no claim being made, the commissioners' court allowed \$15, for which a warrant was drawn in favor of plaintiff, and placed in the hands of the county treasurer subject to her order.

We conclude that all of appellant's assignments are without merit, and that therefore the judgment should be affirmed.

Judgment affirmed.

SWEETWATER LUMBER CO. v. HAMNER.  
(Court of Civil Appeals of Texas. Ft. Worth.  
Dec. 6, 1913.)

CONTRACTS (§ 335\*) — BUILDING CONTRACT—  
MATERIALMAN — ACTION AGAINST OWNER—  
ASSIGNMENT.

Where a petition by a materialman against an owner for materials furnished to the contractor for the building alleged that the contractor was indebted to plaintiff on account of

materials furnished for the building in a greater sum than \$500, and was still so indebted; that the contractor, to secure payment to plaintiff therefor, gave it an order on defendant to pay plaintiff \$500; that plaintiff delivered the assignment to defendant, who accepted the order and promised to pay it out of the sums owing by him to defendant as they became due under the contract; that the contract has been performed, and the work completed, and the indebtedness of the contractor for materials has been paid, except the debt sued on, etc.—the petition was not fatally defective because it failed to allege that the contractor had furnished receipts for material used in the construction of the building, as required by the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1664-1676; Dec. Dig. § 335.\*]

Appeal from Nolan County Court; John H. Cochran, Jr., Judge.

Action by the Sweetwater Lumber Company against Ed. J. Hamner. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. F. Eldson and Crane & Bondies, all of Sweetwater, for appellant. Ellis Douthitt and Geo. T. Wilson, both of Sweetwater, for appellee.

CONNER, C. J. The appellant company instituted this suit against appellee, and as the basis of recovery sought presented a petition, which, omitting formal parts, reads as follows:

"That heretofore, to wit, on or about September 19, 1911, Hugh Martin, a contractor and builder, was engaged in the erection and construction in Sweetwater, Texas, of a home building for the defendant herein under a contract, the nature and terms of which are well known to the defendant, he being a party thereto, but unknown to these plaintiffs, except so far as herein stated. That at the time named said Hugh Martin was indebted to plaintiffs for and on account of materials furnished for and used in the construction of said home in a sum greater than \$500, and is still so indebted. That at the time named the defendant herein was indebted to said Martin for and on account of labor done and performed in the construction of said home in the sum of \$263.05 and more, to the completion of said work upon his said home, plus \$1,041 and more, due him when receipts for the materials used thereupon were obtained. That, in order to secure the payment to plaintiffs of the amount so owing to them as aforesaid, said Martin gave to plaintiffs an order upon the defendant requesting and requiring him to pay to plaintiffs said sum of \$500. That plaintiffs presented and delivered said order and assignment to defendant on or about September 19, 1911. That on the date last named defendant accepted said order and assignment by his certain letter in writing, and promised therein to pay said sum to these plaintiffs out of the sums aforesaid owing by him to defendant as and when they became due and pay-

able under the conditions stated aforesaid. That said conditions have been met, in that said work has been completed, and the indebtedness of said Martin for and on account of materials has been paid off and satisfied, except the debt sued upon herein. Plaintiffs say further, if they are mistaken in saying that all indebtedness of said Martin for materials has been paid (which they do not admit, but insist that the same has been paid), that such fact does not constitute reason why the defendant should not pay them herein, for that the debt sued upon is on account of such materials furnished and used in said home building.

"(2) They say that on or about the date of the contract sued upon the defendant, vi et armis, drove the said Hugh Martin, his agent and employes, away from and off the works and improvements being carried forward on his said homestead, and has ever since refused to permit the said Hugh Martin, his agents or employes, to conduct said work. That at such time there was due and owing to the said Hugh Martin under his contract with defendant herein the sum of \$1,304.65. That said work was practically if not entirely completed. That, to carry said work to completion, and to pay off debts for materials, etc., owing by said Hugh Martin on account of said work, there was necessary to be expended about the sum of \$804.65. That there was therefore then due and owing said Hugh Martin on account of said work the sum of \$500.

"(3) That the defendant is accordingly liable and bound to pay these plaintiffs said sum of \$500; but, though often thereunto requested, he has hitherto wholly failed and refused, and still fails and refuses, to pay the same or any part thereof, to plaintiff's damage in the sum of \$600.

"(4) Wherefore, plaintiffs sue, and pray that defendant be cited to appear and answer herein, and that upon hearing hereof they have judgment for their said damage, with interest and costs of suit, and for such other and further relief as they may be entitled to."

The court erred, we think, in sustaining appellee's general demurrer to the petition. Indulging in its favor all reasonable intentions, as is the rule when challenged by general demurrer, the petition sufficiently charges appellee with an indebtedness which he promised, in writing, to pay to appellant. If the contract between appellee and Martin be subject to conditions which will defeat the alleged indebtedness to Martin, the matter is defensive in character, and lies particularly within the knowledge of appellee. The mere failure of Martin to obtain and furnish receipts for material used in the construction of appellee's building would not defeat the indebtedness to Martin, if such indebtedness actually existed as alleged, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the failure of the petition to aver that such receipts were obtained does not, in view of all the allegations, render the petition fatally defective.

The court also sustained several special exceptions; but we will not discuss them. It is to be presumed, we think, that appellant would have corrected by amendment any formal omission or defect in his petition called for by a special exception had the court overruled the general demurrer. It certainly would be useless to so attempt after the court had ruled that the petition was wholly bad on the general exception.

It is ordered that the judgment be reversed, and the cause remanded.

#### GAMER CO. v. NEWBERG.

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 25, 1913.)

##### DOUBLE RECOVERY—NOT PERMITTED.

Where plaintiff's account for labor and materials on a plumbing job could not properly amount to more than \$92.25, including profit to him as a contractor, items of 20 per cent. added to cover matters possibly overlooked and \$52 for personal services were in the nature of a double recovery, and not permissible.

Appeal from Tarrant County Court; Chas. T. Prewett, Judge.

Action by the Gamer Company against C. A. Newberg, with counterclaim by defendant. Judgment for plaintiff, and it appeals. Reversed, and judgment for a certain amount rendered for plaintiff.

F. H. Haddix, of Ft. Worth, for appellant. Crenshaw & Boykin, of Ft. Worth, for appellee.

SPEER, J. Chas. Gamer sued C. A. Newberg to recover \$299.20 upon a verified account for certain plumbing materials sold and delivered by the plaintiff to the defendant. The defendant answered, pleading a counterclaim of \$163 according to an itemized account for labor and material furnished to plaintiff in making certain plumbing repairs. The defendant admitted the correctness of plaintiff's account, except the sum of \$15, and during the progress of the trial paid \$135 in open court. A jury trial resulted in a verdict and judgment in favor of plaintiff for the sum of \$11.20, and the plaintiff has appealed.

The admission of certain testimony is complained of in the first assignment of error; but appellee insists that the error has been waived since the same or similar testimony was adduced by appellant himself. But, however this may be, a disposition of this assignment becomes unnecessary, for we are compelled to sustain the remaining assignments to the effect that the judgment is not supported by the evidence. Necessarily, the verdict and judgment allow appellee's full counterclaim, while his own

testimony, which is all there is to support it, shows that he is entitled to a much less sum. We have carefully read all the evidence, and are of the opinion it is insufficient to support appellee's counterclaim in excess of \$92.25. His testimony makes it very clear that this sum is a reasonable compensation for all the labor and material furnished by him, and includes a profit or compensation to him as contractor, so that the items of "20 per cent. added on to cover something he may have overlooked" and \$52 for his personal services were improperly allowed. They constituted in effect a double recovery. The judgment of the county court of Tarrant county for civil cases is therefore reversed, and judgment here rendered in favor of appellant for the amount sued for, less \$227.25, or the aggregate of the sum paid during the trial, and the account proved.

Reversed and rendered for appellant.

#### BLACK v. TEXAS & P. RY. CO.

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 1, 1913. Rehearing Denied Nov. 29, 1913.)

##### 1. ABATEMENT AND REVIVAL (§ 54\*)—DEATH (§ 47\*)—SURVIVORSHIP.

In an action by a surviving widow for personal injuries to her deceased husband, the petition, which did not allege whether the injuries received did or did not result in his death, failed to state a cause of action, either under Rev. Civ. St. 1911, art. 4694, providing an action for wrongful death, or article 5686, providing that causes of action for personal injuries other than those resulting in death shall not abate by reason of the death of the injured person; the latter action not surviving at common law, and the former being wholly a creature of statute.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 255-258, 261-270; Dec. Dig. § 54; \* Death, Cent. Dig. § 61; Dec. Dig. § 47.\*]

##### 2. ABATEMENT AND REVIVAL (§ 54\*)—PERSONAL INJURIES—DEATH OF PARTY.

No action can be maintained under Rev. Civ. St. 1911, art. 5686, providing that rights of action for personal injuries not resulting in death shall survive, unless the injury did not cause decedent's death.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 255-258, 261-270; Dec. Dig. § 54.\*]

Appeal from District Court, Taylor County; Thomas L. Blanton, Judge.

Action by Mrs. W. C. Black against the Texas & Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Scarborough & Hickman, of Abilene, for appellant. Cunningham & Sewell, of Abilene, for appellee.

SPEER, J. Mrs. W. C. Black, the surviving widow of W. C. Black, who died on about the 1st of June, 1912, brought this suit against the Texas & Pacific Railway Company to recover damages for alleged personal injuries received by the deceased, and, from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a judgment sustaining a general demurrer to her petition and dismissing her cause of action, has appealed.

[1, 2] It is unnecessary for us to state the character of injuries received by the deceased or the grounds of negligence relied on by appellant, since these could in no manner affect the conclusion we have reached. Appellant's suit is not a death action brought under article 4694, Revised Civil Statutes 1911, for it is nowhere alleged that the injuries received by the deceased resulted in his death. The cause of action in deceased's favor abated at common law, and did not survive to his heirs and legal representatives, unless it comes within the scope of article 5686, Revised Civil Statutes 1911. That article provides that causes of action for personal injuries other than those resulting in death shall not abate by reason of the death of the injured person. Appellant's petition, however, nowhere alleges that the deceased's injuries did not result in his death. She, therefore, has not brought herself within the article last cited. *Ellyson v. I. & G. N. R. Co.*, 33 Tex. Civ. App. 1, 75 S. W. 868. The court properly sustained the general demurrer to appellant's petition, and the judgment is affirmed.

Affirmed.

#### BENNETT et al. v. FOSTER.

(Court of Civil Appeals of Texas. Ft. Worth. Nov. 1, 1913.)

#### 1. MALICIOUS PROSECUTION (§ 58\*)—WRONGFUL GARNISHMENT—EVIDENCE—FALSE REPRESENTATIONS—OPINION.

In an action for wrongful garnishment, in a suit against plaintiff as surety on notes executed for the value of stock sold to A., evidence that plaintiff was induced to sign the notes as surety by the representations of L., who was negotiating the transaction, that A.'s father would advance money with which to pay off the notes as soon as the sale of the stock to his son was consummated, etc., was objectionable as a mere expression of opinion on L.'s part, on which plaintiff had no right to rely.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117-124; Dec. Dig. § 58.\*]

#### 2. MALICIOUS PROSECUTION (§ 58\*)—WRONGFUL GARNISHMENT—EVIDENCE.

Where, in an action for alleged wrongful garnishment arising out of plaintiff's signing as surety notes of A. given by him in a stock transaction, plaintiff claimed that he was induced to sign the notes by L., and it was an issue in the case whether L. was an agent of defendants, evidence by defendant B., who conducted the negotiations in behalf of the other defendants as well as himself, that during their pendency plaintiff, A., and L. all came to the corporation's plant, investigated its financial condition, and later L. told him that plaintiff would make the trade if witness would give him 110 shares of stock in the corporation, which witness refused to do, and thereafter plaintiff and L. told witness that E., who was admittedly defendants' agent, had agreed to give 10 shares of his stock coming to him as a commission on the sale in order that the trade might be consummated, was admissible as tending to

show knowledge on the part of the witness that L. was assumed to be acting as the agent of all of the defendants in the sale of the stock to A. and a ratification of his own acts as such.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117-124; Dec. Dig. § 58.\*]

#### 3. EVIDENCE (§ 317\*)—HEARSAY.

In an action for wrongful garnishment arising out of plaintiff's signing as surety notes given by A. for the price of corporate stock, evidence that during the negotiations for the sale F. told plaintiff that L., who was attempting to complete the transaction, was to receive from defendants \$1,000 of the stock as a commission for making the sale was objectionable as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.\*]

#### 4. EVIDENCE (§ 471\*)—CONCLUSION OF WITNESS.

In an action for wrongful garnishment, a question to plaintiff, asking him, from the management of his business, his experience, capital, etc., what his reasonable income would be for the next three years after he was closed out, if he had not been interfered with by reason of the garnishment, was objectionable as calling for a conclusion; it being the province of the jury to estimate the profits plaintiff would have made in the future from all the facts and circumstances in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

#### 5. TRIAL (§ 256\*)—INSTRUCTIONS—MEASURE OF DAMAGES.

In an action for wrongful garnishment, an instruction that if the jury found that the writ was wrongfully issued, plaintiff should recover for such actual loss as was the natural, direct, and proximate result of the service of the writs was not objectionable as failing to give the jury any rule for measuring such actual damages, but was good as far as it went; it being the duty of defendants to request a more specific instruction if they desired it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

#### 6. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO PLEADING.

Where no actual damages were claimed for the levy of a garnishment, the court properly refused a request to charge that the jury should measure the actual damages by the reasonable market value of the property, taken with the legal interest from the time of taking to the time of the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

#### 7. TRIAL (§ 261\*)—INSTRUCTIONS—PARTIAL INVALIDITY.

Where an instruction is partially bad, it may be entirely refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.\*]

#### 8. MALICIOUS PROSECUTION (§ 58\*)—WRONGFUL GARNISHMENT—PLEADING—EFFORT TO COMPROMISE DEBT.

In an action for wrongful garnishment, it was not error to overrule defendants' special exception to a portion of plaintiff's petition, alleging an effort to compromise the debt for which the former suit was instituted, made prior to the garnishment, and to permit proof thereof.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117-124; Dec. Dig. § 58.\*]

#### 9. MALICIOUS PROSECUTION (§ 52\*)—MALICIOUS ISSUANCE OF WRIT—EXEMPLARY DAMAGES.

Where, in an action for wrongful garnishment, plaintiff's petition alleged that the gar-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Index

nishment writ, as well as the attachment, was sued out wrongfully and maliciously and without probable cause, and actual damages were claimed, they were recoverable if proved; and hence exceptions to the claim for exemplary damages, on the ground that no actual damages were sufficiently pleaded, were properly overruled.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 100; Dec. Dig. § 52.\*]

**10. MALICIOUS PROSECUTION (§ 67\*)—WRONGFUL GARNISHMENT—DAMAGES.**

Where, in an action for wrongful garnishment, plaintiff claimed that the levy and subsection of certain shares of corporate stock resulted in damage, and that he lost an opportunity to exchange the stock for certain vendor's lien notes, the claim for the value of such notes with interest was a proper element of damage.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.\*]

**11. MALICIOUS PROSECUTION (§ 67\*)—WRONGFUL GARNISHMENT—LOSS OF BUSINESS—PROFITS.**

Loss of prospective profits in plaintiff's business as the result of a wrongful issuance and service of garnishment cannot be recovered as actual damages, but may be looked to to estimate punitive damages, if a proper predicate is established therefor.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.\*]

**12. MALICIOUS PROSECUTION (§ 64\*)—WRONGFUL GARNISHMENT—DAMAGES—LOSS OF PROFITS—EVIDENCE.**

In an action for wrongful garnishment alleged to have resulted in the loss of plaintiff's business as a broker, evidence held insufficient to establish the extent of plaintiff's loss and the value of his business, and not to justify a recovery of the profits he might have made in succeeding years.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151-153; Dec. Dig. § 64.\*]

Appeal from District Court, Baylor County; Jo. A. P. Dickson, Judge.

Action by J. S. Foster against R. G. Bennett and others. Judgment for plaintiff, and defendants appeal. Reversed.

Taylor & Humphrey, of Henrietta, Sporer & McClure, of Jacksboro, and J. A. Wheat, of Seymour, for appellants. D. A. Holman and Glasgow & Kenan, all of Seymour, for appellee.

DUNKLIN, J. This is the second appeal in this case, the disposition of the former appeal being reported in 152 S. W. 233. In a suit other than the present R. G. Bennett, W. A. Bennett, A. Power, and E. D. Power sued Chas. W. Abbott, and J. S. Foster upon three promissory notes executed by them, and also procured the issuance of an attachment upon an affidavit that Chas. W. Abbott was insolvent, and that J. S. Foster had disposed of his property in part for the purpose of defrauding his creditors. The attachment so procured was levied on certain real estate belonging to Foster. Later a writ of garnishment was sued out and served upon the Seymour Cotton Oil Company, in which company J. S. Foster owned 26 shares of the capital stock, and which was subjected to the writ. The present suit was in-

stituted by J. S. Foster against the plaintiffs in the former suit, to recover damages resulting from the wrongful issuance and service of the writ of garnishment. He alleged that he was a surety only upon the note upon which the former suit was instituted, and that he was not legally liable upon said note, for the reason that he was induced to sign the same by certain false and fraudulent representations made to him by the agents of the plaintiffs in the former suit. In the present suit a judgment was rendered in favor of Foster for the sum of \$3,000 as actual damages, from which the defendants have appealed.

In his petition Foster alleges that by reason of the service of the writ of garnishment upon the Seymour Cotton Oil Company he was prevented from consummating a trade which had theretofore been negotiated, and by which he could and would have exchanged his 26 shares of stock in that company for vendor's lien notes for the principal sum of \$2,600 and bearing interest at the rate of 10 per cent. per annum. He alleged that at the time of the service of the garnishment his stock was not worth more than 80 cents on the dollar of its face value, and that by this trade he would have realized 100 cents on the dollar, and would also have realized interest upon the notes during the pendency of the former suit. He further alleged that since the service of the writ no revenue had been derived from the stock. The damages claimed for the procurement and service of the garnishment was \$520, the difference between the face value of the stock and its real value, and \$758.26 for interest which he would have realized upon the vendor's lien notes had said trade been consummated.

In another paragraph of the petition plaintiff alleged that the writs of attachment and garnishment were sued out without probable cause therefor, and that in procuring them the defendants were actuated by malice; that for a period of 10 years next preceding the institution of that suit plaintiff was "engaged as trader and broker in buying and selling and trading in corporation stock, vendor's lien notes, and real estate and gin property as his occupation and support of himself and his family, which was well known to defendants." He further alleged that at the time of the levy of the writs he had a capital of from \$15,000 to \$20,000, which was employed in the prosecution of his business, also an unimpaired credit, and that for the period of 10 years next preceding the levy of the writs he had realized annual profits from his business of \$2,000; that by reason of the service of the writs his credit has been impaired, and he had been left without sufficient capital to prosecute his business, resulting in a complete breaking up of his business; that by reason

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the service of the writ he had been unable to sell his capital stock garnished, and he had been thereby deprived of its use and benefit. Following those allegations occur the following: "That from plaintiff's past experience in the management of said business, and from the annual earnings and income made by him therein for the past 10 years, he would reasonably have made \$2,500 per annum, all of which he must lose and be deprived of on account of the wrongful, malicious, and oppressive use of the writs aforesaid, to his damage in the sum of \$7,500 for the loss of his said earnings therefrom. And for damages to plaintiff's credit—the inconvenience, humiliation, and trouble occasioned by the breaking up of his business aforesaid, and because defendants in suing out and by service of said writs of attachment and garnishment did so wrongfully, and were actuated by malice, and with intent to vex and harass and oppress the plaintiff, and without probable cause—the said defendants, R. G. Bennett, W. A. Bennett, A. Power, and E. D. Power became liable to the plaintiff in the sum of \$20,000 in exemplary damages."

It was further alleged in plaintiff's petition that the three promissory notes upon which the former suit was instituted were given in part payment for 104 shares of stock in the Seymour Mill, Elevator & Light Company, which were sold to Abbott by the defendants in this case, acting through their agents, M. R. Fuller, and T. W. Larkin; that Foster was surety only upon said notes for Abbott, and was induced to sign the same upon the false and fraudulent representations made to him by said agents; in effect, that the stock then being sold was worth \$1.14 for each dollar shown upon the face of the stock; and that Abbott's father, who was wealthy, and who was anxious to get his son, C. W. Abbott, into business, would liquidate those notes so given, by advancements to his son as soon as C. W. Abbott could get settled into some kind of business. And further that the indebtedness of the Seymour Mill, Elevator & Light Company at that time would not exceed \$13,000 over and above such indebtedness, as accounts and goods on hand belonging to the company were sufficient to liquidate; that each and all of said representations were untrue; that at the time said representations were made said company was insolvent, the stock so sold worthless, and that by reason of such misrepresentations plaintiff was not liable in any amount upon the promissory notes so signed by him. The jury were instructed, in effect, that if the alleged misrepresentations were made to Foster for the purpose of inducing him to sign the notes as surety for Abbott, and that he was induced thereby to sign them, then he was not liable thereon, and that if he was not liable upon those notes, then he could recover the damages actually sustained by him as a result

of the service of the writ of garnishment mentioned above.

[1] Plaintiff testified in part as follows: "I was induced to sign three notes by the representations which Fuller had made to me that the stock was worth \$1.14 on the dollar; that there was enough stock and merchandise, accounts and money, on hand with which to meet all of the indebtedness of the mill due and owing to the First National Bank, and to the statements that Larkin made to me about Abbott, he said that Abbott's father was very wealthy, that Mr. Abbott had married lately into a very wealthy family, and that his wife was spending too much money; that Abbott's father had spoken to him some two or three times, and he, Larkin, said that as soon as Abbott's father found out the trade had been made, the money would be sent him, and that the money would be sent him in 30 days, and that he, Larkin, was satisfied that it would be here in 30 days. These statements induced me to sign the notes." That part of the testimony quoted relative to what Larkin told the plaintiff was objected to by the defendants at the time it was offered, one of the grounds of objection being, in effect, that such statements were hearsay, and not such as plaintiff had the legal right to reply on as an inducement to sign the note. We are of the opinion that upon this objection the testimony should have been excluded. Clearly the gist of the alleged statements by Larkin was an assurance that Abbott's father would advance the money with which to pay off the three notes signed by his son and Foster as soon as the sale of the stock to his son was consummated. This was merely an expression of opinion and belief on the part of Larkin that Abbott's father, who was in no way liable upon the notes, would advance to his son funds sufficient to satisfy them, and such opinion would not constitute a legal basis for Foster to escape liability upon the notes.

[2] The issue whether or not Larkin was the agent of the defendants in this case in the sale of the stock above mentioned to Abbott was sharply contested by the defendants, each and all of whom testified that Fuller was the sole agent to negotiate such sale; that Larkin was never employed by them, and never acted as such agent within their knowledge; and error has been assigned to the refusal of an instruction requested by defendants that the jury should not consider, for any purpose, the testimony of plaintiff, Foster, relative to the alleged misrepresentations made to him by Larkin, and which he says in part induced him to execute the notes. The defendant W. A. Bennett, who seems to have conducted the negotiations in behalf of the other defendants, as well as for himself, in the sale of the stock, further testified that during those negotiations Foster, Abbott, and Larkin all came down to the mill and investigated its

financial condition; that later Larkin came to him and told him that Foster would make the trade if Bennett would give Foster 110 shares of stock, which Bennett refused to do, and thereafter Foster and Larkin came to the mill and told Bennett that Fuller had agreed to give up 10 shares of stock coming to him as a commission on the sale in order that the trade might be consummated, to which proposition Bennett agreed after Fuller instructed him to do so. We are of the opinion that this evidence tended to show, although perhaps to a slight extent only; a knowledge on the part of W. A. Bennett that Larkin was assuming to act as the agent of the defendants in the sale of the stock to Abbott, and a consequent ratification of his acts as such agent; and therefore appellant's tenth assignment of error is overruled.

[3] Plaintiff further testified that during the negotiations for the sale of the stock to Abbott, Fuller told plaintiff that Larkin was to receive from the defendants \$1,000 of the stock in the same company as a commission for making the sale to Abbott. This testimony was objected to on the ground that it was hearsay. Evidently it was offered for the purpose of proving Larkin's agency to sell the stock to Abbott, and clearly it was subject to the objection urged. Accordingly appellant's eleventh assignment of error is sustained.

[4] The following question was propounded to the plaintiff: "Now, from the management of your business, your experience in the management of that business, and the capital you had, can you reasonably state to the jury what your reasonable income would have been for the next three years after you were closed out, if you had not been interfered with?" To this question plaintiff answered as follows: "I ought to have made as much in the next three years as I had made, which was about \$2,000 or \$2,500 per annum." Defendant objected to the testimony upon the ground that it was a conclusion. This testimony was in support of plaintiff's claim for loss of profits in his business occasioned by the service of the writ of garnishment. It was exclusively the province of the jury to estimate the profits that plaintiff would make in the future, from all the facts and circumstances in evidence, and the objection made to this testimony should have been sustained. It follows from this conclusion that appellant's twenty-fourth assignment of error should be sustained.

[5] Complaint is made of two different paragraphs of the court's charge in which the jury were instructed, in effect, that in the event of a finding that the writs of garnishment and attachment were wrongfully issued, plaintiff should be allowed damages for such actual loss as was the natural, direct, and proximate result of the service of such writs. No actual damage was claimed

in the petition for a wrongful levy of the writ of attachment, and it was possible error for the court to base any recovery of actual damages upon a wrongful issuance of that writ, but the instruction is not assailed upon that ground; the only objection being that such instruction did not give the jury any rule for measuring such actual damages. Aside from the criticism above suggested by us, we think the instruction was good so far as it went; and, if the defendants desired a more specific direction to the jury for the computation of the damages, they should have presented to the trial judge a request therefor.

[6, 7] Another error is assigned to the refusal of plaintiff's requested instruction No. 14. In part, that instruction was that the jury should measure the actual damages for the wrongful suing out of the attachment and garnishment by the reasonable market value of the property taken, with the legal rate of interest thereon from the time of taking to the time of the trial. As no actual damages were claimed for the levy of the writ of attachment, this portion of the instruction was inapplicable; and, as other portions of the requested instruction to the actual loss sustained by the plaintiff for wrongfully suing out and serving the writ of garnishment were somewhat confusing and inapt, there was no error in refusing the entire instruction.

Another error assigned is to the refusal of an instruction requested by the defendants that in no event could plaintiff recover the 10 per cent. interest stipulated in the vendor's lien notes for which he would have traded his stock that was garnished. This contention was discussed and decided adversely to appellants upon the former appeal, and we still concur in the views there expressed by us.

The trial court instructed the jury quite at length upon the issue whether or not Fuller and Larkin were legally defendant's agents in the trade by which the stock was sold to Abbott, and plaintiff, Foster, was induced to sign Abbott's notes given in consideration therefor. By the sixth, seventh, and eighth assignments of error complaint is made of errors in those instructions. One of the objections urged to the instructions is that they are upon the weight of the evidence in assuming that Larkin was a joint agent of defendants with Fuller. We do not think the instructions are subject to this criticism. Another ground of complaint is that no evidence was introduced tending to show the agency of Larkin. This objection was untenable, for the reason that, as noted already, we think there was some evidence tending to establish such agency. We do not wish to be understood as approving the instructions given by the court, and last referred to, as we think they are subject to other criticisms not presented by the assign-

ments, and which will likely be avoided upon another trial.

[8] For reasons stated in our opinion on the former appeal there was no error in overruling defendants' special exception to that portion of plaintiff's petition alleging an effort to compromise the debt for which the former suit was instituted, made before the attachment was issued, and in admitting testimony upon the last trial in support of those allegations.

[9] In plaintiff's petition it was alleged that the garnishment writ, as well as the attachment, was sued out wrongfully and maliciously, and without probable cause. As noted already, actual damages were claimed which we are of the opinion were recoverable if established. Hence the exceptions to the claim for exemplary damages on the ground that no actual damages were pleaded were properly overruled. If there was error in overruling other special exceptions seeking more specific information relative to the name of the payee, payer, date of note, date of maturity, etc., such error becomes immaterial in view of another trial, since appellants are now fully informed upon those issues from the evidence introduced on the last trial.

[10] Nor was there error in overruling different special exceptions to the claim for the value of the vendor's lien notes, with interest, which plaintiff alleged that he would have received in exchange for his stock but for the service of the writ of garnishment, for the reasons discussed on the former appeal. See, also, *Trawick v. Martin Brown Co.*, 79 Tex. 460, 14 S. W. 564.

[11] Appellants insist that the loss of prospective profits in business, which appellee alleges resulted from the issuance and service of the writ of garnishment, could not in any event be recovered as actual damages, but could be looked to only for the purpose of estimating punitive damages if the proper predicate should be established therefor. This contention is sustained by numerous decisions of our Supreme Court. *Kaufman v. Armstrong*, 74 Tex. 65, 11 S. W. 1048; *Kauffman v. Babcock*, 67 Tex. 241, 2 S. W. 878; *Miller v. Jannett*, 63 Tex. 82; *Wallace v. Finberg*, 46 Tex. 35. Appellee invokes the following decisions of our Supreme Court to sustain his contention that such loss of prospective profits is recoverable as actual damages. *City of San Antonio v. Royal* (Sup.) 16 S. W. 1101; *G. H. & S. A. Ry. Co. v. De Groff*, 102 Tex. 433, 118 S. W. 134, 21 L. R. A. (N. S.) 749; also the following decisions by the Court of Civil Appeals for the Third District: *American Construction Co. v. Caswell*, 141 S. W. 1013, and *American Construction Co. v. Davis*, 141 S. W. 1019. The case of *City of San Antonio v. Royal*, was one for the recovery of damages for the destruction of the business of a huckster by the removal of his trading stand. The case

of *Railway v. De Groff* was a suit in which an injunction was sought by De Groff to restrain the railway company from obstructing the street in front of plaintiff's hotel, which obstruction caused a depreciation in plaintiff's hotel business, resulting from inconvenience to the customers of the hotel in reaching it. In that case our Supreme Court held that the injunction prayed for would not lie for the reason that plaintiff had a right of action at law for damages for loss of business resulting from such obstruction. *American Constr. Co. v. Caswell*, supra, was a suit by Caswell, a merchant, to recover damages for loss of profits in his business on account of the erection of a fence and other buildings on a lot adjoining plaintiff's store, resulting in a diversion of customers from plaintiff's place of business, and the obstruction of light and air rendering the store hot, dark, and uncomfortable. *American Constr. Co. v. Davis*, supra, was a companion case to the case last noted, by Davis, also a merchant, who sued for damages of the same character. The cases relied on by appellants were suits for damages resulting from the levy of attachment writs wrongfully issued. In the opinions relied on by the appellee no reference is made to the decisions first noted. Whether or not there is a conflict between these two lines of decisions it is not necessary for us to determine, for we feel it our duty to follow the rule announced in the decisions first cited as being more directly applicable to the issues in the present case. Based upon that conclusion, we are of the opinion that actual damages claimed in this suit by the appellee for loss of prospective profits in his business were not recoverable, although such loss could be proven for the purpose of assessing exemplary damages, provided a proper predicate should be established therefor.

[12] We are of the opinion, further, that even though such profits as alleged in plaintiff's petition were recoverable as compensatory damages, the evidence introduced upon the trial was too indefinite and uncertain to warrant such a recovery. The only evidence we have found in the record offered for the purpose of showing such loss of profits was that of the plaintiff, Foster, himself. He testified in part as follows: "In the year 1900 I divided up with my children, my first wife having died, and I had property that I valued at \$1,800. On January 1, 1910, I was worth about \$25,000, which was the income of my property from 1900 to 1910, and from which I estimate that my annual income during that time must have been at least \$2,000 or \$2,500 per year, and from the management of my business, my experience in the management of that business, and the capital I had, I should reasonably have made \$2,000 or \$2,500 during the next three years, and since the running of these garnishments on my property I have not been able to carry on my business. I had nothing left with which

to carry on my business to make the annual earnings I had been the years before. My credit was good at the banks, and in the commercial world, I could borrow money from any one who had it to loan and who knew me without collateral. Nobody ever asked me for collateral or security. I have borrowed the limit several times from these banks here, \$7,000 without security, and since the attachments and garnishments I have had to put up security for every dollar I borrowed. I have not asked any one to credit me without security. \* \* \* My main business has been that of a trader, buying and selling, and Mr. Bennett has lived here for a number of years, and was intimately acquainted with my business. All the property of mine that was reached by the writs of garnishment was the 28 shares in the oil mill. I do not know what my annual earnings were for any one year, cannot say what they were in 1900, 1901, 1902, and 1903, or any other year during the 10 years from 1900 to 1910. I don't know exactly what trades, nor how I made it. Part of the time I was in the grocery business, part of the time in the gin business, a part of the time working on a salary for W. R. Martin Grocery Store. I know of a few trades I have made." This witness then detailed three or four trades that he made upon which he made a profit, consisting of the purchase and sale of real estate, an electric light plant and gin, all of which property he has since sold, and further testified that he had realized a profit from the operation of the electric light plant, and also from the operation of the gin. After detailing those transactions, he continued: "I don't know what other trades I have made, and I couldn't tell you without looking on the record, or something of that kind, as I have kept no account in the last ten years."

It is well established by all those authorities in which damages for the loss of profits in business are allowed that there must be sufficient data to enable the jury, with a reasonable degree of certainty and exactness, to ascertain the loss and that damages will not be allowed where the losses are merely speculative and conjectural and incapable of ascertainment with reasonable definiteness. See *Railway v. De Groff*, supra. As noted already, in the case last cited, the business which plaintiff was conducting was that of hotel keeper. In the case of *City of San Antonio v. Royal*, plaintiff was engaged in operating a huckster's stand, and in each of the cases of *Am. Constr. Co. v. Caswell* and *Am. Constr. Co. v. Davis*, supra, the plaintiff was operating a store for the sale of merchandise. In each of the four cases last mentioned it appears that the business was an established business. It is doubtful whether the business of the appellee in this case, being that of a mere speculator in buying and selling real estate, stock, etc.,

was of that fixed and certain character which would be a proper basis for a recovery of damages even under the four last-mentioned decisions. At all events, we are of the opinion that the evidence introduced upon the trial of the present case was insufficient to sustain appellee's claim for damages for loss of profits in his business, even under the four last-named decisions, as there were no facts detailed by him in his testimony relative to his business transactions during the past 10 years next preceding the trial from which the jury could ascertain with reasonable certainty the amount of profits lost. From plaintiff's own testimony only a small part of his total capital of \$25,000 was tied up by the service of the writ of garnishment. He was left free to operate upon the capital not affected by the garnishment, and did operate the same. He testified that before the levy of the garnishment he could borrow money without giving security therefor, but does not give any estimate of the amount he could have so borrowed. The gravamen of his complaint seems to be that he had lost his credit with the banks to this extent, and yet, according to his testimony, he never attempted to borrow money without offering collateral after the garnishment was served. He does not testify to what uses he would have applied any capital he might have borrowed if his former credit had not been impaired, what investments he could and would have made with such funds, nor does he give the jury any information from which they could estimate whether or not such investments, if any, would have been profitable. As noted above, the aggregate of damages claimed for the loss of appellee's opportunity to exchange his 28 shares of stock for the vendor's lien notes was \$1,278.26. In no event would the record in this cause support a recovery for a sum greater than that amount; and, accordingly, appellants' first assignment of error, complaining that the trial court erred in overruling a motion for new trial on the ground that the verdict was excessive, is sustained.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

#### FT. WORTH BELT RY. CO. v. CABELL.

(Court of Civil Appeals of Texas. Ft. Worth.  
Nov. 8, 1913. Rehearing Denied  
Dec. 13, 1913.)

#### 1. NEGLIGENCE (§ 136\*)—PROXIMATE CAUSE—JURY QUESTION.

Ordinarily, the question whether an injury should have been foreseen and was the proximate result of the negligence complained of is for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

#### 2. NEGLIGENCE (§ 59\*)—PROXIMATE CAUSE.

If an injury follows an act of negligence in natural sequence, and there is no intervening

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

agency, the wrongdoer is, as a matter of law, *held* to have had the result in contemplation.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.\*]

### 3. MASTER AND SERVANT (§ 285\*)—INJURIES TO SERVANT—JURY QUESTION.

In a personal injury action by a railroad brakeman, whether the employer's negligence was the proximate cause of the injury *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.\*]

### 4. MASTER AND SERVANT (§ 129\*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Where a railroad brakeman, upon the breaking loose of cars, attempted to catch them so as to put on the brakes, and was injured by being thrown from the cars when they struck stationary ones, the fact that he left a place of safety and exposed himself to danger, that being his duty, did not break the causal connection between the negligence of the railroad company, in furnishing insufficient couplers and defective tracks, and the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

### 5. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL OF REQUEST COVERED BY THOSE GIVEN.

In a personal injury action, where the court fully charged on proximate cause, the refusal of a special request on that issue, which also defined remote cause, was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

### 6. TRIAL (§ 84\*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In a personal injury action by a railroad brakeman who was thrown from wild cars, which he was attempting to stop after they had broken loose from a train, where the railroad set up contributory negligence because of his failure to jump after he saw that the cars would collide with a standing car, evidence that the parallel tracks on which other cars were standing seemed closer than was usual in railroad yards cannot be held inadmissible merely on general objection, upon the theory that it tended to show negligence not pleaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.\*]

### 7. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in the admission of evidence over objection was harmless, where other evidence to the same effect was received without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

### 8. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTIONS—JURY QUESTION.

In a personal injury action by a railroad brakeman hurt when thrown from wild cars which had come uncoupled, the question of the master's negligence in furnishing insufficient couplers and in maintaining defective tracks, which caused the cars to break loose, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1013, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

### 9. MASTER AND SERVANT (§ 274\*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In a personal injury action by a railroad brakeman, where the railroad company claimed that his failure to jump from wild cars was

contributory negligence, evidence that it would have been dangerous to have jumped, under the circumstances, was admissible.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.\*]

### 10. EVIDENCE (§ 471\*)—CONCLUSIONS OF WITNESS—ADMISSIBILITY.

In a personal injury action, where it was sought to show that plaintiff was a malingerer, and the court allowed a full inquiry as to a previous injury, it was proper to exclude testimony by a physician that on one occasion he noticed plaintiff go across the street on crutches, and that they were absolutely useless as far as the assistance plaintiff was getting from them, the testimony being in the nature of a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

### 11. EVIDENCE (§ 129\*)—ADMISSIBILITY—PERSONAL INJURIES.

In a personal injury action, where there was nothing to show a settled system on the part of plaintiff of maintaining fictitious claims, an isolated instance of a fictitious claim for damages for personal injury is inadmissible to show that plaintiff was simulating his present injuries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-393, 395-398; Dec. Dig. § 129.\*]

### 12. WITNESSES (§ 410\*)—CORROBORATION.

In a personal injury action, where a physician who testified to examining plaintiff at the time of an injury while working for another railroad company was contradicted by plaintiff, that contradiction was not such an impeachment as to authorize the introduction of the report by the physician as corroborative evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1284; Dec. Dig. § 410.\*]

### 13. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—PROPOSITIONS.

In a personal injury action, where plaintiff's character had been impeached by testimony as to his poor reputation for honesty and integrity, and plaintiff testified as to why he failed to pay his debts, propositions under an assignment complaining of the admission of such testimony, which recited that in a personal injury action it is error to admit plaintiff's testimony to the effect that he was poverty-stricken, and that the introduction of immaterial and irrelevant testimony does not justify the admission, over the objection of defendant, of improper testimony to explain it, do not require consideration; being too general, and not pointing out any specific error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

### 14. WITNESSES (§ 358\*)—EXAMINATION—CROSS-EXAMINATION.

Where impeaching witnesses are offered, to attack the reputation of one of the parties, the party assailed is entitled, on cross-examination, to compel the witness to state the source of the reports upon which he bases his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1159, 1160; Dec. Dig. § 358.\*]

### 15. WITNESSES (§ 361\*)—IMPEACHMENT—CORROBORATION.

Where impeaching testimony is offered evidence which will satisfactorily explain it is admissible, and hence, in a personal injury action, where plaintiff's character was impeached by evidence as to his bad reputation for integrity and truth, owing to his failure to pay his debts, plaintiff was entitled to testify as to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the reasons for his failure; especially where some of his reasons were elicited without objection upon the examination of other witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1167–1175; Dec. Dig. § 361.\*]

**16. APPEAL AND ERROR (§ 719\*) — ASSIGNMENTS OF ERROR—NECESSITY.**

In a personal injury action, where there was no assignment of error that the verdict, as reduced by the trial court, was excessive, a judgment for plaintiff will not be disturbed because of improper argument of counsel, which went to the amount of recovery only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982, 3490; Dec. Dig. § 719.\*]

Appeal from District Court, Tarrant County; R. H. Buck, Judge.

Action by G. S. Cabell against the Ft. Worth Belt Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Stephens & Miller, of Ft. Worth, for appellant. Carlock & Carlock, of Ft. Worth, for appellee.

CONNER, C. J. Appellee instituted this suit to recover damages for personal injuries, and secured a verdict and judgment for \$5,000, which upon a hearing of the motion for a new trial was reduced by remittitur to \$3,000.

Every step in the proceeding seems to have been skillfully and vigorously contested in behalf of appellant, but, after a careful consideration of the record, we have failed to find an error for which we think the judgment must be reversed.

As alleged and supported by testimony, appellee's injuries were received under substantially the following circumstances: Appellee at the time was in the employment of the appellant railway company as a switchman. On the day of the accident, a switch engine coupled to a string of some eight standing cars with the purpose of coupling thereto a standing car some 25 car lengths south of the cars first mentioned. Appellee, in the performance of his duty, first released the air on the cars attached to the engine, and immediately and rapidly walked in the direction of the single car to which the train was to be coupled, with the purpose of opening the "knuckle" in order to make the coupling. When within about 30 or 35 feet from the car at the south end of the yards, another switchman, Du Poyster, gave appellee a signal indicating that the cars had broken apart. Appellee, as it was his duty to do, immediately started in a run back to the uncoupled cars which had been attached to the engine, for the purpose of setting the brakes to keep them from doing damage by hitting the stationary car, or by going over a "derail" situated at the south end of the track. Appellee caught the first of the approaching cars while going at

a speed, as he testified, of some 12 or 15 miles an hour, with the intention of ascending to the top and fastening the brakes. This car was provided with a "stirrup" extending below the bottom of the car above which was fastened a hand hold. The ladder provided for ascension was on the front instead of on the side, and appellee, after having gotten upon the stirrup with his left foot and with his left hand holding to the support above, threw his right hand around the corner of the car, intending to ascend the end ladder, when, as he testifies, he saw that he was so near the standing car that he did not have time to make the ascension; that it was dangerous to jump off the car upon which he was standing because of the proximity of some standing cars on a parallel track, and it was likewise dangerous for him to place himself upon the end ladder and remain there during the impending collision; that he, therefore, remained in the position stated, to wit, with his left foot in the stirrup, with his left hand on the support above, with his right hand on one of the rounds of the end ladder, and his right foot on an extending uncoupling rod; that, while in the position stated, the string of cars upon which he was situated violently collided with the standing car; that thereby his hold was broken and he was hurled forward, but managed to catch upon the standing car which he later ascended and where he was afterwards found with injuries to which he testified. As accounting for the fact that the string of cars broke loose from the switch engine, and as grounds of negligence charged to be the proximate cause of appellee's injuries, it was alleged that the string of cars to which the switch engine had been first attached were provided with automatic couplers, and that the track upon which the movements were made was in bad repair, there being low joints in the track which had a tendency to so disarrange the couplers as to allow them to part, and the defendant company was charged with negligence in maintaining both defective couplers and a defective condition of the track whereon the cars were being handled at the time.

[1-3] In several forms, it is earnestly insisted that if it be admitted, as there was evidence tending to show, that the appellant railway company was guilty of negligence in either providing defective couplers or in maintaining a defective track, yet such acts of negligence cannot be held to be the proximate cause of appellee's injuries, for the reason that such injuries were not such as, in the light of the attending circumstances, ought to have been foreseen as a natural and probable consequence of such act of omission; numerous authorities being cited in support of this contention. The doctrine of "proximate cause" has been so frequently

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

discussed, and is so well understood that we cannot hope to add to what has from time to time been clearly stated on the subject in the decisions. There can be no doubt of the general proposition that it is ordinarily an issue for the jury to determine whether, in any given case, an injury similar in character to that under investigation ought to have been foreseen as a result of an act of negligence established by the evidence. If the injury follows the act of negligence in natural sequence, and there is no independent, intervening cause, and the injury would not have occurred but for the act or acts of negligence shown, it meets the requirements of the law. Under such circumstances, the wrongdoer, as a matter of law, is held to have had the result in contemplation. The court gave an approved definition of the term "proximate cause," and we think it was for the jury in this case to say whether the acts of negligence shown caused or proximately contributed to cause appellee's injuries, and whether such injuries, or some like injuries, under the attending circumstances, ought to have been foreseen. The jury's verdict on this issue was in appellee's favor, and under the evidence we do not think the verdict can be disturbed.

[4] It is true appellee was in a place of safety when he was informed of the uncoupling of the cars, but his act in thereupon attempting to ascend the approaching train was in the performance of his duty to appellant as a switchman and can in no legal sense be regarded as an independent cause which brought about appellee's injuries in the sense that it broke the causal connection between the negligence charged and the injuries received.

[5] Nor do we think the court committed error in refusing appellant's special charges 2, 3, and 4, on the subject of proximate cause, which in our judgment would have had a tendency to confuse rather than to enlighten the jury. For instance special charge No. 2 is as follows: "Even though you find and believe from the evidence that the track belonging to the defendant was [and] in use by it at the time of the occurrence of the things complained of by plaintiff in his petition herein was in defective condition by reason of low joints therein, and that by reason of such defective condition of said track the defendant was guilty of negligence, yet you cannot find for the plaintiff on that ground unless you believe and find from the evidence that such negligence was the proximate cause and not the remote cause of the injury of which plaintiff complains. In the law of negligence, a remote cause of an injury is one which does not by itself alone produce the given result, but which sets in motion another cause, called the proximate cause, which immediately brings about the given effect, or, otherwise defined, it is that which may have happened and yet no injury

have occurred, notwithstanding that no injury could have occurred if it had not happened."

The issue presented in the first paragraph of this special charge was submitted in the court's general charge under an approved definition of proximate cause which, intelligently considered, as we must presume was done, needed no illumination in the way of a definition of an opposite—a "remote cause"—which at most could only be indirectly relevant.

[6] It is urged in the sixth and seventh assignments of error that the court erred in permitting appellee, as also the witness C. P. Garey, to testify, in substance, that the parallel tracks hereinbefore mentioned "seemed closer together than tracks in railroad yards ordinarily are." On the trial appellant pleaded contributory negligence on appellee's part because of his failure, among other things, to jump off of the car upon which he attempted to ascend after he saw that it was about to collide with another, and it seems clear that, as relevant to this issue, appellee was authorized to show the distance between the parallel tracks, the distance the standing cars extended over the track, and, as he did by expert testimony, that it was hazardous to jump off of the running car in such close proximity to the cars standing on the parallel tracks. So that we could in no event sustain the single proposition under the assignments named, which is that the testimony "was immaterial and inadmissible, and the admission of such evidence constitutes reversible error."

[7] Could it be said, however, that the general objections that the "evidence was immaterial and inadmissible" were sufficiently broad to admit the contention that it tended to establish an issue of negligence not alleged, or that in no event could be a proximate cause of the injuries received, then we think the objections are answered by the fact that other evidence, of substantially the same effect, on the part of the witness W. N. Turney was offered and received without objection, this witness testifying that: "Those tracks (the parallel tracks to which the testimony objected to relates) are too close together and have always been, while I was working there." Moreover, it would seem that the unusual proximity of the tracks was part of the very situation in which appellee was placed at the time it is insisted he should have jumped from the moving train, and, perhaps, tended to explain why he failed to do as he otherwise might safely have done had the tracks been placed their usual distances apart.

[8] By objection to the testimony, and by the presentation of a special charge to the refusal of which error is assigned, appellant presented the contention that there was no evidence of a defect in the coupling of the cars. It is true that the witness who coupled

the parting cars testified that he looked at the couplings to see if there was any defect, and that he found none, but there was expert testimony, that we think competent, offered in behalf of appellee, to the effect that, with ordinary handling, cars will not part as those under consideration did unless there were defects in the track or in the couplings. It was also shown, as before stated, that there were low joints in the track, and that the particular cut of cars that were being switched broke apart at three different places before they were switched off of the main line track upon which the operation began, and we think it was for the jury to say whether, if low joints in the track were permissible, the couplers, in the exercise of due care, should have been made to extend perpendicularly such distance, or otherwise arranged so as to preclude a parting because of low joints in the track. At least the evidence seems to render it certain that the uncoupling was brought about because of a defect in either the track or the couplings, and whether one or the other would seem to be immaterial, if, as a proximate result, appellee was injured.

[9] The testimony of the witnesses named in the fifteenth to the twenty-first assignments of error, inclusive, to the effect that it would have been dangerous for appellee, under the circumstances, to have attempted either to jump off of the moving car upon which he was stationed, or to have ascended on the end ladder, was relevant to the issue of contributory negligence, and the court, therefore, committed no error in admitting this testimony.

[10] Nor do we think the court committed any error of which appellant can complain relating to its plea that appellee was a malingerer. Appellant was permitted, in support of this plea, to go rather fully into an accident and claim of injury on appellee's part during the previous year on the T. & B. V. Railway, and the mere exclusion, regardless of the sufficiency of the objection thereto, of the statement by Dr. M. L. Langford that on one occasion he noticed the plaintiff go across the street, and "noticed that, in walking with his crutches, his crutches were absolutely useless as far as the assistance plaintiff was getting from them," etc., will not authorize us we think to reverse the judgment. The answer offered par-takes of the nature of a conclusion of the witness, and, as we view the record, it is not clear that the entire issue was not irrelevant.

[11] No connection whatever between the accidents was shown, nor was there evidence offered tending to show a settled course of action or system on appellee's part in the maintenance of fictitious claims, and nothing seems better settled than that, under such circumstances, an isolated transaction of the kind is inadmissible as proof that on the occasion at issue appellee was simulating his injuries.

[12] There is yet another reason for overruling appellant's claim of error in the court's rejection of the written report of an examination of appellee at the time of his injuries on the T. & B. V. Railway. Dr. A. P. Howard was permitted to testify, as a witness, that on the occasion he referred to he examined appellee and failed to find any evidence of injury, and the mere fact that appellee on the trial denied that Dr. A. P. Howard made any such examination was not such an impeachment of the witness as authorized in his corroboration the introduction of the report made by him at the time. See *McKensie v. Watson*, 36 Tex. Civ. App. 235, 81 S. W. 1017; *Hardin v. F. W. & D. C. Ry. Co.*, 49 Tex. Civ. App. 184, 108 S. W. 490; *Tallaferro v. Goudelock*, 82 Tex. 521, 17 S. W. 792.

[13] Under appellant's twenty-fourth assignment of error, objection is urged to the action of the court in permitting appellee to give the following testimony: "Excluding one debt of \$90 which is in doubt, the question of whether I owe it, I owe about \$115. I am indebted to Dr. Langford and have been off and on since my child was born; I owe Jackson & Tatum \$6. I owe Willson Bros. \$17 or \$18, I am not positive. I owe Mr. Ira Wood \$2, and I owe Hillman Bros. \$8. I may owe \$15 or \$20 around the place there, and this W. B. Summers debt. When I opened up business down there I bought \$121. The Summers debt was for furniture, and I paid on that up to the time of the fire, and have the bills to show it, and the reason why I have not met those obligations is that my wife has been constantly sick and in awful bad shape for the last two years and a half. Well, I have been crippled for seven months—this accident, and in that fire, in February last, I lost over \$790, and this past February I was out of employment for two months after the fire, and I only worked four days in May when received this injury, and since then I have been unable to earn any money whatever or do anything."

It appears that appellant had offered a number of witnesses who testified to the effect that appellee's general reputation for truth and veracity and for honesty and integrity was bad in the town of Mart, where he formerly lived, and one of them, at least, on cross-examination by appellee, gave names of persons whom he had heard so state, and testified that appellee was indebted to him and, as reported, to some or all of the other persons, and that: "I think his (appellee's) reputation is bad because he won't pay his debts, and I think that any man that don't pay his honest debts is a bad man." It seems that appellee's testimony quoted above was admitted in explanation of such impeaching testimony, and the only objections thereto that we are called upon to consider by the propositions submitted under the assignment named are: First: "In a suit for damages for personal injuries, it is error to admit

plaintiff's testimony, to the effect that he is poverty-stricken and has been unfortunate in life." Second: "The introduction of immaterial and irrelevant testimony by the plaintiff does not justify the admission over objection by the defendant of improper testimony to explain it." The proposition first quoted points out no specific error and is evidently too general to require consideration. The second proposition is almost if not quite as general as the first in that it entirely fails to give any specific reason why the quoted testimony is "improper."

[14] It cannot be said that the testimony developed by appellee on cross-examination of appellant's impeaching witnesses was either immaterial or irrelevant. Oftentimes nothing short of a cross-examination which compels an impeaching witness to state both the source of the reports to which he testifies and their nature will enable a party either to test the correctness of the impeaching evidence or to protect the person assailed, and it has uniformly been held that such cross-examination is permissible.

[15] Nor can it be said that under no circumstances is evidence explanatory of impeaching testimony authorized. On the contrary, under circumstances and with limitations not necessary to here notice, such evidence is often both material and relevant. See *St. L. & S. W. Ry. Co. of Tex. v. Bryson*, 41 Tex. Civ. App. 245, 91 S. W. 829; *Roberts v. Commonwealth*, 94 Ky. 499, 22 S. W. 845; 2 *Wigmore on Evidence*, § 112; *Annis v. People*, 13 Mich. 517. So that we feel unable to sustain as made the objections to appellee's testimony now under consideration. Moreover, other testimony of like general import was admitted, without objection on appellant's part. That appellee's wife was an invalid was testified to by Dr. Langford without objection and the wife, herself, also appeared as a witness and testified to her condition. Evidence was admitted without objection that the plaintiff's business was burned up in February, 1912, and that he had been out of employment up until a little while before he got hurt, thus raising an inference of an inability to pay his debts and hence of an origin for his ill repute that was without moral turpitude. In view of all which, we think the twenty-fourth assignment of error must be overruled.

[16] The only remaining assignments relate to certain arguments on the part of appellee's counsel in his closing address to the jury, and to an alleged excessiveness in the verdict and judgment. As to these assignments, we think it sufficient to say that, in the case of at least two of the arguments, the court in answer to appellant's objection expressly instructed the jury to disregard them. The remaining argument, as to which the jury were not so instructed, as indeed all of the arguments, went not to the issue of liability, but to the amount of the recov-

ery only and, inasmuch as no assignment raises the question of an excess in the verdict and judgment after the action of the court in requiring a remittitur, we think the assignments relating to the argument as well as that alleging an excess in the verdict should at all events be now overruled.

We conclude by stating, as before, that a careful examination of the record discloses no error for which we think the judgment should be reversed, and, believing that the evidence supports the material issues alleged and submitted, it is ordered that the judgment be affirmed.

#### TEXAS MIDLAND R. R. v. NELSON.

(Court of Civil Appeals of Texas, Dallas.  
Dec. 6, 1913. Rehearing Denied  
Jan. 3, 1914.)

#### 1. EVIDENCE (§ 117\*)—RELEVANCY—SHOWING BY OTHER EVIDENCE.

In an action for the value of a horse, wagon, and harness in a collision at a crossing where, though a witness testified that some six or seven years before the accident the driver was addicted to drink and when drinking was in a stupor and unconscious of what he was doing, there was no evidence that he was intoxicated at the time of the accident or that he was addicted to drink within a reasonable time prior to the accident, and the witness who found a bottle of whisky among the debris of the wagon was two blocks from the accident when it happened, evidence as to the finding of such bottle was properly excluded.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 136; Dec. Dig. § 117.\*]

#### 2. TRIAL (§ 191\*)—INSTRUCTIONS—PROVINCE OF JURY.

In an action for injuries to property sustained in a crossing accident, an instruction that if some one warned the driver of the approaching train, and if he heard the warning and could have stopped in time to have prevented the accident but failed to do so, to find for defendant was properly refused even if otherwise proper, since it made the failure to heed such warning negligence per se, while it would not constitute negligence unless an ordinarily prudent person under all the facts and circumstances would have observed it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 307, 308; Dec. Dig. § 191.\*]

#### 3. RAILROADS (§ 351\*)—CROSSING ACCIDENTS—ACTIONS—INSTRUCTIONS.

In an action for injury to property in a crossing accident, an instruction that if the engineer believed that plaintiff's driver saw the approaching train and believed that he would stop, and if when he attempted to cross the engineer did all he could to prevent the injury, to find for defendant was properly refused where there was evidence that the driver's view of the crossing was obstructed by defendant's cars on a siding, since it permitted the jury to find for defendant, even though the driver went upon the track as the result of defendant's negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\*]

Appeal from Kaufman County Court;  
James A. Cooley, Judge.

Action by J. R. Nelson against the Texas

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Midland Railroad. Judgment for plaintiff, and defendant appeals. Affirmed.

H. C. Coke and S. W. Marshall, both of Dallas, and Dashiell, Crumbaugh & Coon, of Terrell, for appellant. Ed. R. Bumpass, of Terrell, for appellee.

RASBURY, J. The appellee sued appellant in the court below for \$200, alleged to be the value of a horse, wagon, and harness destroyed by appellant in a collision in the town of Terrell at the intersection of appellant's road and Moore avenue, a public highway, between appellant's train and appellee's wagon while being driven by John Wiggins. The grounds of negligence alleged by appellee, the defenses urged by appellant, and the evidence adduced upon trial of the case are substantially identical with those set out in our opinion delivered November 29, 1913, in the case of Texas Midland Railroad v. John Wiggins, 161 S. W. 445, not yet officially reported, which are adopted as a part of this opinion, except where departed from. Wiggins was appellee's driver, and the opinion referred to disposes of an appeal taken by appellant in this case from a judgment for Wiggins for damages for injuries sustained by Wiggins in said collision, which at the same time destroyed the property herein sued for. Upon trial of this case appellee recovered verdict for \$150.

The issues raised on this appeal by appellant under authority of its first, second, third, fourth, fifth, seventh, and eighth assignments of error are decided adversely to appellant in the Wiggins Case, and for that reason we will not discuss them here.

[1] On the trial of the Wiggins Case appellant offered to prove by its witness Clark the presence of a bottle containing whisky in the wagon driven by Wiggins in substantiation of the allegation that Wiggins was drunk on the morning of the accident and appeared drowsy and careless on approaching the crossing where the collision occurred. There we held that no proof having been offered that Wiggins was intoxicated at the time of the accident, and the witness who found the bottle being two blocks from the accident, and the bottle being found among the debris of the wagon after it was demolished, the proof was too remote. On the trial of this case the same witness was offered, the jury withdrawn, and the witness examined, who testified, as he did on the trial of the Wiggins Case, of finding the bottle containing whisky, and then testified that Wiggins was once in his employ for a period of a year, during which time he was a whisky "fiend" or "worm," and when drinking was in a stupor and in substance unconscious of what he was doing. On cross-examination witness said it had been six or seven years since he employed Wiggins, since which time he had seen him daily, with occasional lapses, but had never seen him intoxicated during said period of

years, nor had he seen him in the stupid condition described by witness, nor did witness see him drinking prior to or at the time of accident. The court declined to permit the witness to testify as above indicated to the jury. The court's action is assigned as error. We are of opinion that the facts above detailed do not in any respect cure the objection found by us on trial of the Wiggins Case. It is clear that in the absence of other facts or circumstances having some reasonable proximity to the time of the accident, indicating the drink habit on the part of Wiggins, and in the absence of any definite fact or circumstance tending to prove drunkenness on the day of the accident, evidence that six or seven years ago he was addicted to drink would also be speculative and remote, and hence inadmissible in support of the allegation of drunkenness, and insufficient to support a charge upon such issue.

[2] The court did not err in refusing to instruct the jury as requested by appellant that if some one warned Wiggins of the approaching train by halloaing to him and he heard the warning and could have stopped his horse in time to have prevented the accident, but failed to do so, to then find for appellant. Assuming the facts raised the issue covered by this charge, and conceding the right of appellant to have the facts constituting its defense grouped, yet an analysis of the charge discloses that the failure to heed the warning is made negligence per se, while the correct rule is that Wiggins should have observed the warning, if the jury believed that an ordinarily prudent person under all the facts and circumstances would have done so.

[3] The tenth and eleventh assignments of error complain in substance of the refusal of the court to instruct the jury that if appellant's engineer believed that Wiggins saw the approaching train and believed that he would stop and not attempt to cross the track, and that when he did attempt to cross the engineer did all he could do to prevent the injury, to then find for appellant. Without attempting a discussion at length of this issue, we are of opinion that it is sufficient to say that the charge should not have been given. It ignored and withdrew from the jury a consideration of the duties imposed by law upon appellant under the issues made by appellee. It permitted the jury to find for the appellant, even though Wiggins got upon the track as the result of the negligence of appellant. The evidence sustained the finding of the jury that Wiggins was placed in a position of danger because his view of the crossing was obstructed by appellant's cars on a siding. Whether this was true or not, it was in evidence before the jury, and if the jury believed it, as the verdict indicates, the effect of the charge would have been to tell the jury that, even though he was in a position of danger brought about by the negli-

gence of appellant, nevertheless appellant would not be liable if its engineer believed he was not in a position of danger or did all he could to prevent the accident when Wiggins' danger was apparent and when it was too late for Wiggins to avoid the collision.

The judgment is affirmed.

# SOUTHWESTERN LAND CORPORATION v. NEESE.

(Court of Civil Appeals of Texas. San Antonio. Dec. 10, 1913.)

## 1. JUSTICES OF THE PEACE (§ 147\*)—APPEAL—DECISIONS REVIEWABLE.

Under Rev. Civ. St. 1911, art. 2393, requiring appeals from justice's court to be perfected within 10 days from the date of the judgment, and article 747, providing that a writ of certiorari to review a judgment of a justice of the peace shall not be granted more than 90 days after the date of the judgment, no appeal could be taken from an order refusing to enter nunc pro tunc an order setting aside a judgment granted more than two years before, and granting a new trial, since the statute does not permit the county court to entertain an appeal for the sole purpose of deciding whether such order should have been entered nunc pro tunc, and, if the appeal brought up the entire case, the application, however unfounded, and whensoever made, would have the effect of a motion for a new trial filed within the time prescribed by statute.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 493-501; Dec. Dig. § 147.\*]

## 2. JUSTICES OF THE PEACE (§ 148\*)—APPEAL—DECISIONS REVIEWABLE.

When a judgment nunc pro tunc is entered by a justice of the peace, it becomes the final judgment of the court, and an appeal may be taken therefrom, and a revision of the entire proceedings had.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 502; Dec. Dig. § 148.\*]

## 3. JUSTICES OF THE PEACE (§ 162\*)—APPEAL—EFFECT.

An appeal from a judgment of the justice's court annuls the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 600, 603, 605; Dec. Dig. § 162.\*]

Appeal from Bexar County Court; John H. Clark, Judge.

Action by C. L. Neese against the Southwestern Land Corporation. From a judgment of the county court dismissing an appeal from justice's court, defendant appeals. Affirmed.

Searcy & Browne, of San Antonio, for appellant.

MOURSUND, J. On November 15, 1910, C. L. Neese recovered a judgment by default in the justice's court against the Southwestern Land Corporation for \$135, although there was an answer on file. On December 16, 1912, the defendant filed a motion alleging that the justice of the peace who had rendered the judgment, but was no longer in office, had, during the term at which the judgment

was rendered, set the same aside, and granted a new trial, but such order had not been entered, wherefore defendant prayed that the same be entered nunc pro tunc as of date November 16, 1910. This motion was, on December 28, 1912, denied by the then justice of the peace after hearing evidence, to which ruling defendant excepted, and gave notice of appeal to the county court for civil cases. Appeal bond was filed December 30, 1912. The county court for civil cases dismissed the appeal for want of jurisdiction, whereupon an appeal to this court was duly perfected.

[1, 2] There is only one question to be determined upon this appeal, and that is whether the county court erred in dismissing the appeal from the justice's court for want of jurisdiction. The appeal to the county court is from an order entered two years later than the judgment, by which order the justice's court refused to enter nunc pro tunc an order setting the judgment aside. When a judgment nunc pro tunc is entered, it becomes the final judgment of the court, and an appeal may be taken therefrom, and a revision of the entire proceedings had. But this was not an appeal from a judgment entered nunc pro tunc, but from an order refusing to enter nunc pro tunc an order setting aside a final judgment. Our statutes provide two methods of securing appellate revision of a justice's court judgment; one is by certiorari, the other by an appeal. In this case no appeal was perfected within the time prescribed by article 2393, Revised Statutes 1911, nor was any writ of certiorari procured within the time prescribed by article 747.

[3] When the county court acquires appellate jurisdiction, the trial in such case is de novo. Article 1950, Revised Statutes 1911. An appeal from a judgment of the justice's court annuls the judgment. *Jordan v. Moore*, 65 Tex. 363; *Railway Co. v. Mosty*, 8 Tex. Civ. App. 380, 27 S. W. 1057; *Harter v. Curry*, 101 Tex. 187, 105 S. W. 988.

In this case the judgment itself was not appealed from in either of the methods prescribed by statute. If an appeal from an order refusing to enter nunc pro tunc an order setting aside a judgment carries to the county court the entire case, then an application for such an order, however unfounded, would have all the effect of a motion for new trial filed within the time prescribed by statute, and overruled during the term, although such application was filed long after the term of court expired. On the other hand, our statute does not permit the county court to entertain an appeal for the sole purpose of deciding whether an order should have been entered nunc pro tunc setting aside a final judgment of the justice's court. The county court cannot enter the order, nor can it, as an appellate court,

order the justice's court to enter the same. It is clear that the county court did not acquire jurisdiction of the case, and that the court was correct in dismissing the attempted appeal.

We have omitted to state any of the facts bearing upon the merits of the controversy whether the justice of the peace should have entered the order *nunc pro tunc*, because the only question for us to determine was whether the county court acquired jurisdiction by the attempted appeal.

The judgment is affirmed.

**BALCH et al. v. SAN ANTONIO, F. & N. R. CO.**

(Court of Civil Appeals of Texas. San Antonio. Dec. 20, 1913.)

**EMINENT DOMAIN (§ 172\*)—JURISDICTION OF COURTS—COUNTY COURT.**

A county court has jurisdiction in matters of eminent domain, such jurisdiction not being taken away by Acts 32d Leg. c. 24, diminishing the jurisdiction of the county court of Kendall county.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 470-472; Dec. Dig. § 172.\*]

Error to Kendall County Court; J. W. Lauhon, Judge.

Action by the San Antonio, Fredericksburg & Northern Railroad Company against Alice Balch and another. Judgment dismissing the proceeding. Defendants bring error. Reversed and remanded.

Kampmann & Burney, of San Antonio, for plaintiffs in error.

**CARL, J.** This suit was instituted in the county court of Kendall county by the San Antonio, Fredericksburg & Northern Railroad Company, defendants in error, against Alice Balch and E. J. Beall, plaintiffs in error, to condemn a strip of land for right of way for the railway company over the land of plaintiffs in error in that county. Commissioners were appointed as provided by law and made their award, to which award objections were filed by plaintiffs in error. The court thereupon dismissed said cause, upon the ground that the Thirty-Second Legislature of Texas (General Laws 1911, page 30), had diminished the jurisdiction of the county court of Kendall county so as to deprive it of the power to act in matters of this kind. The judgment of dismissal of said cause has been brought to this court, by plaintiffs in error for review, and is assigned as error.

The Supreme Court of this state has directly passed upon this question in the case of Southern Kansas Ry. Co. of Texas v. Vance, 104 Tex. 90, 133 S. W. 1043, in which it is held that, while the general civil and criminal jurisdiction of the county court may be diminished or taken away, it still

retains its powers and jurisdiction in matters of eminent domain. This being true, it becomes our duty to reverse the judgment of the lower court dismissing this case, and to remand the cause for trial, which is accordingly done.

Reversed and remanded.

**WESTERN UNION TELEGRAPH CO. v. KERSTEN.**

(Court of Civil Appeals of Texas. Galveston. Dec. 22, 1913.)

On motion for rehearing. Motion overruled. For former opinion, see 161 S. W. 369.

**PLEASANTS, C. J.** In an able motion for rehearing filed by counsel for appellee, it is very earnestly insisted that this court erred in the opinion heretofore filed herein in holding that the charge given the jury by the trial court was erroneous in the respects stated in said opinion.

We adhere to our conclusion that the charge was incorrect; but we agree with counsel that the errors in the charge pointed out in said opinion are not such, in view of the evidence in the case, as would require a reversal of the judgment. We reversed the judgment because we concluded that the evidence failed to show that appellee could have been present at his brother's funeral if the telegram had been promptly delivered, and the errors in the charge were only pointed out for the purpose of preventing their repetition upon another trial.

The motion for rehearing is overruled.

**TAFOLLA v. STATE.**

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

**1. WEAPONS (§ 13\*)—CARRYING—JUSTIFICATION.**

The rule that, where a person going about his usual business is informed that unknown persons will likely assault him or have threatened to do so, he may prepare for his defense will not justify a person who on election day is interesting himself in the candidacy of another, and who several times during the day is taken by officers from within the inhibited limits near the polls, in carrying a pistol, even though he had reason to believe from assaults made on others that he was likely to be assaulted.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.\*]

**2. CRIMINAL LAW (§ 829\*)—TRIAL—REFUSAL OF INSTRUCTIONS COVERED.**

In a prosecution for carrying a pistol, it was not error to refuse instructions covered by those given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from Bexar County Court; J. R. Davis, Judge.

Pete Tafolla was convicted of carrying a pistol, and appeals. Affirmed.

C. E. Lane, Asst. Atty. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

DAVIDSON, J. Appellant was convicted for carrying a pistol.

The facts show that there was an election in San Antonio somewhat exciting in its nature and a little strenuous; the election being held for the selection of a mayor of that city. The state's case is to the effect that on the 13th of May, the day of the election, Mock was a policeman on duty at election poll No. 14, which was at the corner of West Commerce and Pinto streets. The witness saw a crowd, in which there seemed to be a fight, at the corner of two streets, and went to the scene of the trouble, and saw defendant standing on the ground near a buggy, saw him get in the buggy, and some one informed him that he had a pistol. Thereupon he searched defendant, and took a pistol from his pants pocket—a small automatic pistol. Morales testified that defendant had been to election precinct No. 14, at the corner of West Commerce and Pinto streets, a number of times during the morning, and was loud and boisterous, and was put out of the poll limits several times. In the evening he came back in his buggy and stopped at the corner of West Houston and Pinto streets, a block from the poll, and began to hurrah, saying, "Oh, we got them beat;" and witness went up to him and said, "If you think you have us beat, why don't you bet your money?" "He said he did not care to bet; that he did not have money. I told him he was afraid to bet. He said, 'Your crowd has the money, and, if you win the election, you will buy it.' I called him a liar. He was in his buggy. He grabbed his whip, and I grabbed it away from him, and he ran his hand in his pocket as he got out of the buggy and pulled a pistol out of his pocket. The crowd prevented further trouble, and a policeman arrested defendant, and took his pistol." This witness was a supporter of the ticket headed by Clinton G. Brown, and defendant was a supporter of the ticket headed by Joseph Ryan; they being the opposing candidates for mayor. This is the state's case.

Appellant testified that he was a supporter of Ryan for mayor; that he was afraid he was going to be assaulted by supporters of Brown; that he had been told by three or four different parties he was in danger of being assaulted; that other Ryan men had been assaulted, and he wished to protect himself from any unlawful attack upon his person; he asked a deputy United States marshal for permission to carry a pistol, but could not get the permit, and on election day he put the pistol in the bottom of his buggy between his feet and the dashboard, and put a newspaper over it; that he was working on that day, going from poll to poll in the city to see that the Ryan men voted, and to get them out to vote; his voting poll was No. 6; that he went with Mr. Poston from poll No. 15 in his buggy to poll No. 14, at the corner of West Commerce and Pinto streets; that he was going to poll No. 6, and poll No. 14

was six or eight blocks out of his direct way to No. 6; that he stopped his buggy a block away at the corner of West Houston and Pinto streets; that Poston got out of the buggy, and Joe Morales offered to bet that Brown would win. "I told him I did not want to bet; he seemed mad, and when I would not bet he slapped at me hard, and then grabbed my whip, and I got hold of the whip, and he broke it. I then reached down in my buggy and got my pistol, and just got out of the buggy, and the crowd got hold of Morales, and I put the pistol in my pocket, and was getting back in the buggy when the policeman arrested me, and found the pistol in my pocket." On cross-examination he testified: "Some three or four parties told me I was in danger; one of them was Sim Guerra. I don't remember the name of any other who told me, or when I was told." Poston testified that he was in the buggy with defendant on day of city election; that when on the way to box No. 6 he saw the pistol on the bottom of the buggy between defendant's feet and the dashboard, and that it was still in the buggy when they got to West Houston and Pinto streets, when he immediately got out, and did not see the commencement of the difficulty; that paper was over pistol part of the time. Guerra testified that he never at any time told defendant he was going to be attacked, or that he was in danger of being attacked. "This was at my house while I was in bed suffering from an assault. I was beat over the head with a pistol." This is the statement of facts.

[1] There were quite a number of charges given and refused which seem to present the case pretty generally and fairly well. There were quite a number of exceptions reserved by bills, the first of which is, in substance, as follows: Defendant offered to prove that a party of Brown supporters in the city election assaulted with knife and pistol one of the partisan supporters of Ryan for mayor, and then on the same night a party of Brown supporters invaded the west side headquarters of the Ryan supporters, and then and there assaulted and beat up with pistols a number of Ryan supporters, which was offered to show that the defendant had reasons to believe the warnings he had received as to his danger of attack from unknown persons to be true, and his inability to protect himself against such assault by having a number of unknown persons arrested by legal process. The county attorney objected to this testimony, for the reason that the fights and riots of others could not justify defendant in carrying a pistol, and was irrelevant and immaterial to the case. Under the facts of this case we are of the opinion the court was correct in excluding this. Taken in connection with the evidence as given by the defendant himself it was not error. He shows that he was working that day over the city, going from one polling place to another in the interest of the Ryan ticket.



This he had a right to do. Every citizen has a right to electioneer for his side of the question or for any candidate he sees proper to indorse or desires to see elected; but this would not justify him in carrying a pistol. If appellant was anticipating an attack from unknown parties, under the decisions of our court he would be justified in carrying some weapon of defense, if the threatened attack was of such a nature as would authorize him to believe that his person or his life was in danger; but in this case appellant was going about the city from place to place for electioneering purposes, and seemed from the testimony little enthusiastic, and on more than one occasion was taken by the officers from within the inhibited limits, and where he should not have been. Under these circumstances we believe the court's ruling was correct, and this testimony was not authorized.

[2] There were several charges asked by the defendant which were refused by the court; but we are of opinion that the charge given by the court and requested instructions given sufficiently presented any defense that he was justly entitled to have submitted. This requested charge was given: "You are instructed that, if the defendant carried a pistol in his buggy at the bottom thereof near the dashboard, then you will determine from the law given you in the court's charge whether or not the same was on or about the person of defendant. And if the same was not on or about his person, you should acquit the defendant, and upon this question, if you have a reasonable doubt, you will find defendant not guilty."

Another requested charge was given, as follows: "If you find from the evidence, beyond a reasonable doubt, that the defendant, Pete Tafolla, did, in Bexar county, Texas, on or about the time alleged in the information, carry on or about his person a pistol, and that at the time the defendant did not then have a reasonable ground for fearing an unlawful attack upon his person, and that the danger of such attack was so imminent and threatening as not to admit of the arrest of the party or parties, if any, about to make such attack upon him, by legal process, then you will find the defendant guilty, and assess his punishment by a fine of not less than \$100 nor more than \$200, or by confinement in the county jail for any period of time not less than 30 days nor more than 12 months, or by both such fine and imprisonment in the discretion of the jury."

The jury was further charged, at the request of the defendant, that the burden of proof is on the state of Texas to prove beyond a reasonable doubt that the defendant did, in Bexar county, Texas, at or about the time stated in the information, carry on or about his person a pistol.

The following charge was also asked by appellant and given: "The law of this state permits a citizen to carry on or about his per-

son a pistol whenever he has reasonable grounds for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party or parties about to make the attack on him, upon legal process. Therefore, even if you should find that the defendant did have and carry on or about his person a pistol, in Bexar county, Texas, at or about the time charged in the information, if you further find that the defendant then had reasonable ground for fearing an unlawful attack upon his person, and that the danger was so imminent and threatening as not to admit of the arrest by legal process of the party about to make such attack, then you will find the defendant not guilty."

The following charge was also asked by appellant and given: "In all criminal prosecutions the defendant is presumed to be innocent until his guilt is established by the state beyond a reasonable doubt. In this case you are instructed that the burden is upon the state to prove the guilt of defendant beyond a reasonable doubt, and, if you have a reasonable doubt as to the guilt of the defendant, you will give him the benefit of that doubt, and find him not guilty. You are the exclusive judges of the credibility of the witnesses and of the weight to be given to their testimony; but you are bound to receive the law from the court as it is herein given you, and be governed thereby."

The following charge was asked but refused: "If you find from the evidence that the defendant, at the time and place mentioned in the information, had a pistol lying in the bottom of a buggy in which he was then and there sitting, and that upon apprehending an attack upon his person, if any he did so apprehend, he took the pistol in his hand with the intention of resisting such attack, then you are instructed that under such circumstances the defendant would not be guilty, and, if you so find the facts, you will acquit the defendant."

There are other charges along the same line which were asked and refused; but we are of opinion the court did not err in refusing the requested instructions, inasmuch as he had sufficiently presented these phases of the law; nor do we believe the court was in error in refusing to charge the jury that the fact that appellant placed the pistol in the buggy and carried it, as he says he carried it, under the circumstances detailed by himself, without taking into consideration the state's evidence, that he was justified in carrying the pistol. If appellant was going about his usual business, and had been informed that unknown parties would likely assault him, or had threatened to do so, and not knowing who the parties were, he would be justified in preparing for his defense against such assault. But under the facts of this case the appellant himself makes it apparent that he was not going about his usual business, but was going about the city inter-

esting himself in the candidacy of Mr. Ryan for mayor of the city. This he might do; but he was not justified in going from polling place to polling place carrying a pistol and conducting himself as the witnesses state he was doing. This would be carrying the doctrine of carrying a pistol under our law beyond what was intended by the law to protect him in carrying the pistol. Therefore the court did not err in giving the charges quoted and similar charges presenting this phase of his contention. Under the facts we think appellant was not justified in carrying the pistol.

Believing there was no such error committed as deprived appellant of a fair trial, or deprived him of any legal rights under the pistol law, we think the judgment ought to be affirmed, and it is accordingly so ordered.

#### COOPER v. STATE.

(Court of Criminal Appeals of Texas. Dec. 17, 1913.)

##### 1. HOMICIDE (§ 309\*)—EVIDENCE—NEGLIGENT HOMICIDE.

Evidence in a trial for homicide *held* not to raise the issue of negligent homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

##### 2. HOMICIDE (§ 165\*)—EVIDENCE—PERSONAL RELATIONS—ILL TREATMENT.

On a trial of accused for the murder of his wife, evidence of his ill treatment of her during their marriage of 13 months was admissible of itself, and especially so in connection with other testimony showing his continuous ill treatment of her down to the time of the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 319; Dec. Dig. § 165.\*]

##### 3. CRIMINAL LAW (§ 1153\*)—APPEAL—DISCRETION OF TRIAL COURT—RECEPTION OF EVIDENCE.

Where relatives of accused were present at the trial and heard the testimony of a witness for the state after the rule had been invoked, but the state's attorney at the time did not know that they knew anything about the case, but after adjournment of the first half day of trial had them sworn and placed under the rule, the trial court, in permitting them to testify, did not abuse his discretion, so as to afford ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.\*]

##### 4. CRIMINAL LAW (§ 706\*)—TRIAL—RECEPTION OF EVIDENCE.

A witness for the state did not or would not remember that he had told the county attorney that immediately before the shooting by accused deceased told accused "not to shoot her," but testified that he said "not to hurt her," whereupon the county attorney held before him and examined him from a statement made by him shortly after the shooting that deceased had said to accused, "Don't shoot me." The witness, when recalled the following day testified that deceased had said, "Don't shoot me." *Held*, that there was no error in permitting such examination by the county attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.\*]

##### 5. HOMICIDE (§ 125\*)—"EXCUSABLE HOMICIDE"—ACCIDENT OR MISFORTUNE.

Homicide is excusable where the death of a human being happens by accident or misfortune.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 189, 190; Dec. Dig. § 125.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2556, 2556.]

##### 6. CRIMINAL LAW (§ 829\*)—TRIAL—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

Where the court correctly submitted the issue of excusable homicide by accident or misfortune, there was no error in refusing the defendant's special charge thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

##### 7. CRIMINAL LAW (§ 778\*)—TRIAL—INSTRUCTIONS—BURDEN OF PROOF.

The court was not called upon to give defendant's charge that, as the evidence introduced by both the state and himself showed his statement that he shot and killed deceased by accident, and did not intend to kill her, the state must show that such statement was false, where in effect he did so charge, and the jury, without believing that his claimed accidental shooting was false, could not have convicted of murder in the second degree.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1900, 1907; Dec. Dig. § 778.\*]

##### 8. HOMICIDE (§ 13\*)—MANSLAUGHTER—IMPLIED MALICE.

In murder in the second degree malice will be implied from the fact of an unlawful killing not justified or excused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 18; Dec. Dig. § 13.\*]

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Eugene Cooper was convicted of murder in the second degree, and he appeals. Affirmed.

Taylor & Forrester, of Waco, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. Appellant was convicted of murder in the second degree, and his punishment fixed at 25 years' confinement in the penitentiary.

The statement of facts is quite lengthy. The material evidence, however, is not extensive. The statement shows the witnesses were examined in chief, crossed, re-examined, recrossed over and over again—simply a rehashing of the same matter without developing anything additional in most of the re-examinations. The appellant and his deceased wife, whom he was convicted of murdering, and appellant's sister and a man by the name of George Bradshaw, all lived in a small house at the time of the killing; appellant and his wife in one room, and appellant's sister and Bradshaw in another. They had been thus living for a few months prior to the killing. Between 7 and 8 o'clock on January 5, 1913, these four persons together went to a picture show in Waco, where they remained till about 10 o'clock; they then went to a negro clubhouse, all the parties being negroes, where they remained,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dancing, drinking, and frolicking till 3 or 4 o'clock in the morning. Bradshaw and appellant's sister went home first and went to bed. Appellant and his wife went later.

At the time of the killing appellant and deceased had been married less than 13 months. For several months after their marriage they lived at a different place from where the killing occurred. A few months before the killing they moved to the place where it occurred.

Gussie Perry, a sister of deceased, testified that she knew how appellant treated deceased when he found deceased had been to see any of her kinsfolk; that he treated her mean, though she never saw him strike her; that on the Saturday night before the killing deceased was at her house; when appellant came and knocked on the door, deceased opened it, and he told her to "come on down; you know it's 7 o'clock."

Ella Ware, deceased's cousin, testified she knew of trouble between Ada Moore, deceased, and appellant after deceased and appellant were married; that deceased caught appellant in bed with Ada, and at the time pulled him out of the bed, and then told Ada that she had married appellant, and did not want to catch her with him any more. Thereupon Ada jumped on and had a fight with deceased; that this Moore woman was not the only one that appellant had anything to do with; that there was another woman by the name of Crystine; that after appellant and deceased were married they were at a picture show one night, and appellant sat by Crystine in this show; that deceased went to him and wanted him to come and sit with her; that he told her to go on back, and after they went home from the picture show appellant jumped on deceased, hit her with his fist, and started to hit her again when he was prevented by one who was present; that appellant just stayed with deceased when he got ready.

Mrs. Mattie Hayden, a white neighbor, testified she lived directly across the street from appellant and deceased at the time of the killing and for a few months continuously theretofore; that sometimes appellant seemed to be kind to deceased, and then again he would abuse her; that she had heard him curse her, and had seen him draw a gun on her in the fall during cotton picking time before the killing; that he seemed to be mad at the time, but his wife was laughing; that the night of the killing she heard appellant and deceased when they got home just before the killing; when he stepped up on his gallery, she heard him say, "I will show you;" that they then went in the house, when she heard loud talking, but could not hear what they said; and that she then heard the report of the gun.

The evidence further shows that the woman Ada Moore was at the clubhouse with the others the night of the killing. Lizzie Brown, who was at the club that night, tes-

tified that appellant's mother was also there, and that she and appellant's mother lived together, but after they separated, when going home that night she went on home, but appellant's mother stayed, waiting to see appellant; that she did not know what she wanted to see him for, but that some of the parties at the club said they (appellant and deceased) were fussing up at the club; that she never heard it herself; that afterwards appellant's mother came on to her house, and still later appellant and his wife, going to their home, passed their house, and appellant's mother, hearing them, opened the door and called to deceased, saying, "Was he there?" Deceased replied, "Oh, I don't know."

Edna Cooper, appellant's sister, who lived in the house with them and George Bradshaw, on cross-examination, testified that she had heard appellant and deceased fuss and then make up several times while they were living together; that it was just kind of fussing, not real fussing; that appellant did not fuss with the deceased much; that she did not know what appellant had ever had to do with Ada Moore, but had seen them talking together, like that; that she had heard deceased hurraing appellant about Ada Moore, and she herself had hurraed him about her.

George Bradshaw, who was living in the house with appellant and deceased and appellant's sister, Edna Cooper, and had for some time before the killing, testified: That he went home that night before appellant and deceased, and when they came he had gone to bed and was asleep. That about 3 or 4 o'clock in the morning appellant and deceased came home, and appellant did not knock at the door, but shook it, and before he could get to it shook it again. That he then opened it and said to appellant, "Hell, quit that beating at the door that way." That he went on back to his bed, and the deceased and appellant came in the room. That a lamp was burning at the time. That the deceased walked up to the dresser and took her hat off, and put it on the dresser. That appellant went over to where his gun was, picked it up, backed back a few steps, breeched and unbreeched the gun, and said to deceased, "You are always talking about killing me." She said, "I wouldn't hurt you for nothing, Eugene." He said, "You are always talking about killing me." She said, "No, Eugene, don't shoot me; I wouldn't hurt you for nothing." And he said, "You are a damn lie," and shot her in the left arm and left side, from which wounds she died a few hours later. That all the time from the time appellant picked up the gun on this occasion, while he was breeching and unbreeching it, and backed back a few steps, he was pointing the gun all the time at the deceased, and seemed to be a little mad.

It seems that the firing of the gun or the commotion at the time put out the light. Deceased, when shot, fell, and began holloeing and calling for Edna Cooper. Edna relighted

the lamp, and, finding deceased shot, Bradshaw went off after a doctor, and told the police. He could not find a doctor; but the police at once went to the house where the killing occurred. Soon after, or about the time, the police got there the doctor arrived. In the meantime many of the neighbors, hearing the shooting and the commotion, hurriedly went over to the house. Numerous witnesses who first got there and the policemen testified that when they first got to the parties deceased had been put on the bed; appellant was standing or kneeling by her, or alternately, one or the other, and trying time and time again to get her to say she had shot herself; the deceased would never say so; that the deceased would not tell the doctor, any of the policemen, or others present who had shot her, or how it had occurred, until repeatedly urged and pressed to do so; that appellant at first expressly denied that he had shot her. During the time appellant went out of the room somewhere. While he was absent deceased then told the police and those present that the appellant had shot her. They then had him come back in the room where she was. The substance of the testimony of the policemen then is that she again stated to appellant that he had shot her, and Mr. Harbour, one of the policemen, testified that when appellant was first called back in he said to deceased, "Honey you done it." She replied, "Honey, you done it;" and he said, "No, I didn't either." She said, "Yes, you did; you know you did." He then said, "Yes, I did do it, but it was an accident; I taken the gun off of the bed and went to set it in the corner, and it went off and shot her."

Appellant himself testified, in effect, denying that he had tried to get deceased to tell that she had shot herself, and he denied that he had denied shooting her, but claimed in his testimony on the trial that he had shot her accidentally, that the gun went off when he was breeching or unbreeching it, and that he had no intention of shooting or killing her. He did testify that when they came from the club that night and his wife was at the dresser she said, "I ought to kill you," something about like that, and that reminded him of his gun. He denied the balance of the conversation between them as testified to by Bradshaw. He also in effect denied that he had any trouble or mistreated his wife at any time, and expressly denied the testimony of Mrs. Hayden. In fact his whole testimony and defense was an accidental shooting and killing.

[1] We have carefully read and studied the evidence, and in our opinion negligent homicide was not raised, and the court did not err in refusing to submit such question to the jury.

[2] By one of appellant's bills of exceptions he objected to the testimony of said witness Ella Ware as to what she testified about his treatment of the deceased, claiming that

the transactions and matters told about by her were too remote from the killing, and no relation or connection therewith was shown between those transactions and the killing, and such evidence was calculated to prejudice the jury against him, and such testimony would throw no light upon or illustrate his motive in the killing. We think this testimony was admissible of and within itself, but especially so in connection with the testimony of other witnesses showing practically a continuous ill treatment of her by him down to the very time of the killing. See section 1235, White's Ann. P. C.; and section 1074, subd. c. of his Ann. C. C. P.

[3] By another bill he complains that the court erroneously permitted said witnesses Ella Ware and Gussie Perry to testify, because they had been present in the courtroom and heard the testimony of George Bradshaw after the rule had been invoked and enforced. The court, in allowing this bill, explained and qualified it by stating that the state's attorney did not know that said witnesses knew anything about the case at the time the rule was invoked, but was advised that relatives of deceased were in court; after court adjourned he then talked with them, and on the following morning had them sworn and placed under the rule; that the case had been on trial only one-half day; and they heard no other witness testify except Bradshaw. The law in such matters, as uniformly held by this court, gives the trial judge wide discretion in permitting a witness to testify under such circumstances, and will not reverse a case where he has thus used his discretion except in clear cases of abuse. Branch's Crim. Law, § 881, and cases cited. We think, under the circumstances, the court did not improperly exercise his discretion in permitting these witnesses to testify.

[4] By his only other bill he complains that the court erred in permitting the character of examination by the county attorney of the state's witness said Bradshaw, in effect, that he asked him leading questions, and held a paper in front of him (the county attorney), and questioned the witness from said paper, representing that it was a written statement signed by the witness in the county attorney's office three days after the shooting. The bill develops that the witness at that time did not remember or would not remember that he had told the county attorney that immediately before the shooting of the deceased by the appellant she told appellant "not to shoot her"; he then testified that she said not to hurt her. The court, in approving this bill, qualified and explained it by stating that the paper mentioned as being held before the county attorney while he was examining this witness was a statement made by said witness shortly after the killing, in which the witness made the statement that the deceased said to defendant, "Don't

shoot me." The witness did not answer the question as indicated in the bill, but was recalled by the state on the day following his first appearance on the stand, when he testified without hesitation that deceased said to defendant, among other things, "Don't shoot me." As qualified by the court, this bill presents no error. *Carter v. State*, 59 Tex. Cr. R. 73, 127 S. W. 215.

In submitting murder in the second degree to the jury for a finding, the court charged the jury: "Now, if you believe from the evidence, beyond a reasonable doubt, that the defendant, Eugene Cooper, in the county of McLennan and state of Texas, did, on or about the time alleged in the indictment, with a gun, and that the same was a deadly weapon, and one reasonably calculated and likely to produce death by the mode and manner of its use in a sudden passion, and not under circumstances which would reduce the killing to an accidental or excusable killing, did unlawfully and with implied malice shoot and thereby kill said Pearl Cooper, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the penitentiary for any period that the jury may determine, provided it be for not less than five years."

[6, 8] Then immediately followed it with the further charge: "Homicide is excusable when the death of a human being happens by accident or misfortune. Now, if you believe from the evidence that the defendant shot and killed the said Pearl Cooper, but if you further believe from the evidence that in the breeching, or unbreeching, or handling the gun with which the shooting, if any, was done said gun was accidentally discharged, thereby shooting and killing the said Pearl Cooper, or if you have a reasonable doubt thereof, then you will return a verdict of not guilty." These charges correctly submitted the issues to the jury, and the court did not err in refusing appellant's special charge No. 2, on the subject of excusable homicide by accident or misfortune, as the court's charge had fully and substantially already so charged.

[7] Under the state of the evidence in this case the court was not called upon to give appellant's third special charge, requiring that, as the evidence introduced by both the state and the defendant as to his admissions and statements in which he stated that he shot and killed the deceased by accident, and did not intend to shoot and kill her, the state must show that his said statement was false; otherwise to acquit him. Besides, in submitting the case to the jury, as shown above, the court, in effect, did so charge, and the jury could not have found the verdict it did without believing that his claimed accidental shooting of deceased without intention to kill her was false.

The court in this case correctly defined murder in the first degree in accordance with the statute. He also fully defined express

malice. In a separate paragraph he quoted the latter part of the definition of murder (article 1140, P. C.): "Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide." Then he charged on murder in the second degree as follows: "Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that in murder in the first degree malice must be proved to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing. Implied malice is that which the law infers from or imputes to certain acts, however suddenly done. Thus, when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse, or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree than, if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and on the other hand there is nothing in evidence that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree. The instrument or means by which a homicide is committed is to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears."

[8] Appellant complains of this part of the court's charge wherein the court states "that in murder in the second degree malice will be implied from the fact of an unlawful killing," claiming that this is not the law, and that such language should not have been used in the charge in this case.

In the recent case of *Hicks*, 163 S. W. —, from Caldwell county, not yet officially reported, in discussing this identical question, we said: "The definition of murder in the second degree, and how and when the law infers malice from an unlawful killing in exact accordance with the two paragraphs of the court's charge above quoted, has been the established law of this state ever since we have had two degrees of murder. Judge White, in his Ann. P. C., in section 1257, after stating what is ipso facto murder of the first degree, says: 'If, however, they do not establish murder committed in one of these modes, and do not show any justification, excuse, or mitigation for the homicide, the law implies the malice, and the murder is in the second degree'—citing *McCoy v. State*, 25 Tex. 33 [78 Am. Dec. 520]; *Jordan*

v. State, 10 Tex. 479; Hamby v. State, 36 Tex. 523; Jones v. State, 13 Tex. 168 [62 Am. Dec. 550]; Atkinson v. State, 20 Tex. 522; Farrer v. State, 42 Tex. 265; Farrell v. State, 43 Tex. 503; Hill v. State, 11 Tex. App. 456; Ellison v. State, 12 Tex. App. 557; Neyland v. State, 13 Tex. App. 536; Martinez v. State, 30 Tex. App. 129 [16 S. W. 767, 28 Am. St. Rep. 895]; Childers v. State, 33 Tex. Cr. R. 509 [27 S. W. 133]; Baltrip v. State, 30 Tex. App. 545 [17 S. W. 1106]. Again, in section 1259, he says: 'Implied malice is the essential characteristic of murder in the second degree. It is not a fact, but an inference or conclusion deducible from particular facts and circumstances judicially ascertained. Thus, when the fact of an unlawful killing is established, and there are no circumstances in evidence which show the existence of express malice, or which tend to mitigate, excuse, or justify the act, then the law implies malice, and the offense is murder in the second degree'—citing *Martinez v. State*, supra; *Harris v. State*, 8 Tex. App. 90; *Toonery v. State*, 5 Tex. App. 163; *Douglass v. State*, 8 Tex. App. 520; *Hubby v. State*, 8 Tex. App. 597; *Hill v. State*, supra; *Ellison v. State*, supra; *Neyland v. State*, supra; *Reynolds v. State*, 14 Tex. App. 427; *Turner v. State*, 16 Tex. App. 378; *Stanley v. State*, 16 Tex. App. 492; *Smith v. State*, 19 Tex. App. 95; *Hart v. State*, 21 Tex. App. 163 [17 S. W. 421]; *Baltrip v. State*, supra. This court, in *Barton v. State*, 53 Tex. Cr. R. 445 [111 S. W. 1042], expressly approved and commended as admirably presenting the law on the subject a charge of which the two paragraphs first above quoted are literally the same. Mr. Branch, in his Criminal Law, § 426, in the first subdivision on page 255, gives as a correct charge substantially the first paragraph above quoted, citing *Douglass v. State*, 8 Tex. App. 520; *Neyland v. State*, 13 Tex. App. 536, supra, and *Gonzales v. State*, 30 Tex. App. 224 [16 S. W. 978], and then follows with a literal copy of the second paragraph as the law on the subject, and cites *Barton v. State*, supra; *McGrath v. State*, 35 Tex. Cr. R. 423 [34 S. W. 127, 941]; *Smith v. State*, 45 Tex. Cr. R. 553 [78 S. W. 694]; *Carson v. State*, 57 Tex. Cr. R. 396 [123 S. W. 590, 136 Am. St. Rep. 961]; and *Harris v. State*, 8 Tex. App. 90."

The charge of the court in this case was correct on this point and in accordance with the law, and appellant's objections thereto present no error. Taking the charge as a whole, which must always be done, it was an admirable announcement of the law, and presents to the jury for a finding in accordance with the evidence in the case.

The evidence clearly was sufficient to sustain the verdict. No reversible error is pointed out, and the judgment will be affirmed.

## JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Dec. 10, 1913.)

## 1. CRIMINAL LAW (§ 1206\*)—PUNISHMENT—INDETERMINATE SENTENCE LAW—EFFECT OF INVALIDITY.

The indeterminate sentence law passed at the regular session of the 33d Legislature (Acts 33d Leg. c. 132) having been declared unconstitutional, accused, charged with murder alleged to have been committed October 1, 1901, for which he was placed on trial in July, 1913, was entitled as of right to have his punishment assessed by the jury, as provided by Code Cr. Proc. 1911, art. 750.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206.\*]

## 2. HOMICIDE (§ 318\*)—DEGREES—PUNISHMENT.

Where the law relating to murder as it existed in 1901, when the crime for which accused was placed on trial was committed, provided a different punishment for murder committed on express malice from that committed on implied malice, he was entitled to have the jury find whether the offense had been committed on express or implied malice, and to have his punishment assessed accordingly.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 671-675; Dec. Dig. § 318.\*]

## 3. HOMICIDE (§ 300\*)—SELF-DEFENSE—INSTRUCTIONS.

In a prosecution for homicide, an instruction on self-defense requiring the jury to find affirmatively that, at the time defendant shot, he believed he had been actually assaulted and struck on the head with a hoe, and that he shot deceased in good faith, etc., in order to entitle him to rely on self-defense, was erroneous; such defense being made out if the jury believed, or had a reasonable doubt, that such state of facts existed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.\*]

Appeal from District Court, Smith County; J. A. Bullouch, Special Judge.

William Johnson was convicted of murder, and he appeals. Reversed and remanded.

O. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. The appellant in this case was indicted, charged with murder, at the fall term, 1901, of the district court of Smith county, alleging that on the 1st day of October, 1901, with malice aforethought, he did kill John Woods by shooting him with a pistol. He was not located nor arrested until in October, 1912, 11 years after the indictment was returned. He was not placed on trial until in July of this year, the verdict being returned on July 16, 1913; the jury returning the following verdict: "We, the jury, find the defendant guilty of murder," assessing no punishment. The court, under this verdict, sentenced appellant to penal servitude in the penitentiary for any term of years not less than five nor longer than his natural life.

[1] Appellant, at the time the charge was given, when the verdict was returned, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the motion for a new trial, objected to the action of the court in his charge authorizing the return of this character of verdict, and to the action of the jury in returning a verdict in which no penalty is assessed, and to the action of the court in itself assessing the punishment to be undergone by appellant. In the case of *Ex parte Randell Marshall*, 161 S. W. 112, recently decided, but not yet reported, we held the indeterminate sentence law, as passed by the regular session of the 33d Legislature (Acts 33d Leg. c. 132), void for the reasons stated in appellant's sixth bill of exceptions; and, while in a number of other bills of exceptions appellant states a number of other reasons why he thinks the law void, we do not deem it necessary to discuss these other grounds. And, having held the first indeterminate sentence law void, appellant had the right, as contended by him in his third bill of exceptions, to have the jury and not the trial judge assess the punishment he should undergo for this violation of the law. Article 750 of the Code of Crim. Proc. (1911 Revision).

[2] Again, appellant contends that, as he was charged with having committed an offense (murder) in 1901, when the laws of this state prescribed a different punishment for murder committed upon express malice from that committed upon implied malice, he had a right to have the jury determine whether if appellant was guilty of murder, he had committed it upon express malice or implied malice. As the law now in force assesses the same punishment for murder,

whether committed upon express or implied malice, and the punishment may be more severe for murder committed upon implied malice than could have been inflicted when he is alleged to have committed the crime, then he had the right to have the jury determine whether or not the offense of murder was committed upon express or implied malice, and, if they determined it was committed upon implied malice, to have them instructed to inflict the punishment in accordance with the law in force at the time he is alleged to have committed the offense. This contention is the law of the state, and the court should have so instructed the jury. Articles 15, 16, 17, and 18 of the Penal Code.

[3] On the law of self-defense, in paragraph 12 of the charge, the court required the jury to find affirmatively that at the time he shot he believed "he had been actually assaulted and struck in the head with a hoe, and that he shot the deceased, in good faith, etc." Then he would be justified in shooting deceased. The law of this state does not authorize the court to instruct the jury that they must find that the defendant "acted in good faith," under such circumstances, nor that they must find the facts affirmatively. The law is, if the jury believe or have a reasonable doubt that such state of facts may have existed, then the defendant would be entitled to act.

The other matters in the record before us need not be discussed, as they present no error, but, on account of the errors above referred to, the case is reversed and remanded.

**ADAMS v. BUTTON et al.**

(Court of Appeals of Kentucky. Jan. 7, 1914.)

**1. HUSBAND AND WIFE (§ 49½\*)—PROPERTY—GIFTS.**

Where a husband, competent to transact business, directed a note given for the price of land sold to be made payable to the wife, it would be construed as a gift to or provision for her, in the absence of any agreement to the contrary or circumstances indicating a different purpose.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.\*]

**2. EVIDENCE (§ 271\*)—DECLARATION.**

In an action to establish a trust in land, declarations of plaintiff's father, bearing upon his intention to create a trust in the proceeds of a purchaser's money note, payable to his wife, plaintiff's stepmother, made when the wife was not present, was not competent against those claiming under her.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1061-1104; Dec. Dig. § 271.\*]

Appeal from Circuit Court, Trimble County.

Action by J. T. Adams against T. L. Button and others. Judgment for defendants, and plaintiff appeals. Affirmed.

G. W. Peak, of La Grange, and Edwards, Ogden & Peak, of Louisville, for appellant. W. B. Moody, of New Castle, for appellees.

**TURNER, J.** This is an equitable action by appellant seeking to have it adjudged that a certain tract of land containing 27 acres was held in trust by his stepmother for his father. F. A. Adams, the father, had been twice married, and appellant was the only child by the first marriage, and there were no children of the last marriage. F. A. Adams, prior to March, 1893, was the owner of a tract of 27 acres of land adjoining two tracts of about 27 acres owned by his last wife, Lydia Adams; the three tracts constituting one farm of about 104 acres. In March, 1893, the whole farm was sold to one Callis, the consideration being \$3,000, payable in three years, and the note for the whole amount was made payable to Lydia Adams, the wife. Callis failed to make any payment of any size on the note, and in April, 1897, he reconveyed the whole tract of 104 acres to Lydia Adams, and his note, amounting then to \$3,500 or \$3,600, was surrendered to him. F. A. Adams died in 1898, and Lydia Adams continued to hold, manage, and control the whole of the farm conveyed to her until her death, in 1908, except she sold 4 acres and a fraction for a cemetery. Thereafter, and in 1909, appellant instituted this action; the lower court dismissed his petition, and he has appealed.

It is urged for appellant that the evidence shows that in March, 1893, when the land was conveyed to Callis, and in April, 1897, when he reconveyed it to Lydia Adams, F. A. Adams was in such mental condition that he could not understand the nature and effect

of a contract, and that for that reason Lydia Adams held the title to the 27 acres in trust for his heirs.

[1] The evidence unquestionably shows that in April, 1897, the condition of F. A. Adams was such that he was incapable of transacting any business or understanding the nature and character of a contract; but at the time at which the original transaction took place in March, 1893, his mental condition, under the evidence of all the witnesses, was very different, and much better. At that time he was attending to all of his own business, conducting his mercantile establishment in the usual way, and, while there is some evidence that he had begun to fail mentally, the decided weight of the evidence is that he was then competent to transact business. That being true, when he directed the note for his land to be made payable to his wife, the universal rule is that it will be construed as a gift to or provision for her, in the absence of any agreement to the contrary or circumstances indicating a different purpose. 21 Cyc. 1297.

The evidence discloses that F. A. Adams was a man of some property; that about the time of the transaction in 1893 he made an advancement of several hundred dollars to appellant, his only son.

[2] The man who wrote the deed from Adams and his wife to Callis testified that, when he ascertained that the title to the 27 acres was in F. A. Adams, he called his attention to that fact, and told him that the note ought to be made partly payable to him, and that Adams laughed, and said, "I am not afraid I will not get my part;" and from this it is urged there was an intention upon the part of F. A. Adams to create a trust. But Lydia Adams was not present at that time, and, even if such a loose, uncertain, and vague expression could be in any case evidence of such a purpose, it could not be in this case competent evidence against Lydia Adams or those claiming under her.

Judgment affirmed.

**TAULBEE v. LEWIS & CHAMBERS.**

(Court of Appeals of Kentucky. Jan. 9, 1914.)

**1. PLEADING (§ 355\*)—STRIKING ANSWER—WANT OF VERIFICATION.**

In an action on notes, where an amended answer, alleging that defendant was plaintiff's agent for the sale of wagons, that defendant agreed to credit him with \$2.50 for every wagon shipped into his territory, and that 650 wagons had been so shipped, and asking judgment against defendant for the balance above the amount of the notes, was not verified, the court should not have allowed it to be filed, and, after filing, when its attention was called to the fact that it was not verified, it properly required defendant to verify it, and, where he failed to comply with the order, did not abuse its discretion in striking it from the files.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1102-1110; Dec. Dig. § 355.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## 2. PLEADING (§ 257\*)—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

In an action on notes, where the answer alleged that defendant was plaintiff's agent for the sale of wagons, that by his contract he was to be credited with \$2.50 for every wagon shipped into his territory by plaintiff independently of him during the life of the contract, that plaintiff sold and shipped into such territory a large number of wagons, the exact number of which defendant could not tell, and that upon a fair settlement he was not indebted to plaintiff in any sum, and called upon plaintiff to file a statement showing the number of wagons so shipped, every fact could be shown under such answer which could have been shown under an amended answer stricken by the court, which alleged that 650 wagons were so shipped.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 764; Dec. Dig. § 257.\*]

## 3. BILLS AND NOTES (§ 489\*)—ACTION—PLEADING AND PROOF.

Where, after an action on notes, in which defendant admitted the execution of the notes, and alleged that he was plaintiff's agent for the sale of wagons, and that he was to be credited with \$2.50 for each wagon shipped into his territory, and that a large number of wagons were so shipped, was referred to a commissioner, who sat for the purpose of hearing evidence, and filed his report, and after plaintiff had moved to submit the case for judgment, defendant, who offered no evidence, filed an amended answer, alleging that 650 wagons were shipped into such territory, plaintiff would have been entitled to judgment even if the court had not stricken such amended answer for lack of verification, as the notes made a prima facie case, and the amended answer, without proof to sustain it, did not defeat plaintiff's right to judgment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1587-1642; Dec. Dig. § 489.\*]

Appeal from Circuit Court, Breathitt County.

Action by Lewis & Chambers against S. S. Taulbee. From a judgment for plaintiffs, defendant appeals. Affirmed.

E. C. Hyden and O. H. Pollard, both of Jackson, for appellant. John E. Patrick, of Jackson, for appellees.

HOBSON, C. J. Lewis & Chambers brought this suit against S. S. Taulbee to recover on four notes executed by Taulbee to them aggregating over \$1,600. Taulbee, by his answer, admitted the execution of the notes, and pleaded that the plaintiffs constituted and appointed him their agent for the sale of Studebaker wagons in the counties of Breathitt, Lee, Owsley, Perry, Knott, Magoffin, Morgan, and Wolfe; that the notes sued on were executed by him for wagons received under this contract, and that, by the terms of the contract, he was to be credited with the sum of \$2.50 for every wagon shipped into and sold in this territory by the plaintiffs independently of him during the life of the contract; that during the life of the contract the plaintiffs, independently of him, sold and shipped into the territory in car lots and otherwise a large number of wagons, the exact number he could not tell, but the plaintiffs knew; and that upon a fair

settlement of the matter he was not indebted to the plaintiffs in any sum or amount. He called upon the plaintiffs to file in the action a statement from its books showing the exact number of wagons shipped into the territory independently of him during the life of the contract. The plaintiffs filed a reply, in which it averred that during the life of the contract 42 wagons, which, at \$2.50 each, entitled him to a credit of \$105, were shipped into the territory, and that these were the only wagons that they had so shipped or sold. By his rejoinder, Taulbee denied that the 42 wagons were the only ones shipped into the territory. He prayed that the case be transferred to equity, and referred to the master commissioner, with directions to hear proof, and ascertain the number of wagons shipped. The motion to this effect was sustained, and at the March term, 1912, an order of reference was made, as he asked. At the next term of the court the commissioner filed a report showing that on the 23d day of April he sat for the purpose of hearing evidence in the case pursuant to the order, notice having been duly given; that the plaintiffs appeared, but that the defendant did not appear, or offer any evidence. The plaintiffs entered a motion on June 5th to submit the case for judgment, and on June 29th the defendant filed an amended answer, set-off, and counterclaim. In the amended answer he alleged that plaintiffs had sold and shipped into the territory referred to 650 wagons, which, at \$2.50, would amount to \$1,625. This he pleaded as a counterclaim, and prayed judgment against the defendant for the balance over and above the notes. On the same day the plaintiffs moved the court to require the defendant to "verify his amended rejoinder filed herein on to-day." While the order uses the word "rejoinder," as the only pleading filed on that day was the amended answer, it is clear that the word "rejoinder" was simply a clerical error for "answer." The court sustained the motion, and, the defendant failing to verify the pleading, it was stricken from the files, to which the defendant excepted, and, the defendant failing to plead further, a judgment was entered in favor of the plaintiffs for the amount of the notes subject to a credit of \$105, as admitted in the answer. The defendant appeals.

[1-3] The amended answer not having been verified, the court should not have allowed it to be filed, and when on the same day his attention was called to the fact that it was not verified, he properly required the defendant to verify it, and, the defendant failing to comply with the order, there was no abuse of discretion in striking it from the files, as it should not have been filed in the first place without verification. The issues had been made up at the previous term; no reason was shown for the delay in tender-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing the amendment, and every fact that could be shown under the amended answer could have been shown under the original answer. The case had been referred to a commissioner to take proof and report on the very subject. In addition to this, the defendant had taken no proof to sustain his defense. The notes made out a prima facie case for the plaintiffs. If the court had simply sustained the plaintiffs' motion to submit the case for judgment, without striking the amended answer from the files, the result would have been precisely the same, for the amended answer, without any proof to sustain it, constituted no reason for withholding judgment from the plaintiffs. The defendant had had his day in court; he had had ample opportunity to take his proof, and he offered none. The judgment is clearly right on the merits of the case, and there was no substantial error in the proceedings of the court.

Judgment affirmed.

#### WILLIAMS v. HARTH.

(Court of Appeals of Kentucky. Jan. 8, 1914.)

#### 1. FRAUDULENT CONVEYANCES (§ 39\*)—PREMIUMS ON INSURANCE POLICIES.

Under Ky. St. § 654, providing that if the premium on any policy of insurance mentioned in that section is paid by any person with intent to defraud creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of creditors, the acceptance by the beneficiary of the amount of the policy and the investment thereof in real estate does not constitute her a fraudulent grantee.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 56, 57, 158; Dec. Dig. § 39.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 57\*)—ASSETS—INSURANCE PREMIUMS FRAUDULENTLY PAID.

Under Ky. St. § 654, providing that if the premium on any life insurance policy mentioned in that section is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of such creditors, the premiums so paid are a trust fund for the creditors, which passes to the personal representative as a part of insured's estate, whether recovered from the beneficiary by the personal representative or a creditor, and the creditor, instituting an action for its recovery and obtaining a *lis pendens* lien on property in which the fund has been invested by the beneficiary, acquires no priority over the other creditors.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 309; Dec. Dig. § 57.\*]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 423\*)—ACTIONS—PARTIES—CREDITORS.

Under such section the personal representative of the person paying such premiums should sue for their recovery, but in the event of his refusal to do so, a creditor may bring the action for himself and all other creditors, to which action all creditors should be made parties.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1660, 1660½; Dec. Dig. § 423.\*]

#### 4. FRAUDULENT CONVEYANCES (§ 39\*)—PREMIUMS ON INSURANCE POLICIES.

Ky. St. §§ 654, 655, providing that the amount of insurance premiums paid in fraud of creditors, with interest thereon, shall inure to the benefit of such creditors, do not apply to premiums paid to fraternal insurance organizations, in view of section 871, providing that the money or other benefit paid by any co-operative or assessment insurance society shall be exempt from execution, and not liable to seizure by any legal or equitable process for the debt or liability of a member.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 56, 57, 158; Dec. Dig. § 39.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 434\*)—ACTIONS—SET-OFFS.

Under Ky. St. § 654, providing that the amount of insurance premiums paid in fraud of creditors, with interest thereon, shall inure to the benefit of such creditors, in an action against a beneficiary to recover the amount of premiums so paid, she was not entitled to set off a note due her from insured, since she owed insured during his lifetime no part of the fund sought to be recovered, but held it impressed with a trust in behalf of creditors, and owed it to them, and hence the court properly relegated her claim on the note to settlement in the action pending for the settlement of insured's estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1698-1715; Dec. Dig. § 434.\*]

Appeal from Circuit Court, McCracken County.

Action by J. W. Williams and others against Jennie E. Harth, which were consolidated. From the judgment, the plaintiff named appeals, and defendant cross-appeals. Affirmed.

Bradshaw & Bradshaw, of Paducah, for appellant. Morton & Morton, of Morganfield, for appellee.

HANNAH, J. J. F. Harth died in Union county, Ky., testate. J. W. Williams, a judgment creditor of said Harth, instituted an action in the McCracken circuit court against Jennie E. Harth, widow of said J. F. Harth, under section 654, Kentucky Statutes, seeking to recover judgment against her in the sum of \$1,427.58, the amount of his judgment against decedent. He alleged that said J. F. Harth, during his lifetime and while insolvent, diverted a large sum of money from his creditors, and employed same in the payment of premiums on policies of life insurance payable to said Jennie E. Harth, and that she had received from several insurance companies quite a sum of money as the proceeds of said insurance contracts, upon the death of said J. F. Harth, the insured. The premiums so paid by decedent, and the policies upon which said sums were paid, were set out in detail in the petition. Soon after the filing of this petition, several other creditors of said decedent instituted similar actions in said court. The defendant Jennie E. Harth, answered for herself individually, and also as executrix of said J. F. Harth. She denied

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the fraud charged in the petition in the diversion of the money so paid for premiums, and pleaded that, by virtue of section 871, Kentucky Statutes, the premiums paid by decedent on one of said insurance contracts, a certain benefit certificate held by him in the Knights of Honor, a fraternal insurance organization, were not recoverable by creditors of decedent; and, finally, as a set-off against the causes of action of said plaintiffs, she pleaded a certain note executed to her by decedent and his two brothers, praying that she might have credit for the amount thereof as against whatever sum might be adjudged against her on account of the payment by decedent of the insurance premiums above mentioned. As executrix, she alleged that should the court, upon trial of said cases, adjudge against her any amount because of the payment by decedent of said insurance premiums, the same belonged to and was a part of the estate of said decedent, and that same should be so adjudged, and subject to distribution ratably among all the creditors thereof. She further alleged that she had qualified in the Union county court as executrix of the will of said J. F. Harth, he having died a resident of that county, and his said will having been probated therein; that as such executrix she had instituted an action in the Union circuit court for the settlement of the estate of said decedent, to which action the several plaintiffs in these actions, as well as all other creditors of said estate, had been made parties defendant; that the several plaintiffs in these actions had filed their claims against said estate in that action, which she alleged was then still pending in said Union circuit court. The several actions above mentioned were then consolidated, the pleadings completed, certain stipulations agreed to, and the cause submitted; and it was adjudged by the court that plaintiffs recover of the defendant Jennie E. Harth the sum of \$6,660.89, which amount the court found to be the sum total of the premiums paid by said decedent on said insurance contracts, after January 1, 1907, the date on which said J. F. Harth became insolvent, as fixed and agreed upon by stipulation of the parties, which amount, however, does not include the amount of the premiums paid by said J. F. Harth on the benefit certificate held by him in the Knights of Honor. The court further adjudged said sum of \$6,660.89 for which judgment was rendered against defendant, Jennie E. Harth, to be a part of the estate of said J. F. Harth, insuring to the benefit of all his creditors, and ordered the same to be paid into the hands of the master commissioner of the Union circuit court, wherein the above-mentioned action was then pending, to settle the estate of said J. F. Harth; the court adjudging that neither the plaintiff nor the other creditors in the consolidated action obtained any priority over the other creditors of said estate by virtue

of their institution of these actions. As to the premiums paid by said J. F. Harth upon the insurance contract held by him in the Knights of Honor, the court adjudged that same were not recoverable by plaintiffs. And, in the matter of the set-off pleaded by defendant, Jennie E. Harth, the court refused to allow same, holding that the proper procedure had been followed when said note was filed, and allowed as a general creditor's claim in the action pending in the Union circuit court to settle said estate. From the judgment denying to the plaintiff J. W. Williams a superior lien on the fund recovered, and priority in the distribution thereof, and refusing to subject the amount of the premiums paid to the Knights of Honor after he became insolvent, said J. W. Williams appeals. The defendant, Jennie E. Harth, prosecutes a cross-appeal from that part of the judgment denying the note above mentioned to be a set-off against the said fund in her hands adjudged to belong to the creditors of her deceased husband.

The questions presented by appellant are: Did the court err in refusing to adjudge appellant to be a preferred creditor and entitled to priority over the other creditors in the distribution of the fund recovered because he instituted the first action to subject the fund; and (2) Did the court err in denying a recovery of the amount of the premiums paid by said J. F. Harth as dues on the benefit certificate held by him in the Knights of Honor?

[1] Appellant bases his claim to preference and priority in the distribution of the fund recovered upon the ground that defendant, Jennie E. Harth, was grantee of a fraudulent conveyance. His petition described the premiums paid by decedent, and policies of insurance upon which same were paid, the purpose thereof being to create a lien on said fund. At the time of his death, the decedent owned several valuable tracts of coal land in Union county, incumbered by mortgage. Action having been instituted shortly after the death of said J. F. Harth for sale of said lands to discharge the mortgage debt, a sale thereof was had, at which defendant, Jennie E. Harth, became the purchaser of said lands; the said purchase being made with the money received by her as the proceeds of the insurance contracts heretofore mentioned. Defendant, Jennie E. Harth, also erected a residence in Paducah with part of the same money. Appellant filed an amended petition containing the necessary allegations upon which to base a *lis pendens* lien, describing the said lands and residence property, and now claims that because of said proceedings he has a lien on the fund recovered superior to other creditors. The defendant, Jennie E. Harth, is not the defendant in the judgment which was made the basis of appellant's action. Nor is she grantee of a fraudulent convey-

ance. There is no fraud brought home to her. The statute declares that the payment by any person of premiums on life insurance contracts made with intent to defraud creditors shall render recoverable an amount equal to the premiums so paid, with interest thereon, which recovery shall inure to the benefit of said creditors. But the acceptance by the beneficiary of the amount of the policy, and the investment thereof in real estate, does not of itself constitute said beneficiary a fraudulent grantee.

[2] The statute under which the plaintiff creditors instituted these proceedings (section 654, Kentucky Statutes) says: "If a premium on any policy in this section mentioned is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall *inure to the benefit of said creditors.*" The plain and manifest meaning of the language of this statute is that the premiums so paid in prejudice of the rights of creditors constitute a fund impressed with a trust in behalf of all the creditors therein mentioned, and said fund passes to the personal representative as a part of the estate of the decedent. The statute is silent as to the person in whom the right of action for the recovery of said premiums is lodged; but undoubtedly when the same are recovered under the action authorized by this section, the fund so recovered becomes a part of the estate of the decedent, for the equal use and benefit of all the creditors in said section mentioned, it matters not by whom the recovery was enforced.

In the case of *Kittel v. Domeyer*, 175 N. Y. 205, 67 N. E. 433, *Kittel*, a creditor of decedent, *Domeyer*, instituted an action against certain life insurance companies, the administrator of the estate, and against the widow, seeking to recover a part of the proceeds of certain insurance policies upon which the decedent had paid premiums while insolvent, and under an alleged state of fact which rendered same recoverable under the New York statute. The plaintiff alleged that the administrator had refused to institute the action. He demanded judgment, declaring the amount of his claim to be a lien upon the proceeds of said insurance policies, because of his institution of the action. The lower court denied to him the particular and exclusive relief prayed for—that is, the application to his claim preferentially of the insurance money above mentioned—but sustained the action so as to bring the fund into the hands of the administrator for distribution ratably among all the creditors of the estate. On appeal to the Court of Appeals from the Appellate Division of the Supreme Court, that court said in part: "It was also held by the Appellate Division that, while in the event of the refusal of the administrator or executor to perform his duty of reducing the excess of insurance

to possession a creditor might bring an action in behalf of himself and all other creditors, the plaintiff's situation gave him no standing to maintain an action of this character. Presumably what the learned court had reference to was the claim in the complaint to a preference in lien and in payment over all other creditors, for that was the theory of the action, and plaintiff's contention is that his diligence entitles him to be so rewarded." But in this contention the higher court did not concur, and it sustained the lower court in holding the said fund so recovered, for distribution ratably among all the creditors of the estate, through the hands of the administrator. We believe this to be the proper construction of the statute under consideration, that the fund when recovered is a part of the estate of the decedent, in which all the creditors mentioned in the statute are entitled to participate ratably.

[3] We are also of the opinion that the personal representative should institute the action for the recovery of life insurance premiums paid in fraud of creditors, but that in the event of the refusal of such personal representative to do so, a creditor may bring such action for himself and all other creditors; and, such action being in the nature of a proceeding to settle the estate, all creditors should be made parties.

[4] As to the premiums paid by said J. F. Harth on the benefit certificate held by him in the Knights of Honor, the lower court properly adjudged that same are not recoverable. This was done upon the authority of section 671, Kentucky Statutes, which provides that the money paid by fraternal insurance organizations as the proceeds of insurance contracts shall be exempt from execution, and not liable to be seized, taken, or appropriated by legal or equitable process to pay any debt of the insured. The Legislature evidently intended to except from the operation of sections 654 and 655, Kentucky Statutes, premiums paid to fraternal insurance organizations, and in fact does so in direct terms.

[5] As to the cross-appeal prosecuted by appellee, the court properly refused to adjudge the note held by defendant against decedent a set-off against the fund adjudged to be in her hands belonging to decedent's creditors. This note was for money loaned decedent. She owed her husband during his lifetime no part of the fund adjudged against her in this action. Upon the death of her husband, this fund, by operation of the statute referred to, became the property of decedent's creditors, and she held it impressed with a trust in their behalf. She at no time owed the decedent anything on account of this fund; and, when she collected it, she held it for the creditors and owed it to them. The court properly relegated her claim to settlement in the action pending

in the Union circuit court, wherein the estate of decedent is in process of settlement, and in which action said note had been filed.

The judgment appealed from is affirmed on both the original and cross-appeals.

#### MORELAND v. HENRY et al.

(Court of Appeals of Kentucky. Jan. 8, 1914.)

##### 1. VENDOR AND PURCHASER (§ 343\*)—RECOVERY OF PURCHASE MONEY PAID—OVERPAYMENT.

Where a tract of land was represented by the vendor to contain 200 acres, and the sale was not in gross of a body of land, but by the acre, the vendee could recover the value of any deficit in quantity.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1023-1029; Dec. Dig. § 343.\*]

##### 2. VENDOR AND PURCHASER (§ 80\*)—REMEDIES OF PURCHASER—SUFFICIENCY OF EVIDENCE—OVERPAYMENT.

Evidence held to show that a sale of land was by the acre, and not in gross, though the deed described the land by adjoining land and public roads, and recited that there were 200 acres, more or less.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 132-135; Dec. Dig. § 80.\*]

Appeal from Circuit Court, Ohio County.

Action by Elvis Henry and others against David Moreland. Judgment for plaintiffs. Defendant appeals. Affirmed.

Ernest Woodward and M. L. Heavrin, both of Hartford, for appellant. Barnes & Smith, of Hartford, for appellees.

CARROLL, J. [1,2] In March, 1910, the appellant sold to the appellees a tract of land for \$8,000. The deed described the land, not by metes and bounds, or courses and distances, but by adjoining lands and public roads, and recited that the tract "contains 200 acres, more or less." In the latter part of 1911 the appellees, averring that they bought the land at \$40 per acre, believing that there were 200 acres in the tract, and that the recitation in the deed that it contained 200 acres, more or less, was inserted by mutual mistake, brought this suit to recover from appellant \$520, the value of the deficit in the quantity of the land. For answer to this suit, the appellant set up that the sale was of a tract of land in gross, and not by the acre, and that appellees, at the time of and before the purchase, had actual knowledge of the boundary lines of the land, and the fact that its contents had never been calculated. He also relied upon the recitation in the deed as conclusive of the contract between the parties. After the case had been prepared for trial, the lower court gave the appellees the relief prayed for, and, from the judgment, this appeal is prosecuted.

If the sale was in gross of a body of land, and not by the acre, the deficit, not amount-

ing to as much as 10 per cent. would not be sufficient to entitle appellees to the relief sought. On the other hand, if the tract was represented by appellant to contain 200 acres, and was bought by appellees by the acre, the judgment should be affirmed. Page v. Hogan, 150 Ky. 726, 150 S. W. 801; Salyer v. Blessing, 151 Ky. 459, 152 S. W. 275.

At the outset it is urged by counsel for appellant that the recital in the deed that the land contained 200 acres, more or less, contains the contract between the parties, and this recital, together with the general description of the boundary, shows that the sale was of a body of land in gross, and not by the acre. Unexplained, this recital would be conclusive on the parties that the sale was in gross, and not by the acre; but the weight of the evidence clearly establishes that the appellant, the appellees, and the draftsman of the deed all believed that the body of land contained 200 acres, and that the sale and purchase was of 200 acres of land at \$40 per acre.

The appellees did not have the title examined or the land surveyed, and four witnesses testify positively that appellant represented that the body of land contained 200 acres, and that he wanted \$40 an acre for it.

The draftsman of the deed, who had at one time surveyed the land, but did not calculate the contents of the survey, says that at the time the deed was written appellant said to appellees that there were 200 acres in the tract, and that he (the witness) thought the tract contained 200 acres, and so told appellees. He further testifies that, before writing the deed, he told appellant that he thought there were 200 acres in the tract, and that appellant told him to write the deed "for 200 acres at \$40 an acre." It further appears that the draftsman of the deed inserted the words "more or less" without direction from any person.

The evidence of appellant is to the effect that he declined to sell the land by the acre, although he believed there were 200 acres in the tract, and sold the land as a body for \$8,000.

Under these circumstances, we think the judgment of the lower court was clearly correct, and it is affirmed.

#### RICHARDS v. BARBER ASPHALT PAVING CO.†

(Court of Appeals of Kentucky. Jan. 7, 1914.)

##### 1. MUNICIPAL CORPORATIONS (§ 487\*)—PUBLIC IMPROVEMENTS—LIABILITY TO ASSESSMENT—PRESUMPTION OF PURCHASER'S NOTICE.

Ky. St. § 2834, part of the charter of the city of Louisville, provides for a lien on abutting property for the cost of original improvements of streets and for its enforcement by court proceedings, and that no error in the proceedings of the council shall exempt from payment after the work has been done as re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—70

†Rehearing denied February 4, 1914.

quired by either the ordinance or contract, but that the council or the court shall make all corrections and orders to do justice between the parties. Defendant knew of an improvement at the time he purchased property upon which the assessment had apparently been paid. *Held*, that it must be presumed that he had knowledge of the statute, and hence he was not an innocent purchaser for value without notice, but, under its express provisions, was liable to an additional assessment, resulting from a decrease in the assessment territory ordered by the court and a consequent increase in the assessment against property remaining within the district.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1146; Dec. Dig. § 487.\*]

**2. MUNICIPAL CORPORATIONS (§ 487\*)—PUBLIC IMPROVEMENTS—CORRECTION OF ASSESSMENT.**

In such case the fact that the original assessment paid by defendant's vendor was erroneous, and that such error misled defendant to his prejudice, and required him to pay an additional assessment, was not sufficient ground for estoppel, in view of his presumed knowledge of Ky. St. § 2834, expressly authorizing a city to correct an erroneous assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1146; Dec. Dig. § 487.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by the Barber Asphalt Paving Company against Albert J. Richards and others. Judgment for plaintiff, and defendant Richards appeals. Affirmed.

Oscar O. Bader, of Louisville, for appellant. William Furlong and Furlong, Woodbury & Furlong, all of Louisville, for appellee.

CLAY, C. The city of Louisville, by ordinance approved April 7, 1910, ordered the improvement of Bayly avenue from Frankfort avenue to Center avenue. Being original construction, the work was ordered done at the expense of the abutting property owners. The ordinance defined the assessment district as extending on the east, halfway back to Birchwood avenue. The contract for doing the work was awarded to the Barber Asphalt Paving Company. On completion of the work the cost thereof was regularly assessed against the property owners in that assessment district. As the assessment district was quite large, the bills were comparatively small. All the property owners immediately facing Bayly avenue paid their assessments. Some time thereafter two of these property owners sold and conveyed their lots to appellant, Albert J. Richards. A few months later suit was instituted on the apportionment warrants against those who had not paid their assessments. Among the defendants was one George W. Long. On appeal to this court it was held that the assessment territory was too large, and the case was remanded with directions to the lower court to apportion the assessment as indicated in the opin-

ion. *Long v. Barber Asphalt Paving Co.*, 151 Ky. 1.† The effect of the opinion was to decrease the assessment territory, and consequently to increase the bills against all the property owners, including those who had theretofore paid the original assessments. On the return of the case a reapportionment was made in accordance with the opinion, *supra*. On the day that the reapportionment was made, appellee, the Barber Asphalt Paving Company, filed an amended petition, making parties to the action several persons who had purchased lots between the day of the 1910 apportionment, which was set aside by the court, and the new apportionment made by the lower court. Among those thus made parties was the appellant, Albert J. Richards. On the same day that the amended petition was filed a *lis pendens* notice was filed in the county clerk's office, as required by statute. Appellant defended on the ground that at the time of his purchase his grantors had paid the assessment that was made by the city of Louisville, and that he was an innocent purchaser for value without notice. He also invoked the doctrine of estoppel, based on the principle that where one of two innocent persons must suffer, he should suffer whose act caused the injury. The lower court held these defenses insufficient, and gave judgment against appellant for \$46.26, the excess of the reapportionment over the original apportionment.

[1] Section 2834, Kentucky Statutes, being a part of the charter of the city of Louisville, after providing for a lien on the abutting property for the cost of the original improvement of public ways, provides as follows: "Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned." Appellant knew of the improvement at the time of the purchase of the property, and it must be presumed that he had knowledge of the statute, *supra*. That being true, he was not an innocent purchaser for value without notice. On the contrary, he not only knew that the property purchased was subject to a lien, but he purchased subject to the right of the council or the court to correct any error in the assessment, and with notice of the fact that the property could not be exempted from any part of its just proportion of the assessment by any error on the part of the general council.

[2] For the same reason there is no merit in the plea of estoppel. The mistake in the original assessment, and the collection of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the original apportionment warrant, did not release the lien. The fact that the original assessment was erroneous, and the further fact that he was misled to his prejudice by this error of the city, is not sufficient ground for estoppel, in view of the express authority given by the statute to correct the assessment, and of his presumptive knowledge of this right on the part of the city. It was so adjudged in the case of *Comley, etc., v. American Standard Asphalt Co.*, 130 Ky. 262, 113 S. W. 125, where the precise question was under consideration.

Judgment affirmed.

**BRENTLINGER v. LOUISVILLE RY.  
CO. et al.**

(Court of Appeals of Kentucky. Jan. 7, 1914.)

**1. MUNICIPAL CORPORATIONS (§§ 794, 800\*)—SAFETY OF STREETS—INJURY TO PEDESTRIAN—DUTY OF CITY—DUTY OF CONTRACTOR.**

Where a contractor, under a permit from a city, obstructed the side of a street with his machinery and materials and laid a temporary board sidewalk around the obstruction for the public use, it was the duty both of the city and the contractor to use ordinary care that the temporary walk should be safe.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1653, 1688-1694; Dec. Dig. §§ 794, 800.\*]

**2. MUNICIPAL CORPORATIONS (§ 808\*)—OBSTRUCTION OF STREETS—DUTY OF TRAVELER.**

A pedestrian using a temporary walk around the machinery and material of a contractor obstructing one side of a street was bound to exercise such care for his own safety as might be reasonably expected of a person of ordinary prudence in that situation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 808.\*]

**3. MUNICIPAL CORPORATIONS (§ 816\*)—DEFECTS IN STREETS—LIABILITY OF CITY AND PERSON CAUSING DEFECT—PLEADING.**

Plaintiff, in his action against a city and a construction company for injury from the projecting end of a street car as it turned across the temporary board walk which the city permitted and which the contractor built outside of its machinery and material for the public use, alleged that the city and the construction company were negligent in the construction of a walk so close to the street railroad track as to make it dangerous to people using it, and that the city was negligent in permitting the contractor to block the street and in furnishing a dangerous sidewalk for pedestrians. *Held*, that the petition was good as against a demurrer by the city and by the construction company.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. § 816.\*]

**4. MUNICIPAL CORPORATIONS (§ 806\*)—USE OF STREET—PRESUMPTION OF SAFETY.**

Plaintiff, walking on a temporary sidewalk built by a contractor around his machinery and material on one side of a street and held out to the public for use, had a right to assume that the walk was safe.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 806.\*]

**5. STREET RAILROADS (§ 117\*)—ACTION FOR INJURIES—QUESTION FOR JURY—NEGLIGENCE.**

In an action against a street railroad for injuries from being struck by the rear end of its car projecting over a temporary sidewalk as it turned, *held*, on the evidence, that whether those in charge of the car in the exercise of ordinary care should have anticipated plaintiff's presence on the sidewalk when the car turned, and should have maintained a lookout or taken other precautions for his safety, was a question for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**6. STREET RAILROADS (§ 93\*)—INJURY TO PERSONS ON STREET—CARE REQUIRED—LOOKOUT.**

Where the presence of persons near a street railway track and danger to them may be reasonably anticipated by those in charge of cars, it is their duty to maintain a lookout for such persons and to exercise such care for their safety as may usually be expected of persons of ordinary prudence under the circumstances.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. § 93.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Walter W. Brentlinger against the Louisville Railway Company, City of Louisville, and the Selden Breck Construction Company. Demurrer of the City and the Construction Company sustained, and verdict directed for defendant Louisville Railway Company, and plaintiff appeals. Judgment reversed as to each of the defendants, and cause remanded.

J. L. Richardson and H. O. Williams, both of Louisville, for appellant. Leon P. Lewis and Pendleton Beckley, both of Louisville, for appellee City of Louisville. Fairleigh, Straus & Fairleigh, of Louisville, for appellee Louisville Ry. Co. O'Neal & O'Neal, of Louisville, for appellee Selden Breck Const. Co.

**HOBSON, C. J.** Jefferson street in Louisville runs east and west. There are two street car tracks in the street; cars going west using the north track and cars going east using the south track. Fifth street runs north and south. Most of the cars running on Jefferson street run up and down the street, but there are street car tracks in Fifth street and occasionally a car going west on Jefferson street turns south on Fifth street. In January, 1912, the Selden Breck Construction Company was erecting the Inter Southern building at the northeast corner of Fifth and Jefferson streets, and under a permit from the city was obstructing the north side of Jefferson street with its engines and material nearly out to the north street car track. To permit footmen to get along on this side of the street, it had laid a temporary board sidewalk around its obstructions for the public to walk on. This board sidewalk came out nearly to the street car track,

and all the space between this sidewalk and the property line was occupied by the obstructions referred to. Walter W. Brentlinger, who lived in Jefferson county, was in the city on business and passing eastward on Jefferson street. As he was walking on the board walk referred to, a street car came along. This car turned southward into Fifth street, and in making the turn the rear end of the car swung out over the sidewalk, striking Brentlinger upon the hip and knocking him over upon the material stacked on the opposite side, inflicting upon him as he alleged serious and painful injuries, to recover for which he brought this suit against the city of Louisville, the construction company, and the street railway company. He alleged in his petition that the city and the construction company were negligent in the construction of the sidewalk so close to the railroad track as to make it dangerous to people using it; that the city was also negligent in permitting the construction company to blockade the street and in furnishing a dangerous sidewalk for pedestrians to use; and that the railroad company was negligent in operating the car and running against him. The circuit court sustained the demurrer of the city and the construction company to the plaintiff's petition. The case came on for trial against the railway company, and at the conclusion of the evidence for the plaintiff the court instructed the jury peremptorily to find for the defendant, and, the plaintiff's petition having been dismissed, he appeals.

In *Baumelster v. Markham*, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. Law Rep. 306, 72 Am. St. Rep. 397, we held that the degree of care required of contractors who are constructing buildings on the streets of a city must be proportionate to the danger and risk of injury involved in the circumstances of the particular case, and that they must exercise ordinary care for protecting the public from liability to injury, either from an excavation made in the street or by any other act which makes the use of the street unsafe or less secure.

In *Grider v. Jefferson Realty Co.*, 116 S. W. 691, we said: "It is the duty of a city to keep its streets and all parts thereof at all times in a reasonably safe condition for public travel. And, when the city permits abutting owners to use its streets in the construction or repair of buildings, this does not in any measure lessen its duty to exercise the degree of care that would be required if it had not surrendered a portion of the street for this purpose. The streets of a city cannot be kept reasonably safe for public travel unless obstructions, unsafe places, and excavations are protected by means or methods reasonably sufficient to give persons, exercising ordinary care for their own safety, notice or warning of the obstructions, unsafe places, or excavations."

The same principles were announced in *Blocher v. Dieco*, 99 S. W. 606, and *City of*

*Glasgow v. Gillenwaters*, 113 Ky. 140, 67 S. W. 381, 23 Ky. Law Rep. 2376.

[1] The temporary walkway was built for the public to walk on; the public were by necessary implication invited to use it. It was incumbent upon both the contractor and the city to use ordinary care to keep the street reasonably safe; and, when the temporary sidewalk was provided for the use of the public while the regular sidewalk was obstructed, it was incumbent upon both the contractor and the city to use ordinary care that the temporary walk should be safe. It is true there were no holes in the plank. If there had been holes in the temporary sidewalk and the plaintiff had been injured by falling into one of them, confessedly both the contractor and the city would be liable, for the sidewalk had been there some time and had in fact been constructed under the supervision of the city.

[2, 3] But the danger of being struck by passing cars rendered the sidewalk no less unsafe for pedestrians than if there had been holes in it. The cars usually went straight down Jefferson, and a car going down Jefferson would not be in any way dangerous, but occasionally a car would turn south on Fifth street; and, when a car would turn south on Fifth street, the pedestrians could not tell, until it began to turn, as the movement was made by an electric switch under the charge of the motorman; and when the turn was made the rear end of the car would strike any one on the sidewalk at the point on the turn. Whether the plaintiff exercised ordinary care is a question for the jury. It was his duty to exercise such care for his own safety as may be reasonably expected of a person of ordinary prudence situated as he was. But if, as he showed, he was not aware of any danger on the sidewalk until he was struck by the car, it cannot be said as a matter of law that he was guilty of contributory negligence, especially if, as he showed, the material of the construction company was piled out up to the temporary sidewalk, so that when he came in danger from the car there was no space for him to get out of the way of it. The sidewalk having been provided for the use of the public, if, in view of the projection of the rear end of a street car, it was not reasonably safe, neither the city nor the construction company can be said to have discharged its duty, and this is a question for the jury.

We do not see any essential difference between an excavation made in a street and any other dangerous situation created therein. If this temporary sidewalk had been over an excavation and had been left unguarded so that a person in the dark had fallen into the pit, the defendants would clearly be liable, and the same result must follow if, when they obstructed the regular sidewalk, they constructed for the use of



the public a temporary walkway which for any other reason was not reasonably safe.

It is true we held in *South Covington, etc., Street Railway Co. v. Besse*, 108 S. W. 848, 16 L. R. A. (N. S.) 890, *Louisville Railway Co. v. Ray*, 124 S. W. 313, and *Gribbins v. Kentucky Traction Co.*, 150 Ky. 277, 150 S. W. 338, that a person struck in a street by the rear end of a street car in making a turn could not recover for the reason that he should not have stood so near the street car. These cases are in line with the authorities in other jurisdictions. But there the plaintiff had the whole street for his use; he saw the car and all he had to do was to keep out of its way. The ground upon which all these cases rest is that there the cause of the plaintiff's injury was his not observing the obvious precaution of stepping back or getting out of the way of the car, a thing which under the facts those in charge of the car had a right to assume he would do. *Nellis on Street Railways*, § 424; *Jelly v. North Jersey Street Railway Co.*, 78 N. J. Law, 191, 68 Atl. 1091; *Widmer v. West N. St. Railway*, 158 Mass. 49, 32 N. E. 899; *Garvey v. R. I. Co.*, 26 R. I. 80, 58 Atl. 456.

[4] Here the plaintiff was walking on a sidewalk built for the use of the public and held out to the public for its use. The plaintiff had a right to assume under such circumstances that the sidewalk was safe, for he was using it upon an implied invitation. The facts of the case also distinguish it from the cases cited as to the street car company.

[5] The real danger here consisted in the fact that ordinarily the cars did not turn out Fifth street, and that persons who did not know that cars sometimes turned out Fifth street would be under no apprehension of danger until the car began to turn, and then there would be no adequate way of escape from the danger, as the space left was so narrow. Here the plaintiff testified that when the car began to turn there was no room for him to get out of its way by reason of the obstructions placed in the street by the construction company, and that the car was moving rapidly and struck him before he could do anything. This condition of things had existed for some days. Jefferson street is one of the main thoroughfares of the city. Fifth and Jefferson streets is one of the most important corners of the city; the courthouse being between Fifth and Sixth streets on Jefferson, the city hall on the corner of Sixth street, and many other large buildings in the vicinity. In view of the character of the thoroughfare, the unusual condition of this corner, and the fact that any car turning out Fifth street would endanger a person on this sidewalk, it was a question for the jury whether those in charge of the street car in the exercise of ordinary care should have anticipated the

presence of persons on the sidewalk when a car was making this turn and should have maintained a lookout for them or taken other precautions for their safety.

[6] For the rule is that, where the presence of persons near a railroad track and danger to them may be reasonably anticipated by those in charge of the cars, it is their duty to maintain a lookout for such persons and to exercise such care for their safety as may be usually expected of a person of ordinary prudence under the circumstances.

Judgment reversed as to each of the defendants, and cause remanded for further proceedings consistent herewith.

# VICTORIA LIMESTONE CO. v. HINTON. (Court of Appeals of Kentucky. Jan. 7, 1914.)

## 1. CONTRACTS (§ 216\*)—CONSTRUCTION—TERMINATION.

When the time of service, under a contract for the hauling of stone by barge, was left indefinite, either party could terminate it at any time without any cause therefor.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 996-1009; Dec. Dig. § 216.\*]

## 2. CONTRACTS (§ 10\*)—ACTION FOR BREACH—DEFENSES—WANT OF MUTUALITY.

A want of mutuality in the terms of a contract is no defense in the case of an executed contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.\*]

## 3. CONTRACTS (§ 216\*)—CONSTRUCTION—TIME.

In an action upon a contract for the hauling of stone by barge to average three barge loads a week, indefinite as to time of service, but executed by plaintiff from June 28 to November 4, 1912, when he exercised his right to terminate it because defendant had not furnished such average number of loads, the agreement as to the average number was properly construed as applying to the time for which the contract was executed, instead of for a longer time.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 996-1009; Dec. Dig. § 216.\*]

Appeal from Circuit Court, Warren County.

Action by C. C. Hinton against the Victoria Limestone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sims & Rodes, of Bowling Green, for appellant. G. H. Herdman, of Bowling Green, for appellee.

MILLER, J. The appellant operated the Slim Island Quarries, on Barren river, a few miles below Bowling Green, and, desiring to employ Hinton, the owner of a gasoline towboat and a barge, to haul the stone quarried by the appellant company, it addressed him the following letter, which, by agreement, was taken as the contract between the parties, to wit:

"Bowling Green, Ky., June 12, 1912.

"Mr. C. C. Hinton, Bowling Green, Ky.—Dear Sir: Confirming our conversation with you this morning, will state that this company is at present boating three (3) barges of

stone per week, the barges running from eleven to fourteen hundred cubic feet each, on which we are paying a fee for boating of two (2) cents per cubic foot inspection measure. If you will provide a gasoline or other towboat and barge which will handle this business, we can assure you that our towing will average not less than three (3) barges per week, and within the next few months we expect to increase our quarry equipment, which will enable us to run from four (4) to six (6) barges of stone per week. If you decide to do our boating for us, we will, of course, have no objection to your boating stone for other parties whenever the opportunity presents itself, except we will expect a preference for our own stone, the other stone to be boated at such times that it would not seriously interfere with our business. Yours truly, The Victoria Limestone Company, Robt. P. Starkweather, President."

Hinton began work with his boat and barge on June 28th, and hauled such stone as the appellant tendered him for transportation; it averaging, however, only about 1½ barges per week, instead of a minimum of 3 barges per week, as provided in the contract. Hinton's son ran the boat, and, after he had worked a few weeks, he complained to appellant that he was operating the boat at a loss, because of appellant's failure to furnish the minimum amount of stone provided by the contract; whereupon appellant promised to increase its output, but failed to do so. There being no substantial increase in the business furnished appellee by appellant, the appellee, pursuant to a notice he had theretofore given appellant, terminated the contract on November 4, 1912, and brought this action for breach of contract, fixing his damages at \$670.32, less a credit of \$20 paid thereon.

The substance of the plaintiff's petition is that under the contract the minimum amount of stone to be hauled in the period of about 18½ weeks during which appellee worked was 55 barges, carrying from 1,100 to 1,400 cubic feet of stone each, aggregating 60,500 cubic feet, and that, instead of furnishing him with this minimum amount of freight, appellant furnished only 29 barges of stone, aggregating only 930 feet per barge, being 33,530 cubic feet less than the minimum.

At the close of the plaintiff's testimony the defendant moved the court for a peremptory instruction, which was overruled, and, the defendant standing upon its motion, and declining to offer any testimony, the court sustained the plaintiff's motion for a peremptory instruction, under which the jury returned a verdict for plaintiff for \$650.32, the net amount claimed. The defendant appeals.

Appellant rests its case upon the contention that there is no obligation by the terms of the contract requiring it to furnish appel-

lee with any stone whatever, and that the contract, being indefinite in time, and without mutuality of obligation, is unenforceable.

[1, 2] Upon the question of the indefiniteness of the term of the contract, the rule is well settled that, when the time of service under a contract is left discretionary with either party, or when it is not definite as to time, either party has the right to terminate it at any time, and no cause therefor need be alleged or proved. *L. & N. R. R. Co. v. Offutt*, 99 Ky. 127, 86 S. W. 181, 18 Ky. Law Rep. 303, 59 Am. St. Rep. 467. And as to the question of a want of mutuality of obligation, it is equally apparent that a want of mutuality is no defense in the case of an executed contract. *Des Moines Valley R. Co. v. Graff*, 27 Iowa, 99, 1 Am. Rep. 256.

In the case at bar, therefore, either party had the right to terminate the contract at any time without any further liability; but, so long as the parties worked under the contract, both are liable thereunder.

[3] In this case the contract was in full operation from June 28 to November 4, 1912, and during that time appellant stood obligated to furnish appellee 3 barges of stone per week, and appellee was likewise obligated to tow the same at 2 cents per cubic foot. To that extent the contract was in operation, and, appellant having failed to perform its part thereof, it is liable.

Appellant further contends, however, that by its contract it agreed only that its towing would average not less than 3 barges per week, and that the court erred in applying that provision to the period between June 28th and November 4th, instead of to a longer period, of either six months or a year. In support of this contention it is argued that, while appellant's business might have dropped below the average during the period extending from June 28th to November 4th, it might, nevertheless, have exceeded the average for the remainder of the year, so as to make the general average of freight for the entire year equal to, or even greater than, the average provided in the contract. There might be some force in this argument if appellant had made that fact appear by its pleading and proof; but, in the absence of both allegation and proof upon the subject, we do not think the point is entitled to serious consideration. On the contrary, appellee's proof, which is uncontradicted, shows that appellee complained to appellant that it was not supplying the amount of freight called for by the contract, and that appellant promised to increase its output so as to make the average of freight satisfy the contract, but that it wholly failed to do so.

We are of opinion the circuit court properly interpreted the contract.

Judgment affirmed.

**FARNSELEY'S ADM'R v. PHILADELPHIA LIFE INS. CO.**

(Court of Appeals of Kentucky. Jan. 8, 1914.)

**1. INSURANCE (§ 646\*)—ACCIDENT INSURANCE—ACTIONS—PRESUMPTIONS.**

In an action on an accident policy, which excepted liability for suicide, the presumption that death by drowning was accidental, and not suicidal, arises only after the introduction of evidence of the circumstances surrounding the death compatible either with the theory of accidental death, or with suicide, and cannot be based merely on proof of drowning.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.\*]

**2. PLEADING (§ 345\*)—JUDGMENT ON PLEADINGS.**

In an action on an accident policy excepting death by suicide, judgment was properly directed for defendant on the pleadings, where the petition did not aver that the death was accidental, and the answer did not cure the error; the evidence not disclosing the manner of death other than that it was by drowning.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.\*]

**3. JUDGMENT (§ 569\*)—CONCLUSIVENESS—MATTERS CONCLUDED.**

A judgment on the pleadings in an action on an accident policy, in favor of defendant because of plaintiff's failure to allege that the death was accidental, is in effect a dismissal of the petition for failure to state a cause of action and is not a bar to a future action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. § 569.\*]

**4. COSTS (§ 71\*)—IMPOSITION OF COSTS.**

Under the direct provisions of Civ. Code Prac. § 98, a defendant who fails to demur to a petition which does not state a cause of action is liable for all costs arising after the filing of the answer, even though judgment on the pleadings was directed in its favor after the close of the case.

[Ed. Note.—For other case, see Costs, Cent. Dig. §§ 297-303; Dec. Dig. § 71.\*]

Appeal from Circuit Court, McCracken County.

Action by Frank R. Farnsley's administrator against the Philadelphia Life Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Bradshaw & Bradshaw, of Paducah, for appellant. Reed & Reed, of Paducah, for appellee.

**HANNAH, J.** This action was instituted on what is usually termed an "accident insurance policy," insuring Frank R. Farnsley against "accidental death (suicide, sane or insane, not covered) \* \* \* for loss of life, seven hundred dollars." The petition, after setting out plaintiff's capacity to sue and its appointment as administrator of the estate of Frank R. Farnsley, is as follows: "Plaintiff says that on the 4th day of December, 1912, the defendant, the Philadelphia Life Insurance Company, a corporation of Philadelphia, Pa., engaged in the life and accident insurance business, issued and delivered to the plaintiff's decedent its policy of

insurance, under the terms of which, in consideration of \$1.75 to be paid monthly by the decedent, and which monthly payment for December, 1912, was paid to the defendant, the defendant undertook and obligated itself to pay his administrator, in the event of his death during the life of said policy, the sum of \$700. Plaintiff says that promptly after the death of the decedent, which occurred during the life of said policy (December 23, 1912), the defendant was notified in writing at its home office in the city of Philadelphia, Pa., of the death of decedent; and that the plaintiff did and performed all other acts and things which it was required and bound to do under the terms of the contract between the defendant and plaintiff's decedent. Said contract of insurance is filed herewith as a part hereof marked 'Exhibit B.'"

The policy so filed and made part of the petition shows that defendant is obligated to pay the amount of said policy only in the event of insured's "accidental death (suicide, sane or insane, not covered)." The petition contains no allegation as to the manner or cause of the death of the insured. The exhibit therefore contradicts and virtually destroys the petition because of its lack of an allegation concerning the manner of the death of insured, or that same was accidental.

The answer merely traversed the petition, and skillfully avoids curing the defects thereof. Upon the trial, plaintiff introduced but two witnesses, the widow and daughter of decedent. The widow was asked as follows: "Q. Is Capt. Frank R. Farnsley now living or dead? A. He is dead. Q. State, if you know, of what he died. A. He was drowned. Q. When? A. December 23, 1912." The daughter was asked: "Q. Now living or dead? A. Dead. Q. When did he die? A. December 23, 1912." This is all the evidence in regard to said Farnsley's death. The defendant refused to offer any evidence. Seemingly without any motion by either party, the court instructed the jury to find for the plaintiff the sum of \$700 with interest from April 16, 1913, which they did. Thereupon defendant filed a written motion to render judgment for it on the pleadings notwithstanding the verdict of the jury, which motion was sustained by the court, and a judgment was entered that "the plaintiff take nothing by its petition and that the defendant do recover of the plaintiff its costs herein expended."

It will be seen that the petition fails to show any fact or circumstance from which it can be inferred that the death of decedent was an accident, and the evidence is likewise silent upon that point, except that it shows that he was drowned, but not the manner of the drowning.

[1, 2] It is insisted by appellant that the evidence that he was drowned is sufficient to sustain a presumption that it was an ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

accidental death, and a number of decisions of this court are cited in support of this contention. *Aetna Life Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203, 24 Ky. Law Rep. 2454; *Union Casualty & Surety Co. v. Goddard*, 76 S. W. 832, 25 Ky. Law Rep. 1035; *Masonic Life, etc., Ass'n v. Pollard's Guardian*, 121 Ky. 349, 89 S. W. 219, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198. An examination of the line of authorities cited by appellant, however, demonstrates that it was shown in evidence in those cases that the insured was found dead, there being no eyewitness or evidence as to the manner of death; and, in such cases, the law presumes that death was accidental. Here appellee failed to show that the manner of the death of the insured was unknown; and, if the manner of death was unknown (that is, whether the drowning was accidental or suicide), that state of fact should have been proved in order that plaintiff might be entitled to the presumption that attaches to death by drowning in an unknown manner. That presumption becomes operative only after the introduction of evidence compatible either with the theory of accidental death or with the theory of suicide. In such cases, the law presumes accidental death rather than suicide. The court therefore properly sustained the motion of defendant for judgment upon the pleadings.

[3, 4] The judgment appealed from in effect dismisses the petition on defendant's objection that same fails to state a cause of action, as no trial was had of the action upon its merits and is no bar to any future action. This objection should have been made by the defendant by demurrer before or at the time of the filing of its answer; and, because of its failure to demur, it is liable for all the costs arising in the lower court after the filing of said answer, together with the costs in this court. Civil Code, § 93.

Judgment reversed for judgment as herein indicated.

#### STEARNS COAL & LUMBER CO. et al. v. TUGGLE.

(Court of Appeals of Kentucky. Jan. 8, 1914.)

##### 1. MASTER AND SERVANT (§ 199\*)—FELLOW SERVANTS—WHO ARE.

Servants in charge of different coal cars in a mine are not fellow servants any more than employes on different street cars or railroad trains would be.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 491; Dec. Dig. § 199.\*]

##### 2. TRIAL (§ 229\*)—INSTRUCTIONS.

In a personal injury action, where one instruction correctly stated the rule as to damages, it was not necessary, in another instruction on the question of defendant's liability, to restate the rule.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 513; Dec. Dig. § 229.\*]

##### 3. MASTER AND SERVANT (§ 95\*)—INJURIES TO SERVANT—SERVANT UNDER AGE.

A servant under the age of 16 years, employed in a mine without the consent of his father, may recover for injuries received in the course of his employment, regardless of the negligence of the master, where it knew that the servant was under age, and was warned not to employ him; this being true even though the injury was occasioned by the negligence of a fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 141, 160; Dec. Dig. § 95.\*]

##### 4. DAMAGES (§ 130\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where a boy under 16 had his ankle and foot mashed in an accident in a mine, and the injury confined him to his bed for a month and a half, and necessitated the use of crutches for a similar length of time, an award of \$2,000 was not excessive, where two years after the accident the foot and ankle were still stiff, and a walk of a few miles would cause them to swell so that a shoe could not be kept on.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 130.\*]

Appeal from Circuit Court, Whitley County.

Action by Ray Tuggle, by next friend, against the Stearns Coal & Lumber Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Sharp & Smith, of Williamsburg, for appellants. Robert Harding and John W. Rawlings, both of Danville, and R. L. Pope and R. S. Rose, both of Williamsburg, for appellee.

CARROLL, J. The appellee, Ray Tuggle, at the time he received the injuries complained of, was under 16 years of age and an employe of the appellant company. When injured he was engaged in driving a mule hitched to four loaded coal cars, and was seated on the front end of the front car with his feet hanging over the end. Another loaded train of cars, in charge of a driver named Richmond, had started out of the mine about 25 minutes before Tuggle's train started, but for some reason not very clearly shown in the evidence the first train stopped at a trapdoor at the foot of a heavy grade, and when Tuggle, in the darkness of the mine, first discovered the train of cars standing on the track in front of him, he was only 60 or 70 feet away, and he was unable to stop his train. The mule he was driving, to use the language of Tuggle, "had been in the mine nine or ten years, and he was pretty well up to all the tricks, and had a great deal more experience in working in a mine than I had. And when I first saw Richmond and whistled, the mule just slowed up and sat down on my lap on the front end of the car and held me, and let the trip run up on him, and when the car got to moving up to Richmond, he jumped over the hind car of Richmond's trip to one side, and I moved my left leg as quick as I could out of the way, but did not get my right leg out in time, and got this ankle mashed all to

pieces. The mule seen he was going to have to jump or get caught, and he jumped to the right-hand corner of the car." When this experienced mule saw that a collision was inevitable and jumped out of the way to avoid it, the front car on which Tuggle was riding collided with the rear car of Richmond's train, thereby causing the injuries to recover damages for which Tuggle sued, obtaining a judgment for \$2,000.

[1] Although several grounds of negligence were charged in the petition, it is shown by the record that the case went to the jury upon the ground that Tuggle was under the statutory age, and therefore his employment was unlawful, and that the company was further remiss in failing to furnish him a reasonably safe place and reasonably safe appliances with which to work. We think, however, that the accident was really due to the fact that Richmond stopped his train of cars at the foot of the grade when he should have gone ahead, and, this being so, the negligence in the operation was due to the fault of Richmond. Taking this view of the matter, it is urged that there can be no recovery because it is said Richmond and Tuggle were fellow servants. But aside from the fact that the fellow servant doctrine has no place in the case, as Tuggle was within the prohibited age, they were not fellow servants any more than would be employes on different street cars or on different railroad trains. *L. & N. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law. Rep. 552, 13 L. R. A. (N. S.) 1135; *Louisville Ry. Co. v. Hibblitt*, 139 Ky. 43, 129 S. W. 319, 139 Am. St. Rep. 464.

[2, 3] Instruction No. 3 is the only one criticized, and it reads as follows: "If you believe from the evidence that the plaintiff, Ray Tuggle, at the time of the injury complained of in the petition was under the age of 16 years, which fact was known to the defendants or the one or ones managing, operating, or controlling the mines mentioned in the evidence, their agents or servants, or by the exercise of reasonable diligence could have been known to it or to them, and further believe from the evidence that said employment of said Tuggle was without the knowledge or consent of J. B. Tuggle, the father of the plaintiff, then the law is for the plaintiff, Ray Tuggle, and you will so find." The objection urged to this instruction is that it authorized a recovery irrespective of whether the appellants were negligent or not, and besides, does not define the measure of damages the jury might assess in the event they found for Tuggle. It is very true that instruction No. 3 does not describe the character of damages, but instruction No. 4, of which no complaint is made, correctly advised the jury upon this subject, and it was not necessary to restate it in instruction No. 3, nor was it necessary, to authorize a recovery under instruction No.

3, that the jury should have been told they must believe the persons employing Tuggle were negligent in the discharge of some duty that they owed him. Indeed the instruction, although not as aptly worded and open to criticism, is upon the whole more favorable than appellants were entitled to. The evidence shows that Tuggle was under 16 years of age, and that the company was advised of this fact before it employed him, and was also warned not to employ him in the character of work he was engaged in when injured. The rights of an infant under 16 years of age and the duty and liability of his employer are so fully set out in the case of *Louisville, Henderson & St. Louis Ry. Co. v. Lyons*, 155 Ky. 396, 159 S. W. 971, that it is not necessary to do more than refer to that opinion for the law applicable to cases like this.

[4] Another ground urged for reversal is that the verdict is excessive. Upon this point the evidence shows that the ankle and foot of Tuggle were caught between the cars and severely injured, and that he was confined to his bed about a month and a half, and went on crutches about the same length of time, and that after he was able to dispense with the crutches, he had to go some time without a shoe on the injured foot. The trial took place more than two years after the accident, and it was further shown by the evidence that at the time of the trial the injured foot was stiff from the effects of the injury, and that if Tuggle walked a few miles at a time his foot would swell to such an extent that he would have to take his shoe off, and that it would remain in a sore and swollen condition for three or four days.

We think the evidence shows that the injury is permanent, and, this being so, the verdict was not excessive.

The judgment is affirmed.

#### HENRY BICKEL CO. v. NATIONAL SURETY CO. et al.

(Court of Appeals of Kentucky. Jan. 8, 1914.)

#### MECHANICS' LIENS (§ 47\*)—MATERIALMAN'S LIEN—FURNISHING ENGINE.

One who rented a hoisting engine to contractors was not entitled to a lien for such rent, under Ky. St. § 2463, giving one who furnishes materials, etc., in the erection of any structure a lien thereon.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 50; Dec. Dig. § 47.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by the Henry Bickel Company against the National Surety Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Furlong, Woodbury & Furlong, of Louisville, for appellant. William W. Crawford, of Louisville, for appellees.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**HOBSON, C. J.** E. A. Barker & Son were the contractors for the construction of section B of the northwestern sewer in Louisville under a contract with the commissioners of sewerage and the National Surety Company was the surety of Barker & Son on a bond executed to the commissioners of sewerage, conditioned for the faithful performance of the contract, and "to save and protect the said commissioners of sewerage of the city of Louisville, Kentucky, and any person furnishing materials in the prosecution of said work from any loss or damage by reason thereof." The Henry Bickel Company rented to the contractors, E. A. Barker & Son, a hoisting engine at the rate of \$2.50 a day, the total rent accruing for the time the engine was used by the contractors in the work amounting to \$265.00. Barker & Son failed to pay the Bickel Company the rent; and within the time fixed in the mechanic's lien statute the Bickel Company filed its claim in the county clerk's office of Jefferson county, asserting a mechanic's and materialman's lien for the sum of \$265, and shortly thereafter instituted this action against the contractors, the National Surety Company and the commissioners of sewerage, setting out in the petition the above facts. The commissioners of sewerage and the National Surety Company demurred to the petition, the demurrer was sustained, and, the plaintiff declining to plead further, the petition was dismissed as to them. The plaintiffs appeal.

The question arising on the appeal is whether or not the plaintiff, by furnishing the traction engine in the construction of the sewer in controversy, has a lien under section 2463, Kentucky Statutes, and whether under the provisions of the bond the surety company is liable for the rental of the engine.

Section 2463, Ky. St., provides: "A person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement, in any manner, of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, architect or authorized agent, shall have a lien thereon, and upon the land upon which said improvements shall have been made or on any interest such owner has in the same, to secure the amount thereof with costs."

The bond executed by the National Surety Company was taken by the commissioners of sewerage to protect them against claims arising under the statute, and by its terms the obligors in the bond bound themselves to protect "any person furnishing materials in the prosecution of said work from any loss or damage by reason thereof." Unless by renting the engine to the contractors to be used in the work the Bickel Company

became a "person furnishing materials in the prosecution of said work," its rent claim is not within the terms of the bond; and, if it was, in this way, a person furnishing materials in the prosecution of the work, it is entitled to a lien under the statute. So the whole case comes to this: Is the Bickel Company entitled to a lien under the statute for the rent of the engine?

In *Fowler & Guy v. Pompelly*, 76 S. W. 173, 25 Ky. Law Rep. 615, the person who hauled the lumber to the premises where the house was built was held entitled to a lien as a materialman furnishing labor, but in that case the labor was performed by the man who asserted the claim. The lumber had to be hauled from the mill and the hauling of the lumber to the premises, and the putting of the lumber on the house were necessary steps in the erection of the building; the hauling entering into the value of the lumber when placed on the ground. In *Carson v. Shelton*, 128 Ky. 248, 107 S. W. 793, 32 Ky. Law Rep. 1083, 15 L. R. A. (N. S.) 509, a contractor boarded his hands, and bought from Carson the supplies necessary for this purpose, and for the feeding of his teams. Carson asserted a lien, but it was held that he had furnished supplies for the contractor and not material for the work; and the lien was refused.

In *Avery & Sons v. Woodruff, etc.*, 144 Ky. 227, 137 S. W. 1088, 36 L. R. A. (N. S.) 866, a materialman's lien was adjudged in favor of the person who furnished the lumber out of which the concrete forms were made for the erection of a concrete building. In that case the court said: "In the case at bar, the material furnished by appellees was raw lumber to be used in the erection of the concrete building, and it was contemplated by the parties at the time it was furnished that it would be totally used up in making forms in the erection of the Avery & Sons' plant. If the lumber had been furnished to make a scaffold, molds, or forms with the intention of using them in the erection of that building and then carry them away and use them in constructing other buildings, then no lien would attach, as they would be regarded as a part of the appliances of the workman, and would occupy the same place as a hammer, saw, or other tool used by the workmen, for which no lien is allowed by the statute."

The engine which was used in this case occupied the same place as a hammer, saw, or other tool used by the workmen. The person who rented the engine is no more entitled to a lien on the sewer for the rent than the merchant would be who sold him the spades, drills, or other tools constituting his plant, with which he did the work. In *Evans v. Lower*, 67 N. J. Eq. 233, 58 Atl. 294, one of the claims was for the tools furnished the contractor and used in the work. A lien was refused. In *Lohman v. Peterson*, 87 Wis. 227, 58 N. W. 407, the owner of oxen hired them out to a person who performed labor in haul-

ing ties, and asserted a lien for the rent of his oxen. The claim was disallowed. That case differs from the Pompelly Case above referred to. In the Pompelly Case the man who did the hauling asserted the lien, but in the Lohman Case the man who hired the oxen to the man who did the hauling asserted the lien. In *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706, a contractor for the boring of a well rented a well-boring machine from McAuliffe, and McAuliffe, not having been paid the rent of his machine, asserted a lien. The court pointed out that when he hired his machine to the contractor, it became the latter's machine while he used it, and was used by him as though it was his own; that for its use in connection with his own labor, he would have been entitled to a lien—not for the use of the machine alone, but because with his labors in the use and operation of the machine the well was drilled. After pointing this out, the court said: "The machine thus used is 'the plant of the contractor,' and can in no sense be said to be materials furnished or used in the drilling of the well. *Basshor v. B. & O. R. Co.*, 65 Md. 99 [3 Atl. 285]. To permit this lien to stand and be enforced would be stretching the lien law beyond any reasonable limit."

In *Potter Manufacturing Co. v. Meyer & Co.*, 171 Ind. 513, 86 N. E. 837, 131 Am. St. Rep. 267, the contractor for the construction of a sewer rented of the Potter Manufacturing Company a trench machine, and it asserted a lien on the work for its rent. Refusing a lien, the court said: "This trench machine, owned by appellant, did not work automatically, but was operated by men in the employ and under direction of the lessee of the machine, *J. J. Smith & Co.* There could be no question that the contractor, *J. J. Smith & Co.*, might have acquired a lien to the extent of the value of the work done, including that done by this labor-saving machine. Appellant, however, did not perform, or in any manner engage to perform, any labor upon the structure to be erected. Its claim is not for the value of work actually done, but compensation, at an agreed price for a specified time, as the rental value of the machine. \* \* \* We are clearly of opinion that appellant is not shown to have performed any work, and, as the mere lessor of this machine, cannot be regarded as one performing labor, within the meaning of the statute under consideration." A similar conclusion was reached in *Allen v. Elwert*, 29 Or. 428, 44 Pac. 823, 48 Pac. 54; *Oppenheimer v. Morrell*, 118 Pa. 189, 12 Atl. 307; *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 74 Pac. 357; *Meek v. Parker*, 63 Ark. 367, 38 S. W. 900, 58 Am. St. Rep. 119; *McMullin v. McMullin*, 92 Me. 336, 42 Atl. 500, 69 Am. St. Rep. 510; *Wood, Curtis & Co. v. Eldorado Lumber Co.*, 153 Cal. 230, 94 Pac. 877, 16 L. R. A. (N. S.) 584, 126 Am. St. Rep. 80, 15 Ann. Cas. 382, and

notes; *Haas Electric Co. v. Springfield, etc., Park Co.*, 236 Ill. 452, 86 N. E. 248, 23 L. R. A. (N. S.) 620, 127 Am. St. Rep. 297; *McKinnon v. Red River Lumber Co.*, 119 Minn. 479, 138 N. W. 781, 42 L. R. A. (N. S.) 872, and notes; *Troy Public Works Co. v. City of Yonkers, etc.*, 207 N. Y. 81, 100 N. E. 700, 44 L. R. A. (N. S.) 311.

Judgment affirmed.

## BOARD OF COUNCIL OF CITY OF FRANKFORT v. KIRBY.

(Court of Appeals of Kentucky. Jan. 9, 1914.)

### 1. MUNICIPAL CORPORATIONS (§ 768\*)—STREETS—STONE STEPS—DEFECTS—NEGLECT.

Where, in an action for injuries to a pedestrian, while passing down certain stone steps leading from one street to another, it was shown that plaintiff was caused to fall by the fact that one of the stones was loose and tilted when he bore his weight thereon, it was immaterial whether the negligence of the city consisted of an inherent defect in the construction of the steps or whether it was a mere failure to keep them in proper repair.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1622, 1624, 1625; Dec. Dig. § 768.\*]

### 2. APPEAL AND ERROR (§ 1050\*)—RECEPTION OF EVIDENCE—PREJUDICE.

Defendant in an action for injuries was not prejudiced by evidence of plaintiff that he thought he was going to die for about two weeks, where plaintiff's physicians testified in substance to the same fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

### 3. EVIDENCE (§ 477\*)—CONDITION OF INJURED PERSON.

A lay witness of inexperience, who had not examined an injured person, was not entitled to testify that, from seeing such person, he thought he was in a dangerous condition.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2237-2241; Dec. Dig. § 477.\*]

### 4. DAMAGES (§ 132\*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff, at the time of his injury, was 58 years of age, in good health, and earning \$2 a day, though he was not regularly employed. He was permanently injured, and there was evidence that he suffered greatly and that it was probable that his earning capacity for the rest of his life had been completely destroyed. *Held*, that a verdict allowing him \$3,500 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Franklin County.

Action by Zachary T. Kirby against the Board of Council of the City of Frankfort. Judgment for plaintiff, and defendant appeals. Affirmed.

Scott & Hamilton and F. M. Dailey, all of Frankfort, for appellant. O'Rear & Williams, of Frankfort, for appellee.

TURNER, J. This is an action by appellee against appellant for personal injuries

alleged to have been received by him as a result of appellant's failure to keep in proper repair certain stone steps leading down a steep passageway from East Main street to East Broadway in Frankfort. The trial in the lower court resulted in a verdict of \$3,500 for appellee, and this appeal results.

Many questions were made in the lower court, but in this court they were all expressly waived except two: (1) Should appellant's motion for a peremptory instruction have prevailed; and (2) was certain evidence offered by plaintiff properly permitted to go to the jury?

At the time of the accident appellee was alone, and there was no other eyewitness. His testimony is that in going down these steep stone steps he stepped upon one of them which was loose, and that it tilted slightly when his weight went upon it, which threw him violently against the stone steps, whereby he was injured in his left side, in his stomach, and his head; that he remained in bed 14 or 15 weeks and had never been able to do any work since. Several other witnesses testified that the stone step referred to was loose, that there was a triangular block that had been broken out of this step, or the one next to it, and two or three witnesses besides appellee stated that they had received falls at that place. Several physicians testified that appellee was permanently injured, that he had not been able to do any manual labor since the accident, and probably never would be; that as a result of the injury he had a chronic pleurisy in his left side brought about by the adherence of the pleura to the lung and floating-rib.

[1] It is the contention of appellant that it was entitled to a peremptory instruction because the testimony failed to show that the step shown to have been loose was the one that produced the injury; but in this counsel is mistaken. Appellee distinctly states in his cross-examination that it was the second step of the western set of steps that tilted with him, and the other witnesses identify that step as the one that was loose. It is immaterial for the purposes of this case whether the negligence consisted of some inherent defect of construction, or whether it was failure to keep the steps in proper repair; the salient fact is that it was loose, that it tilted, and caused his injury. The motion for a peremptory instruction was properly overruled.

[2] It is also argued that the testimony by appellee himself that he thought he was going to die for about two weeks was highly improper and prejudicial. Without considering the importance of this testimony, it is sufficient to say that it could not have been prejudicial for the reason that appellee's physicians testified in substance to the same thing.

[3] It is further alleged that the testimony by one of the witnesses to the effect that when he went to see appellee he seemed to

be suffering a great deal, and that he thought he was in a dangerous condition, was erroneous and prejudicial; but for the same reason above given this testimony cannot be prejudicial, although we are constrained to say that it is not proper to permit such evidence to go to the jury from witnesses of inexperience who have not examined the injured person, there being no sufficient basis for their opinion.

[4] It is suggested, but not urged, that the verdict is excessive. At the time of the injury appellee was 58 years of age, in good health, and earning \$2 per day, but not regularly employed. That he was permanently injured, and that he suffered greatly, there seems no doubt from the testimony, and it is altogether probable that his earning capacity for the rest of his life has been completely destroyed.

Judgment affirmed.

CHESAPEAKE & O. RY. CO. v. BURTON.  
(Court of Appeals of Kentucky. Jan. 9, 1914.)

1. RAILROADS (§ 446\*)—KILLING OF STOCK—PROOF OF NEGLIGENCE—PEREMPTORY INSTRUCTION.

Where in an action for the death of a horse from being struck by a train, the uncontradicted evidence showed that the whistle was not sounded at the public road crossing, that there was nothing to prevent the engineer from seeing the animal from 300 to 500 yards back, that the stock alarm was not sounded, and that no attempt was made to stop the train, a peremptory instruction for defendant was properly refused, though those in charge of the train testified that they used care to avoid the accident; the burden placed upon the defendant by Ky. St. § 809, to disprove negligence in a stock killing case not being overcome where the evidence is conflicting, but the question of negligence in such case being for the jury under all the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.\*]

2. APPEAL AND ERROR (§ 231\*)—OBJECTION BELOW—ADMISSION OF EVIDENCE.

Where, in a stock killing case, the killing of the animal by defendant's train was admitted, error in admitting evidence that the killing was caused by defendant's negligence, before defendant introduced any evidence to sustain the burden, placed upon it by Ky. St. § 809, to disprove negligence, could not be considered on appeal, where such evidence was not objected to below on the ground that it was admitted out of its proper order, especially where defendant's rights were not prejudiced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.\*]

Appeal from Circuit Court, Carter County.  
Action by G. W. Burton against the Chesapeake & Ohio Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

W. L. Woods and Wilhoit & Wilhoit, all of Grayson, and Shelby & Shelby, of Lexington, for appellant. H. R. Dysard, of Ashland, for appellee.



**SETTLE, J.** This is an appeal from a judgment entered upon a verdict awarding the appellee, G. W. Burton, \$300 damages for the death of a mare alleged to have been killed by the negligence of the servants of the appellant in charge of one of its passenger trains.

[1] A reversal of the judgment is asked by appellant upon the grounds, first, that the trial court erred in refusing to peremptorily instruct the jury to find for it at the conclusion of the evidence; second, that the verdict is flagrantly against the evidence. It is admitted by appellant that the mare was killed by its train, but denied that her death was caused by the negligence of its servants in charge thereof. According to the evidence, the mare was overtaken and struck by the train on a fill at the end of a bridge spanning Williams creek. This fill is from 80 to 100 yards long, and is crossed by a county road at the distance of about 100 feet from the bridge. The height of the fill near where it is crossed by the county road is 10 feet, and gradually increases until it attains a height of 20 feet at the bridge. For some distance before reaching the bridge its sides are almost perpendicular, and, from the crossing to the bridge, there is a space between the end of the railroad ties and the edge or bank of the fill of only 2 feet in width, and this space on the south side of the track contains a beaten path. Appellee's residence is situated near where the county road crosses the railroad. The mare owned by appellee had been running at large upon his premises, and by some means passed through the gate which inclosed same and went upon the county road, where she was standing when appellant's train came in sight. As the train came on, the mare, becoming frightened, ran down the path of the fill in the direction of the bridge, and, upon reaching the bridge, was overtaken by the train, and, though still in the path by the side of the track, was struck by the train, knocked from the fill, and instantly killed.

The evidence introduced in behalf of appellee shows that the mare ran a distance of 75 or 80 yards before she was struck by the train; also that the engineer and fireman upon the train, by keeping a lookout in approaching the crossing, could readily have seen stock or any similar object on the crossing and track or fill for a distance of 400 or 500 yards therefrom; that the train neither sounded its whistle nor rang its bell in approaching the crossing, or after it came in view of the mare, before she ran in the direction of the bridge, and that there was nothing to prevent the engineer and fireman from seeing the fright of the mare or her flight on the fill toward the bridge several hundred yards before the train reached and struck her; that the train was going at a speed of 35 or 40 miles an hour, and did not at any time sound the stock alarm. According to some of the witnesses, when within 75 or 100

yards of the mare, there seemed to have been a shutting off of the steam, or application of the air brakes, which momentarily lessened the speed of the train, but immediately thereafter the steam was applied, or the air brakes taken off, and the speed of the train again increased before its collision with the mare occurred. Considered as a whole, the evidence introduced in behalf of appellee, much of which was furnished by the testimony of eyewitnesses to the accident, conduced to prove that appellant's servants in charge of the train might have stopped it before reaching the fill, or so slackened its speed as to have prevented the death of the appellee's mare.

The only witness introduced by appellant was H. S. Meddis, the engineer in charge of the train by which the mare was killed. Meddis testified that the mare, when first seen by him, was only 50 yards from the train, which was running at a speed of 35 or 40 miles an hour; that the mare was then standing on the fill near the county road, apparently about 10 feet from the railroad track, and at once began to run in the direction of the bridge, which she reached before being overtaken and struck by the train; that, seeing her at what he thought a sufficient distance from the railroad track to enable the train to pass without striking her, he did not anticipate her collision with the train, and did not, with the whistle, give the stock alarm, fearing it would frighten and cause her to run on the track in front of the train. The witness frankly admitted that at no time did he give the stock alarm, and he failed to state whether the train whistle was sounded for the public road crossing, or that he or the fireman were maintaining a lookout ahead of the train in approaching the crossing. He did testify, however, that at no time after discovering the presence of the mare on the fill would it have been possible to have stopped the train before it struck her. As according to all the evidence the mare was never on the railroad track, but remained on the path of the fill until struck by the train, and the space between the track and edge of the fill was nowhere more than 2 feet in width, Meddis was evidently mistaken in stating that, when first seen by him, the mare was 10 feet from the track.

It will thus be seen that appellee's witnesses were uncontradicted as to the facts that the train whistle was not sounded for the public road crossing; that there was nothing to prevent the engineer or fireman from seeing the mare on the fill for a distance of from 300 to 500 yards before the train reached the crossing, if they or either of them had been maintaining a lookout; that the whistle did not sound the stock alarm; and that there was no attempt on the part of appellant's servants in charge of the train to stop it after it reached the point from which the mare could be seen by the engineer and fireman and before it struck and killed her.

The jury were properly permitted to determine from these facts whether the death of appellee's mare was caused by the negligence of appellant's servants in charge of the train, and, as their verdict must have been based upon the theory that the death of the mare was caused by the failure of appellant's servants to sound the train whistle for the public crossing, or maintain a lookout in approaching the crossing, in failing to stop the train to prevent its striking the mare, or failing to give the stock alarm after she began running toward the bridge, which, if done, might have so frightened her as to cause her to leap from the fill before the train reached her, it is patent that it cannot be said there was no evidence to support it.

It is not to be overlooked that, under the statute (section 809, Ky. Stat.), the killing or injuring of stock by a railroad train is presumed to have been caused by the negligence of those in charge of the train, and the burden of showing that such was not the case rests upon the railroad company. It may, however, relieve itself of that presumption by showing by competent evidence that its servants used ordinary care to avoid the killing or injuring complained of; but when, notwithstanding the testimony of those in charge of the train that such care was used, other witnesses testify that they were negligent, it becomes the duty of the jury to pass upon the question at issue from all the evidence. *L. & N. R. R. Co. v. Rhodes*, 90 S. W. 219, 28 Ky. Law Rep. 692.

In *Campbell v. Mobille & Ohio R. R. Co.*, 154 Ky. 582, 157 S. W. 931, we held that, where stock were killed by a railroad train at a public crossing, the negligence imputed to the railroad company by section 809, supra, is not removed until it is shown that the train, in approaching the crossing, gave the signals required by section 786, Ky. Stat., which are intended for the protection of stock as well as human beings. If appellee had introduced no evidence as to the killing of his mare by appellant's train, it might well be doubted whether the testimony of the latter's engineer, Meddis, relieved it of the negligence imputed to it by the statute; but, when we come to consider that of appellee's witnesses, conducing, as it does, to affirmatively show the negligence of appellant's servants complained of in the petition, no ground is left for saying that the verdict of the jury is flagrantly against the evidence, and, if correct in this conclusion, it necessarily follows that the refusal by the trial court of the peremptory instruction asked by appellant was not error.

[2] It is insisted for appellant that, in view of its having the burden of proof as to the question of negligence, the trial court erred in permitting appellee to introduce some of its evidence before that of appellant was introduced. Notwithstanding the admitted kill-

ing of appellee's mare by appellant's train, and the statutory presumption of negligence arising therefrom, it was necessary for appellee to introduce evidence as to the value of the mare before that of appellant was introduced, and, though he, in addition, introduced some of his evidence tending to prove that her death was caused by the negligence of appellant's servants, which more properly should have been introduced after that of appellant, we do not find in the record that the evidence thus introduced by appellee was for that reason objected to by appellant, in view of which such objection will not be heard on appeal. Appellant's rights were in no way prejudiced in this matter.

It is not complained that the verdict is excessive. The evidence as to the value of the mare was all to the effect that her fair market value at the time of her death was \$300 to \$350. The instruction fairly submitted to the jury the issues of fact involved, and properly advised them of the law applicable thereto.

Judgment affirmed.

#### GESSER v. McLANE et al.

(Court of Appeals of Kentucky. Jan. 9, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 459\*)—SEWER ASSESSMENT—PROPERTY SUBJECT—PAYMENT FROM GENERAL FUND.

Under Ky. St. § 3490, subd. 9, relative to apportionment of the cost of the construction of sewers in cities of the fourth class, a city council may assess the cost of a sewer to the extent of \$1 per front foot on the abutting property, and provide for the payment of the cost in excess thereof out of the general fund; the provision of such section that when the entire cost of the construction exceeds \$1 per front or abutting foot the entire cost shall be assessed on the lots in the sewer district which may be benefited thereby not being mandatory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1101; Dec. Dig. § 459.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 469\*)—SEWER ASSESSMENTS—VALIDITY.

Where a sewer was constructed by a city of the fourth class on its side of a street forming the line between two cities, the fact that the assessment therefor was not levied on the property abutting the street on the opposite side over which it had no control did not invalidate the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1113-1117; Dec. Dig. § 469.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 110\*)—PUBLICATION OF ORDINANCE—SUFFICIENCY.

The publication of an ordinance of the city of the fourth class by typewritten handbills was a sufficiency compliance with Ky. St. § 3487, requiring that all ordinances, unless published in a newspaper, be published by handbills.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 239-244; Dec. Dig. § 110.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 417\*)—CONSTRUCTION OF SEWER—ASSESSMENT.

That a drain had been previously constructed along a portion of the route followed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

by the sewer in question did not preclude the sewer from being an original improvement, the cost of which could be assessed against the abutting property, where it did not appear that the drain was a sewer within Ky. St. § 3490, subd. 9, providing for the construction of sewers and assessment therefor, or that it was not constructed at the city's expense.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1021, 1022; Dec. Dig. § 417.\*]

**5. EMINENT DOMAIN (§ 2\*)—MUNICIPAL CORPORATIONS (§ 470\*)—SEWER ASSESSMENTS—PROPERTY SUBJECT.**

That a corner lot has been assessed \$1 per front foot on one street for the construction of a sewer thereon will not render invalid, as a taking of private property without just compensation, in violation of Const. § 242, an assessment for a sewer constructed upon the other street.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 8-12; Dec. Dig. § 2;\* Municipal Corporations, Cent. Dig. § 1118; Dec. Dig. § 470.\*]

Appeal from Circuit Court, Campbell County.

Action by John B. McLane and another, doing business as John B. McLane & Co., against Joseph P. Gesser. From judgment for plaintiffs, defendant appeals. Affirmed.

Hubbard Schwartz, of Newport, for appellant. Barbour & Bassmann, of Newport, for appellees.

CLAY, C. Bellevue is a city of the fourth class. Its board of council ordered the construction of a sewer along Hoffman alley from Van Voast avenue to O'Fallon avenue, and in O'Fallon avenue from Hoffman alley to the south curb line of Fairfield avenue. By appropriate proceedings John B. McLane and Fred. B. McLane, doing business under the firm name of John B. McLane & Co., were employed to construct the sewer. On completion of the work by them it was accepted by the board of council, and an ordinance was passed assessing the cost thereof on the abutting property owners to the extent of \$1 a foot. The balance of the cost was paid by the city out of its general fund. The sewer extends north and south along O'Fallon avenue about 720 feet. It then turns at right angles and runs west from O'Fallon avenue along Hoffman alley 207½ feet. O'Fallon avenue is on the dividing line of the city of Bellevue and the city of Dayton. The property abutting on the east side of O'Fallon avenue is in the city of Dayton, while that abutting on the west side is in the city of Bellevue. The O'Fallon avenue sewer is laid about seven feet from the corporate line and on the Bellevue side. Joseph Gesser owns a piece of property extending 107½ feet along the sewered portion of Hoffman alley and on a portion of Van Voast avenue, which is parallel with, and the first street west of, O'Fallon avenue, and along which a sewer had previously been constructed. On the failure of the defendant Gesser to pay his

proportion of the cost of the sewer in question, plaintiffs, John B. McLane & Co., brought this action to recover on the apportionment warrant issued against his property. On final hearing judgment was rendered in favor of plaintiffs, and defendant's property was ordered sold to satisfy the lien adjudged thereon. Defendant appeals.

[1] The first point raised by the defendant is that the city of Bellevue had been divided into sewer districts, and as the cost of the sewer in question exceeded \$1 a foot the board of council should have assessed the cost thereof, not only on the abutting property, but on all property in the sewer district benefited by the sewer, and was without authority to assess the cost to the extent of \$1 a foot on the abutting property owners and pay the remainder of the cost out of the general fund. In support of this position we are cited to subsection 9, § 3490, Ky. St. which is a part of the charter of cities of the fourth class, and provides:

"The board of council shall have power within the city:

"9. To construct sewers along or under any of the streets, alleys or highways of the city, and may assess the entire cost including the intersections, of constructing the same, to an amount not exceeding one dollar per front foot of the abutting property, upon the lots and lands abounding or abutting upon said streets, alleys or highways in, under and along which the sewers shall have been constructed; the cost of the construction of sewers not exceeding said sum of one dollar per front foot of the abutting property, shall be apportioned equally on the said abutting lot owners according to the front or abutting feet. When the amount of the quotient, after dividing the entire cost of the construction of the sewer, as estimated and computed to the general council by the engineer by the front or abutting foot, exceeds the sum of one dollar per front or abutting foot, then, and in that event, the entire cost of construction of said sewer shall be assessed upon the lots and lands in the district of said sewer which may be benefited thereby, according to the benefits received, and the said district shall be defined before the improvement is made, and in every such case the council shall, by ordinance, fix and determine the amount of tax to be levied upon the several lots or lands so benefited. The general council may, however, out of the general fund contribute and pay toward the construction of such sewer such part of the cost thereof as may to the council seem proper. The tax provided for in this section shall be a lien upon such abutting property or benefited property, as the case may be, and may be collected and enforced as street improvement liens are collected and enforced, but the amount of sewer tax assessed against any lot or land shall in no event exceed one dol-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lar per front or abutting foot. Nothing herein shall be so construed as to prevent the board of council from paying for all or any part of any sewer or sewers constructed under this act."

It is apparent from an examination of the foregoing section that that part providing that when the amount of the quotient, after dividing the entire cost of the construction of the sewer, exceeds the sum of \$1 per front or abutting foot, the entire cost of construction shall be assessed on the lots and lands in the district of said sewer which may be benefited thereby is not mandatory. On the contrary, it gives express authority to the general council to pay out of the general fund such part of the cost of said sewer as may to the council seem proper. The latter provision is a wise one, for doubtless it would often happen that a lateral sewer benefited no property other than that abutting on the sewer, and yet by reason of having to blast through solid rock the cost might exceed \$1 per abutting foot. In this case the council assessed the cost to the extent of \$1 per foot on the abutting property, and provided for the payment of the cost in excess of that sum out of the general fund. As this plan of assessment is authorized by the section in question, it follows that defendant's complaint on this score is without merit.

[2] Another defense interposed by the defendant is that his property is not liable for the assessment, because the cost of the sewer was not assessed against all of the property abutting thereon. It appears, however, that the property abutting on the east side of O'Fallon avenue lies in the city of Dayton. The sewer was constructed on the west, or Bellevue, side. As a matter of course, the council of the city of Bellevue had no authority to levy an assessment on property located in the city of Dayton. In speaking of abutting property the statute must be construed to mean abutting property lying within the city where the sewer is constructed. That being true, one owning property in one city along which a sewer is constructed cannot complain that property lying in another city, though abutting on the sewer, is not required to bear any part of the cost thereof.

[3] Another contention of defendant is that the ordinance ordering the improvement was not published as required by law. The charter of fourth class cities provides: "Immediately after the adjournment of each meeting of the board, every ordinance passed at that meeting shall be published at least once in some newspaper published in the city, or by handbills, and such publication shall be made before any ordinance is enforced; and it shall be the duty of the clerk to have such publication made and to preserve a copy thereof." Section 3487, Kentucky Statutes. The evidence shows that, upon the passage of the ordinance ordering the improvement and the other ordinances

relating thereto, the clerk had typewritten copies made and posted them in eight or ten conspicuous places in the city. As the statute provides for publication by handbills, without requiring any particular form of handbills, we conclude that publication by typewritten handbills is a sufficient compliance with the statute.

[4] Another ground of complaint is that, prior to the time of the construction of the sewer in question, a sewer had been constructed in Hoffman alley, and that the sewer in question was not therefore an original improvement. The evidence, however, fails to show that a sewer had been previously constructed in Hoffman alley at the expense of the abutting property owners, as provided by the statute. It simply shows that there was a drain there. For aught that appears, the drain may have been constructed at the expense of the city, and was not a sewer within the purview of the statute.

[5] Lastly it is insisted that it was an abuse of legislative authority, and a violation of section 242 of the Constitution, to assess defendant's property for the cost of the sewer on Hoffman alley, in view of the fact that his property had already been assessed for a sewer on Van Voast avenue, on which his property fronted, and that the Hoffman alley sewer was therefore of no benefit to his property. Manifestly this defense is without merit, for it has been held that where a corner lot has been assessed \$1 per front foot on one street for the construction of a sewer on that street, it is nevertheless liable for the construction of a sewer on the other street. *Rich v. Woods*, 118 Ky. 865, 82 S. W. 578, 26 Ky. Law Rep. 799. It is a hardship, of course, but it is a hardship growing out of the disadvantage of owning a corner lot.

Judgment affirmed.

FERRELL v. BAUER COOPERAGE CO.  
et al.

(Court of Appeals of Kentucky. Jan. 9, 1914.)

APPEAL AND ERROR (§ 543\*)—RECORD—EXHIBITS—SUPPLYING LOSS—PROCEDURE.

Where, after trial and before the bill of exceptions was signed, two maps used at the trial were lost, they could be supplied only in the manner provided for supplying lost records by Ky. St. §§ 3991-4000; and hence a map handed by appellant's attorney to the clerk, to which an affidavit that it was a correct copy of the maps used at the trial was attached and which was placed by the clerk in the transcript, could not become a part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2409-2411; Dec. Dig. § 543.\*]

Appeal from Circuit Court, Wayne County.  
Action between H. H. Ferrell and the Bauer Cooperage Company and others. Judgment for the latter, and the former appeals.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On motion to strike a certain map from the record. Granted.

Joe Bertram & Son, of Monticello, for appellant. J. M. Kennedy and F. B. Harrison, both of Monticello, for appellees.

MILLER, J. Upon notice given, appellee has moved the court to strike from the record a map or plat of a survey made by W. C. Bell upon the ground that it was not used upon the trial or made a part of the record by the bill of exceptions.

The affidavits show that two maps were used by the parties upon the trial, and that they were lost after the trial and before the bill of exceptions was signed by the circuit judge. Thereafter, in making up the record for the appeal, appellant's attorney handed the clerk a map which the affidavits show is a correct copy of the maps used upon the trial. The clerk placed said map in the transcript, and it has been filed with it in this court. In the absence of an agreement of record by the parties to the appeal, the map cannot be considered. Appeals are heard upon the record as shown by the bill of exceptions, which is made by the trial judge, not by the clerk. When records are lost they should, in the absence of an agreement of record, be supplied in the manner provided by chapter 106 of the Kentucky Statutes.

The circuit court clerk was without authority to make the plat a part of the record, and the appellee's motion to strike it from the record is sustained. However, since the affidavits show the loss of the maps beyond recovery, appellant is given 30 days in which to supply the record in the circuit court.

#### CITY OF HENDERSON v. CONNELL.

(Court of Appeals of Kentucky. Jan. 9, 1914.)

##### 1. MUNICIPAL CORPORATIONS (§ 408\*)—STREET IMPROVEMENTS—COST OF INTERSECTIONS.

The provision of Acts 1912, c. 113, that a city may assess the entire cost of street improvements or reimprovements against the property owners and issue bonds therefor does not repeal Ky. St. § 3456, providing that the cost of improvements at street intersections shall be paid by the city, but must be construed in connection therewith; and hence it does not authorize the city to assess the cost of intersections against the property holders.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1005, 1006, 1183; Dec. Dig. § 408.\*]

##### 2. STATUTES (§ 159\*)—REPEAL BY IMPLICATION.

A statute will not be construed as repealing a prior statute by implication unless so clearly repugnant thereto as to admit of no other reasonable construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.\*]

Appeal from Circuit Court, Henderson County.

Suit by Hiram Connell against the City of

Henderson. A demurrer to the petition was overruled, and the defendant appeals. Affirmed.

John C. Worsham, of Henderson, for appellant. Clay & Clay, of Henderson, for appellee.

MILLER, J. [1] This case raises the question of the right of cities of the third class to assess the cost of improving intersections of streets with sidewalks, curbs, and gutters against the abutting property. The legislative charter granted to the city of Henderson in 1867 provided that all intersections of streets should be graded, guttered, and stepping stones placed or crosswalks made at the expense of the city; and by the amendment of 1880 said provision was reincorporated into the charter of that year.

Henderson is a city of the third class; and, by the general act of 1893, being chapter 89 of the Kentucky Statutes, and constituting the charter of cities of the third class, it is provided as follows: "In all cases of the improvement of the streets and gutters, curbs and paving sidewalks, the improvement of the intersections thereof shall be paid by the city." Ky. Stats. § 3456.

By an act approved March 18, 1912, the Legislature amended chapter 89 of the Kentucky Statutes by an act entitled "An act to amend the charters of cities of the third class"; the first section thereof reading in part as follows: "Section 1. Chapter 89 of the Kentucky Statutes, Carroll's Revision of 1909, the same being the charter of cities of the third class, is hereby amended by adding thereto after section 3459 thereof, the following section as section 3459a, which section shall read as follows, to wit: 'Sec. 3459a. The common council may provide that the construction or reconstruction of any of the sewers, streets, alleys, public ways and sidewalks shall be made on the ten (10) year plan; and thereupon when any such improvement or reimprovement has been completed and accepted a notice shall be given by publication in a newspaper of general circulation published in the city, requiring the property owner to pay the assessments made against their property for such work; and if such assessments be not paid by such property owners, then to provide a fund for the payment of such portion of the entire cost of such improvement or reimprovement as the property holders shall be liable for but may not pay in cash in conformity with said notice the common council is authorized to borrow money at a rate of interest not exceeding six per cent. per annum in anticipation of the collection of a special tax or assessment for such improvement or reimprovement from such property holders, and to issue the bonds of the city therefor in manner and form herein provided, pledging the liens on the property and any fund which the city

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—71

may have set apart for said purpose and the faith and credit of the city where the city has been authorized to pledge its faith and credit, or any or all of said pledges may be given by the city for the payment of the principal and interest of said bonds as the city may desire. The city may, if it so desires and has been authorized by law to pledge the faith and credit of the city in payment of its part of the cost of any improvement made hereunder, issue bonds for its part of the cost of the improvement in like manner as is herein provided for the issuance of bonds in payment of the cost of the improvement on behalf of the property holders. But said city may assess the entire cost of such improvement or reimprovement against the property owners and issue bonds therefor as herein provided. Said bonds shall be divided into ten series, each series to be as nearly equal as possible; said series to be paid respectively in one, two, three, four, five, six, seven, eight, nine and ten years after date," etc. Acts 1912, p. 380.

Acting under the authority of the amendment of 1912, supra, appellant passed 13 ordinances providing for the improvement of certain streets in the city; section 5 of each ordinance reading as follows: "Sec. 5. That the cost of the construction of the sidewalks, curbs and gutters provided for in this ordinance shall be paid by the owners of the property abutting or fronting thereon, to be apportioned and assessed against said property owners according to the number of front feet abutting thereon; except, that in addition, the cost of the sidewalks, curbs and gutters on the intersection of the various sections shall be prorated among and assessed against the property owners on each of the said sections according to the frontage of their said property."

The appellee, Connell, acting for himself and other citizens of Henderson who were alike interested in, and would be affected by, the proposed improvements, brought this action for the purpose of restraining appellant from collecting the cost thereof from the abutting property holders and from issuing any bonds by which the property owners are to be held liable for the cost of said improvements. The circuit court overruled a demurrer to the petition; and, the city of Henderson electing to stand by its demurrer, the allegations of the petition were taken as true, and the injunction granted. The city appeals.

It is not contended by either side that the act of 1912 repealed section 3456 of the Kentucky Statutes, above quoted, which imposes upon the city the obligation of paying for the improvement of intersections. Appellant insists, however, that the provision of the act of 1912 which declares that the city "may assess the entire cost of such improvement or reimprovement against the property owners, and issue bonds therefor," gives the city the choice of two methods of procedure: (1)

It may pay for the improvement; or (2) it may require the property owners to pay for it. On the other hand, appellee insists that, since section 3456 requires the city to pay for the intersections in all cases, the act of 1912 merely provides two methods of procedure on the part of the city: (1) It may pay in cash; or (2) it may issue bonds therefor as in the act provided. It will readily be seen that these two constructions of the statute are radically antagonistic. Under appellant's construction the city can require the abutting property owner to pay the entire cost of the intersection, while under appellee's contention the city must pay it in all cases.

The act of 1912 provides a new plan by which the payment of the cost of street, sidewalk, and curb construction may be extended over a period of ten years on what is known as the ten-year plan. When the street has been completed and accepted, notice is published requiring the property owners to pay the assessments made against their property for their respective portions of the improvement; and, if such assessments are not paid, the city is authorized to borrow money to provide a fund for the payment of such portion of the entire cost of the improvement as the property holders shall be liable for and to issue bonds therefor upon the faith and credit of the city. In this way the contractor gets his money at once, and the property owner is given ten years in which to pay his debt. After thus disposing of the liability of the property holder, the act further provides that the city may, if it so desires, and has been authorized by law to pledge the faith and credit of the city in payment of its share of the cost of the improvement, issue bonds for the payment of its share in like manner as is provided in the act for the issuance of bonds in payment of the property holder's portion of the cost of the improvement. If the act had stopped there, there would be no doubt as to its meaning, since it is clearly apparent that up to that point the act clearly gives the right, both to the property holder and to the city, of discharging their respective liabilities for the improvement under the ten-year plan. But if section 3456, which imposes upon the city the cost of the intersection improvement in all cases, is to stand unimpaired, then clearly the interpolated clause of the act of 1912, which would give the city the right to assess the entire cost of the improvement against the abutting property holders and issue bonds therefor, cannot be given effect, since the two acts are diametrically opposed in their essential operations. The city cannot improve one street at the cost of the property owners and another street at the cost of the city. The procedure must be uniform.

[2] No rule of law is better settled than that repeals by implication are not favored by the courts, and that no statute will be

construed as repealing a prior statute unless it be so clearly repugnant thereto as to admit of no other reasonable construction. *Commonwealth v. Petri*, 122 Ky. 28, 90 S. W. 987, 28 Ky. Law Rep. 940.

In *Commonwealth v. International Harvester Co.*, 131 Ky. 561, 115 S. W. 707, 183 Am. St. Rep. 256, it is said: "If, however, the Legislature has enacted two or more statutes which from their wording appear to be inconsistent, or if the statute under consideration appears to be in conflict with a provision of the Constitution, state or federal, there is an ambiguity, for it is always presumed that the Legislature did not intend to violate either Constitution; it is always presumed it intended its enactments to become valid and enforceable laws. Nor are repeals by implication favored, as it must be presumed that, if the Legislature had intended that one statute should repeal another, it would have so expressed it as to leave no doubt of its purpose. Hence, when two statutes bearing on the same subject appear on their face to be so inconsistent with each other, the first duty of the court called upon to construe them is to harmonize them, if possible, so as to allow both to stand; or, if that cannot be done without violence to some part of the language employed in one or both the statutes, then the rule is to construe them so as that both will stand so far as possible, and, wherein any part of either is irreconcilable with any part of the other, the latest stands, while the inconsistent part of the former is deemed to have been repealed."

Applying this rule to the seemingly inconsistent provisions of section 3456 of the Kentucky Statutes, above quoted, and the provisions of the act of 1912, it is first to be noticed that the later act is amendatory merely to chapter 89 of the Kentucky Statutes, which constitutes the charter of cities of the third class. The act contains no repealing clause, and evidently it was intended as a mere addition to, or a new provision for, charters of cities of the third class. If the two statutes can be read together so that both may stand, it should be done. Bearing in mind that the legislative intent is the rule by which we are to be guided, we think it reasonably clear that the two statutes can be read together so that both may stand.

As above pointed out, the act of 1912 provided a new scheme by which the cost of street and other like improvements might be paid for on the ten-year plan. This was something new to charters of cities of the third class. It recognized the fact that under section 3456 the city paid the cost of the intersection, while the property holder paid the remainder of the cost, by first providing that the property holder might take advantage of the new plan in so far as it applied to his liability, and immediately thereafter that the

city could, if it so desired, use the same method in the payment of its part of the cost by issuing bonds for its part of the cost thereof in like manner as is provided for the issuance of bonds in payment of the cost of the improvement on behalf of the property holders. That provision is followed by the further provision that the city may assess the entire cost of such improvement or re-improvement against the property owners and issue bonds therefor as therein provided. This last-named provision is, however, not a separate and independent provision to be considered as standing by itself and granting a new power inconsistent with section 3456, supra. Such a construction would be meaningless. Evidently it was intended to supplement the first provision of the amendment, which provides that the ten-year plan might be used in paying that portion of the property holder's liability which he had not paid in cash, by applying the ten-year plan to the entire liability of the property owner. Under this construction the city would have the option of applying the ten-year plan to the payment of such part of the property holder's liability as he had not paid in cash, or it might, at the outset, apply the ten-year plan to so much of the entire cost of the improvement as was chargeable against the property owners. Clearly this was the intention of the Legislature; otherwise we would have to say that it intended to let section 3456 of the charter remain unimpaired, requiring the city to pay the cost of street intersections, and at the same time nullify its operation by holding that the provision of the act of 1912 gave the city the right to put that cost upon the property holder.

The circuit court gave the act the construction above suggested and held the bonds were valid, but that the city was without power to assess the cost of the intersections against the property holders, and that so much of the bonds as represented the cost of the intersections should be paid by the city. We are of opinion that the conclusion there reached was sound in every particular.

Judgment affirmed.

#### NATIONAL CO-OPERATIVE BURIAL ASS'N v. AUL'S ADM'R et al.

(Court of Appeals of Kentucky. Jan. 9, 1914.)

EXECUTORS AND ADMINISTRATORS (§ 119\*)—PERSONAL WRONG—LIABILITY OF ESTATE.

Where defendant claimed that decedent's administrator and the undertaker who buried decedent's body conspired to prevent defendant association from burying decedent, and thus injured defendant's standing and membership in the sum of \$300, such act constituted a tort by the administrator and the undertaker personally for which decedent's estate was not liable.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 483; Dec. Dig. § 119.\*]

Appeal from Circuit Court, Daviess County.

Action by John W. Cheatham, as administrator of J. A. Aul, deceased, and others against the National Co-Operative Burial Association. Judgment for plaintiffs, and defendant appeals. On motion to dismiss. Granted.

W. T. Ellis, of Owensboro, for appellant. Birkhead & Wilson, of Owensboro, for appellees.

HOBSON, C. J. John W. Cheatham, as administrator of J. A. Aul, deceased, brought this suit against the National Co-Operative Burial Association, alleging that his decedent was a member of the association and that it by its policy bound itself to furnish him burial to cost not exceeding \$100 and had failed to do so. Judgment was prayed for \$100 and cost. The association among other defenses pleaded that Cheatham and D. L. Vissels, the undertaker who had buried this deceased, had entered into a conspiracy to prevent it from burying the deceased and had thus injured its standing and membership in the sum of \$300, for which judgment was prayed against them. The plaintiff won in the circuit court. The defendant appeals, and a motion has been entered to dismiss the appeal for want of jurisdiction, as the amount in controversy is less than \$200.

The estate of the decedent is in no wise liable for the conduct of Cheatham and James charged in the answer. This was simply a personal wrong on their part, and the court below properly so held. The matter could not be brought into this action and litigated here. The amount in controversy between the parties to the action is therefore less than \$200, and the motion to dismiss the appeal must be sustained.

Appeal dismissed.

#### S. B. REESE LUMBER CO. v. LICKING COAL & LUMBER CO.

(Court of Appeals of Kentucky. Jan. 9, 1914.)

##### 1. PROCESS (§ 142\*)—SHERIFF'S RETURN—CONCLUSIVENESS.

Where the sheriff's return was sufficient to show due service, it is, under Ky. St. § 3760, providing that, except in a direct proceeding against himself or his sureties, no fact officially stated by an officer, as to a matter about which he is by law required to make a return, shall be called in question, except on the allegation of fraud or mistake, conclusive in a collateral attack on the judgment upon the ground that there was no service, unless the return is attacked as fraudulent or made through mistake.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 193; Dec. Dig. § 142.\*]

##### 2. CORPORATIONS (§ 668\*)—FOREIGN CORPORATIONS—SERVICE ON.

Under Ky. St. § 571, providing that all foreign corporations shall have a known place of business and an authorized agent on whom

process may be served, and that it shall not be lawful for any corporation to carry on business until it shall have filed in the office of the Secretary of State a statement giving the location of its office and the name of its agent, and, if the agent shall be changed, notice shall at once be given, service of process on one who appeared as agent in the statement filed with the Secretary of State is a good service on a foreign corporation, even though the agency had been terminated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.\*]

##### 3. JUDGMENT (§ 138\*)—DEFAULT—VACATIONS.

The negligence of an agent is imputable to the principal; consequently the failure of an agent, appointed by a foreign corporation to receive service of process, to inform the corporation of the service, though preventing the corporation from making a defense to the action, is not an unavoidable casualty or misfortune within the meaning of Civ. Code Prac. § 518, subsec. 7, providing for the vacation of judgments obtained by reason of unavoidable casualty or misfortune preventing the party from defending.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.\*]

##### 4. JUDGMENT (§ 138\*)—VACATION—GROUND.

Courts will not grant an unsuccessful litigant a new trial upon the ground that his negligence prevented him from making his defense to an action; consequently, a judgment against a foreign corporation will not be vacated because service was made on one, who, though not actually its agent, was designated as agent to receive service of process in the statement filed with the Secretary of State.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.\*]

Appeal from Circuit Court, Bath County.

Suit by the S. B. Reese Lumber Company against the Licking Coal & Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

B. S. Wilson and W. A. Young, both of Morehead, and C. W. Goodpaster, of Owingsville, for appellant. J. J. Nesbitt, of Owingsville, for appellee.

SETTLE, J. March 29, 1910, the appellee, Licking Coal & Lumber Company, instituted an action in the Bath circuit court to recover of the appellant, S. B. Reese Lumber Company, \$783.36 alleged to be due it for timber sold and delivered the latter in the year 1907. On the 6th day of October, 1910, judgment was rendered in the court mentioned in favor of appellee and against appellant for the amount sued for, with interest thereon at the rate of 6 per cent. per annum from the 17th day of September, 1907, until paid, and costs of the action. Thereafter execution was duly issued on the judgment directed to the sheriff of Morgan county, and same was by him levied on a 716-acre tract of land situated in Morgan county owned by appellant. Following the advertisement of the sale of the land by the sheriff under the execution, and before such sale could be had, appellant brought this action in the Bath circuit court against appellee and the sheriff seeking the vacation of the judgment in



question and a new trial upon the grounds specified in subsections 4 and 7, § 518 Civil Code; and also to enjoin the sheriff from proceeding with the sale of the land under the execution. In other words, the grounds relied on by appellant for vacating the judgment and obtaining a new trial were: First, that fraud was practiced by appellee in obtaining judgment; second, that appellant was by unavoidable casualty and misfortune prevented from appearing and making defense to the action. A general demurrer was filed by appellee to the petition which the circuit court overruled. Thereupon it filed answer traversing the averments of the petition; and, after the taking of proof by the parties and submission of the case, judgment was rendered by the circuit court dismissing the action, and from that judgment this appeal is prosecuted.

[1] The fraud alleged in the petition is that the timber, for the price of which appellee obtained judgment, had not been sold by it to appellant, but to S. B. Reese, its vice president and manager as the agent of one George Francis, who, it is claimed, was the actual purchaser of the timber and the only person indebted to appellee therefor. This was denied by the answer and as to this issue of fact there was a contrariety of evidence, the weight of which, in our opinion, conduced to show appellant to have been the purchaser of the timber. In our view of the case, however, it will be unnecessary to pass upon this issue, as appellant has failed to establish its second and essential ground relied on for a new trial, namely, unavoidable casualty or misfortune which prevented it from appearing or making defense to the action. The unavoidable casualty or misfortune alleged arises out of the claim upon the part of the appellant that it was never served with summons in the action in which the judgment was obtained by appellee, and therefore it had no knowledge of the institution or pendency of the action until after judgment went against it. This contention is unsupported by the record. Summons was issued in the action instituted by appellee at the time of the filing of the petition, March 29, 1910, and was served by the sheriff on May 9, 1910, by delivering a true copy thereof to William Cook, the agent of appellant. Such service, however, though properly had, was inadequately shown by the return made on the summons by the sheriff at the time of its service; the return being as follows: "Executed on S. B. Reese Lumber Co., by delivering a true copy of the within summons to William Cook of Salt Lick, Kentucky, on May 9, 1910—this 9th day of May, 1910. Seth Botts, S. B. C., by Cole Barnes, D. S." Being later advised of the insufficiency of this return, the sheriff on October 5, 1910, the day before the judgment in appellee's favor was rendered, by leave of the court, amended the return upon the summons as follows: "By leave of court I now amend my return on this summons. I executed this

summons on the 9th day of May, 1910, upon the within named S. B. Reese Lumber Company by delivering a true copy of this summons to William Cook of Salt Lick, Kentucky. Said William Cook being the person designated by defendant upon whom process may be served for said S. B. Reese Lumber Company, as appears from the records on file in the office of Secretary of State of Kentucky. This 5th day of October, 1910. Seth Botts, S. B. C., by Cole Barnes, D. S."

The return of the sheriff by his deputy, as amended, positively shows due service of the summons upon Cook as appellant's agent, and it is not alleged in the petition in this case that the sheriff or his deputy was guilty of fraud in the matter of serving the summons upon Cook, nor is it alleged that there was any mistake made by the officer in the manner of its service or in amending the return thereon. It is true Cook evasively testified that he did not understand from what passed between himself and the deputy sheriff that the summons had been served on him; but the testimony of Cook, even had it been more definite, was incompetent to impeach the officer's return upon the summons. Section 3700, Kentucky Statutes, provides: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement, in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer." If the testimony of Cook could be regarded as admissible for any purpose, it is contradicted, not only by the corrected return on the summons, but also by Barnes, the deputy sheriff, and J. J. Nesbitt, appellee's attorney, who was with that officer when the summons was served. But the return on the summons, being placed by the statute beyond the reach of such collateral attack, must be accepted as conclusive evidence of the proper service of the summons. *Thomas v. Ireland*, 88 Ky. 581, 11 S. W. 653, 11 Ky. Law Rep. 103, 21 Am. St. Rep. 356; *Bramlett v. McVey*, 91 Ky. 151, 15 S. W. 49, 12 Ky. Law Rep. 760; *Pribble v. Hall*, 13 Bush, 61; *Cumberland Bank v. Slusher*, 102 Ky. 415, 43 S. W. 471, 19 Ky. Law Rep. 1497.

[2] It is, however, further contended by appellant, and was testified by Cook, that the latter was not its agent or in its employ at the time of the service of the summons upon him, and that he never notified appellant of its service or of the pendency of the action. This contention is also without merit. It appears from the uncontradicted testimony of C. H. Vansant, Assistant Secretary of State, found in the record, that there is on file in the office of the Secretary of State at the capitol a written statement received from appellant which reads as follows: "To the Secretary of State, Washington, Pa. Frank-

fort, Ky., Feb. 12, 1904. Sir: I hereby give notice that the place of business for the S. B. Reese Lumber Company in Kentucky is at Farmers, Kentucky, on the west side of Licking river in Bath county—and that William Cook of Salt Lick, Kentucky, is our agent thereat, upon whom process may be served in any suit that may be brought against our company within the state of Kentucky. Done at Washington, Pa., this 12th day of February, 1904, James S. Forsythe, Secretary."

Appellant, though doing business in Kentucky, is a foreign corporation, incorporated under the laws of Pennsylvania, and having its chief office at Washington in that state, and the above statement was duly filed in the office of the Secretary of State of Kentucky as required by section 571, Kentucky Statutes, which provides: "All corporations except foreign insurance companies formed under the laws of this or any other state, and carrying on any business in this state, shall at all times have one or more known places of business in this state, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employé of such corporation, who shall transact, carry on or conduct any business in this state, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense." It further appears from the testimony of Vansant that since filing the above statement appellant has not sent to the Secretary of State or filed in his office any other statement from its president or secretary giving any change in the location of its office in this state, or in the name of its agent thereat upon whom process can be served; and that William Cook, upon whom the service of summons was had in the action in which appellee obtained judgment against appellant, remains and is still the latter's agent upon whom process must be served.

The language of the statute supra leaves no doubt of its meaning; and, as held in *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, its provisions are so mandatory that a foreign corporation cannot by suit enforce a contract entered into in the execution of its business in this state without

a compliance with its provisions requiring the filing in the office of the Secretary of State of the written statement designating its place of business therein and its authorized agent thereat upon whom process may be served. It is manifest therefore that William Cook, upon whom service of the summons in the action in which appellee obtained judgment was had, was, at the time of such service, appellant's agent and the proper person upon whom to serve it. It is not material that he was not at the time of the service of the summons in appellant's employ, if such was the case. By the statement from it on file in the office of the Secretary of State, Cook was then and down to the time of the taking of the deposition of Vansant, Assistant Secretary of State, in this case, held out to the public as its agent upon whom it was necessary to serve a summons or other process required in any action brought against it, in view of which appellant is estopped to claim that Cook was not its agent and the proper person upon whom to serve the summons in question.

[8] Nor is it material that Cook failed to notify appellant of the service of the summons upon him. Appellee's attorney, J. J. Nesbitt, testified that he advised Cook at the time of the service of the summons upon him that it was his duty to notify appellant, his principal, of the service thereof; and that Cook replied that he was aware of that fact and would notify appellant. Though Cook's denial that such advice was given him by Nesbitt or that he made the reply attributed to him by the latter; and that of appellant's vice president and manager, S. B. Reese, that notice of the service of the summons was ever given appellant by Cook, be accepted as the truth of the matter, it would merely show that Cook was negligent in failing to inform appellant of the service of the summons upon him, and, this being so, appellant cannot rely upon the negligence of its agent as ground for vacating the judgment rendered against it after being properly summoned in the action. In such a state of case the negligence of the agent is imputed to the principal and is, therefore, the negligence of the latter. In other words, the absence of actual knowledge by appellant of the service of the summons upon its agent or of the pendency of the action, though it may have prevented it from making defense to the action, was not such an unavoidable casualty or misfortune in the meaning of subsection 7, § 518, Civil Code, as entitles it to a vacation of the judgment or a new trial. *Beasley et al. v. Furr*, 154 Ky. 286, 157 S. W. 10.

[4] No court has ever granted the unsuccessful litigant a new trial upon the ground that the negligence of himself or his agent prevented him from making his defense to the action. In this case both appellant and its agent Cook, according to their own showing, were guilty of negligence; the former in failing to advise the public through the

filing of the necessary written statement with the Secretary of State that Cook was not its agent or the proper person upon whom to serve process, and the latter in failing to notify appellant of the service upon him of the summons in the action in which the judgment complained of was rendered. The negligence of neither presented a sufficient reason for the refusal by the circuit court of the new trial asked by appellant.

Wherefore the judgment is affirmed.

#### YENAWINE v. TYCRETE CONCRETE PRODUCTS CO.

(Court of Appeals of Kentucky. Jan. 9, 1914.)

APPEAL AND ERROR (§ 659\*)—RECORD—FILING—APPELLATE COURT.

Unless a view of the original papers is important, the Court of Appeals will not order the original papers brought up unless they are bulky parts of the record, and the circuit clerk will not be compelled to file original depositions, consisting of only a little more than 500 typewritten pages, but he will be required to file exhibits offered with the depositions when an inspection of them will be of assistance to the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834-2843; Dec. Dig. § 659.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action between John W. Yenawine and the Tycrete Concrete Products Company. From a judgment for the latter, the former appeals. On motion for a subpoena duces tecum requiring the clerk of the circuit court to file original exhibits and depositions. Motion sustained as to exhibits and overruled as to depositions.

R. C. Kinkead and H. H. Nettleroth, both of Louisville, for appellant. Burnett, Batson & Cary, of Louisville, for appellee. Morris A. Sachs, of Louisville, for clerk of circuit court.

HOBSON, C. J. The appellant has entered a motion for a subpoena duces tecum against the clerk of the Jefferson circuit court requiring him to file in this court the original depositions and all exhibits filed therewith in the action. In *Rainey v. Rainey*, 144 Ky. 503, 139 S. W. 737, we held that, unless a view of the original papers is important to a correct decision of the appeal, we will not order the original papers brought here unless they are bulky parts of the record, such as a book or the like, the copying of which will cause great and unnecessary cost or delay. The depositions in the case at bar consist of 523 pages of typewriting, and under the rule laid down in that case, which had often been followed before, the original depositions will not be required to be brought here. But the exhibits filed with the depositions are of a peculiar nature, and an in-

spection of the papers themselves, as shown by the affidavits, will be of assistance to the court in the determination of the appeal. The motion for a subpoena duces tecum for the original exhibits filed with the depositions is sustained, but the remainder of the motion is overruled. The appellant is allowed 30 days to complete the transcript by obtaining a copy of the depositions.

The motion is sustained as to the exhibits and overruled as to the depositions.

#### GAHREN, DODGE & MALTBY v. FARMERS' BANK OF ESTILL COUNTY.

(Court of Appeals of Kentucky. Jan. 8, 1914.)

##### 1. NEW TRIAL (§ 32\*)—GROUNDS—PLEADING—AGREEMENT WITH PLAINTIFF.

Though the violation by plaintiff's attorney of his agreement that, if defendant would file no answer, he would take no action in the case without first notifying defendant constituted a ground for new trial, it was not error to refuse the new trial, where the answer tendered was insufficient because not properly verified.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 47; Dec. Dig. § 32.\*]

##### 2. MONEY LENT (§ 6\*)—PETITION.

A petition which alleged that on October 22, 1912, plaintiff loaned defendants \$5,000, which they each both jointly and severally promised to pay one day after date, and that, though frequently demanded, no part had been paid, stated a cause of action.

[Ed. Note.—For other cases, see Money Lent, Cent. Dig. §§ 8-10; Dec. Dig. § 6.\*]

##### 3. PLEADING (§ 126\*)—ANSWER—NEGATIVE PREGNANT.

Where a petition alleged that plaintiff, on October 22, 1912, loaned to defendants \$5,000, which they each both jointly and severally promised to pay, an answer that "defendant denies that on October 22, 1912, plaintiff loaned to defendants \$5,000, which amount both jointly and severally promised to pay," etc., was insufficient, since the answer in that form admitted the loan on some other day, for a sum slightly less, and that, though denying a promise joint and several, it admitted one either joint or several.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. § 126.\*]

##### 4. PLEADING (§ 127\*)—ADMISSIONS—ANSWER—WANT OF CONSIDERATION.

That the answer contained the further averment that the debt was without consideration did not render it sufficient as a defense, in view of the admissions already made that some consideration passed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264-268; Dec. Dig. § 127.\*]

Appeal from Circuit Court, Lee County.

Action by the Farmers' Bank of Estill County against Gahren, Dodge & Maltby and another. Judgment for plaintiff, and defendant Gahren, Dodge & Maltby appeals. Affirmed.

V. S. Beatty and T. B. Blakey, both of Beattyville, for appellant. Sam Hurst and J. F. Sutton, both of Beattyville, for appellee.

CLAY, C. Plaintiff, Farmers' Bank of Estill county, brought this action against the defendants, Gahren, Dodge & Maltby and the Citizens' Trust & Guaranty Company of Parkersburg, W. Va., to recover the sum of \$5,000, with interest from October 22, 1912, until paid. It alleged, in substance, that on October 22, 1912, at the special instance and request of both of the defendants, plaintiff loaned to them the sum of \$5,000, which amount they each, and both jointly and severally, agreed to pay plaintiff one day after date, with 6 per cent. interest from date until paid; that said debt was just, and no part thereof had ever been paid, though payment thereof had been frequently demanded. The petition was filed on April 24, 1913. On June 3, 1913, the Citizens' Trust & Guaranty Company filed an answer which it is not necessary to consider. On July 17th plaintiff moved the court to take the allegations of the petition as true against the defendant Gahren, Dodge & Maltby, and to render judgment against it according to the prayer of the petition. Thereupon the defendant Gahren, Dodge & Maltby tendered and offered to file the following separate answer: "The defendant, Gahren, Dodge & Maltby, denies that on the 22d day of October, 1912, at its special instance and request, plaintiff loaned to the defendant the sum of \$5,000, which amount both defendants jointly and severally agreed to pay plaintiff one day after date, with 6 per cent. interest from date until paid; denies that said indebtedness is just and due against this defendant, and that no part thereon has ever been paid, and, having thus answered the defendant, Gahren, Dodge & Maltby, asks to be dismissed hence with its cost. Defendant states that said note or debt sued on was without consideration, and this defendant received nothing therefor." The foregoing answer was verified by T. B. Blakey, one of defendant's attorneys, who stated that none of the defendant's chief officers were present in Lee county at that time. The trial court permitted the foregoing answer to be filed. Thereupon plaintiff interposed a demurrer to the answer, which was sustained. On being asked by the court if it desired to amend its answer or to file any further pleadings, defendant declined to do either, but elected to stand on its answer. Thereupon came plaintiff and renewed its motion to take the allegations of the petition as true. This motion was sustained, and judgment was entered in favor of plaintiff for its debt, interest, and costs. Defendant appeals.

[1] Among the grounds urged for a new trial and for a reversal of the judgment here is the violation of the agreement alleged to have been made by plaintiff's attorney with J. W. Butler, vice president of the defendant. According to the affidavits filed by Butler and V. S. Beatty, one of defendant's attorneys, plaintiff's attorney agreed that if defendant would file no answer or other de-

fensive pleading in the case, he would not take any judgment against the defendant without first notifying said Butler. Notwithstanding this agreement, plaintiff's attorney, on July 16th, asked for a judgment against the defendant without any notice whatever to said Butler. At that time said Butler and one of his attorneys, V. S. Beatty, were absent from the city of Beattyville on other business. In view of the fact that Butler left Beattyville, and thereby made it impossible for plaintiff's attorney to notify him of any contemplated action in the pending suit, and in view of the further fact that one of defendant's attorneys was present in court when judgment was asked, and not only filed an answer to which a demurrer was sustained, but elected to stand on that answer and declined to plead further, it may be doubted if the violation of the alleged agreement constituted a ground for new trial. But, conceding that it did, it was incumbent upon defendant, in order to avail himself of such ground, to show that it had a good defense to the action. To this end it was its duty to present a good and sufficient answer, verified according to law. The answer which it tendered, while sufficient in other respects, was not verified. That being true, the trial court did not err in refusing a new trial on the ground mentioned.

[2] But defendant insists that it is entitled to a reversal because plaintiff's petition is not sufficient. It appears from the petition that on October 22, 1912, at the special instance and request of both the defendants, plaintiff loaned to them the sum of \$5,000, which amount they each both jointly and severally agreed to pay plaintiff one day after date, with 6 per cent. interest thereon from date until paid; that payment thereof had been frequently demanded, but no part thereof had ever been paid. There can be no doubt that the petition states a cause of action.

[3, 4] But it is insisted that the original answer filed by the defendant presented a good defense. It is unnecessary to cite authority to show that this is not the case. A denial that on the 22d day of October, 1912, plaintiff loaned to defendant the sum of \$5,000 is an admission that on some other day plaintiff loaned to defendant that sum. A denial that plaintiff loaned to defendant the sum of \$5,000, without the addition of the words, "or any other sum," is, of course, not good, for it is an admission that plaintiff loaned to defendant a sum slightly less than \$5,000. For the same reason, the denial of the following allegation of the petition: "Which amount they each both jointly and severally agreed to pay plaintiff" in the following language: "Which amount both jointly and severally agreed to pay plaintiff"—is an admission that either jointly or severally it agreed to pay plaintiff said amount. Nor does the addition of the words, "defendant states that said note or debt sued on was

without consideration, and this defendant received nothing therefor," in view of the admissions contained in the first part of the pleading, present a defense. Having admitted the loan and the agreement to pay, the consideration was likewise admitted, and the plea of no consideration was not available.

Judgment affirmed.

## LOUISVILLE & N. R. CO. v. MOORE.

(Court of Appeals of Kentucky. Jan. 8, 1914.)

### 1. PLEADING (§ 369\*)—ELECTION—CAUSES OF ACTION—NECESSITY.

In an action by an injured servant, where he attempted to rely both on the common law and the federal Employers' Liability Act (Act April 22, 1908, c. 149, § 5 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), the defendant's motion to require an election must be sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.\*]

### 2. APPEAL AND ERROR (§ 1039\*)—REVIEW—HARMLESS ERROR.

In a personal injury action by a servant where he attempted to plead in the alternative under the federal Employers' Liability Act (Act April 22, 1908, c. 149, § 5 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) and the common law, the improper denial of the master's motion to compel an election is harmless, where the court at the close of the evidence ruled that the case did not come within the federal act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

### 3. MASTER AND SERVANT (§ 198\*)—INJURIES TO SERVANT—FELLOW SERVANT.

Servants placing running boards on a railroad car are not fellow servants with a carpenter engaged in repairing the floor, where the two acted entirely independently.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.\*]

### 4. APPEAL AND ERROR (§ 1033\*)—PERSON ENTITLED TO ALLEGE ERROR.

In a personal injury action by a servant, the master cannot complain that the court improperly ruled that certain persons were fellow servants of plaintiff, and that a recovery could only be had in case the master furnished an insufficient number of persons to perform the duties imposed upon such persons.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

### 5. DAMAGES (§ 168\*)—INJURIES TO SERVANT—EVIDENCE.

In a personal injury action by a servant, testimony that while unable to work he had to do what little he could to keep from sending his children to the orphans' home is incompetent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490, 482-486; Dec. Dig. § 168.\*]

### 6. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR.

In a personal injury action by a servant, the admission of evidence that he had to do what little he could to keep from sending his children to the orphans' home, and the failure of the court to admonish the jury that evidence of the servant's sobriety and industry

could be considered only on the question of damages, was harmless, though erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

### 7. DAMAGES (§ 132\*)—PERSONAL INJURIES—MEASURE OF DAMAGES.

An allowance of \$12,500 damages in favor of a carpenter who received such severe injuries that he was unable to do anything and was a physical wreck, and would remain so until death, is not excessive where, at the time of the injury, he was a strong, vigorous young man of 28 years.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Circuit Court, Warren County.

Action by P. Norman Moore against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Benjamin D. Warfield, of Louisville, and Sims & Rodes, of Bowling Green, for appellant. Wright & McElroy, of Bowling Green, Hazelrigg & Hazelrigg, of Frankfort, and B. F. Procter, of Bowling Green, for appellee.

CARROLL, J. The appellee, a carpenter, was engaged as a car repairer by the appellant company, and while engaged in repairing a car was struck and seriously and permanently injured by a plank that fell from the top of the car. To recover damages for the injury thus sustained, he brought this suit, and on a trial before a jury there was a verdict and judgment in his favor for \$12,500.

At the time of his injury Moore was about 28 years old and a strong, vigorous young man. He was a carpenter by trade and had been working for the railroad company as a car repairer about ten months before he was hurt. On the day he suffered the injury complained of, he was directed by Jacobs, the foreman in charge of this class of work, to repair a freight car standing in the railroad yard at Louisville. He had a helper working with him by the name of Turpin. After they had finished repairing the floor in the car, it was discovered that the car door needed some attention, and for the purpose of repairing it the appellee and Turpin were standing outside of but near to the side of the car. At the time appellee and Turpin were engaged in laying the floor, and also when they were repairing the door of the car, three other men, employed by the company, were engaged in putting new running boards on the top of the car. These two sets of men, although working on the same car and under the same foreman, had no duties in common to perform. They were engaged in separate, distinct kinds of work, and the appellee testifies that he did not know that running boards were being put on the top of the car by men engaged in that work.

A man named Herbold was the head carpenter engaged in putting the running boards

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on the car and was assisted by two laborers, Torstick and Stone. It appears that Herbold stood on top of the car and that Stone and Torstick handed the boards from the ground up to him. Two running boards had been put in place on top of the car, and Torstick and Stone had picked up a third board, which was a heavy pine board about 34 feet long and 8 inches wide, that would weigh about 130 pounds. Torstick was at one end of the board and Stone at the other, and, after they had carried it on the ground to the end of the car, Torstick climbed a step-ladder with the board and handed the end of it up to Herbold on top of the car, and, after doing this, Herbold pulled the board and Stone pushed from the other end. When Herbold had pulled the board so far up on top of the car that the end Stone had hold of was beyond his reach, the board got away from Herbold and slipped from the top of the car, falling down on the side at which appellee was engaged in repairing the door. When the board fell it struck appellee, inflicting the injury sued for. At the time the board fell no person had hold of it except Herbold. Torstick, it seems, let the board go after he lifted the end high enough for Herbold to catch it, and when Stone had pushed the board up on top of the car as far as he could, standing on the ground, his connection with it ceased.

Returning now for a moment to the pleadings, it appears that in the petition a recovery was sought under the state law, but afterwards an amended petition was filed setting up the federal Employers' Liability Act, and it was pleaded in the alternative that plaintiff's cause of action arose under this act or the common law in force in this state. A motion was made in behalf of the railroad company to require the plaintiff to elect whether he would prosecute his action under the common law prevailing in this state or under the federal act, but this motion was overruled.

Upon the conclusion of the evidence for the plaintiff, the court overruled a motion to direct a verdict in favor of the company but, after all the evidence was in, correctly ruled, in response to a request of counsel for the company, that the case did not come within the federal act, and that the plaintiff's cause of action arose under the common law, but overruled a motion for a peremptory instruction.

[1, 2] It is now insisted that the court erred in overruling the motion to require the plaintiff to elect whether he would prosecute his suit under the federal Employers' Liability Act or under the common law. The motion to elect should have been sustained. *S. C. & C. St. Ry. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742; *Louisville & Nashville R. R. Co. v. Strange*, 156 Ky. 439, 161 S. W. 239. But this error, however, was not in this case prejudicial to the railroad company, and in cases like this the failure

to require the plaintiff to elect will not be reversible error unless it appears that the substantial rights of the defendant were prejudiced by the ruling of the court, as an error in this respect is to be treated as are other errors made by the trial court. In the *Strange Case* we pointed out the difference between the federal act and the common law and the reasons why it was prejudicial error in that case not to have sustained a motion to elect, but the reasons that made it prejudicial not to sustain the motion in that case do not appear in this one, and so we may pass this assigned error.

It is further strongly contended that the evidence in behalf of the plaintiff was not sufficient to take the case to the jury under the common-law rule, and that the motion by counsel for the railroad company to direct a verdict in its favor should have been sustained. We do not think so.

The petition charged four acts of negligence: That the men engaged in putting the running boards on the car were negligent in handling the plank that fell, and also negligent in failing to give warning to appellee that they were going to put a running board plank on top of the car; that the company was negligent in failing to have a sufficient number of hands to handle the running board planks with reasonable safety, and also in the employment of incompetent and inexperienced men to do or help to do this work. There was sufficient evidence to sustain each of these charges of negligence and to authorize an instruction submitting each of them to the jury, but the trial court, under a mistaken view that Herbold and his crew were fellow servants of appellee, not only refused to give any instructions upon the subjects of the negligence of these men in handling the running board plank and in failing to warn appellee that they were about to put the plank on the car, but instructed the jury that the men handling the running board plank and appellee were fellow servants, and there could be no recovery if appellee was injured by reason of their negligence. Having this view, the court submitted the case to the jury in two instructions treating of the subject of the insufficiency of the hands to properly handle the running board plank and their inexperience and incompetency.

[3, 4] The instructions given on these subjects, although criticised, fairly submitted the issues described in them to the jury, but on the whole case the instructions were entirely too favorable to the railroad company, because the men handling the running board plank were not fellow servants of appellee, and he was entitled to recover if his injury was due to the negligent manner in which they handled the running board plank or to their failure to give reasonable notice that they were about to put the plank on the car. *L. & N. R. R. Co. v. Brown*, 127 Ky.

732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135; Louisville R. Co., v. Hibbitt, 189 Ky. 47, 129 S. W. 319, 139 Am. St. Rep. 464. So that the railroad company has no ground upon which to rest a complaint that the jury was not properly instructed.

[5, 6] On the examination of appellee, in answer to the question, "Are you able to do anything with your hands?" he replied: "No, sir; I ain't able to do anything, to tell the truth. I have to work what little I can do to keep from sending my children to the orphans' home." To this answer there was an objection and an exception. A part of the answer was competent, but so much of it as related to his children was incompetent; but under the circumstances it cannot be said to have been so prejudicial as to amount to a reversible error, and the same may be said of the failure of the court to admonish the jury that evidence as to the industrious and sober habits of appellee was only admissible for the purpose of showing the loss he sustained by the injuries that disabled him from engaging in any wage-earning employment.

A few other minor criticisms are made touching the admission of evidence, but they are scarcely of sufficient importance to notice.

[7] Complaint is also made that the verdict is excessive. But it is not. The evidence shows that the appellee, on account of the injuries, is practically a physical wreck and will so remain the balance of his days.

Upon the whole case we find no reason for disturbing the judgment, and it is affirmed.

#### ADAMS et al. v. CHATTANOOGA CO., Limited.

(Supreme Court of Tennessee. Nov. 29, 1913.)

#### 1. CORPORATIONS (§ 634\*)—FOREIGN CORPORATIONS—LICENSING OF FOREIGN CORPORATIONS.

A foreign corporation doing business in the state under foreign corporation statutes (Acts 1877, c. 31; Acts 1891, c. 122; Acts 1895, c. 81), requiring the filing of the charter with the secretary of state and the procurement of a license, is not a new entity, distinct from the foreign organization, and is domestic only as to property and acts within the jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2497-2502; Dec. Dig. § 634.\*]

#### 2. EQUITY (§ 241\*)—PLEADING—PRACTICE.

Every reasonable presumption should be exercised in favor of a bill when assailed by demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 515; Dec. Dig. § 241.\*]

#### 3. CORPORATIONS (§ 691\*)—FOREIGN CORPORATIONS—DISSOLUTION—JURISDICTION OF COURTS.

A court of chancery will not dissolve a foreign corporation domesticated in the state,

where all of its assets are in a foreign jurisdiction, regardless of its authority to act, for its decree would be unenforceable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2673-2677; Dec. Dig. § 691.\*]

#### 4. CORPORATIONS (§ 691\*)—DISSOLUTION—FOREIGN CORPORATIONS.

Shannon's Code, §§ 5187, 6103, 6104, respectively declaring that a corporation is not dissolved by the nonuser or assignment of its powers and franchises, unless all its property has been appropriated to the payment of its debts, and any creditor or stockholder may file a bill to attach the corporate property, and have it applied to the payment of debts, and to have any surplus divided among the stockholders, and that in such cases the court may appoint a receiver, and take an account of the affairs of the corporation, and satisfy the debts, and divide the surplus if any, apply not only to domestic corporations but to foreign corporations, and under them a court of chancery may dissolve a foreign corporation as to its property within the jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2673-2677; Dec. Dig. § 691.\*]

#### 5. CORPORATIONS (§ 691\*)—DISSOLUTION—RIGHT TO DISSOLVE.

Complainants and others joined in forming a British corporation, chartered to acquire land and the stock of any companies owning land or doing business in Tennessee, to take or otherwise acquire stock in any company engaged in business which it was authorized to carry on, and to sell, hold, reissue, or otherwise deal with such stock and securities. The British corporation, which was formed to take over large tracts of land in Tennessee, did not develop them, but sold them to other corporations, receiving the shares of those companies in part payment. Held that, as it was not insolvent, and as the holding of such stocks was within its charter powers, complainant stockholders were not entitled to dissolution, under Shannon's Code, § 5187, declaring that a corporation is not dissolved by the nonuser or assignment in whole or in part of its powers, franchises, and privileges, unless all of the corporate property has been appropriated to the payment of debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2673-2677; Dec. Dig. § 691.\*]

#### 6. CERTIORARI (§ 64\*)—REVIEW—MOOT CASES.

In a suit to dissolve a corporation and distribute its assets, where the preferred stockholders were not before the court, it is improper for the court to construe the charter in relation to the rights of the preferred and common stockholders; that being a moot question not presented by the record.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. § 64.\*]

#### Certiorari to Court of Civil Appeals.

Bill by J. W. Adams and others against the Chattanooga Company, Limited. A decree sustaining a demurrer to the bill was affirmed by the Court of Civil Appeals, and complainants bring certiorari. Affirmed.

T. D. Young, of Corinth, Miss., and Coleman & Frierson, of Chattanooga, for plaintiffs. Thomas & Thomas, of Chattanooga, for defendant.

WILLIAMS, J. The bill of complaint in this cause was filed by complainant Adams

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and others, as the owners of about 8,000 shares of a total issue of 60,000 shares of the common or ordinary shares of the Chattanooga Company, Limited, against that company, two other corporations as vendees of that company, and the Chattanooga Savings Bank. A demurrer filed to it was sustained by the chancellor. The bill is lengthy and somewhat involved, and it is more than ordinarily difficult to succinctly state the contents, due in large measure to the fact that general allegations in the body of the bill are in several instances modified or refuted by more detailed recitals of corporate records exhibited with the bill and prayed to be treated as parts thereof.

So far as material to the disposition of the errors assigned in this court, the bill may be said to contain allegations as follows:

Complainants were formerly holders of blocks of the preferred stock of the Chattanooga Land, Coal, Iron & Railway Company, predecessor of the defendant Chattanooga Company, Limited. The predecessor company issued \$1,300,000 of mortgage bonds, upon which it defaulted. The bonds were held by residents of Great Britain. Pending a sale in foreclosure, the bondholders and the holders of the preferred stock entered into a reorganization agreement, by the terms of which it was stipulated that a new corporation should be organized, under the laws of Great Britain, to acquire the mortgaged estates at such sale, the capital stock of the new corporation to be issued in two classes: 12,000 of 6 per cent. preferred shares of 25 each, and 60,000 common shares of 5 each, the preferred shares to go to the bondholders, and the common shares to go to the preferred stockholders, of the insolvent company—complainants and others. It was recited in the reorganization agreement that "the condition of preference is that the preferred shares shall receive principal and interest at 6 per cent. before anything is paid upon common shares, and that the preferred shares shall thereafter rank as common shares."

The Chattanooga Company, Limited, accordingly was organized and acquired the mortgaged estates, and its capital stock was so distributed. After holding the properties for about 19 years (during which practically nothing was done towards developing its lands for profit), defendant company sold and conveyed 12,000 acres of its holdings to defendant Durham Coal & Iron Company, receiving as consideration \$120,000 in cash, \$300,000 in the 7 per cent. preferred stock, and \$150,000 in the common stock of this vendee corporation. The entire remaining realty of the company, 8,000 acres, was conveyed to the defendant Chattanooga Estates Company in consideration of \$200,000 in cash, \$1,000,000 in the preferred stock, and \$1,300,000 in the common stock of this vendee corporation; the total consideration received in

the two transactions being \$3,000,000 in cash and stocks.

The charter of the Chattanooga Company, Limited, was prepared by or at the instance of the preferred stockholders in Great Britain, and provided for the lodgment of the voting power in the preferred stock until that stock was, by payments made, reduced to the level of the common stock. A copy of the British charter was filed and registered in the state of Tennessee in compliance with our foreign corporation laws, and thereby the corporation became domesticated in this state, and, it is by complainants alleged, became a distinct corporation in, and under the laws of, this state.

As to the locus of the assets of the company: It is alleged that the Chattanooga Company, Limited, has "no property or assets in England or elsewhere, saving and excepting the lands in Hamilton county, Tennessee"; that the defendant Chattanooga Savings Bank, located in Hamilton county, "has for a long time been, and is now, the financial agent and depository of the company, and, as such, now has in its possession a large amount of cash notes, accounts, and various stocks and bonds belonging to said defendant company," which the bill seeks to impound; that "said cash proceeds from the sale of said lands have been unlawfully distributed pro rata among the preferred stockholders" as interest on their shares of stock.

Touching the place or places where the company's business was transacted: The city of Chattanooga "was the place of the principal office and business headquarters of said company in the state of Tennessee, where it kept its books, conducted all its business transactions, and kept and used its corporate seal." The principal officers and directors all lived in Great Britain, where corporate meetings were held.

The charter of the Chattanooga Company, Limited—memorandum and articles of association under the Companies Acts of Parliament 1862 to 1890—provided that the objects of the company were, among others:

To purchase and otherwise acquire land and other properties in America and the capital or other stocks of any companies owning property or doing business in Tennessee.

To enter into and carry into effect, as the company may determine, any agreements for the purchase or acquisition of the properties or stocks so acquired.

To take or otherwise acquire stock, shares, and securities of any company carrying on, engaged in, or about to carry on or engage in any business or transaction which this company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to sell, hold, re-issue, or otherwise deal with such stock, shares, and securities.



To sell the undertaking of the company, or any part thereof, for such consideration as the company may think fit, and, in particular, for shares, debentures, or securities of any other company having objects altogether, or in part, similar to those of this company.

To issue preference shares and ordinary shares, and to attach to said preference shares and ordinary shares such preferential, deferred, or special rights, privileges, or conditions as may be determined by, or in accordance with, regulations of the company.

The bill charges in general terms that the Chattanooga Company, Limited, is insolvent; but its exhibits show in detail that the company is solvent, and its solvency was properly assumed by the solicitors of the complainants in their arguments in this court.

It is alleged that the company, upon the sale of said lands to the purchasing companies, "ceased to do any business, to use its franchises, or to be a going concern;" but this is refuted by the corporate records exhibited, which show that the company was, in the exercise of its British franchises, proceeding to the transaction of business in course claimed by it to be regular. That business was being transacted in Great Britain by the company, complainants elsewhere in their bill allege.

It is charged that the directors purpose to hold the proceeds of the land sales, particularly the stocks of the vendee corporations, in the treasury, and not to distribute to the shareholders; that they further purpose arbitrarily and unjustly to favor the preferred shareholders in so doing, in this, that the 6 per cent., stipulated to be paid on the preferred stock, may accumulate thereon until in the end all claim of the common shareholders in the purchase-money fund is wiped out. It is further charged that the said fund is in no sense "earnings," and that only earnings may be applied, lawfully, in payment of interest on the preferred stock; that the payment so made out of the cash consideration sums is a diversion; and that any payments out of capital (such as the consideration cash and stocks) must be made to all shareholders pro rata, without preference as between the two classes.

Complainants sue in behalf of all creditors and stockholders, and the prayer of the bill is that it be sustained as a general creditors' bill for impoundment of the assets, including the consideration stocks, for a receiver to take charge of the property, that an account be taken to ascertain the rights of creditors and stockholders, and for general relief.

The bill of complaint was demurred to on grounds to be later indicated rather than formally stated; the demurrer was sustained by the chancellor, whose decree was affirmed by the Court of Civil Appeals. The cause is before this court on writ of certiorari.

The errors assigned by complainants are two in number.

1. The Court of Civil Appeals was in error

in holding that the courts of Tennessee have no jurisdiction to wind up the affairs of the defendant company, at the instance of stockholders, because it has been domesticated in Tennessee, and it fairly appears from the bill that all its assets are in Tennessee.

2. That court was in error in holding that the bill does not allege such facts as would warrant a court of equity, at the instance of stockholders, in winding up the defendant corporation and distributing its assets, because (1) it appears that the original scheme is now impossible of consummation; (2) such nonuser and assignment to others of the powers and franchises of the corporation are alleged as entitle complainants to relief under our statutes; (3) the complainants are entitled to a distribution in specie under the charter; (4) the bad faith of those in control in holding the stocks in the treasury until all interest of the common stockholders shall be consumed, by diversion of funds, entitled complainant to the relief sought; and (5) the corporation was organized to do business in Tennessee, and with intention that its property should be located here, and that by the sale of its realty, and the attempt to withdraw the consideration sums to Great Britain, the company has abandoned its corporate business.

There arises for determination, under these assignments of error, the question whether a court of equity of this state will assume jurisdiction of a proceeding to wind up the defendant corporation on the grounds set forth in the bill of complaint.

This, in turn, involves a consideration of the status and nature of this defendant as a corporation complying with and domesticated under the provisions of our foreign corporation statutes. Acts 1877, c. 31; Acts 1891, c. 122; Acts 1895, c. 81.

[1] It was held by this court, in *Coke & Coal Co. v. Steel Co.*, 123 Tenn. 428, 442, 181 S. W. 988, 991 (31 L. R. A. [N. S.] 278), that the result of the first-named act, as amended by the two last named, was in effect a legislative pronouncement that such corporations shall be "deemed and taken to be corporations of this state, and said corporations may sue and be sued in the courts of this state, and shall be subject to the jurisdiction of the state as fully as if created under the laws of Tennessee."

The insistence of complainants is that, under these statutes and the decisions based thereon, a distinct and separate corporate entity was created in this state when the Chattanooga Company, Limited, complied with the law by filing its charter in the proper office in this state—a corporation so far dissociated from the British entity as that it may be wound up in a Tennessee court in all respects as could a corporation originally chartered under the laws of this state, without reference to the status or condition of the foreign entity.

The true concept, as indicated by our de-

cisions, based upon the statutes referred to, appears to us to be that a corporation so domesticated becomes, not a new and distinct entity, but only a corporation of this state quoad hoc any property and acts within its jurisdiction. *Ohio & Miss. R. Co. v. Wheeler*, 1 Black, 297, 17 L. Ed. 180; *Young v. Iron Co.*, 85 Tenn. 189, 197, 2 S. W. 202, 4 Am. St. Rep. 752; 19 Cyc. 1204. It differs essentially from such corporations as were under consideration in *Grangers' Life Ins. Co. v. Kamper*, 73 Ala. 325, and *Memphis, etc., R. Co. v. Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518, which were corporations with distinct incorporators, stock issues, or directors, in the respective domesticating states.

The doctrine now is that "one state may make a corporation of another state, as thus organized and conducted, a corporation of its own, as to any property in its territorial jurisdiction. Illustrations of these conclusions are now seen every day in the passage by states of enactments making foreign corporations doing business within the domestic jurisdictions domestic corporations, and amenable in all respects to the domestic laws and police regulations, notwithstanding the provisions of their foreign charters. But it remains equally true that, for many purposes of legal procedure and practical convenience in the administration of justice, each one of the bodies so created remains a domestic corporation within the state under whose Legislature it has been called into existence. Clearly, such a corporation is a domestic corporation within each of the states whose legislation has created it, for the purpose of local jurisdiction to the application of local police regulation. Such a corporation is a resident of each of such states, for the purpose of the ordinary jurisdiction of its courts." 10 Cyc. 170, 171; 5 *Thomp. Corp.* (2d Ed.) § 6629.

This court, in *Coke & Coal Co. v. Steel Co.*, supra, cited and quoted opinions of the Supreme Court of the United States in support of the ruling there made that it was competent for a state to make a foreign corporation complying with its legislative acts so providing a domestic corporation, and commented, without disapproval, on the statement of limitation in *St. Louis R. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, that such domestication was "in regard to property and acts within the territorial jurisdiction." and also on the ruling in the *James Case* to the effect that a domestication of a corporation, after the manner of that involved in this case, left outstanding or remaining in the state of its creation, an entity, of citizenship foreign to the domesticating jurisdiction, so to be treated in that jurisdiction for certain purposes indicated. The Supreme Court of South Carolina held the same way touching a corporation which had been made, in like manner, a domestic corporation of that state. *Calvert v. Rail-*

*way Co.*, 64 S. C. 155, 36 S. E. 750, 41 S. E. 963, affirmed 187 U. S. 636, 23 Sup. Ct. 844, 47 L. Ed. 343. To the same effect is the later case of *Southern R. Co. v. Allison*, 190 U. S. 328, 23 Sup. Ct. 713, 47 L. Ed. 1078, wherein Mr. Justice Peckham, for the court, stated a distinction between a domestication, such as herein appears, and that form of domestication of a corporation which was considered in *Memphis, etc., R. Co. v. Alabama*, supra, and said that, "by reason of the language used in the Alabama act, there was a separate original Alabama corporation formed, which made it a corporation created as well as controlled by the state of Alabama."

That the defendant Chattanooga Company, Limited, became a domestic corporation quoad hoc, and not for all purposes as a wholly separate and unrelated entity, is further shown by the fact that by our Acts 1891, § 5, above cited, provision is made that, when a complying foreign corporation has no agent in this state upon whom process may be served, its property may be attached as that of a nonresident, thus affirmatively showing that the Legislature did not conceive or intend that compliance should ipso facto work a creation of a distinct body politic, and work a loss to the corporation of residence or citizenship in the state of its creation.

In *Re Standard Oak Veneer Co.* (D. C.) 173 Fed. 103, that able jurist, Judge Sanford, sitting in the United States District Court in this state, held that a foreign corporation, so complying with our foreign corporation acts, did not become a resident of this state, where the corporation retained its principal office in the state of creation, and its present claim was based upon transactions conducted through such foreign office, so far forth as to be entitled to the priority awarded to creditors who are resident in Tennessee in the distribution of the assets of a foreign corporation itself also domesticated in this state under the cited statutes. Notwithstanding compliance and consequent domestication, it was held that the claimant corporation remained also a resident of the state of its creation, and, as such, was constitutionally to be denied its claim of right to share in priority, under the rulings in *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; *Blake v. McClung*, 176 U. S. 60, 20 Sup. Ct. 307, 44 L. Ed. 374, overruling *McClung v. Embreeville Co.*, 103 Tenn. 399, 52 S. W. 1001, and *Sully v. American Nat. Bank*, 178 U. S. 289, 20 Sup. Ct. 935, 44 L. Ed. 1076.

In *Young v. Iron Co.*, supra, it appeared that the city of Chattanooga was by the Iron Company's by-laws made the general office of the company; that all of its books, including its stock books and seal, were there kept; that all of its officers resided there; the meetings of stockholders and directors were held there, where also was its plant and corporate property of every kind. It was held

that, while a foreign corporation in one sense, that company, in view of its corporate acts, was to be deemed a domestic corporation so far forth as to give situs, for attachment of its shares of stock, in this state. There the "acts within the territorial jurisdiction" went to the extent of drawing even corporate situs, for the indicated purpose, into this jurisdiction as the place of the true home office of the corporation. Fact was allowed to overrule legal fiction. But it was not meant to be there ruled that every corporation which complies with our acts acquired, by virtue of that fact, situs for stock attachment purposes.

[2, 3] On the basis, therefore, of the defendant company being treated as a corporation domesticated only for purposes of jurisdiction in respect of property and transactions in this state, we have next for consideration whether a court of equity in this state will assume jurisdiction in a case where, as here, the corporation is not insolvent, at the instance of stockholders, to wind up the corporation on any ground stated in the bill of complaint.

Under the familiar rule that the court should make every reasonable presumption in favor of the bill of complaint when assailed by a demurrer, we are of opinion that the complainants must be taken to allege that the undistributed assets of the defendant company are in this state.

Counsel of defendant company insist that the bill shows otherwise, and in accord with the truth, that the assets sought to be impounded are in Great Britain. If this appeared, or were made to appear, then we would have for further consideration whether a court of equity in this state, regardless of any question of potential jurisdiction over the defendant as a domestic corporation, would decline to assume or exercise jurisdiction. This, on the ground that, the governing officers and the property to be affected being out of the state, the court could render no effective decree, and would leave the claimants to seek their remedy in the jurisdiction where the corporation was created. *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308; *Clark v. Mutual, etc., Ass'n*, 14 App. D. C. 154, 43 L. R. A. 390; *State v. North American, etc., Co.*, 106 La. 632, 31 South. 172, 87 Am. St. Rep. 309; *Williston v. Mich., etc., R. Co.*, 13 Allen (Mass.) 400; *Smith v. Mutual, etc., Co.*, 14 Allen (Mass.) 336; 19 Cyc. 1238, 1345.

Manifestly, as to the phase of insolvency, our cases which relate to the winding up, at the instance of Tennessee claimants, of insolvent foreign corporations (*Smith v. St. Louis, etc., Ins. Co.*, 3 Tenn. Ch. 502; *Id.*, 6 Lea, 564, and cases in accord) are aside. We have here no such case, whether the principal defendant be deemed a domestic or a foreign corporation for that assumed purpose.

[4, 5] But a phase of the decisions in the last-cited case is relied on by complainants in support of their contention that a court of equity will award to a resident stockholder, even in a foreign corporation, relief of winding up its affairs, so far as assets within the state are concerned, in a proper case. Code, Shannon's, provides (as did the Code of 1858, in sections 3431, 4294, and 4295) as follows:

"Sec. 5187. A corporation is not dissolved by the nonuse or assignment to others, in whole or in part of its powers, franchises, and privileges, unless all the corporate property has been appropriated to the payment of its debts, and any creditor, for himself and other creditors, whether he has recovered judgment or not, or any stockholder, for himself and other stockholders may file a bill under the provisions of this chapter, to attach the corporate property, and have such property applied to the payment of the debts of the corporation, and any surplus divided among the stockholders."

"Sec. 6103. The creditors of a corporation may also, without first having obtained a judgment at law, file a bill in the court of chancery, to attach the property of the corporation, and subject the same, by sale or otherwise, to the satisfaction of their debts, when the corporate franchises are not used, or have been granted to others in whole or in part.

"Sec. 6104. In such cases the court may appoint a receiver, take an account of the affairs of the corporation, and apply the property and effects to the payment of debts pro rata, and divide the surplus, if any, among the stockholders."

In the case last cited the statute was construed to apply to creditors of a foreign corporation as well as a domestic corporation, and this, whether the effort of the creditors was to base their remedy on insolvency of the corporation or on its having ceased to do business and to use its franchise.

Chancellor Cooper said: "The argument is that the provisions of our Code—sections 3431, 4294, 4295 (Shannon's, §§ 5187, 6103, 6104)—apply to domestic corporations, and the property of foreign corporations is left to be seized by the more diligent claimants under other provisions of the law. \* \* \* Both the statutes and the decisions speak of corporations, without drawing any distinction between domestic and foreign corporations, and the principle of the decisions, as shown by the authorities cited, is manifestly based on the nature of corporations and corporate funds generally. And it would be a curious departure from uniformity, so desirable in the administration of law, to hold that a different measure of justice should be meted out to creditors, dependent upon whether their debtor was a domestic or foreign corporation. Most clearly there is nothing in the language of the Code or the de-

cisions to give countenance to the distinction contended for." 3 Tenn. Ch. 504, 505.

By parity of reasoning, the quoted sections of the Code sustain an action of like character on the part of stockholders there named along with creditors.

Complainants insist that they have presented a proper case for the winding up of the company and a distribution of its assets; their prime contention being that the original scheme of the coventurers is now impossible of consummation, and has been definitely abandoned. They urge that the object of the corporation was to acquire and develop land in Hamilton county; that practically no development had been made and no profits had been earned, in consequence of which the lands had been sold, and the scheme abandoned. This contention takes no note of the alternative provisions of the charter, stipulating that the company might "sell its undertaking, or any part thereof, for such consideration as the company may think fit, and, in particular, for shares \* \* \* of any other company having objects altogether, or in part, similar to those of this company," or of the further provision that the company shall have power "to hold or otherwise deal with stock or shares." The bill of complaint shows that the governing body of the company is, in pursuance of this feature of the British franchise, proposing to hold the consideration stocks, thus carrying on the business. There is therefore no nonuse of that franchise. Complainants invested in the enterprise by taking shares in the British entity under the British charter, and they cannot validly urge that a discontinuance of the use of any feature of the franchise from this state touching the ownership and control of land here, acquired on or after domestication, gives them a right to treat, or have treated, the enterprise as abandoned, and the company wound up. The case of *O'Connor v. Knoxville Hotel Co.*, 93 Tenn. 708, 28 S. W. 308, urged on us, manifestly is no authority for the contention that this enterprise is, on these facts, impossible of consummation.

Having failed, first, to show insolvency, and, as just demonstrated, to show discontinuance of the business of the corporation and nonuse of its franchises, in neither aspect of the code section quoted above (Code, Shannon, § 5187) do complainants make out a case for the winding up of the affairs of the company.

All other matters assigned as error do not fall within the purview of the bill of complaint and the prayer for relief. No relief by way of injunction or otherwise is asked in respect of what are claimed to be ultra vires acts of the directors in Great Britain in respect to the payment of dividends on the preferred stock, to complainants' prejudice.

[8] An effort is also made in this court to

convert the bill into one for a construction of the charter in relation to the rights of the preferred stockholders and the common stockholders, respectively, in a distribution of assets on dissolution; but, since there is a failure to show grounds for winding up, and the holders of preferred stock are not before the court, no such issue arises for solution on the record. As said by the Supreme Court of the United States: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Kimball v. Kimball*, 174 U. S. 158, 19 Sup. Ct. 639, 43 L. Ed. 932; *Taylor v. Insurance Co.*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621, 627.

The demurrer to the bill was properly sustained, and the decree of the Court of Civil Appeals is affirmed.

#### CAROLINA, C. & O. RY. v. SHEWALTER.

(Supreme Court of Tennessee. Nov. 22, 1913.)

##### 1. APPEAL AND ERROR (§ 1092\*) — REVIEW — REDUCTION OF VERDICT.

The reduction of the verdict in an action for death, being upheld by the Court of Civil Appeals, will not be interfered with by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4312-4321; Dec. Dig. § 1092.\*]

##### 2. DEATH (§ 10\*) — CAUSE OF ACTION — STATUTES—INTERSTATE COMMERCE EMPLOYÉ.

Act April 22, 1908, known as the Employers' Liability Act, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), declares a carrier by railroad liable in damages to a "person suffering injury" while employed by it in interstate commerce, or, in case of his death, to his personal representative, for the benefit of certain relatives. Section 9, added to such chapter by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), provides that any right of action given by this act to a "person suffering injury" shall survive to his representative. *Held*, that section 9 creates no new cause of action, but merely preserves, by survival, the cause of action given the employé, and therefore has no application where there is an instantaneous killing, right of action for the killing in such case being given the personal representative.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 10.\*]

##### 3. DEATH (§ 18\*) — ACTION FOR BENEFIT OF RELATIVES.

To authorize recovery for the benefit of the father of an adult son instantly killed while employed by a railroad in interstate commerce, under Act April 22, 1908, c. 149, § 1.

35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), merely declaring the company liable in damages, it must be shown the father had reasonable expectation of pecuniary assistance or support from deceased.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.\*]

Appeal from Law Court, Sullivan County; E. K. Bachman, Special Judge.

Action by W. N. Shewalter, administrator, against the Carolina, Clinchfield & Ohio Railway. Judgment for plaintiff. Defendant appeals. Reversed and dismissed.

Phlegar, Powell, Price & Shelton, of Johnson City, for appellant. Harr & Burrow, of Bristol, for appellee.

GREEN, J. This suit was brought by W. N. Shewalter, the father and administrator of Robert Shewalter, deceased, to recover damages for the death of the latter, a railroad fireman, who was killed in an accident on the line of defendant company while in its employ.

[1] There was a verdict below for \$15,000, remittitur of \$5,000 directed, and judgment entered for \$10,000. This judgment was affirmed by the Court of Civil Appeals. The case is before us on certiorari, both parties petitioning. The administrator complains of the reduction of the verdict. We will not interfere in a matter of this sort, where the Court of Civil Appeals has upheld the trial judge. We overrule all assignments of error on behalf of the railway company, except those raising the question of the measure of damages under the act of Congress known as the Employers' Liability Act, which we will now consider.

The suit was founded on the act of Congress, known as the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322], and the amendment of April 5, 1910, c. 143, § 2, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1325]).

The particular provisions of the act drawn in question upon this appeal are the following sections:

Section 1: "That every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death, of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or

in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its care, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Section 9: "That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury."

Section 9 was an amendment to the original act. It will be observed that by the provisions of section 1 heretofore two rights of action are given; the first to the injured employé, and the second, in case of death, to his or her personal representative, for the benefit, etc.

In two cases arising in the circuit courts of the United States it was held that the first right of action, that given to the employé, would not survive to his personal representative in case of his death. *Fulgham v. Midland Valley Railroad Co.* (C. C.) 167 Fed. 660; *Walsh v. N. Y., etc., R. R. Co.* (C. C.) 173 Fed. 494.

As appears from the reports of the Judiciary Committees of the House and Senate, the amendment was enacted to meet the effect of these two decisions, and to cause the survival of the original right of action given to the employé for injuries to his personal representative.

It is conceded upon this record that the death of Robert Shewalter was instantaneous, or practically so. He was killed by the collision of the engine, upon which he was fireman, with a large boulder that had fallen from the mountain side, along which the train ran, to the track below. The engine overturned, and probably rolled over him. The witnesses say he was killed outright.

In his charge to the jury, the circuit judge instructed them as follows:

"The statute of the United States, known as the Employers' Liability Act, under which this suit is brought, provides that 'the right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow, husband, or children of such employé; and if none, then to such employé's parents.' This means that all the rights the employé would have had for the injury received will, in the case of his death, go to his personal representative, for the benefit of his widow and children, if there be any; and if none, then for the benefit of his parents. In this case, if you shall find that plaintiff is entitled to re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 161 S.W.—72

cover, the elements of damage that would have survived to Robert Shewalter, had death not resulted from his injuries, will survive for the benefit of his father, he having left no widow, child, or mother. I, therefore instruct you that, in an action for personal injuries, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by defendant's negligence, and a reasonable sum for the pain and suffering, if any be shown, and also a fair recompense for the loss of what he would have otherwise earned at his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant, if such be shown. And this will be the measure of damages in this case, if you shall find for the plaintiff. In other words, the pecuniary value of the life of the deceased, Robert Shewalter, is to be determined, if you find for the plaintiff, upon a consideration of his expectancy of life, his age, condition of health and strength, capacity for labor, and for earning money through skill in any trade, occupation, or business, and his personal habits as to sobriety and industry, all modified, however, by the fact that the expectation of life is at most only a probability based upon experience, and also by the fact that the earnings of the same individual are not always uniform. All of these elements are to be taken into consideration by the jury, and, after weighing them all, they should assess such amount of damages as may be sufficient to compensate for the loss of the life whose value they are attempting to estimate."

The point of the criticism directed at this excerpt from the charge is that it permits the jury to assess damages in this suit not only for the loss sustained by the plaintiff, the beneficiary of the suit, but also the actual damages inflicted upon the person and the estate of the deceased—the pecuniary value of the life of deceased.

It is insisted that, inasmuch as the death of the deceased was instantaneous, he sustained no damage himself, and no cause of action accrued to him which might survive; that plaintiff's only right of action here is under those provisions of the act which provide a cause of action for certain beneficiaries in case of death of the party injured; and that the only damages to which the plaintiff is entitled are those actually sustained by him.

The charge of the circuit judge was correct, under the statutes of Tennessee, and is in accord with the law as laid down in *Davidson-Benedict Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967, and cases there reviewed.

This suit, however, is not brought under the statutes of this state, but is founded on the act of Congress, and this act of Congress, in the field which it covers, has been expressly held by the Supreme Court, in *Mondou v.*

*N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, to supersede all state legislation, and to cover and control all matters arising thereunder.

It therefore becomes necessary to examine the federal statute and determine the measure of damages properly allowable under it in a suit like this.

Owing to the peculiar language of our acts relating to this subject, our decisions construing these acts unfortunately will be of little benefit to us in this investigation.

At the common law, as is well known, the right of action for damages for personal injuries perished with the death of the injured person. Such right did not survive in favor of any one.

Another rule of the common law was that the death of a human being was not a matter that could be complained of as an injury by any one, and no one was entitled to maintain an action for damages for the mere loss of life of another. *Pollock Torts*, 54; *Baker v. Bolton*, 1st Camp. 493; *Osborne v. Gillette*, L. R. A. Exch. 88.

The Parliament of Great Britain, and the Legislatures of nearly all the states of this Union have passed acts to obviate and repeal these harsh common-law rules. Some of these acts repeal the first rule, and provide that a decedent's cause of action against a wrongdoer shall survive. These are often called "survival acts." Other acts give substantially a new cause of action to certain relatives or persons dependent upon deceased for the loss they sustained by reason of the death. These acts are frequently spoken of as "death acts."

Quite often it appears that the states have passed both survival and death acts and they are sometimes contained in the same general statute. Such seems to have been the course taken by Congress in the act here under consideration, after it was amended. The act provides for the survival of the original cause of action, and also provides a new action for death of the injured person in favor of certain designated beneficiaries.

As has been said before, the statutes of Tennessee upon this subject are unique, and this court has been at much pains to explain these statutes and lay down rules for their interpretation. See review of our cases in *Davidson-Benedict Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967.

Tennessee statutes as contained in *Shannon's Code* are as follows:

"Sec. 4025. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing of another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his personal

representative, for the benefit of his widow or next of kin, free from the claims of creditors."

Sections 4026, 4029, 4466, and 4469 contained other provisions with reference to such suits which are not material to this discussion. Under section 4025, it was formerly held by this court that damages were not recoverable where the killing was instantaneous. The court said:

"The killing of a man is not, of itself, a cause of civil action. Damages recoverable are for what was incurred or suffered while the person lived. If the killing be absolutely instantaneous, damages are not recoverable, for that would be giving damages for the mere act of killing." *Railroad v. Burk*, Adm'x, 6 Cold. 45, 52.

This holding of the court was afterwards overruled in *Railroad v. Prince*, 2 Heisk. 585, in which case, construing the statute, this court said:

"But does the section of the Code under consideration include and provide for a case in which the injury produced instantaneous death? The answer to this question must depend upon the intention of the Legislature, as the same is to be ascertained from the language used. It will be observed that two classes of cases are provided for in the section connected together by the use of the disjunctive conjunction, 'the right of action which a person *has* who dies from injuries received from another.' This language describes one class of cases—those in which death results after the injuries received, but not instantaneously, as we understand the language. As to the second class, 'the right of action which a person, whose death is caused by the wrongful act or omission of another, *would have had* against the wrongdoer, in case death had not ensued, shall not be extinguished by his death.' This is the second class of cases. One class embraces right of action which the person *has* who dies from injury received; the other class, rights of action which the person '*would have had* whose death is caused by the wrongful act or omission of another,' etc. The distinction between the two classes of cases is by no means clear. If there is any difference, it is this: That the language used in describing the second class more clearly includes cases of instantaneous death than that used in describing the first class; and we infer that the language was used in the alternative, with the view of more distinctly indicating the purpose of the Legislature to include cases of instantaneous death, as well as those of death ensuing from injuries previously received. But whether the Legislature used the two different forms of expression for the purpose suggested or not, it cannot be controverted that the language, 'whose death is caused by the wrongful act or omission of another,' includes cases of instantaneous death; and language which immediately follows, '*would have had* against the wrong-

doer, in case death had not ensued, shall not abate and be extinguished by his death,' necessarily means that the representative of the deceased person shall have a right of action, whether the deceased died after the injuries were received, or died simultaneously with the infliction of the injury which caused death; and this right of action is to be for the benefit of the widow or next of kin."

After some further discussion, the court overruled the case of *Railroad v. Burk*, supra, in so far as that case construed the act to contain no provision for recovery of damages in cases of instantaneous death.

*Railroad v. Prince*, supra, has been followed in *Fowkes v. Railroad*, 5 Baxt. 663; *Haley v. Railroad*, 7 Baxt. 239; and *Railroad v. Daughtry*, 88 Tenn. 721, 13 S. W. 698, and other cases. It has been conceded since the decision in *Railroad v. Prince* that our statute covered cases where the killing was instantaneous, by reason of the peculiar provisions of this statute pointed out in that case.

The Connecticut statute of chapter 193 of the Public Acts of 1903, provides:

"In all actions surviving to or brought by an executor or administrator for injuries resulting in death, *whether instantaneous or otherwise*, such executor or administrator may recover from the party legally in fault for such injuries, just damages not exceeding \$5,000."

Prior to the passage of the above-mentioned act, 1903, the statute of Connecticut provided that "actions for injury to the person, whether the same do or do not result in death \* \* \* shall survive."

The Connecticut court has been at pains to explain and point out the difference between the statutes of that state and those of other states to which we shall hereafter refer. *Murphy v. New York & N. H. R. Co.*, 30 Conn. 184; *Broughel v. Sou. New Eng. Telephone Co.*, 72 Conn. 617, 45 Atl. 485, 49 L. R. A. 404.

The Iowa statute contains some peculiar clauses, and the decisions construing the same do not appear to be in harmony. In so far as a recovery has been permitted under a survival statute in cases of instantaneous killing, such recovery seems to have been justified by reason of an old statute of that state which provided: "When a wrongful act produces death, the perpetrator is civilly liable for the injury." See *Connors v. Burlington C. R. & N. Y. Ry. Co.*, 71 Iowa, 490, 32 N. W. 465, 60 Am. Rep. 814; *Worden v. Humeston & S. R. Co.*, 72 Iowa, 201, 33 N. W. 629. See, also, *Tiffany's Death by Wrongful Act* (2d Ed.) § 75. For a critical review of the Iowa cases, see *Dillon v. Great Northern R. Co.*, 38 Mont. 485, 100 Pac. 960.

In Louisiana, likewise, the decisions construing the survival act of that state seem to be somewhat out of harmony. In so far as these decisions authorize recovery of dam-

ages for instantaneous killings, they seem to rest upon the provisions of a statute which enacts that, "every act whatever that causes damage to another obliges him by whose fault it happens to repair it. The right of this action shall survive, in case of death in favor of the minor children or widow of the deceased," etc. See *Van Amburg v. Vicksburg & P. R. Co.*, 37 La. Ann. 651, 55 Am. Rep. 517, and *Hamilton v. Morgan's L. & T. R. & S. S. Co.*, 42 La. Ann. 824, 8 South. 586.

It will be observed in this connection that the Supreme Court of the United States, construing the Louisiana statute, held that, where a vessel met with an accident, and sank ten minutes later, drowning libellant's daughter, no action for her suffering and fright during such ten minutes, separate and apart from the cause of action arising out of her subsequent death, could be maintained. *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 38 L. Ed. 727.

The four states mentioned, Tennessee, Connecticut, Iowa, and Louisiana, are the only four, so far as we know, where damages have ever been allowed to be recovered under survival statutes, where death was instantaneous. In Tennessee and Connecticut, it is manifest from what we have said that this result was reached owing to the peculiar statutory provisions in those states. As we understand their decisions, no uniform result has been attained in Louisiana or Iowa. To the extent, however, that survival statutes in those states have been held to justify recovery in cases in instantaneous killings, the decisions appear to be rested likewise on peculiar phraseology of statutes in force.

Reverting now to the act of Congress under consideration, there does not appear to be any ambiguity in the language of the act of 1908 or the amendment of 1910.

The original act provided that carriers should be liable in damages to "any person suffering injury," and the amendment provided that this right of action given "to a person suffering injury" should survive. There seems to be small room for construction here. The provisions of this amendment of 1910, or survival act, as we may call it, are little different from the provisions of survival statutes in several of the states to which we shall now refer.

There are a number of statutes in Massachusetts, but the original act, which has been frequently construed by the courts of that state, provides that "the action for trespass on the case for damages to the person shall hereafter survive so that in the event of the death of the person entitled to bring such action, it may be prosecuted or defended by or against the executor or administrator in the same manner as if he were living." And construing this statute, the Massachusetts court, speaking through Chief Justice Shaw, said:

"The statutes suppose the party deceased

to have been once entitled to bring an action for damages for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising that right. The question is whether the provision cited applies to the case before us. In the first case, where the casualty relied on as the cause of action, and the death of the party injured was simultaneous, it seems clear that the right of action cannot survive. The case contemplated by the statute must be of such a nature that the party injured must himself have \* \* \* had a cause of action. The cause of action must accrue during the lifetime of the party injured. Here there was no time, during the life of the intestate, at which a cause of action could accrue, because the life closed with the accident, from which a cause of action would have otherwise accrued." *Kearney v. B. & W. R. Co.*, 9 Cush. (Mass.) 108.

In a similar case, the same learned judge observed:

"The question, in deciding whether any case is within the statute, is whether the sufferer survived, that is, lived after the act was done, which constitutes the cause of action. Life or death, that is the test. If the death was instantaneous, and, of course, simultaneous with the injury, no right of action accrues to the person killed, and, of course, none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him, as a person in esse, and his subsequent death does not defeat it, but, by operation of the statute, vests in it, the personal representative." *Hollenbeck v. Berkshire R. Co.*, 9 Cush. (Mass.) 478.

The rule laid down in these cases is reaffirmed by the Massachusetts court in the following cases: *Kennedy v. Standard Sugar & Refinery*, 125 Mass. 90, 28 Am. Rep. 214; *Moran v. Hollings*, 125 Mass. 93; *Mulchahey v. Washburn Car Wheel Co.*, 145 Mass. 281, 14 N. E. 106, 1 Am. St. Rep. 458.

Under the Constitution of Arkansas, art. 5, § 31, and by its statutes (Kirby's Digest, §§ 6285-6290), provision is made for the survival of causes of action for injuries resulting in death without peculiar phraseology.

The Arkansas court has held, in a suit for damages for the death of a child, that "the survival of the action depends upon whether the injured child lived after the act constituting the cause of action." *St. Louis, I. M. & S. Ry. Co. v. Dawson*, 68 Ark. 1, 56 S. W. 46; *St. Louis, I. M. & S. Ry. Co. v. Stamps*, 84 Ark. 241, 104 S. W. 1114.

The Mississippi Code of 1906, § 721, as amended by chapter 167 of the Laws of 1908, now provides: "The fact that death is instantaneous shall in no case affect the right of recovery." Prior to this amendment, a simple survival statute existed in Missis-



ssippi, and construing this statute, the Supreme Court of that state said:

"The evil of the common law was that all personal actions died with the person. The remedy of the statute is to cause the action or the right of action to survive to the personal representative. Whatever suit was maintainable by the deceased shall be held maintainable by the personal representatives of the deceased. But the deceased never had any personal action which could abate at common law, where the injury causing death and the death itself was simultaneous. It is impossible to conceive, at common law, of a right of action to be begun \* \* \* by one who died instantaneously on being injured. If, as we have declared, the statute was framed to prevent the abatement of the right of personal action by the death of the injured person, then it bears its own natural construction upon its own face. And if no strained or hidden meaning is to be imparted to the language of the statute, the survivorship is to personal actions which the testator or intestate might have commenced and prosecuted. But the testator or intestate could never have begun or prosecuted an action for injuries which ended in instantaneous death." *I. C. R. Co. v. Pendergrass*, 69 Miss. 425, 12 South. 954; *Vicksburg, etc., R. Co. v. Phillips*, 64 Miss. 693, 2 South. 537.

In Montana there was some discussion as to whether their statute was a survival statute. The court held that it was, and, after an exhaustive review of the authorities, concluded, referring to deceased: "As his death was instantaneous, it seems it was impossible that such a cause of action could arise in his favor for the wrongful act which caused his death, and, as such cause of action did not arise prior to his death, we hold that there was not any survival of a right of action." *Dillon v. Great Northern R. Co.*, 38 Mont. 485, 100 Pac. 960.

The South Dakota statute provides that, if the life of any person shall be lost, "the personal representatives may institute suit and recover damages in the same manner that the person might have done for any injury where death did not ensue." Section 5498, Comp. Laws 1887. The court held that this was a survival statute, and, when death was instantaneous with the accident, no right of action accrued to deceased, because his life closed with the accident, and none could therefore accrue to his personal representative. *Belding v. Black Hills R. Co.*, etc., 3 S. D. 369, 53 N. W. 750.

Under the Kentucky General Statutes 1873, c. 10, providing for any person injured, with certain exceptions, an action might be brought or revived by the personal representative in the same manner as a cause of action founded on contract. It was held that there must be an appreciable interval between the infliction of injury and

the death, and that no recovery could be had where the death was practically instantaneous or immediate. *Hansford v. Payne*, 11 Bush (Ky.) 380; *Newport News, etc., R. Co. v. Dentzel*, 91 Ky. 42, 14 S. W. 958.

We do not understand that *Hansford v. Payne* has been overruled by the later case of *Givens v. Ky. Central R. Co.*, 89 Ky. 231, 12 S. W. 257. The suit in the later case was based upon a different statute.

In Michigan both a survival statute and a death statute exist. It has been frequently held there that, if death is instantaneous, the administrator can recover damages under the death statute alone, and that, if death is not instantaneous, he can recover only under the survival statute. *Sweetland v. Chg., etc., R. Co.*, 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568; *Dolson v. Lakeshore, etc., R. Co.*, 128 Mich. 444, 87 N. W. 629; *Kyes v. Valley Telephone Co.*, 132 Mich. 281, 93 N. W. 623; *Oliver v. Houghton County Street Ry. Co.*, 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607, 3 Ann. Cas. 53.

In Maine it was formerly provided that any railroad corporation, by whose negligence the life of any person in the exercise of due care was lost, should forfeit not more than \$5,000, nor less than \$500, to be recovered by indictment to the use of persons specified, the remedy by indictment being applicable to only a small class of persons. An indictment could be maintained only in cases of instantaneous death. In other cases, an action was maintainable for the recovery of such damages as the party injured might have recovered had he lived under the survival act, now Revised Statute 1903, c. 89, § 8. In 1891 the Legislature passed a death act (Laws 1891, c. 124, Revised Statute 1903, c. 89, §§ 9, 10) substantially on the lines of Lord Campbell's Act, which, by implication, repealed the remedy by indictment. The construction given to the statute providing a remedy by indictment was adhered to, however, in so far that it is held that the death act is limited to cases where the person injured died immediately, upon the ground that the Legislature must have intended by this act to extend the means of redress to a class of cases where none existed before, and not to begin two actions for a single injury, one for the benefit of the decedent's estate, and another for the benefit of the widow and children, or next of kin. *Tiffany's Death by Wrongful Act* (2d Ed.) § 43, and cases there cited.

In Wisconsin, which has both a death act and a survival act, the precise question here under consideration does not seem to have arisen, but the Wisconsin court has held that the length of time a decedent survives after the injury is material in estimating the damages recoverable. *Brown v. Chg. & N. W. Ry. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579; *Lehmann v. Folwell*,

95 Wis. 185, 70 N. W. 170, 37 L. R. A. 333, 60 Am. St. Rep. 111.

In some of the states it is held there can be no recovery under a survival statute at all, except in cases where death results from some cause other than the injury. It is said in those states that the death statutes are intended to cover every case where death results from the injury, whether immediate or otherwise. *Holton v. Daly*, 106 Ill. 131; *Chg. & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *McCarthy v. Chg. R. I. & P. R. Co.*, 18 Kan. 46, 26 Am. Rep. 742; *Lubrano v. Atlantic Mills*, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797. Also see *L. & N. R. Co. v. McElwaine*, 98 Ky. 700, 34 S. W. 236, 34 L. R. A. 788, 56 Am. St. Rep. 385.

[2] From the foregoing review of the cases, it may be taken as well-settled law that no right of action passes to the personal representatives of a deceased person where the killing was instantaneous, under statutes which provide simply in general terms for a survival of causes of action for personal injury. Statutes which have been construed to the contrary, as we have seen, contained some language peculiar to themselves, and are not plain and direct in their terms as is the amendatory act of Congress here under consideration.

The act of 1908 conferred a right of action upon employes suffering injury, and the amendment simply provided that this right of action should survive. The amendment undertook to deal with the causes of action which had accrued, and which otherwise would have been lost by the death of the employe. The amendment was passed to meet the effect of the decisions in *Fulham v. Midland Valley R. R. Co.* (C. C.) 167 Fed. 660, and *Walsh v. New York, etc., R. R. Co.* (C. C.) 173 Fed. 494. It was not the intention of Congress by this amendment to create a new cause of action, but only to preserve one heretofore conferred upon the employes by the act of 1908. The act of 1908 cannot be construed as having conferred upon an employe or his estate an action for recovery of damages, where his death was instantaneous. In such cases, the right of action was conferred upon designated beneficiaries.

Only the quick can be described as *suffering*. The dead may have *suffered*, but are not *suffering*. When injury and death of an employe are simultaneous, there occurs no period in which he may be said to be *suffering*, no span of life in which this right of action may accrue. Never having existed, such right of course cannot survive.

It is insisted, however, that the reports of the judiciary committees of the House and Senate indicate that the purpose of the amendment of 1910 was to make the remedy of the employe as broad and comprehensive as the remedy afforded to him and his estate in any of the states. Such language is found in these reports.

We must, however, look primarily to the language used by the lawmakers in the statute enacted. If the language there used is plain, and there is no cause for construction or interpretation, we are not justified in drawing upon extraneous sources for the meaning of the statute. The Supreme Court of the United States has said this:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute." *U. S. v. Goldenberg*, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. Ed. 394. See, also, *Lewis Sutherland Statutory Construction*, § 366.

As said before, the language of the act of 1908 and the amendment of 1910 seems plain and simple. We cannot supply the omission of Congress, nor cure a failure to adopt all the unusual remedies and measures of damage obtaining in different states, by interpolations into this act or construction broader than the language used would warrant.

[3] As we have observed, the amendment of 1910 deals with an action that has accrued. No action accrues to an employe where his death is instantaneous, and consequently no action survives. The remedy in such cases is conferred by that portion of the original act patterned after Lord Campbell's Act, which provides for recovery in case of death in favor of certain designated beneficiaries.

The case under consideration is not covered by the amendment, and must therefore be disposed of as a suit based on the act of 1908, brought on behalf of beneficiaries named to recover damages for the employe's death.

This portion of the act of 1908 has been considered and construed by the Supreme Court in the late cases of *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, decided January 20, 1913, and *American R. Co. v. Didrickson*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456, decided January 27, 1913.

The court said that the act of Congress, in giving an action for the benefit of certain members of the family of the decedent, was essentially identical with the act known as Lord Campbell's Act, chapter 93, 9 and 10 Victoria. Acts fashioned after Lord Campbell's Act have been passed in many states of

the Union, and the rules for ascertaining and fixing damages recoverable thereunder are well settled.

Mr. Tiffany collates the statutes on his work on *Death by Wrongful Act*, § 129 et seq. He says:

"The distinguishing feature of Lord Campbell's Act and of acts similar to it in respect to damages is that the damages to be recovered are solely such as result (1) from the death (2) to the persons for whose benefit the action is given. This feature is common to all the acts in force in the United States with the following exceptions:

"I. The acts of Iowa, Kentucky, Oregon, and Rhode Island, as construed by the courts, provide that the damages except in actions by parents shall be such as result from the death to the estate.

"II. The acts of North Carolina, Virginia, and West Virginia, as construed by the courts, provide for a recovery notwithstanding there may be in existence no one of the relatives for whose benefit the action is primarily given.

"III. The acts of Louisiana, Mississippi, and Tennessee provide, in effect, for the recovery both of such damages as result to the party injured from the injury, and to the beneficiaries from the death.

"IV. The act of Georgia provides that the measure of damages shall be the full value of the life without deduction for the expenses of deceased had he lived.

"V. The acts of Massachusetts provide for a forfeiture in certain cases to be recovered by indictment. A civil action may also be maintained, under certain circumstances, in which the damages are assessed with reference to the degree of culpability of the defendant." *Id.* § 129.

The act of Congress contains none of the exceptional provisions found in the statutes of some of the states noted above, but as said by the Supreme Court:

"First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as follow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injury. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings." *Michigan Central R. Co. v. Vreeland*, *supra*.

The court again says:

"The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'ac-

cording as the action is brought for the benefit of husband, wife, minor child or parent of minor child for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.'" *Tiffany's Death by Wrongful Act* (2d Ed.) §§ 158, 160-2.

The deceased, Robert Shewalter, was an adult about 25 years of age. He did not live with his father at the time of his death, nor did he contribute anything to the support of his father, so far as the record shows. An effort was made by counsel for the railroad company below to ascertain from a brother of deceased while on the stand what contributions deceased had made to his father's support, with a view of putting this in evidence to mitigate the recovery. Objection, however, was taken to this evidence by counsel for plaintiff below, and it was excluded. So there is no evidence in the record that the father of deceased had been in the habit of receiving pecuniary assistance or support from deceased. The deceased was, of course, under no legal liability to the beneficiary, and the beneficiary has wholly failed to show that he has lost any prospective pecuniary benefit by reason of the death of his son.

In *Michigan Central Railroad Co. v. Vreeland*, *supra*, the Supreme Court expressly approves the rule for the measurement of damages laid down by Mr. Tiffany in his *Death by Wrongful Act*. In discussing the measure of damages to which a beneficiary is entitled under Lord Campbell's Act, where the latter has no legal claim upon deceased, and the loss consists only in a prospective benefit to which he was not legally entitled, as where the beneficiary sues for the death of an adult child, this author says:

"The distinction taken in the English cases has generally been observed in the United States, that is, the plaintiff must show that the decedent gave assistance to the parent, or that the parent had reasonable expectation of pecuniary benefit from the continued life of the child. The proper measure of damages is the present worth of the amount which it is reasonably probable the deceased would have contributed to the support of the parent during the latter's expectancy of life in proportion to the amount he was contributing at the time of his death, not exceeding his expectancy of life; though it would seem that the rule is not to be applied with mathematical strictness, and that the jury may properly take into consideration the increasing wants of the parents, and the increasing ability of the child to supply them. In some cases the evidence has been held sufficient to sustain a finding that there was a reasonable expectation of pecuniary benefit, although the evidence fell short of showing that assistance was actual-

ly rendered. In *Hutchins v. St. Paul M. & M. Ry. Co.* [44 Minn. 5, 46 N. W. 79], it was said 'the proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of deceased and the income derived thereby, his health, age, talents, habits of industry, his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin, and if the verdict is greatly in excess of this sum thus arrived at, the court will set it aside, or cut it down.' *Tiffany's Death by Wrongful Act* (2d Ed.) § 168.

It is necessary under the rule laid down by the Supreme Court, in order to entitle the beneficiary to recover, that he show some reasonable expectation of pecuniary assistance or support of which he has been deprived, and the court held in *Michigan Central Railroad Co. v. Vreeland*, supra, that it was error to permit the jury to estimate the value of a husband's care and advice to his wife, even if such care and advice be considered a kind of service from him capable of measurement by pecuniary standard, where there was neither allegation nor evidence of such loss of service, care or advice.

Under the rule laid down in the several cases collected in *Tiffany's Death by Wrongful Act* (2d Ed.) § 184, it is doubtful if there is any sufficient pleading by the plaintiff below to justify a recovery in this case. No damages to the beneficiary of this suit of a pecuniary nature are averred in the declaration. Whether such an averment was necessary or not, we need not determine. Certain it is there is no proof offered from which it appears that the plaintiff below had any reasonable expectation of pecuniary assistance or support from the deceased. As we understand *Michigan Central R. Co. v. Vreeland*, supra, such proof is necessary to a recovery.

There being therefore no evidence upon which a recovery in this case might be based, the motion of the railroad company for peremptory instructions should have been sustained. The action of the lower courts in overruling such motion is here reversed, and the suit dismissed.

#### FOURTH NAT. BANK OF NASHVILLE v. NASHVILLE, C. & ST. L. RY. CO.

(Supreme Court of Tennessee. Dec. 30, 1913.)

#### 1. CARRIERS (§ 69\*)—FREIGHT—DELIVERY WITHOUT BILL OF LADING.

Though a railroad company wrongfully delivered grain without the surrender of the bill of lading as required by it, the consignors had no right of action against it if they were not injured because they had received payment for the grain.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 217-219, 222, 228, 230, 232-239; Dec. Dig. § 69.\*]

#### 2. CARRIERS (§ 55\*)—FREIGHT—"BILL OF LADING."

A "bill of lading" is not a negotiable instrument but is merely a contract by a carrier to deliver the goods described at a particular place according to the usual course of transportation.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 130, 168; Dec. Dig. § 55.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 790-795.]

#### 3. CARRIERS (§ 59\*)—BILL OF LADING—BONA FIDE TRANSFEREE.

Complainant bank first accepted a bill of lading, covering a shipment of grain, and an attached draft on February 10th, and that draft and three other drafts against the same bill of lading were subsequently dishonored and taken up by the maker, and when the fifth draft was deposited, which was likewise dishonored and was not taken up, the bill of lading had been issued for more than three months. The grain covered by it was a domestic shipment to an adjoining state. *Held*, in view of the staleness of the bill of lading, that the bank was not an innocent transferee of the bill of lading and was estopped from recovering from the railroad company for negligently delivering the grain without the surrender of the bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 170-190; Dec. Dig. § 59.\*]

#### 4. ESTOPPEL (§ 54\*)—EQUITABLE ESTOPPEL—DILIGENCE.

One relying on an estoppel must have exercised such reasonable diligence as the circumstances require.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 128-135; Dec. Dig. § 54.\*]

#### 5. ESTOPPEL (§ 54\*)—EQUITABLE ESTOPPEL—KNOWLEDGE OF PARTIES.

Where both parties have the same means of ascertaining the truth, no estoppel can exist.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 128-135; Dec. Dig. § 54.\*]

#### 6. ESTOPPEL (§ 54\*)—EQUITABLE ESTOPPEL—NEGLIGENCE.

One who conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss cannot invoke the doctrine of estoppel.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 128-135; Dec. Dig. § 54.\*]

#### 7. ESTOPPEL (§ 52\*)—GOOD FAITH.

One claiming the benefit of an estoppel must have proceeded with the utmost good faith.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.\*]

#### 8. ESTOPPEL (§ 56\*)—NEGLIGENCE.

If a ground of estoppel is based on negligence, the negligence must have been the proximate cause of the conduct of the complaining party.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 142; Dec. Dig. § 56.\*]

#### 9. CARRIERS (§ 69\*)—DELIVERY OF GOODS—BILL OF LADING—FAILURE TO REQUIRE EVIDENCE.

In an action by the holder of a bill of lading for damages because defendant railroad company surrendered freight without presentation of the bill of lading, evidence *held* to show that such negligence by the railroad company was not the proximate cause of the bank's loss.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 217-219, 222, 228, 230, 232-239; Dec. Dig. § 69.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Chancery Court, Davidson County; John Allison, Judge.

Action by the Fourth National Bank of Nashville against the Nashville, Chattanooga & St. Louis Railway Company. From a decree for complainant, defendant appeals. Reversed.

Frank Slemons, Sloss D. Baxter, and Claude Waller, all of Nashville, for appellant. Stokes & Stokes, of Nashville, for appellee.

GREEN, J. This suit was brought by the Fourth National Bank of Nashville against the railway company to recover from the latter the value of a shipment of grain made on an order notify bill of lading by Miller & Co., of Nashville, to the Santee Cypress Company, of Ferguson, S. C., which bill of lading was negotiated by the shipper at complainant bank. The shipment of grain was released by the final carrier to the consignee without surrender of the bill of lading.

The suit was brought under the Carmack Amendment (chapter 3591, § 7, 34 Stat. at L. 584, 595 [U. S. Comp. St. Supp. 1911, p. 1807]) to the Hepburn Act to hold defendant railway company as the initial carrier liable for the default of the Atlantic Coast Line, which was the last carrier and the carrier handling the grain to the point of its destination.

The railway company answered and interposed several defenses. The chancellor rendered a decree in favor of complainant, and the railway company has appealed to this court.

Miller & Co. delivered to the railway company at Nashville some 400 bags of oats on February 10, 1910, to be shipped to the order of consignees at Ferguson, S. C., with directions to notify the Santee Cypress Company at the latter place. The railway company issued a through bill of lading in customary form containing, among other things, the following stipulation: "The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property."

On this same day Miller & Co. made a draft on the Santee Cypress Company for \$1,041, to which draft was attached the bill of lading just referred to. The draft was deposited on account of Miller & Co. in complainant bank and cash credit was given to them for the amount thereof, less .025 per cent.

This draft was dishonored and returned. Miller & Co. paid to the bank the amount of the draft and on March 5, 1910, made another draft with this bill of lading attached on the Santee Cypress Company. The second draft was returned and taken up by Miller & Co., and on March 31, 1910, a third draft with the bill of lading attached was made on the above-mentioned consignee. The third draft was also dishonored, and on April 21, 1910, a fourth draft with the same bill of

lading attached was made by Miller & Co. on the same parties, which draft was returned unpaid. On May 19, 1910, a fifth draft, to which was attached this same bill of lading, was made by Miller & Co. on the cypress company, and this draft was likewise dishonored.

Upon the return of the first four drafts, Miller & Co. made the amount of each good at the bank. They had received cash credit for all the drafts, less discount. By the time the fifth draft was returned, Mr. Miller, the head of this concern, had died, and his firm proved insolvent. Hence this suit by the bank against the railway company.

The grain in question was ordered from Miller & Co. by the Santee Cypress Company on open account, and no authority was given to Miller & Co. to draw on the consignee. When the shipment arrived at Ferguson, S. C., there appeared to be a shortage in it. On March 14th, however, a check was sent to Miller & Co. by the cypress company for the amount of the consignment, less the shortage, and the cypress company having credit with the agent of the railroad company at Ferguson, S. C., the latter released the grain, on explanation that it had been paid for, without the surrender of the bill of lading. The shortage in question was made good by Miller & Co., and on April 27th the cypress company sent a check for the balance of this order.

So that on May 19, 1910, when the draft with the bill of lading here sued on was last deposited in complainant bank, the grain represented by the bill of lading had been some time delivered to the consignee, and the shipper had been paid therefor.

At this time the consignors had no claim whatever against the railway company by reason of their possession of this bill of lading. Proper delivery had been made of the grain shipped, and the consignors had been paid for the same. While consignors held the bill of lading, its surrender to the railway company, so far as they were concerned, at this time would have been merely a matter of ceremony. This is pointed out in *Witt & Watkins v. Railroad*, 99 Tenn. 442, 41 S. W. 1064.

[1] Although the railway company breached its duty in delivering this grain without the surrender of the bill of lading, no damages resulted to the consignors by reason of this breach, for they had received payment for their grain. The consignors had no right of action or just claim against the railway whatever.

There is some conflict of authority as to the rights of an innocent transferee of a bill of lading, fraudulently negotiated, after there has been a delivery of the goods. It is not necessary to review these authorities here, owing to the peculiar circumstances of this case.

[2] A bill of lading is not a negotiable instrument, but, if this one should be treated as such, there could be no recovery by the bank in this case. For if this bill of lading be considered as negotiable, it was "past due" at the time it was last transferred to the bank. A bill of lading is a contract or undertaking on the part of a carrier to deliver the goods therein described at a particular place, subject to the conditions therein contained, according to the usual course of transportation. This bill of lading was dated February 10, 1910. It covered a shipment from Nashville to a point in a neighboring state, and in ordinary course of carriage such shipment was due to be delivered long prior to May 19, 1910, the date upon which said bill of lading was last negotiated.

But, as said above, a bill of lading is not a negotiable instrument, and the rights of the parties are not to be determined by the application of rules controlling the transfer of commercial paper.

The cases which declare a carrier liable to the bona fide holder of a bill of lading fraudulently negotiated, after delivery of the consignment, proceed on the theory of estoppel. They rest on the principle that, where one of two innocent parties must suffer, he, by whose fault the loss was occasioned, must bear it. It is said that when a carrier issues a bill of lading, a symbol of property, undertaking to deliver such property to the holder thereof, it is liable to one who acquires this bill of lading for value, if it has made delivery to another, even to the consignee, without the surrender of the bill of lading, but leaving same outstanding, and a loss is thereby occasioned to an innocent transferee. *Merchants', etc., Bank v. Railroad Co.*, 102 Md. 573, 63 Atl. 108; *Midland National Bank v. Railway Co.*, 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505; *Ratzer v. Railway Co.*, 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530; *Railway Co. v. Johnson*, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540; *Hutcheson on Carriers*, vol. 1, § 182.

[3] Is the complainant bank an innocent transferee, and is it entitled to recover in this case?

We think not. Applying familiar principles of the law of estoppel, the bank must be denied relief herein.

[4, 5] A party setting up an estoppel is bound to the exercise of reasonable diligence—such diligence as the circumstances of the case require. *Moore v. Bowman*, 47 N. H. 494. This rule is probably the foundation of the other rule that, where both parties have the same means of ascertaining the truth, there can be no estoppel. *Crabtree v. Bank*, 108 Tenn. 483, 67 S. W. 797, and *Brant v. Va. Coal, etc., Co.*, 93 U. S. 326, 23 L. Ed. 927.

[6] That is to say, if a party decides upon a matter or determines his course with a careless indifference to means of informa-

tion reasonably within his reach, or if he is heedless of circumstances highly suspicious and sufficient to warn him, he will not be entitled to complain and invoke estoppel.

[7] To hold that one, who shuts his eyes and disregards danger signals flaunted before his view, is an innocent party, entitled to invoke the doctrine of equitable estoppel, would be to encourage fraud. A person who so conducts himself scarcely acts in good faith, and it is well settled that a party must proceed in the utmost good faith to claim the benefit of an estoppel. 16 Cyc. 747, and cases there cited.

Referring again to the facts heretofore set out, complainant bank first took this bill of lading and a draft for the value of the grain February 10th. This draft was dishonored, and likewise three other drafts with the same bill of lading were dishonored before the final draft was negotiated. At the time the fifth draft was deposited, this bill of lading, covering a domestic shipment, was more than three months old. It was stale. It had previously passed through the bank's hands four times. The period during which this grain should have been transported and delivered in ordinary course of business had long since expired. The bank should have known that something was wrong. It should have made some inquiry as to this collateral before taking it for the fifth time, if it expected to be protected as an innocent holder. The transaction of making five drafts on the same bill of lading was out of the ordinary and so unusual as to excite suspicion and to require investigation. The bank has been so negligent and remiss in this matter as to deprive it of the status of an innocent transferee and to compel the court to rebuff the effort to obtain an equitable estoppel in its behalf.

[8] Another principle is that, when an estoppel is sought to be based on negligence, such negligence must be the proximate cause of leading the complaining party into the mistake. 16 Cyc. 772, and cases cited.

[9] While the carrier was of course negligent in delivering this grain without requiring the surrender of the bill of lading, we hardly think such negligence was the proximate cause of the bank's loss in this case. It is fairly inferable from this record that the bank received these drafts from the consignors and gave the latter cash credit therefor more by reason of the standing and supposed responsibility of the consignors than upon the faith of the bill of lading. The testimony of a bank official in this record shows that the account of Miller & Co. was very satisfactory, and that they enjoyed good credit at the bank. Every time one of these drafts was deposited by Miller & Co. and credited to their account, the bank made a profit of about \$2.50.

Had this credit to Miller & Co. been extended solely or principally on the faith of the

bill of lading, it is more than likely that the bank would have refused further credit thereon when the first or second draft was dishonored. The drafts were cashed, as we think, rather on the individual credit of Miller & Co. than on the faith of this bill of lading. Consequently the bank's mistake as to the credit of Miller & Co. proximately occasioned its loss and not reliance upon the bill of lading.

Other interesting questions are presented in the case respecting the application of the Carmack Amendment to these facts. We do not, however, find it necessary to consider them in this opinion, inasmuch as we must dismiss this bill for the reasons heretofore stated. The decree of the chancellor will be reversed.

### FINE et al. v. LASATER et al.

(Supreme Court of Arkansas. Dec. 8, 1913.)

#### 1. DEEDS (§ 61\*)—DELIVERY—DEPOSIT FOR DELIVERY ON GRANTOR'S DEATH.

An owner of land executed a deed thereto to his daughter, reciting that it was in consideration of the support of himself and his wife for life, and delivered it with an indorsement stating that it was to be delivered to his daughter's husband after his death, to an officer of a bank, with instructions to deliver it to the son-in-law after his death. The daughter knew the terms of the deed and accepted them, and in compliance therewith cared for her father and mother until the father's death, and thereafter continued to care for the mother. The father never by word, or act, showed that he was dissatisfied with having executed the deed, or attempted to exercise any control or dominion thereover, and always referred to the place as his daughter's, and told various persons that he had deeded it to her. *Held*, that the deed was in escrow, or was in the nature of an escrow, and, having been recorded by the son-in-law after the father's death, would not be canceled as a cloud on the heir's title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.\*]

#### 2. DEEDS (§ 17\*)—CONSIDERATION—AGREEMENTS TO SUPPORT.

An agreement upon the part of a grantee to support the grantor during his lifetime is a sufficient consideration for a deed conveying land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 26-37; Dec. Dig. § 17.\*]

#### 3. DEEDS (§ 61\*)—DELIVERY—DEPOSIT FOR DELIVERY ON GRANTOR'S DEATH.

Whether the delivery of a deed to a third party, to be delivered by him to the grantee after the grantor's death, is to be deemed a present delivery is generally a question of fact, depending on the conduct and intention of the parties to the transaction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.\*]

#### 4. DEEDS (§ 61\*)—DELIVERY—DEPOSIT FOR DELIVERY ON GRANTOR'S DEATH.

For the delivery of a deed to a third party, to be delivered by him to the grantee after the grantor's death, to constitute a present delivery, the grantor must deliver it for the grantee's use, and in some way express such intention, and

must part, both with the possession of the deed, and with all dominion and control thereover.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.\*]

Appeal from Crawford Chancery Court; J. V. Bourland, Chancellor.

Suit by Mattie Fine and others against Annaliza Lasater and others. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

Sam Dent Bell, of Van Buren, for appellants. Hill, Brizzolara & Fitzhugh, of Ft. Smith, for appellees.

HART, J. Appellants instituted this suit in the chancery court against appellees, and their complaint alleges, in substance, that they, as well as appellee Annaliza Lasater, are the heirs at law of E. B. Bryant deceased; that during his lifetime, E. B. Bryant executed and acknowledged a deed to a tract of land owned by him to Annaliza Lasater; that said deed was never delivered to the grantee, but was wrongfully obtained by her, after the grantor's death, and placed on record. The prayer of the complaint is that the deed be canceled as a cloud upon their title, and that the lands embraced in the deed be partitioned among the heirs of E. B. Bryant, deceased, according to their respective interests. The deed was a warranty deed in common form, and was executed on the 19th day of February, 1908, and purported to convey to the grantee, Annaliza Lasater, a tract of land which is admitted to be worth \$8,000. The deed recites: "That we, E. B. Bryant and Julia A. Bryant, his wife, for and in consideration of the sum of taking care of us, E. B. Bryant and Julia A. Bryant, during our natural lives to us paid by Annaliza Lasater; said Annaliza Lasater to keep, and to care for E. B. Bryant and Julia A. Bryant during our natural lives did hereby, grant, bargain, sell and convey unto the said Annaliza Lasater and unto her heirs and assigns forever, the following lands lying in the county of Crawford, and state of Arkansas, to wit." The deed was written by J. W. Storie, a justice of the peace, and acknowledged by E. B. Bryant and his wife, Julia A. Bryant, and was left in the possession of E. B. Bryant. About four days after this, Mr. Bryant went to the office of Mr. Storie and made his will. He placed the will and the deed in an envelope, and wrote thereon: "Deliver to N. A. Lasater at my death. [Signed] E. B. Bryant." He carried the envelope and delivered it to the assistant cashier of the bank of Mulberry, with instructions to deliver it to N. A. Lasater after his death. After he died, the envelope was delivered to N. A. Lasater who opened it, took the deed out, and placed it upon record.

J. W. Storie testified that E. B. Bryant, Julia Bryant, his wife, and Annaliza Lasater were all present in the room when the deed

was executed; that he left the deed there after it was executed, and no further reference was made to it; that he remained with them for about a half an hour, engaged in social conversation; that he was a frequent visitor in the homes of the Lasaters, and that Mr. Bryant and his wife continued to live with them until his death; and that the relation between the parties always seemed pleasant.

Mr. Bryant was 79 years of age when he died. The cashier of the bank testified that he did not know what the envelope contained, but that Mr. Bryant delivered it to him and instructed him to deliver it to N. A. Lasater after his death; that in accordance with his custom he deposited the envelope in a box with the letter "B" on it, which contained papers belonging to Mr. Bryant and other customers whose names began with B; that Mr. Bryant never thereafter asked to see the envelope or exercised any control over it; that after Mr. Bryant's death, the envelope was delivered to N. A. Lasater who opened it and found that it contained the deed in question, and also Mr. Bryant's will.

Mrs. Mattie Fine, one of appellants, stated that she was a daughter of Mr. Bryant, and that some time during the year before he died her father told her that it was not recorded that Annaliza Lasater would get everything he had, and that if things did not go to suit him the papers could be easily destroyed. The wife of the grandson of Mr. Bryant testified that she was present and heard this conversation.

Julia Bryant, the wife of E. B. Bryant, testified: "My husband, my daughter, Annaliza Lasater, and myself were all present when the deed in question was executed. My daughter knew the terms of the deed, and knew that the property was being conveyed to her in consideration of her taking care of Mr. Bryant and myself. She agreed to the terms of the deed. Mr. Bryant told me that he had deposited the deed in the bank to hold for our daughter, Annaliza Lasater. My husband and I resided at the home of our daughter from the time the deed was executed, on the 19th day of February, 1908, until the date of his death, on the 5th day of August, 1912. During all this time, and for several years prior thereto, my daughter took care of us and gave us every attention that we needed. I still reside with my daughter, and intend to remain with her as long as I live. She is my only child; the other heirs of Mr. Bryant being children by his first wife."

Annaliza Lasater testified: "I was present at the time when the deed in controversy from my parents was executed to me. I knew that the deed was made in consideration of my taking care of my father and mother during their natural lives, and I accepted these terms. My father and mother had been living with me for several years before the deed was executed, and continued

to live with me up to the date of my father's death. My mother still lives with me, and I intend to take care of her until she dies. It was at one time thought that my father had cancer, but he got better of that before he died. I gave him and mother every care and attention that could be bestowed upon them, and intend to continue to do so in regard to my mother until her death. I knew that the deed was placed in the bank for me."

"N. A. Lasater, the husband of Annaliza Lasater, testified that he was told about the execution of the deed and its terms, and agreed to the same; that the envelope containing the deed and Mr. Bryant's will was delivered to him after Mr. Bryant died, and that he filed the deed for record; that he was also named as executor of the will.

Two other witnesses testified that were well acquainted with E. B. Bryant, and that he told them he had executed a deed to his daughter Annaliza Lasater to the land in controversy, and that he had placed the deed in the bank of Mulberry, and that the bank was holding it for his daughter.

By the terms of the will, certain specific bequests were made to the children of Mr. Bryant, other than Annaliza Lasater, and the amount of these bequests more than absorbed his remaining estate. The chancellor found in favor of appellees, and the complaint was dismissed for want of equity. The case is here on appeal.

[1] Counsel for appellees seek to uphold the decree on the ground that the deed was in escrow, or was a deed as in the nature of an escrow. In the case of *Masters v. Clark*, 89 Ark. 191, 116 S. W. 186, the court said: "To constitute an instrument an escrow, it is absolutely necessary that the deposit of it should be irrevocable; that is, that when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the grantor for all time, and that he should actually lose the control of and dominion over the instrument; for, in case the deposit is made in furtherance of a contract between the parties, the contract must be so complete that it remains only for the grantee or obligee, or another person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import." 16 Cyc. 568, and cases cited; 1 Am. & Eng. Encyclopedia of Law (2d Ed.) 336."

In the case of *Foster v. Mansfield*, 3 Metc. (Mass.) 412, 37 Am. Dec. 154, Shaw, Chief Justice, speaking for the court, said: "Whether, when a deed is executed, and not immediately delivered to the grantee, but handed to a stranger, to be delivered to the grantee at a future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often matter of some doubt; and it will generally depend rather on the words used and the purposes express-



ed than upon the name which the parties give to the instrument. Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery; but when thus delivered, it will take effect by relation, from the first delivery. But this distinction is not now very material, because where the deed is delivered as an escrow, and afterwards, and before the second delivery, the grantor becomes incapable of making a deed, the deed shall be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity."

[2] Tested by this rule, we think the contention of counsel for appellees is correct. An agreement upon the part of the grantee to support the grantor during his lifetime is a sufficient consideration for a deed conveying land. *Boyd v. Lloyd*, 86 Ark. 169, 110 S. W. 596.

The testimony on the part of appellees shows that appellee Annaliza Lasater knew the terms of the deed, and accepted them. In compliance therewith, she did take care of her father and mother for over four years, until her father died, and is continuing to take care of her mother until her death. Both she and Mrs. Bryant testified that her father told her that the bank was holding the deed for her. Mrs. Bryant testified that she was still living with her daughter, and intended to do so until her death, and that she was satisfied that the deed should be delivered to her daughter. Thus it will be seen that appellee had sub-

stantially performed the condition in the deed, and the delivery to her was not wrongful.

[3] Whether, in a given case, the delivery of a deed to a third party to be delivered by him to the grantee after the grantor's death is to be deemed a delivery in present or not is generally a question of fact, depending on the conduct and intention of the parties to such transactions. *Battle v. Anders*, 100 Ark. 427, 140 S. W. 593, and cases cited.

[4] The grantor must deliver the deed to a third person for the use of the grantee, and in some way express his intention to that effect; and at the time of such delivery to the third person, he must part both with the possession of the deed and with all dominion and control over it. We think that under the facts shown in the case at bar, the chancellor did not err in holding that the delivery of the deed to the cashier of the bank was, in effect, the present delivery of it to be held by the bank for the benefit of appellee Annaliza Lasater. The testimony on the part of appellees shows that the grantee in the deed was present when it was executed, knew its terms, and accepted them. The grantor told his wife and his daughter, the grantee in the deed, that he would place it in the bank to be delivered to the grantee after his death. He lived for over four years after this time at the home of the grantee, and never, by word or act, showed that he was dissatisfied with having executed the deed, nor did he ever attempt to exercise any control or dominion over the deed. He always referred to the place conveyed by the deed as being his daughter's, and told various persons that he had deeded the place to his daughter. Under these circumstances, we do not think the finding of the chancellor can be disturbed on appeal.

The decree will be affirmed.

In re NINETEENTH STREET IN KANSAS CITY.

KANSAS CITY v. MASTIN REALTY & MINING CO. et al.

(Supreme Court of Missouri. Dec. 24, 1913.)

1. EVIDENCE (§ 242\*)—WIDENING OF STREET—ASSESSMENT OF BENEFITS AND DAMAGES—WAIVER OF ERROR.

Where a property owner's authorized agent, appearing in his stead, testified in condemnation proceedings that the owner would be satisfied with the assessment to be made so long as the benefits did not exceed the damages, an assessment made by the jury on a basis more favorable to the owner than such testimony authorized, could not be disturbed on appeal, though disproportionate to assessments against other property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 219; Dec. Dig. § 242.\*]

2. EVIDENCE (§ 242\*)—TESTIMONY OF AGENT—BINDING EFFECT.

Where a property owner authorized an agent to represent him in condemnation proceedings, he was bound by the agent's testimony that his principal would be satisfied with the assessment so long as the benefits did not exceed the damages, though such agent exceeded or misconceived his instructions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 219; Dec. Dig. § 242.\*]

Woodson, J., dissenting.

En Banc. Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Condemnation proceedings by Kansas City against the Mastin Realty & Mining Company and others. From the judgment, defendant named appeals. Affirmed.

This is a condemnation proceeding under an ordinance of Kansas City for the widening of Nineteenth street between specified limits. Proper steps were taken in the circuit court as prescribed by the charter of said city, and a jury called to assess the respective benefits and damages of the owners of the property lying within the benefit district, who returned their verdict on the 25th of October, 1912. On the trial the evidence showed that 15 feet of the south side of Nineteenth street (running east and west) were taken for the distance of three blocks, in order to widen it according to the ordinance; that appellant owned the entire frontage on both sides of one of the three blocks to be widened, being the distance between McGee street and Grand avenue. The amount of damage assessed the appellant was \$38,000, and it was charged as benefits in the sum of \$37,617.69. The only part taken by appellant during the trial was the following testimony given by his employé Isaac Tempofsky. "Q. What property is it you represent? A. All of block 39, Mastin's subdivision. All we have to say in the case is, we think the benefits should not exceed the damages. That is about all there is to say, as we own on both sides of the street. Cross-examination by Mr. Cooper: Q. That is the

attitude of the owners of the Mastin property—that if it is an offset, the damages and benefits be equal, they are satisfied? A. Yes, sir. Q. Do the owners of your property think this is a general benefit to the neighborhood and to the property? A. Yes, sir." After the verdict appellant duly moved for a new trial, and was allowed 10 days thereafter to file affidavits in support. Within said time two unsworn statements in the form of affidavits were filed by appellant, the one signed by its president, the other signed by its agent Isaac Tempofsky. In substance, Mastin stated that his company owned certain property on Nineteenth street within the locality where it was to be widened; that he favored the widening of the street, and undertook to express his views to Isaac Tempofsky an employé of his company; that being out of the city he did not appear as a witness himself; that the testimony given by Tempofsky is not in harmony "with what affiant purposed touching the widening of said street," adding, "Mr. Tempofsky's testimony was that I would be satisfied as long as the benefits did not exceed the damages, or vice versa, but he did not intend to mean on my benefits or my damages, but of the entire property taken, and referring also to the entire benefits and damages." He further complained that the verdict of the jury would cause him to lose \$3,500 after having donated the property for the widening of the street, and that said amount of \$3,500 should have been allowed him as damages for reconstruction. The statement of Mr. Tempofsky is, to wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City. N. 68513. In the Matter of the Opening and Widening of Nineteenth Street from the East line of Maine Street to the West line of McGee Street. State of Missouri, County of Jackson—ss.: Isaac Tempofsky, being first duly sworn, says: I am the agent of the Mastin Realty & Mining Company, and testified before the jury having under consideration the widening of Nineteenth street, Kansas City, Mo. I have read the affidavit of T. H. Mastin, filed herein, and am familiar with the contents of the same. That it was my purpose in testifying before the jury to express the thought as contained in Mr. Mastin's affidavit, and if the jury got a different impression I certainly misstated myself, or the jury misconstrued by testimony. Mr. Mastin had instructed me to do all that I could to assist in the enterprise of widening said street, but he certainly did not authorize me to give the company's property away with such liberality as has been done in the jury's verdict. [Signed] Isaac Tempofsky.

"Subscribed and sworn to before me this 29th day of November, 1912. My commission expires ———, 191——, Notary Public, Jackson Co., Mo."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The motion for new trial was overruled and this appeal is only prosecuted by Mastin Realty & Mining Company. Other evidence bearing on the errors complained of by appellant will be noticed as much as is needful in ruling upon the same.

Boyle & Howell and Jos. S. Brooks, all of Kansas City, for appellant Mastin Realty & Mining Co. A. F. Evans, City Counselor, and Francis M. Hayward, Asst. City Counselor, both of Kansas City, for respondent.

BOND, J. (after stating the facts as above). [1] The errors assigned are, that the jury made unequal and disproportionate assessments of the property of appellant. The evidence shows that in estimating benefits the jury charged a sum against plaintiff in excess of what should have been apportioned to it, considering the extent of the entire benefit district and considering also the proportions of the total benefits which should have been borne by it and by other property owners, respectively; this was particularly the case as the relative amount of assessments of benefits found against appellant and one Tilney. No apparent reason existed for the discrimination between these two parties, since the jury awarded one of them damages for reducing his lot to 35 feet, and assessed against the other a benefit for reducing his lot 17 feet; the two lots being on opposite sides of the street. In view of this action of the jury we would reverse and remand this case except for the basis afforded to their findings by the testimony of Tempofsky, who was sent to testify before them on behalf of appellant. But, considering the testimony and the statement explanatory thereof made by the president of the appellant corporation and submitted on its motion for new trial, we do not feel at liberty to award appellant the redress it would have been otherwise entitled to on this appeal. There was no misdirection as to the rule governing the assessment of benefits and damages to the various property owners expressed in the instructions of the court, which, in substance, embraced the provisions of the charter of Kansas City on that subject and the general law applicable to such matters. *Webster v. K. C. & S. Ry. Co.*, 116 Mo. loc. cit. 118, 22 S. W. 474. The seeming disregard of that rule by the verdict of the jury was induced by the statement on the witness stand of appellant's accredited agent, that appellant only desired an equation of benefits and damages in the assessments which the jury might make for this desirable street widening. Appellant got that, for the damages given it slightly exceeded its burdens in the way of damages.

[2] II. The only question which can arise as to the preclusiveness on this appeal of the testimony given for appellant on the trial is whether Tempofsky was authorized by it

to appear as its representative? That he was so employed is clear from the statement made in support of its motion for new trial; and, if it be true the witness exceeded his instructions or misconceived them, still he was acting within the apparent scope of his agency when he appeared and testified, and hence his principal is just as much bound by that testimony as if it had conformed in all respects to the directions given to the agent. Mr. Mastin, the president of appellant, saw fit to intrust the communication of his "attitude to the widening of Nineteenth street" to its employé, and, that communication having been made without notice of any limitations to the court and jury, the verdict rendered in accordance with the testimony thus adduced is just as free from legal objections as if it had been based on the same testimony falling from the lips of the president of the corporation if he had chosen to appear as the witness, which he says he intended to do, but that on account of absence he delegated that task to his agent. The law is the guardian of the rights and property of all persons, but it does not undertake to stand sponsor for their failure to exercise ordinary care and vigilance in the management of their own business. "*Vigilantibus et non dormientibus jura subveniunt.*" If any loss has happened to appellant in this matter, it resulted simply from voluntary inattention to his private business. *Gayle v. Mo. Car & Fdry. Co.*, 177 Mo. loc. cit. 455, 76 S. W. 987. *Estes v. Nell*, 163 Mo. loc. cit. 395, 63 S. W. 724.

We discover no reversible error in the judgment; it is affirmed.

LAMM, C. J., and GRAVES, BROWN, WALKER, and FARIS, JJ., concur.

WOODSON, J., dissents.

#### STATE v. WEINHARDT.

(Supreme Court of Missouri. Dec. 24, 1918.)

##### 1. ROBBERY (§ 27\*)—INCLUDING OFFENSES.

The crime of robbery includes all the elements of larceny, with the added acts of violence or putting in fear, so that in a prosecution for robbery, if there is substantial evidence that the taking was without assault or putting in fear, defendant is entitled to submission of the offense of larceny.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 38-40; Dec. Dig. § 27.\*]

##### 2. ROBBERY (§ 27\*)—INCLUDING OFFENSES—PETIT LARCENY.

Where accused was charged with first degree robbery in that he entered a saloon and by seizing and choking the saloon keeper's wife forced her to permit him to take \$20 from the cash register, which he carried and converted to his own use, and he testified that after ordering beer he passed behind the bar, opened the cash register, and removed the money, but did not choke or threaten to choke the saloon keeper's wife, who was in charge of the saloon, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

did nothing to put her in fear, it was error for the court to refuse to charge on petit larceny.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 38-40; Dec. Dig. § 27.\*]

Walker, J., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

Andrew Weinhardt was convicted of robbery in the first degree, and he appeals. Reversed.

Defendant appeals from a judgment of the circuit court of St. Louis city sentencing him to serve five years in the penitentiary for the alleged crime of robbery in the first degree, as denounced by section 4530, R. S. 1909. The evidence on the part of the state strongly tended to prove that defendant entered a saloon kept by one Koebbe, and by seizing and choking Koebbe's wife, who was temporarily in charge of said saloon, forced her to permit him to take about \$20 from the cash register which he carried away and converted to his own use. It is unnecessary to incumber this opinion with the detailed evidence on the part of the state—it amply supports the verdict and judgment. The only error assigned upon which defendant seriously insists for reversal is the failure of the trial court to instruct the jury on the crime of petit larceny. Defendant's learned counsel assert that the defendant's evidence tends to prove that he did not use any violence towards Mrs. Koebbe, and did not place her in fear of immediate injury to her person while he was taking the money, and therefore the court should have given his requested instruction on petit larceny.

That part of defendant's testimony which it is contended presents the issue of petit larceny is as follows: "Q. Did you drink any beer in the saloon, Andreas? A. I asked for a glass of beer. Q. Was it served? Did you get it? A. Yes, sir. Q. Now, tell the jury what happened, in your own way, as near as you remember it. A. Mrs. Koebbe was standing behind the bar, and we was making fun there, talking like that, and I walked behind the bar and rang the cash register and took the money out, and she says I should don't hurt her. Q. Speak louder. A. She told me that I should don't hurt her, and I says, 'No, I ain't going to do nothing,' and I walked right outside. That is all I know about it. Q. Did you take the money? A. Yes, sir. Q. That is all you know about it? A. Yes, sir. Q. Now, Andreas, I will ask you did you grab her by the throat, or put your hands on her, or threaten to kill her, or anything like that? A. No, sir; not a word like that. She was excited and nervous, and she was standing there talking. Q. But you did take the money, did you? A. Yes, sir. Q. Then when you got the money what did you do? A. I walked out. \* \* \* Q. And you told her that you wasn't going to kill her if she didn't holler? A. No, sir; I just told her

I wouldn't hurt her. Q. You did tell her that you would not hurt her if she did not holler? A. No, sir. Q. What did you say to her? A. I just said to her, 'I ain't going to hurt you.' She said: 'Don't hurt me; take all you want.' Q. And just before you went behind there you ordered a glass of beer and she set that on the counter? A. Yes, sir. Q. And instead of taking the beer, that is when you ran behind her? A. No, sir; she took the nickel and went to put it in the register, and I walked back there. Q. You tell this jury you did not touch her at all? A. Yes, sir. Q. And had not threatened to kill her? A. No, sir. \* \* \* Q. I will ask you whether you told this officer, Sergeant Hussey, or any other of these officers, that you had gotten Mrs. Koebbe by the throat, or threatened to kill her? Did you tell them anything like that? A. No, sir. Q. Did anything like that happen, as near as you can remember? A. No, sir. \* \* \* Mr. Shaner: You say then, if I understand you correctly, that you know everything that you did on the inside of that saloon, but you are not sure of everything you did on the outside; is that correct? Answer that yes or no. Judge Zachritz: I object to that. He hasn't stated that. A. I know I didn't do much on the inside, just took that money and walked out; that is all I done. \* \* \* Q. If you were drunk and don't know what you did, you don't know but what you put your hands on this woman there, as she says you did, do you? A. I know I didn't do that. Q. You didn't touch that old woman in there? A. No, sir. Q. That is correct? A. Yes, sir."

Zachritz & Zachritz, of St. Louis, for appellant. John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for the State.

BROWN, J. I. When this case was heard in division 2 of this court, the writer was of the opinion that defendant's own evidence amounted to an admission that at the time he took the money from the cash register he placed Mrs. Koebbe in fear of immediate injury to her person, and therefore I favored the affirmance of the judgment appealed from. But upon a reargument of the case in banc, and a re-examination of the evidence, I am convinced that the testimony of defendant did warrant an instruction on the crime of petit larceny.

[1] The crime of robbery in the first degree includes all the elements of larceny, with the added acts of violence or putting in fear, etc., so that, under section 4904, R. S. 1909, if there was substantial evidence that in taking the money from Koebbe's cash register the defendant did not assault Mrs. Koebbe nor place her in fear of immediate injury to her person, then it became the duty of the trial court to instruct the jury that it might find defendant guilty of petit larceny, provided it believed that he took,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

stole, and carried away the money from Koebbe's cash register, and that he was not guilty of robbery as that crime was defined in the instructions. Though Mrs. Koebbe may have been scared, that fact alone does not convert defendant's acts in taking the money into the crime of robbery, unless he intentionally did or said something which placed her in fear of immediate injury to her person.

[2] However improbable the testimony of defendant may have been, the court could not refuse to submit it to the jury. By refusing and failing to give any instruction on the crime of petit larceny the court arbitrarily refused to allow the jury to consider defendant's evidence, and thereby committed reversible error. *State v. Richardson*, 194 Mo. 326, 92 S. W. 649; *State v. McBroom*, 238 Mo. 495, 141 S. W. 1120; *State v. Hoag*, 232 Mo. 308, loc. cit. 316, 134 S. W. 509; and *State v. Bidstrup*, 237 Mo. 273, loc. cit. 286, 140 S. W. 904.

Other alleged errors are assigned by defendant, but, if errors at all, they are not likely to re-occur upon another trial of this cause; therefore we have not considered them.

For the error of the circuit court in failing to submit to the jury the issue of petit larceny as presented by defendant's evidence, its judgment must be reversed, and the cause remanded for a new trial. It is so ordered. All concur, except WALKER, J., who dissents in separate opinion filed.

WALKER, J. I. I do not concur in the majority opinion in its holding that an instruction for petit larceny was authorized upon the testimony of appellant; upon this testimony he was, if not guilty of robbery, entitled to an acquittal. He denies the assault, and as confirmatory of his testimony that he did not put the woman, who was in possession of the money, in fear of immediate injury, he says, "I told her I wouldn't hurt her," to which she replied: "Don't hurt me; take all you want." In the absence of an assault or putting in fear, one or the other necessarily essential to the crime, there can be no robbery, and, if the owner of the property under these circumstances consented to the taking of the same, there is absent an equally vital essential to the existence of the lesser offense, and there can be no larceny. It is elementary that the crime of larceny always includes the taking and conversion of property without the consent of the owner. Hence there can be no larceny if, as the appellant contends, the owner voluntarily parted with the possession of the property. *State v. Court*, 225 Mo. 609, 614, 125 S. W. 451; *State v. Anderson*, 186 Mo. 25, 35, 84 S. W. 946; *State v. Waller*, 174 Mo. 518, 523, 74 S. W. 842; *State v. Storts*, 138 Mo. 127, 137, 39 S. W. 483. This rule is so universal that the employment of further space in the cita-

tion of authorities in its support is not necessary, except to say that it has been held in Colorado that, when property is taken with the consent of the owner, no matter how guilty may have been the purpose and intent of the taker, there is no larceny. *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295. Measuring the grade of the offense by appellant's testimony alone, he was therefore not entitled to an instruction for petit larceny, and the trial court ruled correctly in refusing same.

II. However, there is another equally cogent reason why the instruction should not have been given. While it is true that a defendant, when charged with an offense consisting of different grades, or where one offense includes another, may be entitled, under proper testimony, to an instruction for a lesser grade of offense than the one with which he is charged, although his testimony alone may afford the basis for such an instruction, there is a well-established exception to this rule, viz., that the testimony, on which the instruction for a lesser grade of offense is based, must not be inconsistent and unreasonable when compared with all the other testimony in the case, and, if so, it should not be given.

In view of a different announcement of the rule in *State v. Richardson*, 194 Mo. 326, 344, 92 S. W. 649, which is not and does not assume to be supported by any authority, to the effect that a defendant is entitled to such an instruction as we have referred to, no matter how inconsistent and unreasonable may have been his statements, we deem it not improper to summon at least a few of the well-reasoned authorities in this jurisdiction to bear witness in opposition to the rule as thus announced.

In *State v. Nelson*, 118 Mo. 124, 23 S. W. 1088, the accused was convicted of an assault with intent to kill, in having shot at an officer with a pistol. The court held that, while a defendant in a criminal case has a right (which we do not question here) to testify as to the intent with which he did the act, he is not entitled to an instruction upon his oral testimony where it is contradicted by the physical facts.

In *Payne v. Railroad*, 136 Mo. 562, 583, 38 S. W. 308, 314, the court holds in passing upon certain testimony not deemed in accord with the physical facts that: "Even in criminal cases, cases involving liberty or life, we have repeatedly ruled that, if a party testifies directly in the face of, and in opposition to, obvious physical facts, neither courts nor juries are bound to stultify themselves by giving credence to such testimony"—citing in support thereof a number of Missouri cases.

In *State v. Pollard*, 139 Mo. 220, 228, 40 S. W. 949, 952, this court says: "Heretofore we have said, and we have frequently repeated the observation, that neither courts nor juries are required to yield credence to the

statements of a witness who, to save himself from justly merited punishment, challenges the array of all the physical facts in the case, and then boldly invokes instructions based upon such simulated evidence"—citing in support thereof some six earlier cases decided by this court.

In *State v. Hamilton*, 170 Mo. 377, 70 S. W. 876, an assault with intent to kill, it was held that an instruction will not be authorized where the defendant testifies that he shot simply to scare parties and not to do them any harm; that his intention will be measured and estimated by his acts, and not by his subsequent explanatory words.

In *State v. Fraga*, 199 Mo. 127, 136, 97 S. W. 898, it is held in a murder case that, where the facts are clearly inconsistent with the defendant's account of the homicide, he is not entitled to an instruction on the ground of self-defense, citing in support thereof a number of cases.

In *State v. Vaughan*, 200 Mo. 1, 22, 98 S. W. 2, it is held that where the defendant testified to a pretended agreement and distinct understanding with others that no one should be hurt or killed in the perpetration of a felony agreed upon, which testimony was inconsistent with the physical facts, the court should for that reason alone refuse such an instruction. Courts are not required to yield credence to the statement of a defendant absolutely inconsistent with the physical facts and base an instruction on such simulated evidence.

In *State v. King*, 203 Mo. 560, 571, 102 S. W. 515, a murder case, the defendant sought to have the court give an instruction for a lower degree of homicide based on his own testimony, which was refused on the ground that it was in contradiction of all the other testimony in the case, and that "neither courts nor juries are required to stultify themselves by rejecting the immutable facts in the case."

In *State v. Arnold*, 206 Mo. 589, 600, 105 S. W. 641, an assault with intent to kill, the court holds that neither courts nor juries are required to accept, as true, evidence which contradicts the admitted physical facts in a case.

In *State v. Tucker*, 232 Mo. 1, 18, 133 S. W. 27, it is held that where the statements of the defendant so contradict the physical facts, and his conduct was so unreasonable and inconsistent with the experience of mankind, that the court was not bound to believe him and instruct the jury on his testimony for a less grade of the offense than murder in the first degree.

A brief review of the facts in the case at bar, under the rule announced in the authorities cited, will enable it to be determined whether an instruction for petit larceny should have been given.

Appellant and his cousin, both under the influence of liquor—a fact repeatedly sought

to be emphasized by the counsel for the defense during the trial—went to Koebbe's saloon, at the time in charge of his wife, and, finding her alone, the cousin remained outside, evidently on the lookout, while appellant caught Mrs. Koebbe by the throat and told her to shut up; that, if she did not, he would kill her. He then dragged her about half the length of the counter or bar, to where the cash register was located, and, while holding her with one hand, he opened the register with the other and took out the money. During this time she was not able to speak, but, recovering her voice, she said: "You can have that money, but leave me alone; don't kill me." He then dragged her back to the end of the counter or bar, and ran out; this in brief is the testimony for the state, except that the police officers, who arrested appellant and his cousin, testified that both made statements admitting the offense as charged.

The probative force of evidence must, under all circumstances, be measured by the standards of average human intelligence and the ordinary experience of men. Taking into consideration the fact that the appellant was bent on taking the money, which is not disputed, the testimony for the state is not a strained or distorted account of what probably happened. A woman of Mrs. Koebbe's station and environment, especially when employed as a barkeeper in her husband's absence, was little likely to be alarmed, much less intimidated, by any words, although framed as threats, of a man under the influence of liquor. As the appellant was of the same nationality as Mrs. Koebbe, and had lived from boyhood in the neighborhood, he doubtless knew her personally and realized full well that nothing short of an assault, coupled with threats, would enable him to accomplish his purpose. He employed both, and forcibly held her while he robbed the register.

Defendants in criminal cases should, under all circumstances, be accorded fair and impartial trials; but where, as in this case, the proof of guilt is convincing, and the statements of the defendant are so contradictory to and inconsistent with all the other testimony, we cannot, without subscribing to the violation of a rule in the administration of the criminal law, which we regard as established beyond cavil, agree with the majority that the instruction in question should have been given.

A most earnest and vigorous defense was made by counsel for the appellant, and he was allowed such latitude that the transcript is replete with testimony in his client's behalf, which, under a proper regard for the rules of evidence, should have been excluded; notwithstanding this, the jurors under their oaths found beyond a reasonable doubt that appellant was guilty as charged, and this

finding was approved by the trial court in its overruling of the motion for a new trial.

We are therefore of the opinion that the judgment of the trial court should be affirmed.

# BOARD OF COM'RS OF TUBERCULOSIS HOSPITAL DIST. OF BUCHANAN COUNTY v. PETER.

(Supreme Court of Missouri. Dec. 24, 1913.)

## 1. CONSTITUTIONAL LAW (§ 48\*)—STATUTES—VALIDITY.

A statute will not be held unconstitutional by the courts unless, after viewing it with every presumption in its favor, there is no reasonable doubt that it is violative of the organic law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

## 2. TAXATION (§ 38\*)—TAXING POWER—TUBERCULOSIS—"PUBLIC PURPOSE."

Laws 1911, p. 130, § 8, as amended by Laws 1913, pp. 143 et seq., establishing a tuberculosis district in B. county, and providing for the levy of a tax to support the same within such district, provided for the levy of a tax "for a public purpose," within Const. art. 10, § 3, providing that taxes may be levied and collected for public purposes only, etc.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 67; Dec. Dig. § 38.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5815-5817; vol. 8, p. 7773.]

## 3. TAXATION (§ 29\*)—CONSTITUTIONAL PROVISIONS—TAXING POWER—LIMITATION—HOSPITAL DISTRICT—"MUNICIPAL CORPORATION."

Const. art. 10, § 1, providing that the taxing power may be exercised by the General Assembly for state purposes only, and by counties and other municipal corporations under authority granted to them by the General Assembly for county and other corporate purposes, is a limitation on the sources of the taxing power, and hence did not authorize the Legislature to confer such power on a hospital district which could not be regarded as a "municipal corporation."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 60; Dec. Dig. § 29.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4620-4627; vol. 8, p. 7726.]

## 4. COUNTIES (§ 190\*)—COUNTY LEVY—LIMITATION—STATUTES—INVALIDITY.

Const. art. 10, § 11, provides that taxes for county purposes may be levied at a rate not exceeding 35 cents on the \$100 valuation, and authorizes an increase of the rate for the erection of public buildings, etc., on authority granted by two-thirds of the qualified voters, etc. Held, that Laws 1911, p. 130, § 8, as amended by Laws 1913, pp. 143 et seq., creating the board of commissioners of the tuberculosis hospital district of B. county, and authorizing an additional levy for hospital purposes equal to 25 cents on the \$100 taxable valuation, was violative of the Constitution and unsustainable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.\*]

En Banc. Appeal from Circuit Court, Buchanan County; Wm. D. Rusk, Judge.

Petition by the Board of Commissioners of the Tuberculosis Hospital District of Buchanan County, for the levy of a tax for the support of the district, under Laws 1911,

p. 130, § 8, as amended by Laws 1913, p. 143 et seq., in which James J. Peter intervened and filed objections. From a decree denying such relief, petitioner appeals. Affirmed.

Corry C. Ferrell, C. F. Strop, and Culver & Phillip, all of St. Joseph, for appellant. Spencer & Landis, of St. Joseph, for respondent.

LAMM, C. J. Plaintiff appeals from the judgment of the Buchanan circuit court in a proceeding to obtain an order from that court directed to the county court of Buchanan county requiring the latter to levy certain taxes theretofore "levied" by the Board of Commissioners of the Tuberculosis Hospital District of Buchanan County; the order being denied.

In 1911 the General Assembly enacted a statute prescribing a method for the creation of public tuberculosis hospital districts, the appointment of boards of commissioners for such districts when organized, and prescribing the duties and powers of such boards, among them the power to levy taxes, to establish and maintain public tuberculosis hospitals and dispensaries. Laws of 1911, § 8, p. 130. In conformity with that act an election was held in Buchanan county in November, 1912, resulting in a favorable vote, the organization of a district, and the appointment by the Governor of a board of commissioners (hereinafter called the board). Such board organized in conformity with the act and the district became "a body corporate and politic" by the name and style of the Tuberculosis Hospital District of Buchanan County. Section 2. In 1913 (Laws of 1913, p. 143 et seq.) the General Assembly repealed section 8 of the act of 1911, and in lieu thereof enacted four new ones, viz., 8, 8a, 8b, and 8c. There was also an emergency clause putting the amendatory act into immediate effect on its approval, which happened March 20, 1913.

A summary of sections 8, 8a, and 8b may not be amiss. (Section 8c pertains to bond issues to acquire lands and erect hospitals and improvements thereon, etc., but, as that power is not in question in this cause, we shall say nothing about it.)

Section 8 gives the board power by resolution to levy annually a tax of not exceeding one-fourth of 1 per cent. on each dollar of the aggregate of the assessed valuation of all property of every kind within said district, subject to taxation for state and county purposes, and shown by the last preceding assessment, to be used by the board for the support, maintenance, and operation, additions and improvements, or all other necessary and proper expenses of carrying out the purposes for which the district was created. Such resolution is to be certified to the proper prosecuting attorney or city counselor, as the case may be.

Section 8a provides that the prosecuting

attorney or city counsellor, as the case may be, on receipt of such resolution certifying that a levy had been directed, shall immediately present a petition to the circuit court of his county setting forth the facts and specifying the reasons why such tax should be assessed, levied, and collected; whereupon such court, on being satisfied that such levy is authorized by law, and that the assessment, levy, and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court, commanding it to have assessed, levied, and collected said tax, and shall enforce such order by mandamus or otherwise. This circuit court order is to be certified to the county court, and thereat it becomes the duty of such county court "to include the tax levy so ordered in the annual levy to be made for the current year for state and county \* \* \* purposes." Thereat such levy shall be carried out on all the assessment books of property within the district and such taxes shall be collected by the collector at the same time and in the same manner that state and county taxes are collected. When collected, such tax is to be turned over to the treasurer of the board, and provision is made for suits to enforce payment or to collect the same without suit precisely as provided by the laws relating to collection of taxes, and such taxes are made a lien upon the property situate in the district the same as other taxes.

Section 8b prescribes that the board shall have power to make one tax levy of one-fourth of 1 per cent. of each dollar of the assessed value of taxable property in the district (to be ascertained as in section 8a) for the purpose of paying for lands condemned or purchased for tuberculosis hospitals, and for erecting improvements, reconstructing hospital buildings, etc., such levy to be subject to the same provisions enumerated in section 8a, and to be collected in the same way.

Following the passage of that amendatory act, to wit, on the 31st day of March, 1913, the board passed a resolution levying a tax of one-fourth of 1 per cent. of the assessed value, on all taxable property situate in said district, having regard to the assessment for state and county purposes for the preceding year, and such steps were taken thereafter that the prosecuting attorney of Buchanan county became charged with the duty of presenting a petition to and obtaining an order from the circuit court directing the county court to levy such tax. Such petition in the name of the board he presently presented, showing, *inter alia*, that the district had no lands, buildings, or other equipment to carry out the purposes for which it was created, and that the levy was necessary for the acquisition of lands, the erection of buildings, and the maintenance of hospitals for the treatment of persons suffering from tuberculosis, no levy having been theretofore made for such purpose. He further informed the

court that the levy and collection of the tax were not in conflict with the Constitution or laws of this state. Presently a hearing was had on issues made by the pleading of one Peter, who intervened as a householder and resident taxpayer of the county, on leave granted. Intervener alleged that the valuation of the property situate in Buchanan county is in excess of \$30,000,000 for taxation purposes; that under the Constitution (section 11, art. 10) there could not be levied for county purposes in said county a tax in excess of 35 cents on the \$100 valuation; that a levy at that rate was the usual one in that county, and was necessary for county purposes, and that the levy of the proposed tax of one-fourth of 1 per cent. of each dollar, i. e., 25 cents on each \$100 of valuation) would be in contravention of that constitutional provision; and, further, that not only is the amendatory act of 1913 unconstitutional in the particular mentioned, but that it was violative of sections 1 and 3 of article 10 of the Constitution, for that the purpose for which the levy is made is prohibited thereby. The court found the averments of the petition true except that one averring the constitutionality of the amended act. It held *contra* on that point, and refused to make the order on the ground that the act of the Legislature purporting to authorize such order violates the Constitution, and hence confers no jurisdiction to make such order. Accordingly it dismissed the petition and adjudged costs against plaintiff. As said, an appeal was prosecuted from the judgment of the court denying the order and dismissing the petition. The cause, advanced on motion, was submitted on briefs on both sides and oral argument by appellant.

There are propositions, some of law, others of fact, which it cannot be amiss to lay down as a foreword, to wit:

[1] (a) Courts, out of solemn respect to the lawmaker, never impute to him an intention to circumvent, abrogate or impair a constitutional provision; hence they approach the question of the constitutionality of a law with great caution, view it from all angles and in all its aspects, giving free play to a strong (even violent) presumption in favor of its validity; hence, too, they never declare a law void unless its nullity and invalidity are placed, in their judgment, beyond a reasonable doubt; hence (and most of all) every allowable art, part, and act of judicial power, every wise and benign rule of construction and interpretation, should be astutely levied upon and exercised in so interpreting the law, if possible in reason, that none of its parts perish. *Ex parte Loving*, 178 Mo. loc. cit. 203 et seq., 77 S. W. 508; *State ex rel. v. Warner*, 197 Mo. loc. cit. 656, 94 S. W. 962; *In re Wellington et al.*, *Petitioners*, 16 Pick. (Mass.) loc. cit. 95, 26 Am. Dec. 631; *State ex rel. v. McIntosh*, 205 Mo. loc. cit. 602, 103 S. W. 1078; *State ex rel. v. St. Louis*, 241 Mo. loc. cit. 247, 145 S. W. 801.



But if, when all is done for it that can be done in reason, it appears that there can be no two ways about it, but that the law violates the Constitution, then the paramount authority of that instrument breaks the law. It becomes a mere empty noise, and is as if it never had been at all. To declare a statute unconstitutional is the exercise of a high and delicate, but necessary, judicial power, to be fearlessly used if need calls and there is no way out of it. In no other way known to intelligent men can a government by written constitution exist except there be power somewhere to make statutes square with that instrument, and to say whether or no they do. That high power is now lodged with the courts, there it has been for generations, and there it must remain until the people by the exercise of their sovereign will, expressed in a constitutional way, take it away and lodge it elsewhere.

(b) So vast and imminent is the peril struck at by the statute, so surely has science shown us in these latter times that mankind is not (as once was thought) helplessly bound, as by a decree of fate (to wit, by some dreadful and immutable law of heredity), to be the pathetic victim of an incurable and inherited disease, tuberculosis, so surely is the benign object of the law directed to the welfare of the people in protecting them from a scourge bred by infection, a scourge that is "communicable, preventable and curable," that kills one-tenth to one-seventh of all our people and one-third of all who die between the ages of 18 and 45—I say, in view of such premises, my personal feelings in deciding this cause are expressed in the first part of the judgment of Crewe, C. J., in the matter of the petitions of Lord Willoughby and the Earls of Oxford and Derby anent the noble house of De Vere and the earldom of Oxford, pending and adjudged in the high court of Parliament, in the first year of Charles I (Sir William Jones' Rep., vol. 1, p. 26) viz.: "I have labored to make a covenant with myself that affection may not press upon my judgment; for I suppose there is no man, that hath any apprehension of gentry and nobleness, but his affection stands for the continuance of so noble a name and house, and would take hold of a twig or twine thread to uphold it." For "gentry and nobleness," read "public weal," and for "name and house," read "statute," and the excerpt justifies itself to me as apposite.

(It may not be getting too far afield for correct judicial discourse to observe that the discriminating scholar who has not access to the old report may thank me for citing him to 252 Mo. p. —, where the remainder of Chief Justice Crewe's observations, one of the most notable and rugged examples of unalloyed eloquence that ever fell from judicial lips, may be found quoted in the funeral oration of Judge Phillips in the memorial services at our bar for our late Brother GANTT.)

Despite our respect for the motive of the

statute and our labor to sustain it, we are constrained to follow the cold reason of the thing in the beaten path of interpretation and sustain the judgment instead, as will now appear.

(c) It is argued for respondent that the statute is void because violative of section 1, art. 10, of the Constitution, reading: "The taxing power may be exercised by the General Assembly for state purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes."

It is further argued that it violates section 3 of article 10, reading: "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

[2] (1) It is not apparent why the purpose to be subserved by the tax in question is not a *public purpose* within the intendment of section 3, supra. The evil in the mind of the Constitution maker, and blazoned forth in his instrument, was the danger of a misuse of the taxing power for *private purposes*, and we are not willing to hold that the statute comes within the mischief interdicted thereby. The argument of respondent in that behalf is faintly developed, and if there were no other constitutional obstacles in the way of the statute, we would be inclined, at first blush and without at this time pursuing the matter in all its ramifications and bearings, to hold that statute well enough from that angle.

[3] (2) Coming to section 1 of article 10, supra, it is an unquestionable limitation on the sources of the taxing power. It is a plain provision made by plain men for plain men, locating that power in only two places, namely, in the General Assembly for state purposes, and in counties and "other municipal corporations" for "corporate purposes." It can be looked for at no other places than those two. If, now, the act of 1911 had not been amended by the act of 1913, it would have stood as a palpable violation of the Constitution in that regard; for the act of 1911 granted the taxing power to the board of commissioners of the tuberculosis hospital district—a source of taxing power strange to the Constitution, and a statutory invention so clearly outside of the provisions of that instrument as to be a daring and dangerous innovation. It cannot be held that the hospital district is a municipal corporation within the purview of section 1, supra. Black's L. Dict. (2d Ed.) tit. "Municipal Corporations." Where would the end be on that road? What other new source of taxing power would come in if the constitutional barrier is to be thus overleaped or broken down? The maxim "withstand beginnings" could nowhere be better applied than by stamping out such heresy when it first rears its head. The act of

1913 obviously was intended to bring the law within constitutional sanctions in that particular. True, it directs that the board by resolution may *levy* a tax rate in a given amount. The use of the word "levy" was unfortunate; for by common usage that word expresses a concept inseparably and intrinsically connected with the taxing power. But the act of 1913 requires the avouchment of the county court and a levy by that body as a condition precedent to the consummation of a legal tax levy, so that the act of 1913 may be interpreted to mean that the county court must make the levy, but may not do so unless the board has theretofore by resolution required it to be done. The word "levy" in the grant of power to the board might be construed, in a pinch, to be a mere preliminary order or requisition evidencing the official action of the board upon the amount necessary for the purposes in hand.

Section 1 of article 10, under review, uses the phrase "corporate purposes." That is a broad term, intentionally left broad and general, and to be broadly construed or interpreted. We are not prepared to say it does not mean county purposes or city purposes, as the case may be; and what, in turn, is a city or county purpose must be determined by a reference to the whole body of the learning on that score. We will not go into that field because roads, bridges, the care of paupers, of the insane, of prisoners, official salaries, the care of public buildings, etc., have usually been considered county purposes within the purview of revenue laws and the administrative details of county business, and, having in mind the settled breadth and scope of county purposes as evidenced by a group of statutes, we are not prepared to say that a statutory scheme, involving the prevention and cure of infectious diseases imperiously menacing the public health, and the care of those who are afflicted therewith, who are indigent, at public expense in the same public hospital with those who can pay and are required to pay, as here, would not be such essential part of the public welfare as would become a corporate purpose—i. e., a county purpose—within the fair intentment of the broad constitutional term.

The provision of the act of 1913 requiring the resolution of the board to be lodged with the prosecuting attorney, and requiring that officer to present a petition to the circuit court in order that the legality of the tax levy be predetermined by that tribunal, and that the county court should only move under the direction and order of the circuit court, has two aspects, viz.: In one it would appear at first blush that the lawmaker entertained such serious doubts of the validity of his enactment that he interdicted its enforcement except on the *visé* and avouchment of the circuit court. But looked into, that is not so; for the other is that the lawmaker, out of abundant caution, was but squaring his enactment with those provi-

sions of the General Statutes, commonly known as the "Cotter Act" (Laws 1879, p. 185) carried forward as live law in some of the sections of article 5, c. 117, R. S. 1909, entitled "Taxation and Revenue." The Cotter act provides for the same kind of an application to the circuit court and puts the same limitation on the exercise of the taxing power in some of its features; hence all sinister significance, in the way of a supposed doubt in the lawmaker's mind, must be put to one side. As at present advised, we see no insuperable obstacles to the law in section 1, art. 10, of the Constitution, standing alone; but that section, as well as section 3, supra, must be read in connection with section 11 of article 10 of the Constitution, for they pertain to the same subject-matter, and are strictly in *pari materia*. *Brooks v. Schultz*, 178 Mo. 228, 77 S. W. 861.

[4] (d) It is argued for respondent that section 11, art. 10, of the Constitution is violated by the amendatory act of 1913, and this contention presents the decisive question and discloses the fatal blemish in the act. That section is long and we reproduce only those parts material here, viz.: "Taxes for county, \* \* \* purposes may be levied on all subjects and objects of taxation. \* \* \* For county purposes the annual rate on property; \* \* \* in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred-dollar valuation. \* \* \* For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, \* \* \* voting at such election, shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for state and county purposes; \* \* \* said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness. \* \* \* " That part of section 11, above, referring to the erection of public buildings and the increase of taxation therefor upon the vote of two-thirds of the qualified voters of the county, may be laid out of view for the purposes of the instant case, because the facts do not bring the case within that provision, and no contention is made by appellant that the tax levy in judgment stands on that foot, or is validated thereby. Neither is it contended by appellant that the proposed tax enters into and becomes an integral part of the 35 cents on the \$100 authorized to be levied for county purposes.

The case, then, must stand or fall on the proposition that the proposed levy is in addition to the 35 cents allowed by the Constitution for "county purposes." Evidently that was the theory of the lawmaker. Otherwise, if the constitutional levy of 35 cents for roads, bridges, the care of the insane, paupers, criminals, and the current expenses of the county for salaries, jury service, care of public buildings, and what not, is to be depleted by a deduction of a 25-cent levy on the \$100 for the tuberculosis hospital district, then all the usual and needful activities of the county would be crippled by starvation into a state of suspended animation akin to death. Self-evidently so benevolent an act as the one under review could not have contemplated so unbenevolent and injurious a result. The itching idea in the lawmaker's mind was to progress—i. e., to keep what we have and get more—not to go backward in governmental purpose and action. The lawmaker, then, must be held to have intended his act to permit a levy in addition to the 35 cents permitted by the Constitution, and appellant so argues in a brief most commendable in tone and uncommonly ingenious in reasoning. But we shall not follow the lead of learned counsel. That provision of the Constitution may neither be struck down by the General Assembly nor ignored, nor evaded by deft indirection. It stands there as an insurmountable barrier to an increase in taxation for county purposes beyond the maximum rate of 35 cents on the \$100. It goes further. It interprets itself. It declares that the restriction shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness. Looked at from every standpoint, we have come to rate it as our bounden duty to so write the law. The student in Missouri history need not be told that the constitutional convention of 1875 met at a time when there was a deep-going and widespread popular revulsion from high taxes incident to a prior expansion of county and city expenditures and indebtedness and a present contraction of debt-paying ability. That convention provided remedies therefor with unsparing and unmistakable words. It left no loopholes for evasion or bars down in that behalf. It encompassed public frugality by setting impassable metes and bounds to taxation, public expenditure, and the creation of public indebtedness. Its instrument must be construed by courts so as to preserve its spirit and further its purpose. "Ita lex scripta est."

If, peradventure, the state has outgrown prescribed taxation limits, or new discoveries have been made, or a new public sentiment has sprung, demanding as a matter of

social justice and public welfare that the hard and fast limits of the present Constitution no longer are adequately responsive to the people's needs, then the remedy is not for this court to emasculate or whittle away the permanent law by refinements, but it is for the people to at all times cry aloud (vide Cato's iteration and reiteration anent the destruction of Carthage) for an amendment to the Constitution in a straightforward constitutional way, or to frame and adopt a new one.

Unless the proposed tax be construed to be for corporate purposes, which we think (and have ruled) are equivalent to county purposes, it has no constitutional warrant at all.

We are referred to principles of law permitting the levy of special assessments for local improvements, as for example, for park, street, levee, and drainage purposes. But those benefit assessments have been validated because, in their essence, while referable to the taxing power in a sense, they are not taxes in a constitutional sense, but stand on a distinct principle not at all applicable here. They are taxes only in a loose and colloquial sense, and not in a constitutional or legal sense. We cite a case or so to the point (from one discern all): *Farrar v. St. Louis*, 80 Mo. loc. cit. 387 et seq., and cases cited and reviewed; *Kansas City v. Bacon*, 147 Mo. loc. cit. 282, 48 S. W. 860. Appellant's case cannot prosper on the theory validating special assessments for local improvements. The tax levy here sought is of a tax strictly so by name and by inherent quality. We have no doubt the act, in the particulars in judgment, is unconstitutional. It follows that the circuit court did right in refusing to order a tax levy.

Let the judgment be affirmed.

WOODSON, GRAVES, WALKER, and FARIS, JJ., concur. BROWN, J., dubitante. BOND, J., concurs in result.

LUEDEBS v. ST. LOUIS & S. F. R. CO.  
(Supreme Court of Missouri, Division No. 1.  
Dec. 6, 1913.)

1. CONSTITUTIONAL LAW (§ 301\*)—DEATH (§ 9\*)—DUE PROCESS OF LAW—LIABILITY FOR PERSONAL INJURIES.

Rev. St. 1909, § 5425, providing that when a person shall die from an injury received through the negligence of any person engaged in running a locomotive, car, etc., the owner of the vehicle shall forfeit and pay as a penalty, etc., the sum of not less than \$2,000 and not exceeding \$10,000, in the discretion of the jury, is not a delegation to the jury of the legislative power of fixing penalties so as to deprive one of his property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 848-850, 857; Dec. Dig. § 301;\* Death, Cent. Dig. § 11; Dec. Dig. § 9.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. RAILROADS (§ 76\*)—USE OF STREETS—EXTENT OF RIGHT.

Where a railroad company is permitted by a municipality to lay its tracks in a street, the extent of its rights in the street is measured by the permission given, together with such lawful ordinances as define and regulate its use, and, within such limits, its rights in the street are upon an equality with the rights of the public; each must respect the rights of the other, having due regard to the nature of the use by each.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 195, 196, 199-201; Dec. Dig. § 76.\*]

## 3. RAILROADS (§ 236\*)—USE OF STREETS—POWER TO CONTROL AND REGULATE.

As a municipality may impose, as a condition to its grant to a railroad company of the right to lay its tracks in a public street any reasonable regulation, it could afterwards pass a speed ordinance and make other regulations as to the use.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 749; Dec. Dig. § 236.\*]

## 4. RAILROADS (§ 385\*)—INJURIES TO TRAVELER—USE OF STREETS—LIABILITY.

A railroad company, in the use of a public street, had a right to assume that its signals would be heard and obeyed by travelers in the street, and a traveler in the street had the right to presume that the railroad would observe all regulations prescribed by law for his protection; hence, in the use of a street along which a railroad track extended, a traveler had the right to presume that the railroad would observe an ordinance limiting its speed to five miles per hour.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1311-1313; Dec. Dig. § 385.\*]

## 5. RAILROADS (§ 398\*)—INJURIES FROM OPERATION IN STREET—EXCESSIVE SPEED—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for the death of plaintiff's intestate run over by a train in a public street on which tracks extended, held to justify a finding that the speed of the train was excessive in view of an ordinance limiting the speed to five miles per hour.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1358, 1358-1363; Dec. Dig. § 398.\*]

## 6. EVIDENCE (§ 5\*)—JUDICIAL NOTICE—DISTANCE BETWEEN TELEGRAPH POLES.

This court will take judicial notice of the fact that telegraph poles are more than 150 feet apart.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.\*]

## 7. RAILROADS (§ 398\*)—INJURIES FROM OPERATION IN STREET—PROXIMATE CAUSE OF INJURY.

Evidence, in an action for the death of plaintiff's intestate run over by a train in a public street, held to justify a finding that the excessive speed of the train was the proximate cause of the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. § 398.\*]

## 8. RAILROADS (§ 381\*)—CARE REQUIRED OF PERSON ON TRACK.

A person walking along a railroad track in a public street along which the tracks extended was bound, after he saw a train approaching, to use the care that an ordinarily prudent person would have, under the circumstances, used to get off the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1285-1293; Dec. Dig. § 381.\*]

## 9. RAILROADS (§ 400\*)—CROSSING ACCIDENT—ACTION—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff's intestate used such care was properly submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.\*]

Graves and Lamm, JJ., dissenting in part.

Appeal from Cape Girardeau Court of Common Pleas; R. G. Raney, Judge.

Action by Johanna Lueders against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Moses Whybark, of Cape Girardeau, W. F. Evans, of St. Louis, and A. P. Stewart, of Cape Girardeau, for appellant. Orren Wilson, of Cape Girardeau, and Wilson Cramer, of Jackson, for respondent.

BROWN, C. This suit was brought in the Cape Girardeau court of common pleas August 23, 1907. The plaintiff, respondent here, is the widow of Henry Lueders, who was killed by a train of the defendant in the city of Cape Girardeau May 1, 1907. She sues to recover, on account of his death, \$10,000, the maximum penalty prescribed by section 2864 of the Revised Statutes of Missouri, 1899, as amended by the act of April 13, 1905 (page 135), being section 5425 of the Revised Statutes of 1909. The negligence charged is the violation of an ordinance of the city limiting the speed of railway engines, cars, and trains within the city to five miles per hour and prescribing a fine for its violation. Defendant demurred to the petition on the ground that the statute is unconstitutional because it vests in the jury an absolute and arbitrary discretion as to the amount of the recovery, depriving the court of the power to control it, thereby denying to the defendant the right of trial by jury as theretofore enjoyed, and depriving it of property without due process of law; and also that it closes the court against and denies certain remedy to the defendant for injury to his property. The demurrer was overruled, and the point was again made from time to time in the progress of the trial. The question of constitutional construction so presented is the foundation of the jurisdiction of this court. The defendant answered with a general denial and a plea of contributory negligence by going upon defendant's tracks, and by failing to step off the track when he saw the train and was warned of its approach.

The accident occurred on Aquamsi street, a traveled street in the city of Cape Girardeau upon which defendant's track had been laid and operated for many years along the west bank of the Mississippi river. The defendant's shops and roundhouse and the trackage connected therewith were situated on a tract of land adjoining the river in the southern part of the city through which its

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

main track extended, from the southern limits, more than three-quarters of a mile south of William street, reaching the river bank where Morgan Oak street abutted on a levee; thence north to Good Hope street, a distance of one block of about 450 feet; thence across Good Hope street to William street, about 520 feet further; thence north along the levee in Aquamasi street, some 635 feet further; and thence in the same general direction to defendant's passenger station, and through the city. The freight depot was a considerable structure situated on the east side of the track toward the river between Good Hope and William streets, and between the main track and the depot, extending from Morgan Oak street to a point between the south side of William street and the north end of the depot, was a side track used for loading and unloading cars. The grade of the main track from Morgan Oak to Good Hope street was nearly level; and from Good Hope street north to and beyond the place of the accident descended one per cent., or one vertical foot in each 100 horizontal feet. At the time of the accident, a train stood on the side track west of the depot consisting of a couple of freight cars, a caboose, and the engine, which was headed south so that the cars cleared the switch of William street. The foot travel along Aquamasi is indicated to some extent by the testimony of the engineer, who said that at the time he saw Mr. Lueders on the track there were several other people walking along a little beaten path by the west end of the ties. Mr. Carleton, a witness of the accident, said that he would pass up and down the track sometimes a dozen times a day, and Mr. McKee, another witness, said he walked up and down the track every morning.

Mr. Carleton was a transfer man, and testified that he was at the freight depot on business the day of the accident, and first saw Mr. Lueders at a little road that crosses from Aquamasi street into the freight house about two-thirds of the way north from Good Hope street to William street, walking north; that witness came out from the north end of the freight house, and Mr. Lueders was walking on the track north of it, and witness passed him. He seemed to have a cane or fish pole, he could not say which. The witness thought a man as feeble as he looked to be was in danger and had no business there. He was old and feeble and seemed to be nervous, and that is how he came to notice him so much. The witness was on the north side of William street when he first heard the train; it was then south of Good Hope street, and had not yet whistled for the crossing. He walked on something like ten steps and turned around and saw the old man still walking, and about that time the train came around the curve and blew for the crossing—four whistles. The old man was then down almost to William street. He did not look

back when they blew for the crossing, and the witness thought perhaps he might be deaf, and started back and motioned to him. He thinks he saw him and finally looked back—looked directly south toward the train, which was in full view. He then turned around, facing north, and walked diagonally toward the edge, put one foot outside the rail on the tie, and stopped and looked back again over his shoulder in the direction of the train. The train was not very far from him at that time, probably (witness indicating) from here to that door. He made no effort to get any further, and remained standing practically in the same position until they struck him. The train whistled the alarm probably two telegraph poles from him, and continued to whistle short blasts right up to the time they struck him, and applied the air something in the neighborhood of one telegraph pole from him.

Mr. Fish, the engineer, testified that he was running north into Cape Girardeau with an engine and caboose on the schedule and as first section of passenger train, with signals displayed indicating that a second section was following. Eighty rods south of Good Hope he whistled for that crossing, and when he approached it he saw the train standing at the depot and called attention to his own signals with two blasts of his whistle. The engineer of the standing train, the engine of which was heading south, did not respond, and on crossing the street he blew the same signal again, making four blasts all together. The other engineer then appeared from the left side of his engine, came around the pilot, and gave the necessary signal with his hands—two movements as if he were pulling the cord—and Mr. Fish passed on. He had shut off the steam before signaling the standing train, so as to drift down the hill, which gave him better control of his engine in case it should become necessary to make an emergency stop. The top of his grade was at Good Hope street. Before shutting off the steam, he had glanced ahead and seen nobody on the track. After shutting it off, his attention was drawn to the front of the engine to look at the air and water gauges. It was necessary to look at the water gauge because the water sometimes recedes when the engine stops working the steam from the boiler, and he looked at the air gauge to make sure that he would have the necessary pressure in case of emergency. His attention, he said, was properly drawn to the front of the engine for those purposes two or three seconds, during which he would say that his engine had moved a couple of car lengths possibly. The length of the average car is 34 feet inside and about 37 feet outside, which includes the couplings. He then looked up and saw Mr. Lueders walking about two car lengths, somewhere near 70 feet ahead of him. He then applied the air in emergency and grabbed the signal and

whistled the warning. To put his hand on the brake valve and apply the air would probably consume two seconds, and to reach the whistle rope about a second or so. It would consume from about two to four seconds, and the train would move in that time four or five car lengths. He sounded the whistle immediately. Mr. Lueders heard it. It was the first intimation he had, apparently, that the train was there. He hesitated, looked back over his shoulder, and started over the rail on the right-hand side. He got both feet over the rail. He got his feet to the end of the ties, but in a stooped position. His body stuck back, and he was feeling with a cane as though for a place to set a foot, when the bumper beam of the pilot struck him. This is a heavy beam across the front of the engine flush with the outside of the cylinders, or perhaps an inch outside them to protect them. The end of this struck him in the region of the hip. He stood stooped over like this (illustrating), with the cane like this (illustrating). The bumper beam struck him right in here (indicating), and turned him around and knocked him in the direction and he fell into a pile of rocks down on this side of the dump. The engine was drifting under control. Had the man shown up in the middle of the track when he shut off, he could have stopped easy enough, but after he looked at the gauge and looked out and saw him he could not. The engine stopped two or three car lengths, not to exceed three car lengths, after striking the man. The engineer testified that south of Good Hope street he had been running at eight or ten miles an hour, but in coming around the curve it slowed up to some extent when he crossed the street. As to the speed when he struck Mr. Lueders, the following question was asked and answers given: "Q. At what rate of speed were you going when you struck him? A. I stated at one time I was making eight or ten miles, but since I have looked over the ground and seen the distance in which I stopped and seen the gentleman and stopped after I struck him, I don't think I was running that fast, but I did state at the coroner's inquest I was going that fast, because when anything like that happens a man will naturally judge his speed faster than any ordinary time."

Mr. McKee testified that he was living on Aquamsi street and had for six years before the trial, about 80 feet from the street, behind the Catholic Church and pretty near the center of the block between William and Merriwether streets. He was at home the afternoon of the accident and saw them bring Mr. Lueders up the bank and put him in the caboose. The point from which they brought him was across the track and perhaps four feet further north than the north-east corner of the witness' house.

[1] 1. The appellant calls attention to the fact that since acquiring jurisdiction of this

appeal we have upheld the constitutionality of the section of the statute upon which the suit is founded in *Young v. Railroad*, 227 Mo. 807, 127 S. W. 19 (decided March 31, 1910), and *Boyd v. Railroad*, 236 Mo. 54, 139 S. W. 561 (decided July 1, 1913), and reminds us that we have also held that, having obtained jurisdiction upon the constitutional question, we will retain it, citing *Pope v. Railroad*, 242 Mo. 232, 146 S. W. 790, which was decided in April, 1912. It still insists, however, upon the question. We know of no better way to meet this contention than by quoting from the last-named case the following: "Since the trial of this case, the constitutionality of section 5425, Revised Statutes 1909, on which the action was based, has been sustained by this court, and therefore appellant's attack thereon need not be further considered." We are still of the same mind.

2. Did the court err in refusing to direct a verdict for defendant? If there was substantial evidence tending to prove that the plaintiff while in the exercise of that reasonable care which the law requires of persons acting under like circumstances and conditions, was struck by defendant's train because it was being run in Aquamsi street in the city of Cape Girardeau at a speed exceeding five miles per hour, then there was no error in that respect; for the killing and the existence of the ordinance limiting the speed of trains to five miles per hour are admitted for all the purposes of this hearing, and no excuse is offered for the violation of the ordinance, if it were violated, which is denied. It is seldom we have a case more free from difficulty as to the physical facts; for the stories of the three witnesses, each from his own standpoint, of which we have made the foregoing consecutive synopsis, naturally give us a clearer and more vivid impression of the details than we could have gained with our own senses from any single point of view. To qualify ourselves for the proper application of these facts, however, it will be helpful to first consider the legal situation of the parties at the time of their occurrence. Mr. Lueders was not there as a trespasser, nor did he have to depend for his right upon the permission of the defendant. The locality was a public street of the city, dedicated to the purposes of public travel by the public at large, on foot and on horseback as well as by the more complicated and cumbersome means of locomotion. The use by the defendant was an extraordinary one, in that its vehicles were confined to an immovable track, so that they could not turn out to avoid obstacles, and were so heavy that their momentum could not be readily overcome when moving even at normal speed. For these reasons the Legislature very naturally forbade the laying of railroad tracks in the public streets of cities without municipal permission. The easement so granted has been described by this court

as "carved out of the people's common inheritance, to wit, the right to safely come and go on a public thoroughfare." *Riggs v. Railroad*, 216 Mo. 304, 317, 115 S. W. 969, 974. In the same case the court continued: "Showing the pre-existing, dominant idea of public use, it has been held that a city council has no authority to establish a street for the use of a business corporation or an individual, but that the right to establish a street is traced back to the need of the public at large. In re *Twenty-First Street* (*Kansas City v. Hyde*) 196 Mo. 498 [96 S. W. 201]. See, also, *Scullin v. Railroad*, 184 Mo. loc. cit. 704 et seq. [83 S. W. 760], and cases cited."

[2-4] When the city of Cape Girardeau authorized the defendant to lay its track in the city and upon Aquamsl street, it placed it upon an equality with plaintiff so far as the use of the street was concerned. Each had the right to use it, having due regard to the rights of the other and the nature of the use which was to be made of it by each. Public safety and the public interest demanded that the defendant should have due regard to the safety of those who should use it in a more primitive and less deadly way, and demanded of the plaintiff that he should not unnecessarily expose himself to danger from the lawful use of the defendant's engines and cars, nor unnecessarily embarrass the defendant in the performance of the duties to the public on which its right was founded. As the city might have imposed any regulation of this character as a condition of its grant (*Railway v. Kirkwood*, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300) as it might afterwards, and did by the speed ordinance in question, make reasonable regulations for such mutual use. And all such regulations, whether they result from the salutary principles of the common law, which come to the rescue in case of so many deficiencies in human foresight, or from direct legislative, or municipal action as in this case, are mutually binding upon all parties to the transaction. As the defendant had the right, in the lawful use of its franchise to assume, in the absence of any appearance to the contrary, that its signals to insure the safety of the public would be heard and obeyed, so that plaintiff had the right, in the lawful use of the street, to assume that all those things which the law required for his protection would be faithfully observed. It would be a travesty to require that the defendant move its trains at a speed of five miles per hour through the city for the protection of the public using its streets, and refuse the people any advantage from such protection, but compel them to act as if no such protection existed; to be in a constant state of *qui vive* expecting the law to be violated.

[5-7] From this standpoint we have to approach the killing of Lueders. He came on the track at a private way leading across it

into the station one-third of the block, or 150 feet south of the south line of William street and near the rear of the little train that stood there with its rear car clearing the switch. Mr. Carleton, who was in the depot and saw him come on the track, left the building from the north end and got on the track behind him after he had passed the switch on his way north to the place of the accident. Being old and feeble, and very nervous, Mr. Carleton overtook and passed him and went on north of William street, when he heard the train coming up from the south. Feeling anxious for the old man on account of his evident infirmities, he turned round, saw him still coming down the track, and then the train came round the curve and blew for the crossing; four whistles. The old man did not look back; and Mr. Carleton started back, motioning to him. The old man then looked around and started to the east side of the track, where he was hit. The train whistled the alarm about two telegraph poles from Mr. Lueders and put on the air about one telegraph pole away from him. Since railways measure the distance from mile to mile by the number of telegraph poles, directing public attention to the system and its resulting information by painting upon the poles, and a nomenclature has come into general use in which "telegraph poles" and "car lengths" are used as units of distance, the courts may assume, without subjecting themselves to the imputation of arrogance, that a telegraph pole ordinarily represents a distance of as much as 150 feet; so that, interpreting the statement of Mr. Carleton into the latter terms, it is safe to say that it means that the engineer whistled to alarm Mr. Lueders when he was yet 300 feet away, and that he put the air on his brakes in emergency 150 feet away.

Keeping these things in mind, we will look for a moment from the point of view of the engineer on the locomotive. He moved at least a half mile through the town at a speed of from eight to ten miles per hour, whistled four blasts for the crossing at Good Hope street while yet a quarter of a mile away, and as he was approaching it he shut off the steam, and looking ahead saw nobody on the track, but did see a train standing at the freight house in the block north of Good Hope. He whistled twice to call attention to his signals, and after waiting for a response, and not receiving one, he repeated his signal, and it was answered. Up to this time he had not been hurried. If moving only ten miles per hour between Morgan Oak and Good Hope streets, it took him a full half minute to reach the south line of the latter, and from there it would take him still longer, 35 seconds, to reach the south line of William street, although here he was drifting down a stiff grade without steam or brakes and would naturally pick up speed. At a point not more than 150 feet north of Good Hope street the front of the two engines

met. The communication between the two engineers was necessarily finished, and we will leave him there for a few moments, while we locate Mr. Lueders, and then we will go back and pick him up. Mr. McKee's house, so the defendant's map shows us, was in the middle of a 30-foot lot fronting on Aquamsi street immediately north of and adjoining the lot of the St. Vincent Church 165 feet wide on the northwest corner of William and Aquamsi. Mr. McKee saw the injured man brought up the bank and located the point as being a few feet north of the north line of his house. All previous observations described by the witnesses had been taken while conditions were changing with lightning-like rapidity; but here the victim had become still, the place where he fell was marked by a pile of stones described by the engineer, and the defendant has perpetuated it by a mark upon the map in its abstract, so that we are at perfect liberty to take it as a starting point. The old gentleman was struck, then, at least 180-odd feet north of William street, which is 70 feet wide and 150 feet north of the wagonway where he entered upon the track. All these points are easily ascertained and plainly described in the evidence, and show that he had, at the time he was struck, walked along the track in his feeble way about 400 feet. South of where he went onto it, stood the other train consisting of its three cars and engines, which, according to the figures given in the testimony of Mr. Fish, occupied 153 feet more. Here we get back to his own engine running at the rate of 10 miles per hour, or 15 feet per second, with 550 feet to go before overtaking Mr. Lueders. This would take him, at the rate given, nearly 37 seconds, and it is for this time and distance that he tries to account in his testimony. He had a perfectly straight track before him, with the old gentleman in plain view, several hundred feet ahead of him. We will assume that up to that time he had neglected to look at his gauges. His attention, he said, was probably drawn to the front of the engine two or three seconds, during which he would say that it possibly moved a couple of car lengths. Ignoring the fact that this movement would indicate a speed of at least 17 miles per hour, we accept it as it is given us, and find that when his attention was released, and he found himself at perfect liberty to take up his lookout along the track, he still had 475 feet of track between him and the place of the accident. He then looked up and saw Mr. Lueders on the track 70 feet ahead. What had become of the remaining 400 feet of track he does not say, unless there is some hint of it in the statement that when he saw the old gentleman he applied the air in emergency, and grabbed his signal and whistled a warning. That to put his hand on the brake valve and apply the air would probably consume two seconds, and to reach the whistle rope about a sec-

ond or so. It would consume from two to four seconds, he says, and the train would move in that time four or five car lengths. These figures would require a speed, in round numbers, of from 25 to 60 miles per hour. There is no reason why the jury should not, and many reasons why they should, have believed the statement of Mr. Carleton that the engineer of the defendant's train saw the deceased, and whistled the alarm while still 300 feet away from him, and that he failed to apply the air or attempt to get his train under control until too late to save him. The engineer's testimony is a story of reckless disregard of human safety in running upon a public street under the circumstances which he details, without even sufficient outlook to discover a man walking on a straight track ahead until he gets within 70 feet of him, although in plain sight of him for at least a minute and a half. This, however, constitutes no ground for recovery, as the plaintiff, in her petition, has put herself fairly upon the ground that the cause of the death of her husband was the running of the train at a speed in excess of five miles per hour contrary to the provisions of the city ordinance.

3. That the evidence tended to prove that the train was running, at the time it struck Mr. Lueders, more than five miles per hour, is not disputed by the appellant, and, in our opinion, it tends strongly to show that it was running at even greater speed than ten miles per hour, the maximum mentioned by Mr. Fish. It says, however, that "the facts show that the failure to observe the ordinance of five miles per hour was not the proximate cause of the injury." Upon that question there is ample evidence tending to show: (1) That if the train had been running at the rate of five miles per hour Mr. Lueders would have had ample time to and would have saved himself by clearing the train with his body in the effort he actually made to escape. Had the jury believed from the whole evidence, as they might well have believed, that the train was running at the rate of ten miles per hour, the old gentleman would have had as much time in which to take the last step for which he was feeling with his cane, as it had already taken him, after his warning, to escape to that point. Had the warning been received while the engine was only 70 feet away, he would still have had five seconds in which to take this step. The jury had the right to come to the sensible conclusion that he would have taken it, and had time to spare before the engine would pass him. (2) They might have found from the evidence that the engineer saw the old man and recognized his danger while he was still 300 feet (two telegraph poles) away, and that excessive speed was the only thing in the evidence tending to account, on any reasonable hypothesis, for the failure to put the train under complete control, and stop, if necessary, to save him. Or (3) they might



well have adopted the engineer's own theory eloquently expressed from the witness chair, that had it not been necessary to examine the water and air gauges to guard against the explosion of his boiler, and to prepare for just such emergencies as the one he encountered a moment afterward entirely unprepared, he would have had ample time to have looked out for Mr. Lueders and to have saved him. Although this may seem ridiculous as an excuse in its application to the occurrences on Mr. Fish's engine from the time it passed the engine in front of the freighthouse to the place of the accident, yet it contains the pith that gives life to all such regulations, enabling all parties to enjoy their rights without interfering with their opportunity for forming that calm and deliberate judgment indicated by the nature of the situation, and acting accordingly. If the jury should believe every word of his testimony, it would not be difficult for them to find from it that it was the speed of his train which made it impossible to perform the other duties crowded upon him and look out for Mr. Lueders, and that even 10 or 15 seconds added to his time would have enabled him to save him.

We think that from the evidence the jury would have been justified in finding not only that the speed of the train was excessive in view of the ordinance, but that the fact contributed directly to his death in any or all of the three ways we have indicated.

[8] 4. The question whether Mr. Lueders by his own negligence contributed directly to his death is simplified by the fact that it is specially pleaded in the answer as follows: "That if plaintiff's husband was killed as alleged in the petition, the same was the result of his own carelessness and neglect by going upon the railroad track of the defendant and walking thereon, when he knew, or by the exercise of ordinary care might have known, that the trains of the defendant were constantly passing thereon; and that, after the train which it is alleged struck him was in view, he saw the same and could have stepped off of the track and out of its way without injury, but he neglected and failed to do so, although he saw the said train, and in addition thereto, was warned of its approach."

[9] As we have already seen, Mr. Lueders had the right, notwithstanding the municipal permission to the defendant to lay its track upon and move the trains along it, to use the street even where the defendant's track is laid, for purposes of ordinary travel, in a manner consistent with the right of defendant; and the defendant's right is measured by the permission by which it is created, and such lawful ordinances as may have been enacted defining and regulating its use, that the deceased was under no obligation to anticipate that the defendant would use the street with its trains otherwise than to the extent of its said right, and

might therefore presume, upon going upon the track, that it would conform its speed to the requirement of the ordinance. Being so in the use of the track, the presumption would continue until he should become aware or have reason to believe that the defendant was violating or would violate the ordinance. After he saw the train and had been warned of its approach, it was his duty to give it the right of way by making all reasonable efforts to get off the track so that it might pass without striking him. Under this pleading we are not called upon to consider to what extent the duty of watchfulness rested on him, for he actually saw the train, and the question is whether after he saw it he could, by the exercise of reasonable care—that is, by making a reasonable effort—considering all the circumstances, including his own condition and ability, have escaped it. The testimony of the engineer affords interesting and ample material for the enlightenment of the jury on that question. If it found that he could not have escaped by reasonable effort, then it became their duty to inquire whether the train was exceeding the speed limit of five miles per hour. If they found that it was, it remained for them to determine whether, if it had been observing the speed limit from the time he first saw it, he could and would have escaped. These questions were all within the peculiar province of the jury, and there was no error in submitting them.

5. The defendant complains of the refusal of the court to give at its request the following instruction: "6. You are further instructed that, although you may find from the evidence that the train which struck the deceased was running in excess of five miles an hour, yet, if you further find that the deceased was conscious of his danger in time to avoid the same, and he could have done so by stepping over the west rail and off the track, but, instead of taking that course, he walked across the railroad track, to the east, and undertook to leave the track on the east side, and in doing so he did not get off the same in time to avoid the train, then and in that case you will find the issues for the defendant." It is sufficient to say of this instruction that the question is not what the deceased could have done to save himself in the light of all the facts and circumstances developed at the trial, but whether he acted as a reasonably careful man would have done in trying to escape it. The court committed no error in refusing it.

The judgment of the Cape Girardeau court of common pleas is affirmed.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All concur; GRAVES, J., in separate opinion in which LAMM, J., concurs.

GRAVES, J. (concurring). I concur in the result of the opinion by our learned Commissioner, and in the opinion itself, except

the following language: "Since railways measure the distance from mile to mile by the number of telegraph poles, directing public attention to the system and its resulting information by painting upon the poles, and a nomenclature has come into general use in which 'telegraph poles' and 'car lengths' are used as units of distance, the courts may assume, without subjecting themselves to the imputation of arrogance, that a telegraph pole ordinarily represents a distance of as much as 150 feet; so that, interpreting the statement of Mr. Carleton into the latter terms, it is safe to say that it means that the engineer whistled to alarm Mr. Lueders when he was yet 300 feet away, and that he put the air on his brakes in emergency 150 feet away." This language is in effect announcing that we will take judicial notice of the fact that telegraph poles are not set less than 150 feet apart. This is a matter of proof, and there is no proof in the record. We cannot judicially know this fact, and as to the foregoing language I dissent.

LAMM, J., concurs in these views.

#### UNION ELECTRIC LIGHT & POWER CO. v. CITY OF ST. LOUIS.

(Supreme Court of Missouri. Dec. 24, 1913.)

##### 1. ELECTRICITY (§ 1\*)—POWER RATES—ORDINANCE—NULLIFICATION.

Repeal of Rev. St. 1909, §§ 9568, 9569, 9570, conferring on the city of St. Louis authority to fix rates for service of public utilities operating under franchises within the city, by Acts 1913, p. 651, § 139, vesting such power in the public service commission, operated to nullify St. Louis city ordinance No. 24196, approved February 24, 1909, prescribing a maximum electric rate, and regulating the measurement of the service and furnishing of new lamps, etc.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 1.\*]

##### 2. APPEAL AND ERROR (§ 781\*)—SUBJECT-MATTER—TERMINATION PENDING APPEAL—EFFECT.

Where, pending appeal in a suit to enjoin the enforcement of a city ordinance fixing maximum electric rates and regulating the furnishing of electric light and power, the ordinance was nullified by the repeal of the statute under which the city derived power to pass it, the appeal thereafter involved but a mere moot question, and would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.\*]

En Banc. Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Suit by the Union Electric Light & Power Company against the City of St. Louis. Judgment for plaintiff, and defendant appeals. On motion to dismiss. Granted.

The Legislature of this state in 1907 passed an act approved by the Governor May 8, 1907, which required the owners or operators of certain public utilities, under franchises granted by the state of any of its

cities, to conform their charges for service of utilities to the amount "fixed" by the ordinances in the respective cities where they were conducted. The words of the act granting this power to the cities are as follows: "Are hereby granted power or authority to fix, by ordinance, the rates of the charge for the service of such utilities within their corporate limits, and to provide and enforce fines and penalties for the violation thereof, and to change such rates, by ordinance from time to time, as often as may be deemed necessary; provided, however, that such rates must be reasonable, and shall not be changed oftener than once every two years." Session Acts 1907, p. 120, § 1. The act also afforded a right of attack in the circuit court, within 20 days after the passage of such ordinance, to test its validity and the reasonableness of such rates, with a further right of appeal by either party as in other cases. The act further provided that any such city or town might create a commission to investigate all facts and matters touching the establishing of a just and reasonable rate of charge, and report its findings and recommendations to the city council. The provisions of this act were carried into the Revised Statutes of 1909, where they now appear as sections 9568-9570.

In pursuance of the above delegation of authority, the city of St. Louis, by ordinance No. 24196, approved February 24, 1909, created a public service commission and, upon a report from that body bearing on the business and property and rates charged by the Union Electric Light & Power Company, adopted a further ordinance, which is No. 25812, approved April 12, 1911. This ordinance by its terms went into effect six months after its approval. Section 1 of said ordinance prescribed a maximum rate of 9½ cents per kilowatt hour for the services of electric current. Said ordinance by section 3 provided that all owners or proprietors engaged in supplying electric current, "such be subject and bound by the following regulations." It then provided that such persons shall furnish to the consumer of electric current meters free of cost, and under certain circumstances to supply them lamp renewals upon the return of burnt-out lamps, and forbade them to contract with consumers not to use other means than electricity for light or power, or to require any consumer to contract for a longer period of service than one month, and prohibited them from charging any rental for service connection or meters, or to require the customer to agree to use a fixed amount of electric current, or to pay any fixed sum for services rendered him, prohibited them from requiring any customer to make a deposit to secure payment of services in excess of two months' average business, and requiring them to pay interest at 5 per cent. per annum on all deposits, and re-

quiring them to furnish free service connections to the extent of 100 feet from the street to the inside walls of the premises of such consumer. Immediately after the passage of this ordinance, to wit, April 28, 1911, the Union Electric Light & Power Company, a corporation engaged in the city of St. Louis in the business of furnishing and selling electricity for lighting, heating, and power, brought this suit, praying that said ordinance, setting it out in *hæc verba*, be declared unconstitutional and void as to said plaintiff and that its enforcement be perpetually enjoined.

The grounds upon which the ordinance was sought to be annulled were: That its enactment by the city was in *excess* of the power delegated to it by the act of the Legislature of Missouri (R. S. 1909, §§ 9568, 9569, 9570), in that the only power purported to be given to the city by the terms of said act of the Legislature, was the power "to fix, by ordinance, the rates of charge for the services of such utilities within their corporate limits," and that from these words the city could not exercise the broader power of establishing a maximum rate and regulating the business of complainant as it had attempted to do by the ordinance in question; that said ordinance was unreasonable and confiscatory, and attempted to impair the right of contract and the freedom of contract guaranteed to plaintiff by the Constitution of Missouri (section 4, art. 2).

The defendant city filed its amended answer, admitting that plaintiff is engaged in the city of St. Louis in the business stated in its petition, admitting the passage by defendant of the ordinance referred to in the petition, and that it was correctly copied therein, and admitting, further, that "unless restrained by this or other court of competent jurisdiction it will proceed to enforce the ordinance against the plaintiff." Defendant further answered, denying that the maximum rate of charge for electricity established by said ordinance is unreasonable as concerns the business of plaintiff, denying that, if enforced, it would require plaintiff to furnish electric current for a sum which will not yield a fair and reasonable return upon the cost and value of its property, and denying that said ordinance is therefore unreasonable, oppressive, or confiscatory. Upon the filing of said answer plaintiff filed a written motion for judgment upon said answer on the ground of the admission in the answer as to the passage of the ordinance and the purpose of the city to enforce it against the plaintiff. Said motion for judgment concludes to wit: "Whereupon this plaintiff states that defendant by said answer admits that it has passed, and upon the filing of the petition herein threatened, and now still threatens, to enforce said ordinance, under an act of the General Assembly authorizing it merely to fix, but not to reg-

ulate the rates which may be charged by this plaintiff. And plaintiff states that it thus appears by the admissions of defendant that the ordinance aforesaid, the enforcement of which is sought by this plaintiff to be restrained, is null, void, and of no effect, because, among other grounds assigned in its petition it does not come within the exercise of the power conferred upon defendant by said act of the General Assembly. Wherefore plaintiff now moves the court for a judgment and decree upon said answer as is prayed by it in its petition." Upon the consideration of this motion the court on the 12th of February, 1912, entered a decree sustaining the prayer for judgment and perpetually enjoining the enforcement of said ordinance against plaintiff. After the overruling of a motion for new trial defendant appealed to this court.

During the pendency of said appeal the respondent filed in this court a motion to dismiss the appeal for the reason that since it was taken, the General Assembly had passed an act known as the "Public Service Commission Act," creating such a commission and defining its powers and duties, and investing it with full regulation and control of public service corporations like the plaintiff, and expressly repealing, in terms, sections 9568-9570 of the Revised Statutes of 1909 in pursuance of which sections the ordinance sought to be enjoined had been enacted by the city of St. Louis. Said motion concludes to wit: "That by reason of the repeal of the said sections of the Revised Statutes of 1909 aforesaid, all power or right of the city of St. Louis to fix the price of electric current has been repealed, so that said city of St. Louis no longer has such power; and therefore the appeal in this case presents now merely a moot or academic question." In support of this motion and in opposition thereto, the parties have filed printed briefs in addition to those filed theretofore, and have stipulated for the submission of the case on said briefs.

William E. Baird, Truman P. Young, and Lambert Walther, all of St. Louis, for appellant. H. S. Priest, John H. Drabelle, and Schnurmacher & Rassieur, all of St. Louis, for respondent.

BOND, J. (after stating the facts as above). I. On the motion of respondent to dismiss this appeal only one question is presented. Was the ordinance, No. 25812, which purported to establish a maximum rate of charge for electrical service and provide other regulations which should govern the plaintiff in the conduct of its business, repealed when the act of 1907 (R. S. 1909, §§ 9568-9570), was expressly repealed by section 139 of the Public Service Commission Act passed by the Legislature of 1913 (Session Acts, p. 651, § 139)?

This ordinance could only spring from one

or two sources; i. e., the charter of the city, or the provisions of the grant of power to it contained in the act of 1907 (R. S. 1909, §§ 9568-9570). Was it within the power vested in the city by its charter? Appellant pleaded no such authority in its amended answer in this case, but that does not exclude it from review, for the charter of St. Louis is judicially known to all courts. Const. Mo., art. 9, § 21. In the brief for appellant our attention is directed, as authority for the ordinance derivable from the city charter, to the following language: "To license, tax and regulate \* \* \* telegraph companies or corporations \* \* \* and all other business, trades, avocations or professions whatever." Charter of St. Louis, art. 3, § 28, cl. 5. This language of the charter of St. Louis was in judgment in this court where the point under review was the authority of the city of St. Louis, by force of that language, to pass an ordinance prescribing that, "The annual charge for the use of the telephone in the city of St. Louis shall not exceed \$50.00." The telephone company was fined \$300 for violating that ordinance, and appealed to this court. It was contended that the ordinance could be sustained under the language of the charter above quoted. It was ruled that the language in question afforded no warrant for the enactment of the ordinance fixing the rate for telephone service; that such power resided in the state, but had not been delegated to the city of St. Louis under the provisions of its charter, to which the attention of the court was then directed, nor under its power to regulate the streets, nor under that given to it by the "general welfare clause," and since such a power was not necessarily or fairly implied in or incident to any power expressly granted to the city, it was not exercisable by it. *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370. The case cited has been a leading authority in this state since it was ruled, and is conclusive from a charter standpoint, as to the invalidity of the ordinance under review in so far as it attempted to establish a maximum rate of charge for the service of electric current. Indeed that is conceded in the brief of the learned counsel for the city, who insists, however, that the ordinance is sustainable as to those clauses and provisions which are termed "regulatory," since these merely protect the public against any "improper or harmful manner in which the service might have been rendered," and hence are within proper exercise of the police power of the city. We cannot assent to that view. An analysis of the various regulations contained in the ordinance discloses that each and all of them relate to the question of the price at which the plaintiff might sell its electric current, and do not touch even remotely, upon the health, morals, and welfare of the public, or the conservation of its prop-

erty, or upon any subject falling within the just protection of the police power of the city. Take for instance the requirement of free meters; that was evidently designed to bring within the maximum rate all expense attendant upon securing the service of electricity. In other words it was the intention of the framers of the ordinance that all meter cost should be absorbed in the amount prescribed in the maximum rate of charge. That regulation bore no possible relation to any matter lying within the just domain of the police power. The same may be said to the regulation as to lamp renewals without cost to the consumer.

The other regulations related to restrictions upon the power of plaintiff to make contracts with its consumer for the purpose of securing the payments of its charges; such regulations are not only outside of the police power, but they are in contravention of the Constitution, which guarantees to the citizens the right of freedom of contract as to any lawful subject-matter.

Our conclusion is that the regulations inserted in this ordinance were only intended to prevent the avoidance, in any way, of the maximum rate of charge prescribed, and were inserted in the ordinance, not for police purposes, but to insure that none of the appliances for the service of electric current should carry its cost to the users above 9½ cents per kilowatt hour. As the city had no power under its charter to fix any rate of charge for the use of electricity, it necessarily was without charter power to affect the price at which it was sold to the public by regulatory provisions contrived solely to that end, for that would be pro tanto a fixing of the price, and this, as has been seen, it had no charter power to do. The result is that the ordinance under review cannot be sustained as a valid exercise of any powers expressly or incidentally granted in the charter of St. Louis.

II. Was the ordinance in question enacted within the scope of the powers delegated to the city of St. Louis by the act of the Legislature of 1907? R. S. 1909, §§ 9568-9570.

[1] The act of the Legislature approved March 17, 1913, known as the Public Service Commission Act, relieves us from an answer to that inquiry. That act, among other things, in express terms repealed the three sections of the Revision of 1909 in which the original act of 1907 was bodily incorporated. Session Acts of 1913, p. 651, § 139. The effect of this specific repeal of the sections of the Revised Statute necessarily repealed any ordinance which the city of St. Louis might have enacted in pursuance of the power devolved upon it by the repeal sections of the statute. This exact point was before this court in a recent case, where the court held in judgment whether an ordinance of the city of St. Louis was repealed by a repugnant act of the Legislature subsequently enacted.

The defendant in that case was charged with the violation of the ordinance prior to the statute. Despite that fact, this court, speaking through Woodson, J., held that the defendant was properly discharged, adding, "For the reason that the law is well settled in this state that the repeal of an ordinance pending a prosecution under its provisions operates to relieve the defendant unless it is otherwise provided in the act repealing the ordinance." *St. Louis v. Dairy Co.*, 213 Mo. loc. cit. 147, 148, 112 S. W. 525; *City of Kansas v. Clark*, 68 Mo. 588. The present case is stronger, if possible, than the one just cited, for here the section of the statute upon which the ordinances of the city of St. Louis were necessarily founded was expressly and in terms repealed by the later act.

[2] We, therefore, hold that the present appeal, being resolved into an effort to reverse a judgment which enjoined as to this respondent an abrogated ordinance, presents no question for review by us, and the appeal taken herein is accordingly dismissed.

LAMM, C. J., and GRAVES, BROWN, WALKER, and WOODSON, JJ., concur in result and in paragraph 2 in opinion by GRAVES, J. FARIS, J., concurs in result.

GRAVES, J. I concur fully in what is said in paragraph 2 of the opinion of our Brother BOND, and in the result reached in the case. What is said in paragraph 2 of the opinion fully disposes of the case, and renders what is said in paragraph 1 in a sense obiter—not strictly obiter, because it could well be written under the issues involved, but obiter in the sense that after reaching the conclusion reached in paragraph 2, the case was finally disposed of, and there was no necessity for further utterance. The opinion may be right or wrong upon the questions discussed in paragraph 1 (matters upon which we express no opinion at all), but when we touch one question, therein suggested, we are in contact with a very "live wire," and ought to approach it with hesitancy, and then only in a case where the question is *the* question in the case. I refer to restrictions in state laws or ordinances which tend to do away with the terms of existing contracts on the theory that the police power of the state cannot be contracted away. The trend of recent legislation is such that this question is going to become the turning point in some case in the very near future, and for that reason I prefer to express no opinion thereon at this time, but await a time when it can be considered upon full argument in the light of modern statutes and some more recent cases.

For these reasons I concur only in paragraph 2 of the opinion, and in the result.

LAMM, C. J., and WOODSON, BROWN, and WALKER, JJ., concur in these views.

STATE ex rel. SPRIGGS v. ROBINSON et al., State Board of Health.

(Supreme Court of Missouri, Division No. 2. Dec. 6, 1913.)

1. PHYSICIANS AND SURGEONS (§ 11\*)—RIGHT TO PRACTICE—NATURE.

The right of a licensed physician to practice is not a mere shadowy privilege which may be revoked regardless of whether the possessor has violated the laws of the state, but is a valuable privilege and perhaps a property right, which is protected at least by such safeguards as the Legislature has thrown around it.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.\*]

2. PHYSICIANS AND SURGEONS (§ 11\*)—REVOCATION OF AUTHORITY TO PRACTICE—STATUTORY PROVISIONS.

Rev. St. 1909, § 8317, authorizing the State Board of Health to refuse to license to practice medicine and surgery persons guilty of unprofessional or dishonorable conduct and to revoke licenses for like causes, and specifying certain acts which shall be deemed unprofessional and dishonorable conduct, but providing that these specifications are not intended to exclude all other acts for which licenses may be revoked, so far as it authorizes the revocation of licenses, is highly penal and must be so construed.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.\*]

3. STATUTES (§ 241\*)—CONSTRUCTION—PENAL STATUTES.

A penal statute is construed with a degree of strictness commensurate with the severity of the penalty it imposes, and where the penalty is onerous no one can be held to have violated its provisions unless his acts come within both the letter and the spirit of the law.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.\*]

4. STATUTES (§§ 174, 175\*)—CONSTRUCTION — RATIONAL CONSTRUCTION.

All laws must receive a rational and not an arbitrary construction.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 254, 266; Dec. Dig. §§ 174, 175.\*]

5. PHYSICIANS AND SURGEONS (§ 11\*)—PROCEEDINGS TO REVOKE LICENSES—EVIDENCE.

Under Rev. St. 1909, § 8317, authorizing the State Board of Health to revoke licenses to practice medicine and surgery for producing criminal abortions, an advertisement by a physician, stating that his practice was limited to "diseases of women and surgery," and the testimony of a witness, that several physicians had told him that such physician had the reputation of being a criminal abortionist, would not sustain a suspension from practice.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.\*]

6. EVIDENCE (§ 317\*)—HEARSAY EVIDENCE—STATEMENTS OF THIRD PERSONS.

In a proceeding to suspend a physician for producing abortions, the testimony of a witness, that physicians had told him that defendant had the reputation of being a criminal abortionist, was hearsay evidence and should not have been admitted or considered.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174–1192; Dec. Dig. § 317.\*]

7. PHYSICIANS AND SURGEONS (§ 11\*)—SUSPENSION FROM PRACTICE—GROUNDS.

Under Rev. St. 1909, § 8317, authorizing the State Board of Health to revoke licenses

to practice medicine and surgery for unprofessional or dishonorable conduct, and providing that habitual drunkenness, drug habit, excessive use of narcotics, producing criminal abortions, or soliciting patronage by agents shall be deemed unprofessional and dishonorable conduct, but that these specifications do not exclude all other "acts" for which licenses may be revoked, a willingness or offer to produce an abortion does not justify suspension of the right to practice, in view of the fact that the grounds specified all grow out of intentional affirmative acts, while the general specification which follows refers only to "acts."

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11.\*]

#### 8. STATUTES (§ 194\*)—CONSTRUCTION—GENERAL AND SPECIFIC WORDS.

Where a law specifically designates several matters or things which shall be governed by its provisions, and then by general language undertakes to include other acts and things not specifically named, it must be so construed as to apply only to things or acts of the same general nature as those definitely set out.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. § 194.\*]

#### 9. PHYSICIANS AND SURGEONS (§ 11\*)—SUSPENSION FROM PRACTICE—GROUND.

Under Rev. St. 1909, § 8317, authorizing the State Board of Health to refuse to license to practice medicine and surgery persons guilty of unprofessional or dishonorable conduct and to revoke licenses for like causes, and specifying certain acts which shall be deemed unprofessional and dishonorable conduct, but providing that these specifications are not intended to exclude all other acts for which licenses may be revoked, the board is not authorized to determine what shall constitute dishonorable and unprofessional conduct, in view of Const. art. 4, § 1, vesting the power to make laws in the General Assembly, and article 3, prohibiting executive officers from performing legislative functions.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11.\*]

#### 10. PHYSICIANS AND SURGEONS (§ 11\*)—SUSPENSION FROM PRACTICE—GROUND.

Assuming that, under Rev. St. 1909, § 8317, authorizing the State Board of Health to revoke licenses to practice medicine and surgery for unprofessional or dishonorable conduct, specifying certain acts which shall be deemed unprofessional and dishonorable conduct, but providing that these specifications shall not exclude all other acts for which licenses may be revoked, the board may determine what shall constitute dishonorable and unprofessional conduct, it could not suspend a physician for offering to commit an abortion where it had made no law or rule prohibiting offers to commit abortions, in view of Const. art. 2, § 15, prohibiting the enactment of laws retrospective in their operation by the General Assembly.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11.\*]

Appeal from St. Louis Circuit Court; G. C. Hitchcock, Judge.

Proceeding by the State, on the relation of M. Luther Spriggs, against E. F. Robinson and others, comprising the State Board of Health. From a judgment sustaining the action of the Board in suspending relator from the practice of medicine and surgery, he appeals. Reversed, and action of the Board quashed.

Appeal from the judgment of the circuit court of St. Louis city sustaining the action of the State Board of Health in suspending the appellant from the practice of medicine and surgery in this state for a period of one year. The charge upon which appellant was suspended is that he was guilty of "unprofessional and dishonorable conduct," in that he offered, or was willing, to commit a criminal abortion. Prior to October 19, 1912, appellant was engaged in the practice of medicine and surgery at Joplin, Mo., and the evidence upon which he was suspended from practice is mostly documentary, and is as follows:

First. The following advertisement inserted by appellant in a newspaper at Joplin: "Dr. M. Luther Spriggs. Practice limited to diseases of women and surgery. Office and private hospital, 417 S. Cox avenue. Consultation hours, 9 to 12 a. m., 2 to 4 p. m. Home phone 411, Bell phone 517. Residence, The Connor." After this advertisement appeared, a post office inspector caused certain letters to be written and mailed to appellant from Galena, Mo., to which letters was affixed the name "Susie Davis." Said letters and the appellant's replies thereto are as follows:

"Galena, Mo., May 10th, 1912. Doctor M. Luther Spriggs—Dear Sir: I cut the enclosed from a Joplin Globe of last Sunday, and wish to write you, as I was about to go to Kansas City or somewhere away from here. I am not married and was indiscreet to allow my beau liberties which I should not have done. The worst of it is, I am caught, I fear, and in a family way. I missed just twice. I ought to be sick the 14th of this month but I don't know whether I will or not. I have taken all kinds of medicine without avail. I am scared every day of discovery and believe I am getting larger. Please let me know if you will take it away and how much it will cost. I ask no charity as I have some money and I know the young man the cause of the trouble will furnish more, if needed. We can pay you well between us. Please destroy this letter. Yours truly, Susie Davis, Galena, Mo."

"Joplin, Mo., May 11, 1912. Miss Davis: Replying to yours of the 10th inst., allow me to say that you should come here at the earliest possible moment. At that time we can go fully into all of the details. Very truly yours, M. Luther Spriggs."

"Galena, Missouri, May 21st, 1912. Doctor M. Luther Spriggs—Dear Sir: Replying to your letter in regard to my coming to Joplin for operation, I would ask what the approximate cost will be. I do not want to make the trip to Joplin without enough money to have the work done. I can get the money easier now than I can get it after I get there. I can leave here as soon as I hear from you. Yours truly, Susie Davis, Galena, Mo."

"Joplin, Mo., May 22, 1912. Dear Miss Davis: Will say in reply to yours of the 21st

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

inst., that your bill with me will be approximately \$125.00 and your living expenses will have to be met for something like a week or possibly ten days. It seems to me that \$150.00 should be ample to take care of everything. Remember that it is important to act as promptly as possible. Very truly yours, M. Luther Spriggs."

"Galena, Missouri. Dr. M. Luther Spriggs—Dear Sir: Replying to your favor of the 22nd inst., I had no idea the price for relieving one in a family way was over \$25.00 to \$50.00. While I can get more than this, I much fear that I cannot raise the amount you mentioned, and unless you can do some better for me, I must make other arrangements. I can raise \$100. Please write me without delay what you will do. Yours truly, Susie Davis, Galena, Mo. May 26th, 1912."

"Joplin, Mo., May 26, 1912. Dear Miss Davis: Replying to yours of to-day allow me to say that we do not ordinarily make any concessions in such matters. However, I am willing under the circumstances, to allow you the reduction you speak of, viz.: \$100.00 professional fee. You will of course have to defray your living expenses for a week or ten days, which will be moderate, and I will be glad to assist you to make arrangements in this way that will be satisfactory. Hoping this will meet with your approval. Very truly yours, M. Luther Spriggs."

"Galena, Mo., May 30th, 1912. Dr. M. Luther Spriggs—Dear Sir: Replying to your letter of the 26th inst., I thank you for the concession you have made, but since my last letter, I have come unwell a little. Do you think I could be pregnant under the circumstances? I have missed a week or two before but never anything like this. Could my worrying over this matter have kept off my monthly sickness? However, the flow is not like it usually is and there is some pain which is not usual with me. Do you think I should still come to Joplin and have the work done? I can come if you think it possible that I am in a family way and that I should come under the circumstances. Thanking you for your prompt attention to this matter for me, I am, Yours very truly, Susie Davis."

"Joplin, Mo. Dear Miss Davis: Replying to yours of the 30th inst., will say that you should not be confused by the appearance of a discharge. By all means do not delay your coming as we are losing valuable time. There is no doubt whatever in my mind in regard to the actual condition. However, when I examine you I will be in a position to tell you definitely all about the details. It is not uncommon for women to have a menstrual discharge, which originates from the cervix, in a condition such as yours and they are sometimes deceived by it. You may be quite positive that worry and anxiety would never cause a delay such as yours. I cannot impress too forcibly on your mind the absolute necessity of prompt action. Assur-

ing you of my best wishes and hoping to see you soon, very truly, M. Luther Spriggs. May 30th, 1912."

The complaint was signed by three physicians of Joplin, Mo., who describe themselves as the "Board of Censors of Jasper County Medical Society." Neither of those physicians testified at the trial. The secretary of the State Board of Health testified that several physicians of Joplin, Mo., had told him that appellant had the reputation of being a criminal abortionist. Four physicians residing at Joplin, Mo., and two residing at Galena, Mo., testified that appellant had been practicing medicine in Joplin for about ten years, that they were quite intimately acquainted with him, and that his reputation was of the very best. They also testified that he was a very skillful surgeon; that a large part of his professional work consisted in performing operations upon patients brought to him by other doctors. He had operated upon one of the physicians who gave evidence in this cause, and upon the wife of another of said witnesses. The evidence of all six of these witnesses was very laudatory of the personal character and professional ability of appellant. They had never heard of him being suspected of committing criminal abortions until this proceeding was instituted. It is conceded by the respondents that "Susie Davis" had no real existence, and that her name was simply used by the post office inspector in carrying on the correspondence with appellant hereinbefore set out.

W. T. Nardin, of St. Louis, and Howard Gray and McReynolds & Halliburton, all of Carthage, for appellant. John T. Barker, Atty. Gen., and W. T. Rutherford, Asst. Atty. Gen., for respondents.

BROWN, P. J. (after stating the facts as above). I. The theory of respondents is that the letters introduced prove that appellant offered to commit the crime of criminal abortion upon the mythical "Susie Davis"; in other words, that he was possessed of evil thoughts, or a willingness to commit crime, and therefore his license to practice medicine and surgery should be revoked.

*Statute.* The statute under which the Board of Health suspended the appellant is as follows: "The Board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct, and they may revoke licenses, or other rights to practice, however derived, for like causes, and in cases where the license has been granted upon false and fraudulent statements, after giving the accused an opportunity to be heard in his defense before the Board as hereinafter provided. Habitual drunkenness, drug habit or excessive use of narcotics, or producing criminal abortion, or soliciting patronage by agents,

shall be deemed unprofessional and dishonorable conduct within the meaning of this section, but these specifications are not intended to exclude all other acts for which licenses may be revoked." Section 8317, R. S. 1909. That portion of the statute upon which the action of the respondents in finding appellant guilty of dishonorable and unprofessional conduct must be sustained, if it can be upheld at all, is found in the last three lines before quoted, and is as follows: "But these specifications are not intended to exclude all other acts for which licenses may be revoked."

Concretely stated, the contentions of appellant are: (1) That the evidence does not prove that he offered to commit the crime of abortion; (2) that if it were satisfactorily proven that he offered, or was willing, to commit said crime, the statute does not authorize the State Board of Health to revoke his license or suspend him from the practice of medicine and surgery, because he merely possessed a desire to do a dishonorable and unprofessional act.

[1] II. *Rights of Appellant.* To properly dispose of the issues we must consider the nature of the right which appellant held as a practicing physician. Is it a mere privilege? Is it a vested right? Is it property? Some of the authorities cited by respondents hold that a license to practice a profession is not property, and not a right at all, but only a privilege which the state may withdraw without the formality of a trial, and without a compliance with the constitutional guaranties (section 10, art. 2, Constitution of Missouri) which protect persons, property, and character. *State ex rel. v. Goodier et al.*, 195 Mo. loc. cit. 560, 93 S. W. 928. I am impressed with the idea that a more logical and rational view was announced by the members of division 1 of this court in the recent case of *State ex rel. Shackelford v. McElhinney*, 241 Mo. loc. cit. 606, 145 S. W. 1139, wherein it was held that the right of a licensed attorney to practice law is "a valuable property right." By analogy, it must be admitted that if the right of an attorney to practice law is a property right, then the duly licensed physician has a property right, protected at least by such safeguards as the Legislature has thrown around it. It is not a mere shadowy privilege which may be revoked regardless of whether the possessor has violated the laws of the state. By what we have said it should not be inferred that we desire to overrule the *Goodier Case*. It is not necessary to disturb that decision in order to reach a correct conclusion in this case. We approach the solution of this case with the understanding that the appellant, through his license to practice medicine, and through his ability and industry, has become possessed of at least a valuable privilege—perhaps a property right, which has been sus-

pended by the action of the respondents for his alleged violations of the laws of this state.

[2-4] III. *Penal Law.* The next preliminary question which arises in the case is: Shall that part of section 8317, supra, which authorizes the Board of Health to revoke licenses of physicians, be adjudged a remedial or a penal statute? If remedial, it must be liberally construed in behalf of both respondents and appellant, while, if it be a penal law, it must be strictly construed against the respondents, as the representatives of the state, and liberally construed in favor of appellant. *State v. Balch et al.*, 178 Mo. 392, 77 S. W. 547; *State v. Kooch*, 202 Mo. loc. cit. 235, 100 S. W. 630; and *State v. McMahon*, 234 Mo. loc. cit. 614, 137 S. W. 872. This rule is announced in *Lewis' Sutherland, Statutory Construction*, vol. 2 (2d Ed.) § 531: "Among penal laws which must be strictly construed, those most obviously included are all such acts as in terms impose a fine or corporal punishment under sentence in state prosecutions, or forfeitures to the state as a punitive consequence of violating laws made for the preservation of the peace and good order of society. But these are not the only penal laws which have to be so construed. There are to be included under that denomination also all acts which \* \* \* take away or impair any privilege or right." A statute which provides for the disbarring of attorneys has been held to be a penal law. *Montroy v. People*, 162 Ill. 194, 44 N. E. 496. A penal statute is construed with a degree of strictness commensurate with the severity of the penalty it imposes, and where the penalty, as in this case, is onerous, no one can be held to have violated its provisions unless his acts come within both the letter and the spirit of the law. *Lewis' Sutherland, Statutory Construction*, vol. 2, §§ 520, 521; *State ex inf. v. Railroad*, 238 Mo. 605, loc. cit. 612, 142 S. W. 279. All laws, however, must receive a rational, and not an arbitrary, construction. Upon the well-considered precedents we have no hesitation in holding that the law now in judgment, in so far as it authorizes the revocation of licenses of physicians, is highly penal, and must be treated as a penal law.

[5, 6] IV. *Hearsay Evidence.* Coming back to the facts in this case, we find no existence in the brief of the honorable Attorney General that the conviction and suspension of appellant can be sustained on the advertisement which the appellant published in a newspaper, or upon the evidence of Dr. Hiller to the effect that several physicians of Joplin had told him that appellant bore the reputation of being a criminal abortionist. It would certainly have been an insult to the intelligence of the age to contend that a judgment could be sustained on the mere hearsay evidence of Dr. Hiller, which ought



not to have been admitted or considered by respondents.

V. *Evidence.* This leaves for our consideration the letters between the appellant and the mythical "Susie Davis." It will be observed that appellant did not directly offer to perform an abortion upon "Susie," though the letters written to him were cunningly worded and designed to make it appear that if he agreed to treat her at all he was willing to commit that crime. There is no expert medical testimony before us which tends to explain whether the symptoms narrated in the letters indicated the presence of a living fœtus, a dead fœtus, or some ailment of the womb or genital organs. The writer of the letter, after describing "her" symptoms, does not say that she is pregnant, but only that she fears she is pregnant. If the symptoms detailed in the letters indicated the presence of a dead fœtus, then the replies which appellant made to said letters would not point to an evil purpose or a willingness on his part to commit criminal abortion. The appellant proved such an excellent reputation by his neighbors—physicians who knew him intimately—that if the letters could have been construed so as to be consistent with an innocent purpose, the Board of Health, being honorable men and learned in the medical science, would certainly have given him the benefit of the doubt and acquitted him. The fact that they found him guilty must, under the evidence in this case, be taken by us to mean that the symptoms and conditions narrated in the Davis letters unmistakably pointed to the existence of a living fœtus, which it would have been a crime to remove or destroy.

[7, 8] VI. *Construction of Statute.* This brings us to the application of the statute to the facts proven. Did the General Assembly, by the enactment of section 8317, R. S. 1909, mean to designate a mere willingness to commit the crime of abortion as dishonorable and unprofessional conduct? We may gain some light on this point by a close consideration of the specific acts designated as unprofessional conduct.

There is a well-recognized rule that where a law specifically designates several matters or things which shall be governed by its provisions, and then by general language undertakes to include other acts and things not specifically named, such law must be so construed as to apply only to things or acts of the same general nature as those definitely set out. *City of St. Louis v. Kaime et al.*, 180 Mo. 309, 79 S. W. 140, and *State ex rel. v. Berryman*, 142 Mo. App. 373, 127 S. W. 129. This is but the restatement of a rule of common sense and everyday experience of mankind. When a man is speaking only of bonds and promissory notes, his mind is not supposed to be dwelling on wagons and threshing machines, and we do not apply his words uttered on that occasion to any such subjects.

If a man speak of wild animals, his mind is not likely at the selfsame time to dwell upon domestic animals, and it would be silly to give his words such a construction.

The General Assembly cannot enact a valid law without the minds of its members considering the things to which the law is to apply, for the legislative will is what becomes the law. In a broad general sense we discern the legislative will by the words it has spoken through its enactments, the same as we would interpret the language of an individual.

Applying this well-known and simple rule to the statute now under consideration, we find that "habitual drunkenness, drug habit, or excessive use of narcotics" are declared dishonorable and unprofessional conduct; likewise, "producing criminal abortion or soliciting patronage by agents" are placed in the same category. The first three specifications, it will be observed, grow out of acts of a physician which tend to weaken or destroy his mind and render him mentally incapable of properly applying his medical skill. The second two specifications pertain to acts which are by the Legislature deemed sufficient grounds for revoking a license. It will further be observed that all five of the specifications named grow out of intentional affirmative acts, not a mere contemplation or willingness to perform wrongful acts. The general specification then follows: "But these specifications are not intended to exclude all other acts for which licenses may be revoked." It will thus be seen that the lawmakers, after having particularly designated certain mind-destroying habits and certain wrongful acts for which the license of a physician may be revoked, undertook to designate generally that there are other acts which may justify such revocation. To my mind, it is clear that the general specification cannot be applied to mere evil thoughts or a consent to do wrong where no wrong is actually done. It could not logically be urged that a mere desire or willingness to use intoxicants or narcotics excessively would impair the mind; and for the same reason it must be held that a mere consent to perform an abortion would not make the appellant an abortionist, or subject him to the penalties of having committed that crime. The general specification of the statute in judgment is directed solely against certain undesignated acts, not against evil thoughts or a willingness to perform wrongful acts.

As we have said, the statute in judgment is highly penal and cannot be expanded or enlarged beyond its letter or spirit. Consequently, it does not support the action of respondents in revoking appellant's license. We have been taught that a mere desire to do wrong is as great a sin as the act of doing wrong itself. That rule will be all right when the Creator sits as Judge, but mere courts and boards of health have not the

capacity to search out and correctly weigh the many impulses which enter the human mind. For that reason the state concerns itself mostly about wrongful acts, not evil thoughts, and its agents and administrative boards must be governed accordingly. No one can be deprived of any right or privilege because his mind has been contaminated by evil thoughts, unless the statute has denounced said evil thoughts in plain terms. However reprehensible it may be for a physician to entertain a desire to commit abortion, his license cannot be revoked unless by a written statute his evil desires are made a ground for subjecting him to that penalty.

Our learned Attorney General earnestly insists that it was impossible for the General Assembly to designate the numerous acts and things which would constitute "dishonorable and unprofessional conduct" on the part of physicians, and that therefore the general specification in section 8317, *supra*, should be construed to include all acts (and, inferentially, all wicked thoughts and evil desires) which, by "common judgment," are found to be dishonorable. He cites in support of this contention: *People v. Apfelbaum*, 251 Ill. loc. cit. 22, 95 N. E. 995; *Berry v. State* (Tex. Civ. App.) 135 S. W. 631; *Morse v. State Bd. Med. Ex.*, 57 Tex. Civ. App. 93, 122 S. W. loc. cit. 448; *Spurgeon v. Rhodes*, 167 Ind. loc. cit. 11, 12, 78 N. E. 228; and *Wolf v. State Bd. Med. Ex.*, 109 Minn. 360, 123 N. W. 1074. The authorities cited tend to support the contention of respondents. The attorneys for the appellant, with equal industry, have cited the following cases which tend to sustain their insistence that the general specification in section 8317, *supra*, is void for uncertainty: *Matthews v. Murphy* (Ky.) 63 S. W. 785, 54 L. R. A. 415; *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750; *Czarra v. Board*, 25 App. D. C. 443; and *Ex parte Jackson*, 45 Ark. 164. In view of the conflicting opinions of respectable courts on this proposition, we will quote what is said by the learned commentators of Cyc.: "The grounds commonly designated by the statute upon which the medical board is authorized to revoke a physician's license or certificate are unprofessional, dishonorable, or immoral conduct. Unprofessional or dishonorable conduct is not defined by the common law, and what conduct may be of either kind is a matter of opinion only. For this reason it has been held in several cases that such a statute is void for uncertainty. Similar statutes have been construed in other jurisdictions without the question of validity being raised, the courts merely considering what can be deemed unprofessional, dishonorable, or immoral conduct." 30 Cyc. p. 1555 (B).

There is such a great divergency in judicial thought on this subject that, after reading it all, we find ourselves groping in a wilderness of confusing precedents. In considering precedents it is usually safest to keep any eye on the rules of common sense, which often prove a safer guide than hairsplitting judicial reasoning. We do not take judicial notice that doctors are more willing to commit crimes than men of other professions. Physicians are usually people of intelligence, with a high sense of the duties and responsibilities of good citizenship. We are therefore unwilling to believe that the physicians of our state, or any of them, are guilty of such a multiplicity of wrongful acts that their conduct may not safely be regulated by a single legislative enactment. By section 4739, R. S. 1909, it is made a crime to offer for sale any secret drug designed to prevent conception, and it would be the rankest folly to say that it would have been more difficult to prohibit physicians from offering to commit abortions than it was to prohibit persons from offering for sale obnoxious drugs. We therefore hold that it would have been possible for the General Assembly to designate the particular offenses for which they intended that the licenses of physicians might be revoked.

[9] Another theory of the Attorney General is that the general specification in section 8317, *supra*, must be construed to authorize the Board of Health to determine what shall constitute dishonorable and unprofessional conduct. This point does not deserve serious consideration. To grant the Board of Health that power would be to concede that it has the right to enact from time to time such laws as it deems necessary to regulate the conduct of physicians and surgeons. We give the honorable members of the Board of Health credit with possessing too much good judgment to attempt to assume the rôle of lawmakers.

[10] If section 1, art. 4, of the Constitution of Missouri, vesting in the General Assembly the power to make laws, and article 3 of said Constitution, prohibiting executive officers from performing legislative functions, could both be suspended, and the Board of Health given power to legislate, the respondents would be in no better condition, so far as the facts of this case are concerned. It nowhere appears in this record that prior to the institution of this action to revoke appellant's license the State Board of Health had ever enacted, or pretended to prescribe, a law or rule prohibiting physicians from offering to commit abortions. The General Assembly is prohibited from giving its enactments retrospective effect, and if we concede legislative powers to the Board of Health (which we do not) that Board would have to be governed by the same constitutional limitations. Section 15, art. 2, Constitution of Missouri.

The action of the State Board of Health in suspending the appellant from the practice of medicine and surgery should be quashed and for naught held; and the judgment of the circuit court of St. Louis City sustaining and upholding the action and finding of the Board of Health should be reversed. It is so ordered.

WALKER and FARIS, JJ., concur.

### SAILS v. FUNK.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913. Rehearing Denied Jan. 6, 1914.)

#### 1. PARTIES (§ 75\*)—DEFECTS—WAIVER OF OBJECTION.

Under Rev. Stats. 1909, § 1800, authorizing the objection of a defect of parties plaintiff to be taken by demurrer when apparent upon the face of the petition, and section 1804, providing that if such defect does not appear upon the face of the petition, the objection may be taken by answer, and that if not so taken, defendant is deemed to have waived it, where such objection was not taken by demurrer or answer, the court did not err in refusing to permit defendant to amend his answer at the close of plaintiff's evidence so as to allege such defect.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115-117; Dec. Dig. § 75.\*]

#### 2. BAILMENT (§ 29\*)—ACTIONS AGAINST BAILEE—PARTIES.

A deed conveying land to plaintiff, his wife, and his brother-in-law was left with defendant for safe-keeping. Plaintiff purchased his brother-in-law's interest, and defendant thereafter destroyed the deed and procured a new deed from the grantor to a third party. Plaintiff then sued the grantor, the third party, and the brother-in-law to quiet title and, having obtained a decree quieting the title in himself and his wife, sued defendant to recover the costs of such litigation and the value of his time lost in attending thereto. *Held*, that the wife who paid no part of such expenses was not a necessary or proper party, as she had no claim against defendant jointly with her husband, or otherwise, in the subject-matter involved.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 122; Dec. Dig. § 29.\*]

#### 3. BAILMENT (§ 12\*)—CARE REQUIRED—BAILEE WITHOUT REWARD.

A bailee of a deed without reward was required to exercise such care thereof as an ordinarily careful and prudent person in his situation would bestow on his own property, and to excuse his failure to produce it on demand it must appear that it was lost without his negligence or fault; and hence, in an action against him to recover the expenses of a suit to quiet title necessitated by his destruction of the deed the procurement of a deed from the grantor to a third person, the court did not err in refusing to instruct a verdict in his favor, and instructions requiring a finding that he acted fraudulently or in bad faith to justify a verdict against him were sufficiently liberal in his behalf.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 37-41; Dec. Dig. § 12.\*]

#### 4. APPEAL AND ERROR (§ 1001\*)—REVIEW—QUESTIONS OF FACT.

In an action against one intrusted with a deed to recover the expenses of litigation necessitated by his destruction thereof and his procurement of a new deed to a third person, where

the questions of his fraud and bad faith were submitted to the jury and found against him on evidence tending to support the finding, the verdict could not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by James Sails against J. J. Funk. Judgment for plaintiff, and defendant appeals. Affirmed.

M. R. Lively, of Webb City, for appellant. W. R. Shuck, of Webb City, and R. M. Sheppard, of Joplin, for respondent.

ROBERTSON, P. J. Plaintiff sued the defendant in the circuit court, alleging that in April, 1911, he, his wife, and his brother-in-law purchased from John A. Kerchner a tract of land in Jasper county, and that said Kerchner executed and delivered to those three a general warranty deed therefor; that the purchasers did not record the deed, but deposited it with the defendant; that the plaintiff afterwards purchased his brother-in-law's interest in said property; that in March, 1912, the defendant fraudulently procured from said Kerchner and wife a second deed conveying said property to the father-in-law of plaintiff, and that the defendant, without the knowledge or consent of the plaintiff, destroyed the first deed; that the plaintiff, after learning of the execution and delivery of the second deed to his father-in-law, caused to be brought in the circuit court of Jasper county a suit in equity to quiet the title to said property, and obtained a decree in said court vesting the title in plaintiff and his wife, and that as a result of said litigation he was compelled to and did employ counsel in order to perfect the title to said property and to pay out money in said cause, and costs, and that he had lost time in attending to said litigation, for all of which he asked damages in the sum of \$500. The defendant appeared and answered by a general denial. A trial was had to the jury, and resulted in a verdict for \$100 in favor of the plaintiff, and the defendant has appealed.

The testimony discloses that the property, which was incumbered at the time of the purchase, was paid for by the plaintiff's wife, conveying to Kerchner 40 acres of land in Arkansas, which constituted the sole consideration for the equity in the Jasper county land. It also appears that the land was purchased for the purpose of conducting a retail grocery business in the store building thereon. Immediately upon the purchase of the property the plaintiff paid some interest on the incumbrance then past due, and made some improvements in the buildings located on the land. Three or four months after the original purchase the plaintiff bought his brother-in-law's interest in the property, paying the consideration therefor in cash and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

notes. In April or May, 1912, the plaintiff first learned that the original deed had been destroyed and a new one executed and delivered, whereupon he immediately interviewed the defendant, ascertaining what he could about the transaction, but getting little information. He says that the defendant first told him that he could not find the first deed, and later that he had destroyed it long before the plaintiff's first inquiry about it. The plaintiff, after consulting with his wife, then wrote to his father-in-law about the transaction, requesting that the premises be reconveyed to him and his wife, but, receiving no satisfactory answer, he instituted the equity suit referred to in his petition. That suit was brought against Kerchner, plaintiff's brother-in-law and his father-in-law, and resulted in a decree vesting the title to the premises in plaintiff and his wife. Upon the eve of the trial of the former suit, the plaintiff's brother-in-law and father-in-law delivered to the plaintiff a quitclaim deed, conveying the property to the plaintiff and his wife; but if the plaintiff and his wife had then dismissed their case, they would have had no instrument showing a transfer from Kerchner, because, so far as the evidence discloses, the grantors in the quitclaim deed did not tender the deed from Kerchner to the father-in-law, and it was never recorded, and there is some evidence that it was destroyed.

The defendant's testimony was to the effect that the plaintiff's wife, at the time of the execution of the first deed, was an employé in defendant's office, and kept in his safe a package of her private papers; that she put the first deed in question in a package and sealed it up and placed it in the safe, as it was her custom to do, and that thereafter she advised defendant that she wanted a deed made to her father because they were so far behind on the payments due on the incumbrance that foreclosure was threatened, and she, therefore, wanted to deed it to her father, or have it deeded to him, and he would advance the interest and save their home. At the request of plaintiff's wife, he says, he saw Kerchner, and inquired if he would make a new deed. Defendant says that he advised her it would be the easiest way, and would save recording one deed, which would cost 90 cents, and the making of one entry on the abstract, which would cost 50 cents, and told her she could get a deed direct from Kerchner, and the other deed, not being recorded, could be destroyed. The defendant thereupon saw Kerchner, who testified that he agreed to execute a new deed upon the assurance of the defendant that it was entirely satisfactory to the grantees named in the first deed. The defendant admits that he destroyed the old deed without the consent of the plaintiff, and admits that he did not talk to the plaintiff until a long time after this transaction. He also admits that he paid Kerchner \$2 for executing this new deed, but says he simply advanced it

for plaintiff's wife, although he testifies that he has never been repaid. Kerchner testified that the defendant told him he was paying it out of his own pocket. The defendant further testified that he knew of the equity suit to quiet the title some time before the trial, and wrote to the wife of plaintiff about it. The defendant, in undertaking to explain why he did not advise the plaintiff that the first deed was destroyed when plaintiff first inquired about it, states that at first he thought the plaintiff was asking about the second deed, yet the defendant had previously testified that the second deed had been delivered to the plaintiff's wife, and the defendant must therefore have known that he did not have that deed. Later he seeks to explain this apparent inconsistency, but it was for the jury to determine which of his statements was correct.

At the close of the testimony the defendant requested the court to instruct the jury to return a verdict for him, which was refused. At the request of the plaintiff the court instructed the jury that if the first deed was deposited with the defendant for safe-keeping, and afterwards he, without the knowledge or consent of the plaintiff, destroyed said deed and procured a second deed to said property from said Kerchner and wife, conveying said property to plaintiff's father-in-law, and that said deed was delivered to him, and that the defendant destroyed the first deed and procured the second deed for the purpose of defrauding the plaintiff out of his interest in said property, and if it became necessary for the plaintiff to institute the suit in the circuit court for the purpose of having the title to said property vested in himself and wife free and clear of the claims of Kerchner and the brother-in-law and father-in-law, then they should find the issues in favor of the plaintiff, and assess his damages at such sum as from the evidence it appeared it was necessary for the plaintiff to expend, and obligate himself to expend, in perfecting said title, not exceeding the amount claimed in the petition. At the request of the defendant the court instructed the jury that, even though it might appear from the evidence that the defendant did destroy the first deed, yet if he acted in good faith therein, and in soliciting the execution of the second deed, the verdict must be for the defendant.

At the close of the testimony offered in behalf of the plaintiff the defendant asked leave to amend his answer so as to charge that "the parties plaintiff were not properly joined, and that there was a defect of parties plaintiff in the suit." The permission to amend at that time, as stated by the attorney for the defendant, was asked for the reason that he had not sooner been able to discover this condition. The court thereupon inquired of the defendant, who it was claimed were the necessary parties plaintiff, which elicited the answer, "We claim that Mrs. Salls is

one." The court refused to permit the amendment, and the defendant excepted. The defendant is now here insisting that the court erred in refusing to permit the amendment, and insists that by reason of the fact of the nonjoinder of plaintiff's wife there was no cause of action stated.

There are several other minor objections as to the sufficiency of the petition which, when followed to their final analysis, are referable to the alleged defect of parties plaintiff.

The defendant offered the plaintiff's wife as a witness, who was first excluded because she was not a competent witness, and the defendant thereupon offered to prove certain facts by her, which the court properly held were not material, and also sustained the objection as to her competency. Later, however, she did testify as a witness in behalf of the defendant upon numerous material questions about which she was asked, and upon the court sustaining objections as to her competency made by plaintiff, the defendant offered to prove certain facts, which offer the court properly refused, as they were wholly immaterial. The defendant here assigns error solely on the ruling as to the competency of the plaintiff's wife, and does not complain as to the ruling on the question as to the immateriality of the testimony offered, and, as we must sustain the court on this ruling as to materiality, it is unnecessary to consider the questions as to the competency of the wife as a witness.

There are, to our minds, but two propositions involved here, and these are: First, whether or not the court erred in refusing to permit the proposed amendment; and, second, whether or not there is sufficient testimony in this case to uphold the verdict.

[1, 2] That the court committed no error in refusing to permit the amendment is so evident from a reading of sections 1800 and 1804, R. S. 1909, that it seems useless to cite the numberless authorities so holding. Section 1800 provides for raising the objection of a defect of parties plaintiff by demurrer when it is apparent upon the face of the petition, and section 1804 provides that if such defect does not appear upon the face of the petition, the objection may be taken by answer, and if not so taken, the defendant is deemed to have waived the same. We are discussing only the right of the defendant to amend his answer, and are not deciding that there was no other way to reach the point in view. We are, however, of the opinion that plaintiff's wife was not a necessary or proper party to this suit. She paid no part of the expenses of the equity suit, and has no claim against the defendant jointly with her husband, or otherwise, in the subject-matter involved here.

[3] Upon the second proposition, it is clear that the court did not commit any error in refusing to instruct the jury to find the is-

ssues in favor of the defendant. The instructions which were given were sufficiently liberal in behalf of the defendant to foreclose any grounds of complaint on his part. While it is true the defendant was in the nature of a bailee of the first deed without reward, yet he is required to exercise reasonable care in its safe-keeping; and, to excuse his failure to produce the deed to the plaintiff upon demand therefor, it must appear that "it was lost without defendant's negligence or fault." *Huxley v. Hartzell*, 44 Mo. 370, 373. It was the duty of the defendant in this case to take the same care of the deed intrusted to him by the plaintiff as an ordinarily careful and prudent person in his situation would bestow on his own property. *Levi & Co. v. Railroad*, 157 Mo. App. 536, 543, 138 S. W. 699; *Standard Milling Co. v. Transit Co.*, 122 Mo. 258, 274, 26 S. W. 704.

[4] The instructions in the case at bar went further, and required the jury to find that the defendant acted fraudulently, and the instruction given in behalf of the defendant required that the jury should find that he acted in bad faith in destroying the first deed and soliciting the execution of the second. The jury resolved both questions of fraud and good faith against the defendant; and, as there was testimony tending to support these propositions, or at least the question of gross negligence, we are powerless to destroy the verdict of the jury.

The judgment is affirmed.

STURGIS and FARRINGTON, JJ., concur.

#### STATE v. SCHOMERS.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913. On Motion for Rehearing, Jan. 7, 1914.)

##### 1. INDICTMENT AND INFORMATION (§ 79\*)—LANGUAGE—MISTAKES IN GRAMMAR.

An information need not strictly and technically conform to the rules of grammar and rhetoric, if it fully and sufficiently informs defendant of the nature and cause of the accusation.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 209-214; Dec. Dig. § 79.\*]

##### On Motion for Rehearing.

##### 2. ASSAULT AND BATTERY (§ 77\*)—INDICTMENT AND INFORMATION—ACTS CONSTITUTING ASSAULT.

An information for common assault may be good without any averments as to striking, beating, or wounding.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 106; Dec. Dig. § 77.\*]

##### 3. ASSAULT AND BATTERY (§ 74\*)—INDICTMENT AND INFORMATION—ACTS CONSTITUTING ASSAULT.

An information for assault charging that "one S. \* \* \* in and upon one B. \* \* \* did make an assault, and with a deadly weapon \* \* \* 'him,' the said S., did then and there \* \* \* strike, beat and wound with intent

\* \* \* him, the said B., \* \* \* to kill and murder," was not defective as charging that S. struck, beat, and wounded himself, or as failing to show whom he struck, beat, or wounded, since "him" could be read as referring to B., and where it is possible, without doing much violence to the language used, that reading which upholds the indictment, rather than one which destroys it, should be adopted, especially where, taking the indictment as a whole, there is no doubt but that such is the reading and meaning intended, and, moreover, the clearness and accuracy required in criminal pleadings is often relaxed in misdemeanor cases.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 103, 106, 108; Dec. Dig. § 74.\*]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

John Schomers was convicted of assault, and he appeals. Affirmed.

Holmes & Holmes and Bland & Murphy, all of Rolla, for appellant.

ROBERTSON, P. J. The defendant was convicted of common assault and has appealed to this court. The information upon which his conviction is based reads as follows, omitting the caption, signature, and jurat: "Corrie L. Arthur, prosecuting attorney within and for the county of Phelps and state of Missouri, upon his official oath, here informs the court that, on or about the — day of November, 1912, at and in the county of Phelps and state of Missouri, one John Schomers, did then and there, in and upon one Tim Birmingham, feloniously, on purpose and of his malice aforethought, did make an assault, and with a deadly weapon, to wit, a stick of wood of the length of about two feet, of the thickness of about 1½ inches and of the weight of about two pounds, commonly called a 'billy,' him, the said John Schomers, did then and there feloniously on purpose and of his malice aforethought, strike, beat and wound, with intent then and there him, the said Tim Birmingham feloniously, on purpose and of his malice aforethought, to kill and murder, against the peace and dignity of the state."

The only complaint made in behalf of the defendant is that this information "charges no offense; it plainly and unmistakably charges the appellant (defendant) with beating and wounding himself with the intent to kill and murder Tim Birmingham." We do not so hold. The information, divested of the explanatory, surplus, and qualifying words, would read as follows: "That one John Schomers did upon one Tim Birmingham make an assault and, with a deadly weapon him (Birmingham), the said John Schomers did then and there strike, beat and wound, with the intent, him, the said Tim Birmingham, to kill."

[1] The insistence upon behalf of the appellant appears to us so unjustifiable that we do not deem it necessary to consume time or space to further discuss the question, ex-

cept to cite the case of *State v. Zorn*, 202 Mo. 12, 45, 100 S. W. 591, holding that it is not essential for an information to strictly and technically conform to the rules of grammar and rhetoric if it fully and sufficiently informs the defendant of the nature and cause of the accusation. The information involved here is clearly sufficient to accomplish this end, and therefore the judgment of the trial court is affirmed. All concur.

#### On Motion for Rehearing.

PER CURIAM. [2, 3] The defendant urges on us a reconsideration of this case on the ground that the opinion is in conflict with *State v. Evans*, 128 Mo. 406, 31 S. W. 34, wherein an indictment similar to this one is held bad. Reminded that the decisions of the Supreme Court are binding on us, we have given this case much thought. We have concluded, though not without some doubt, that the former opinion should stand. An information for common assault may be good without any averments as to striking, beating, or wounding. See the information held good in *State v. Cox*, 43 Mo. App. 323. The information in this case differs from that in the *Evans Case*, supra, in that in that case there was no object to the verbs "strike, cut, stab, and thrust." In that case the court said of the indictment: "As it is, the indictment is fatally defective in that it fails to state who it was that was cut, struck, or stabbed." Such is not this case, as it is here claimed that the person charged to have been "struck, beaten, and wounded" is the defendant himself. It is evident that the pronoun "him" is the object of such verbs, and the whole question is as to whom "him" refers, to the defendant or the person assaulted. The defendant contends that the indictment can only be read with "him" referring to John Schomers, the defendant; that is, did "strike, beat, and wound him, the said John Schomers." We think, however, that it can also be read with "him" as the object referring to Tim Birmingham; that is, "him (Tim Birmingham), the said John Schomers did then and there strike, beat, and wound." Where it is possible, without doing much violence to the language used, we think we should adopt that reading which upholds the indictment, rather than one which destroys it. This is especially true where, taking the indictment as a whole, there is no doubt but that such is the reading and meaning intended, and no one reading it would misunderstand it. This indictment was carelessly drawn and a close analysis shows faulty grammatical construction. This case, however, comes to us as a misdemeanor, and many cases will be found holding that the clearness and accuracy required in criminal pleadings is often relaxed in misdemeanors.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

The Evans Case, *supra*, is rather an extreme case even for a felony. That case was reversed and remanded on other grounds. The only case there cited by Sherwood, J., on this point, is *State v. Rector*, 126 Mo. 328, 23 S. W. 1074. That opinion was also written by Judge Sherwood, and on the part of it dealing with this point the other judges expressed no opinion, and it is the opinion of the writer only. While this Evans Case has been cited as to the general statement of the law that in criminal pleading nothing material must be left to intendment or implication, it seems not to have been cited as to the particular defect bearing on this case. It is highly technical, and we are not disposed to extend the ruling there made to an information any less faulty than the one there considered. We are persuaded that the information here fully informed the defendant of the nature and cause of the accusation against him, and that he was not prejudiced in the least in making any defense he had by reason of any defect in the language of the information.

The motion for rehearing is overruled.

**STATE ex rel. BEHRENS v. WILSON,**  
Clerk of Circuit Court.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913. Rehearing Denied Jan. 6, 1914.)

**1. EXECUTION (§ 161\*)—PLURIES EXECUTION—VOID JUDGMENT.**

A pluries execution issued on a void judgment should be quashed.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 467-471; Dec. Dig. § 161.\*]

**2. GARNISHMENT (§ 217\*)—INTERPLEADER—COUNTERCLAIM.**

An independent action by one interpleader against another cannot be ingrafted upon a garnishment proceeding by the mere filing of a counterclaim, and the court could not render judgment by default on such counterclaim in favor of such interpleader against the other.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 409, 410; Dec. Dig. § 217.\*]

Mandamus by the State of Missouri, on relation of Henry A. Behrens, against Charles D. Wilson, Clerk of the Circuit Court of Stoddard County. Writ denied.

Charles D. Yancey, of St. Louis, for plaintiff. Lew R. Thomason, of Poplar Bluff, for defendant.

**PER CURIAM.** This is an original proceeding in this court asking a peremptory writ of mandamus to compel the defendant, as clerk of the circuit court of Stoddard county, to issue a pluries execution on a certain judgment rendered in that court on October 6, 1910, in favor of Charles D. Yancey, as plaintiff, against Louisa E. Graves, Elizabeth Graves, and Alice Mohan, defendants, in the sum of \$858.66, said execution to be in favor of the relator, Henry A. Behrens, as

assignee and owner of said judgment. A return to the preliminary writ has been filed by defendant, and relator moves for judgment on the pleadings. The defendant's return sets up the facts connected with the rendition of said judgment in the circuit court substantially as the same will be found in the statement and opinion of the St. Louis Court of Appeals under the title of *Chapman v. Yancey*, 155 S. W. 1087, and such facts need not be repeated here. The defendant also pleads the decision and judgment of the St. Louis Court of Appeals in said cause and the subsequent judgment of the Stoddard county circuit court, rendered in pursuance to the mandate of said Court of Appeals, as res judicata of plaintiff's right, and that of his assignee to have, and of the power and authority of the said circuit court to issue, any execution on that judgment. It is sufficient here to say that the judgment on which this execution is asked to be issued is the same judgment of which the St. Louis Court of Appeals, in the case mentioned, in speaking of the action of the Stoddard county circuit court in rendering the same, said: "Its judgment in favor of C. D. Yancey and against these parties [Louisa E. Graves, Elizabeth Graves, and Alice Mohan] was not only irregular but absolutely void." All the parties to said judgment, inclusive of relator, Behrens, as assignee, on which we are asked to direct an execution to be issued, were parties to the proceedings on the writ of error in the St. Louis Court of Appeals in the case just mentioned, and that case is the same case as this one under a different title as therein explained. It is insisted here that this case of Charles D. Yancey v. Louisa E. Graves, Elizabeth Graves, and Alice Mohan was never before the St. Louis Court of Appeals and that the Chapman Case, *supra*, is a different case; but that is a misapprehension, and is true only as applied to the title of the case, and not to the case itself.

[1, 2] There can be and is no doubt but that we are asked to direct the issuance of an execution, a pluries one, to enforce the same judgment of the Stoddard county circuit court in favor of Yancey and against Louisa E. Graves, Elizabeth Graves, and Alice Mohan, rendered on October 6, 1910, as was the basis of the alias execution, the refusal to quash which was held error in the Chapman Case, *supra*, because the said judgment of the Stoddard county circuit court was and is void. Moreover, we have no hesitancy in saying and holding, as we now do, that, if the clerk had issued a pluries execution on that judgment, and the circuit court had refused to quash the same, this court would on the facts presented in the return hold such refusal error. And this is true because, as held by the St. Louis Court of Appeals, an independent action by one interpleader against another cannot be ingrafted

on a garnishment proceeding by the mere filing of a counterclaim. The circuit court in such proceeding would have no jurisdiction to render a judgment by default on such counterclaim in favor of one interpleader against the other.

It results, therefore, that the peremptory writ asked for is denied.

#### KAUFMAN v. DAVIS et al.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913. On Motion for Rehearing, Jan. 6, 1914.)

#### 1. APPEAL AND ERROR (§ 699\*)—RECORD—MATTERS TO BE INCLUDED.

Under Springfield Court of Appeals rule 8, providing that, for the purpose of reviewing the giving or refusal of instructions, it shall not be necessary to set out the evidence in the bill of exceptions, but that it shall be sufficient to state that there was evidence tending to prove the particular fact or facts, the refusal of an instruction could not be reviewed, though the abstract of the record stated that there was evidence tending to prove the facts upon which it was based, where the instructions given were not brought to the Court of Appeals, since the burden is on appellant to establish error, and the Court of Appeals could not presume that the refusal, if erroneous, was not cured by the other instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.\*]

#### 2. FRAUD (§ 59\*)—ACTIONS FOR DAMAGES—MEASURE OF DAMAGES.

Where a party induced to agree to an exchange of property with H. and to pay money to brokers in reliance on the brokers' false representations that H. had title to the real property to be exchanged by him, instead of suing in equity to rescind the contract, sued at law for damages from the fraud and deceit of the brokers, he was entitled to recover the benefits of his bargain, and hence to recover the value of the land which he would have obtained had H. had title and not merely to recover the money paid by him.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

#### On Motion for Rehearing.

#### 3. APPEAL AND ERROR (§ 671\*)—RECORD—MATTERS TO BE INCLUDED.

In an action by a person, induced to enter into an exchange of merchandise for land in reliance on brokers' false representations that the other party had title to the land, against the brokers for damages from the fraud and deceit, where the abstract, unobjected to, showed only that plaintiff introduced evidence tending to sustain the allegations of his petition and that the court rejected his evidence as to the market value of the land on the ground that such value was not the proper measure of damages, the court could not pass on defendant's contention that the title to the merchandise also failed or that it was of no value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

#### 4. FRAUD (§ 49\*)—ACTIONS—PLEADING—ISSUES.

In an action for damages by a person induced to enter into an exchange of merchandise for land in reliance on brokers' false representations that the other party had title to the land, where the answer contained only a general de-

nial, a defense or counterclaim arising from the fraud and deceit practiced by plaintiff with reference to the quality, quantity, or title of the merchandise could not be passed upon by the trial court or Court of Appeals.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 44, 45; Dec. Dig. § 49.\*]

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by Arthur Kaufman against A. F. Davis and others. From a judgment for plaintiff for an insufficient amount, he appeals. Reversed and remanded.

R. M. Sheppard, of Joplin, for appellant. Grant Emerson and W. J. Owen, both of Joplin, for respondents.

ROBERTSON, P. J. Plaintiff seeks to recover of the defendants the sum of \$2,500 as damages on account of the alleged fraud perpetrated upon him by defendants in that, as he alleges, for a commission agreed by him to be paid to them, they undertook to trade certain property owned by plaintiff for a tract of real estate in Arkansas, and that, in pretending to consummate the deal, the defendants falsely and fraudulently represented to the plaintiff that one Henson was the owner of the land; that the defendants furnished the plaintiff with a pretended abstract of title to the land, showing said Henson to be the owner thereof, but that said Henson did not own the land, and the abstract which so showed was absolutely false; that the plaintiff, relying upon these representations, transferred his property to Henson and also paid to the defendants \$45 in cash as a commission for their services and executed a note payable to the said Henson for \$150 and a mortgage on said land to secure the payment of the same; that the defendants delivered none of the plaintiff's said property to Henson but kept and fraudulently appropriated the same to their own use and did not pay any part of the said money received from plaintiff to said Henson, nor deliver said note to him, but, without any authority from Henson, indorsed his name upon said note and transferred it to some other person. Plaintiff further alleges that the land was reasonably worth the sum of \$2,500.

The defendants' answer is a general denial. A jury trial resulted in a verdict in favor of the plaintiff for the sum of \$45, from which judgment the plaintiff has appealed, assigning as error the action of the trial court in refusing to admit testimony offered by him as to the reasonable market value of the Arkansas land at the time the fraud is alleged to have been perpetrated upon plaintiff by defendants; the court excluding the offer on the ground that the measure of damages was confined to the amount of the money paid. The court also refused the following instruction requested by the plaintiff: "If the jury find the issues for the plaintiff, then



you should find for the plaintiff the full value of what said land would have been worth at the time of said sale if the title to said land had been, as represented by said defendants, not to exceed \$2,500." This refused instruction is set out in the appellant's abstract of the record and is said to have been taken from page 126 of the bill of exceptions. No other instructions are quoted in appellant's abstract of the record.

[1] Rule 8 of this court (123 S. W. v) is a duplicate of rule 6 of the Supreme Court (73 S. W. v). In the case of *Clark v. Iron & Foundry Co.*, 234 Mo. 436, 437, 137 S. W. 577, the method of applying this rule is announced. It is there said that, where it is sought to have only a review of the action of the court upon instructions, "It is sufficient for the bill of exceptions to show that the evidence offered by the plaintiff tended to prove all of the allegations of the petition, and that the evidence offered by the defendant tended to contradict all of the evidence offered by the plaintiff, and also tended to prove the allegations of the answer, and that plaintiff offered evidence tending to disprove all of the allegations of new matter contained in the answer," etc. See, also, *O'Donnell v. Patton*, 117 Mo. 13, 18, 22 S. W. 903. We are not insisting that any fixed or inflexible form is essential under this rule, but we are of the opinion that the appellant should do more than submit the instruction or instructions complained of by him where other instructions have been given, as it is apparent, from the motion for a new trial, other instructions were given in this case. We are not ordinarily authorized to presume that because the court refused to give one instruction, even if the refusal was erroneous, other instructions were not given which cured any error in the refusal of the one. The burden is on the appellant to establish error. *Ran-kin v. Railroad*, 150 Mo. App. 32, 129 S. W. 755. Under rule 8, while the appellant may, as a foundation for a review of the action of the trial court on instructions, state that his testimony tended to prove a certain state of facts, yet it is incumbent upon the appellant to bring to this court all of the instructions which were given, so that we may determine the force and effect of the ruling of the court on any one instruction with reference to the instructions as a whole. It frequently happens that an instruction given by the court cures the error in the refusal of an instruction. It is as important that the appellate court, in passing on the question of instructions, have all of the given instructions in a case as that there should be submitted to the appellate court all of the testimony in a given case when passing on a demurrer to the testimony. However, in view of the fact that the respondent has joined issue here, made no objection to the appellant's abstract of the record, and offered no additional abstract of the record, we have

concluded, since there is but one legal proposition involved, to assume that said errors are properly presented here. It is evident from the motion for a new trial that the questions of the rejection of the testimony and the refusal of the instructions here involved were properly submitted to and were passed upon by the trial court.

[2] The issue here for review is clearly and concisely defined by the appellant as follows: "The contention of the plaintiff and appellant herein at the trial court and here is that the rule in this state is that, in cases where fraudulent representations are made as to property which induced a person to part with money or other valuable consideration, the measure of damages is the difference in the reasonable market value of the property at the time of the transfer, if as represented, and its value as it really was."

The respondents in their brief state that they agree with appellant that "there is but one point to be determined, and that is the measure of plaintiff's damages." Respondents also state: "This is an action *ex delicto* and is in no wise to be confused with actions arising out of breach of contracts or actions *ex contractu*."

From the case of *Ryan v. Miller*, 236 Mo. 496, 508, 139 S. W. 128, 131 (Ann. Cas. 1912D, 540), we quote as follows: "In cases of fraud and deceit the plaintiff has two remedies: (1) He can stand upon his contract and sue for the damages growing out of the fraud and deceit practiced upon him in the procurement of the contract; or (2) he can elect to rescind the contract and sue to have the same canceled and for naught held. *Brown v. South Joplin L. & Z. M. Co.*, 231 Mo. 166, 132 S. W. 693 [140 Am. St. Rep. 509]. Of these two remedies the first is at law and the latter in equity. The measure of damages is different as well as the forum. In the first action the plaintiff can recover the difference between the full value of the property, as its value would have been had the property been up to the representations, and the real or actual value of the property, thus giving to the grantee the benefits and profits of his bargain. *Kendrick v. Ryus*, 225 Mo. 150 [123 S. W. 937, 135 Am. St. Rep. 585]. In the action in equity the court simply places the parties where they were before the vitiated contract was made." We had occasion in the case of *Peters v. Lohman*, 171 Mo. App. 465, 483, 156 S. W. 783, to note this distinction.

That the appellant in this case is seeking relief under the first above-mentioned remedy is clear from the allegations of his petition, as is conceded by the respondents, and we must therefore hold, under the authorities in this state, that he is entitled to recover the "benefits of his bargain" and that the trial court committed error in refusing to admit the testimony and to give the instruction above quoted. The respondents, in support

of their contention, cite the cases of Tapley v. Labeaume's Ex'r, 1 Mo. 550; Evans v. Fulton, 134 Mo. 653, 661, 36 S. W. 230; Frank v. Organ, 167 Mo. App. 493, 151 S. W. 504; Coleman v. Clark, 80 Mo. App. 339; Jeffords v. Dreisbach, 168 Mo. App. 577, 153 S. W. 274; and Falk v. Organ, 160 Mo. App. 218, 225, 141 S. W. 1—but all of these cases were actions for the breach of covenants of seisin. Respondents also rely upon cases from other states and refer to the case of George v. Hesse, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456, which contains a lengthy note commencing on page 776. There it is noted that the decisions of the federal courts are opposed to the rule of giving the purchaser the benefit of his bargain. However, the following statement is found: "But a majority of the state courts hold that the plaintiff is entitled to the benefit of his bargain and can recover the difference between the actual value of the property at the time of the purchase and what it would have been worth if the false representations had been true."

Judge Graves in the case of Kendrick v. Ryus, 225 Mo. 150, 158, 123 S. W. 937, 939 (135 Am. St. Rep. 585), enters upon an exhaustive review of the authorities prefaced as follows: "This action is not to rescind the contract but an action ex delicto for damages sustained by reason of fraud and deceit used at the time the contract was made." So that it is unnecessary for us to further review the cases outside of this state, as the "benefit of the bargain" rule is clearly recognized in this state.

Since the court erred in excluding the testimony offered and in refusing the instruction requested, we reverse the judgment and remand the case.

STURGIS and FARRINGTON, JJ., concur.

On Motion for Rehearing.

PER CURIAM. [3, 4] Respondents in this case are insisting that this court consider and pass on questions not presented to us by the record. They insist that the merchandise represented by the invoices assigned to them, or the party whom they represented on the trade for the land, had no existence or value, or that plaintiff had no more or better title to such merchandise than the party for whom respondents purported to act in making the trade had to the land. It is insisted that the transaction was, in part at least, merely a trade of land for merchandise, and that while the title to the land fell on the one side, so did the title or value of the merchandise fall on the other side, and that plaintiff ought not to be allowed to recover for the value of the land lost to him without taking into account the value of the merchandise lost to the respondents. This court has not so ruled for the reason that no

such question is presented in this record. If evidence to sustain respondents' contention was offered, the record does not so show. On this point the abstract of the record, unobjected to, shows no more than that plaintiff put in evidence tending to sustain the allegations of his petition, and that the court rejected his evidence as to the market value of the particular land lost to him by the failure of the vendors' title on the ground that such value was not the proper measure of damages. Nor was any such issue raised by defendants' answer. Under the pleadings, as they now stand, neither the trial court nor this court is called upon to pass on any defense or counterclaim arising to defendants from fraud and deceit practiced by plaintiff with reference to the quality, quantity, or title of the merchandise exchanged for the Arkansas land.

The motion for rehearing is overruled.

#### UNION COLD STORAGE & WAREHOUSE CO. v. PITTS.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913. Rehearing Denied Jan. 6, 1914.)

#### 1. APPEAL AND ERROR (§ 699\*)—RECORD—REVIEW.

It appearing merely that there was objection and exception to modification of the instructions, and not appearing what the modifications were, there is nothing for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.\*]

#### 2. PLEDING (§ 29\*)—ADVANCES BY PLEDGEE.

A cold storage company, to which produce stored with it was pledged as security for advances, refusing arbitrarily to sell to customers produced by the pledgor at prices sufficient to pay it, and afterwards selling it for an insufficient amount, is liable for the loss.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 74; Dec. Dig. § 29.\*]

#### 3. WAREHOUSEMEN (§ 28\*)—ADVANCES.

A cold storage company, to whom produce stored with it was pledged as security for advancements, having refused to sell it to customers produced by the pledgor at prices sufficient to pay it, and then sold it for less, is liable for conversion.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 64; Dec. Dig. § 28.\*]

Appeal from Circuit Court, Polk County; C. H. Skinner, Judge.

Action by the Union Cold Storage & Warehouse Company against W. H. Pitts. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Wood, of Humansville, for appellant. Rechow & Pufahl, of Bolivar, for respondent.

ROBERTSON, P. J. Plaintiff alleges in its petition that it is engaged in the cold storage and warehouse business in the city of Chicago, and that at the special instance and request of the defendant it advanced

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to him the sum of \$3,300, for which the defendant executed and delivered to it five promissory notes aggregating said sum, and that the defendant held in storage with plaintiff, in Chicago, produce designated and described in various invoices mentioned in said notes which was to be held by the plaintiff as collateral security for said notes; that the collateral contract in said notes provided that the plaintiff should be authorized to sell said produce or any part thereof upon maturity of the notes or at any time thereafter or before in the event that said security depreciated in value in the opinion of the plaintiff; and that such sale might be made privately or publicly, without advertising or giving any notice to the maker of the notes, and plaintiff should apply the proceeds to the payment of the notes, or any other liability of the defendant to plaintiff, including interest and all expenses, and that, in case the proceeds so derived were not sufficient to cover the principal, interest, and all expenses, the defendant should pay the deficiency forthwith after such sale. Plaintiff further alleges that the produce designated in said invoices consisted of dressed poultry to the amount of \$2,551, which the plaintiff sold under the terms of said notes and applied said amount to the credit of the defendant on the said notes, leaving a balance due of \$49 on one of the notes and \$700 on another of the notes, exclusive of interest on all of said notes. The plaintiff further alleges that the defendant deposited with it other and further warehouse warrants for produce to the value of \$717.24, which were sold by the plaintiff, and that the defendant paid in cash the sum of \$9.35, making the total amount received on additional collateral \$726.59; that there was charged against the defendant interest on said notes amounting to \$173.71, insurance on produce in storage, \$34.47, storage charges, \$293.16, cartage, labor, and packing, \$46.21, making a total of \$547.55, leaving a balance due the defendant on said additional collateral account of \$179.04; and that, after deducting the said last-named sum from the balance due on said promissory notes, there was a balance of \$569.96 due and owing the plaintiff from the defendant, for which amount it prayed judgment, together with interest from April 19, 1912.

The defendant filed his answer to plaintiff's petition, alleging as a counterclaim that in the year 1910 he stored with plaintiff, in Chicago, chickens and turkeys of the total value of \$4,851.38, and that on or about June 21, 1911, he demanded possession of said turkeys and ordered and directed the plaintiff to deliver same to another company in Chicago, and that on or about June 29, 1911, he demanded possession of all of said chickens and ordered and directed the plaintiff to deliver the same to a third company in Chicago, and that these two companies demanded possession of said fowls so sold to them, and

that the plaintiff failed and refused to deliver any of them but converted the same to its own use, all of which said poultry was then of the reasonable value of \$4,851.38, and that, by reason of the failure and refusal of the plaintiff to deliver the property as aforesaid, the defendant has been damaged in said sum, for which, together with interest at the rate of 6 per cent. per annum from June 29, 1911, the defendant asked judgment. And for another cause of action against the plaintiff the defendant alleged that he was in possession of the property aforesaid of the value above stated, and that plaintiff without any authority converted the same to its own use, to his damage in the amount above stated, for which judgment, with interest, was prayed.

Plaintiff filed its reply in the nature of a general denial, the trial on the issues was had to the court, and judgment rendered and entered by the court against the plaintiff on its petition and in favor of the defendant on his counterclaim in the sum of \$670, after allowing plaintiff credit for all sums advanced to defendant on the promissory notes, together with interest, storage, expense of sale, and all claims for money advanced and expended for and in behalf of the defendant. From this judgment the plaintiff has appealed.

The testimony discloses that, for a number of years previous to the transactions involved here, the defendant has been engaged in collecting, dressing, and shipping fowls to the plaintiff for cold storage in its warehouse in Chicago and for sale on commission, and that the plaintiff would advance to the defendant, upon such property so shipped and stored, certain sums of money agreed upon between them, which the defendant would collect by sight draft, and the plaintiff would thereafter forward to the defendant, for his signature and return, an agreement in the nature of a promissory note and a collateral security contract covering the warehouse warrant for the merchandise stored. Prior to June 21, 1911, the price of chickens and turkeys in Chicago began to decline, and the defendant became anxious to dispose of the poultry and discharge his obligation to the plaintiff. He thereupon agreed with the two firms above referred to for the sale of the property, and so instructed plaintiff, and directed plaintiff to deliver same to them, with the understanding that those parties would pay plaintiff the purchase price thereof, which was more than sufficient to pay all of the obligations owed by defendant to plaintiff, and that the plaintiff refused to so deliver the property but thereafter disposed of said produce, as it contends, under its collateral agreement, with the result set out in the petition. The only reason plaintiff gave for not complying with defendant's request was that one of its officers did not like the parties to whom the defendant had sold the property, although there is no testimony

introduced in behalf of the plaintiff which discloses that these parties were not financially responsible and entirely reliable business concerns, and although in fact many sales in the same manner had theretofore been made by the defendant to them. The value of a portion of the property alleged to have been converted by the plaintiff was made up of a number of consignments of turkeys which the defendant alleges to have been of the value of \$1,197.86. At no time had the plaintiff ever made any advancement to the defendant on account of these shipments.

The trial proceeded upon the theory in behalf of the plaintiff that it was not bound to sell the property at the market value in June, 1911, for the benefit of defendant, and consequently objected, and insists here upon the objection, that the court erred in permitting the defendant to prove the market value of the property at the time it is alleged the plaintiff converted the same. The defendant's position here is that it was incumbent upon plaintiff, under the circumstances disclosed in this case, to dispose of the property at the time he requested the sale, and that the plaintiff could not arbitrarily refuse to comply with his request and thereafter sell the property upon a declining market and arbitrarily compel the defendant to suffer loss by reason thereof.

At the conclusion of the testimony the court declared the law to be that, if the plaintiff received the produce in question, made advancements to the defendant thereon, held the warehouse receipts as collateral security on the notes given for such advances, then the plaintiff had the right to retain the possession of the property until the sums advanced by it, together with interest due thereon according to the terms of the notes, as well as all proper charges for storage, were paid or tendered; that plaintiff was not required to turn the property over to the defendant or any other person on his order unless when the demand for the property was made the full amount of the advances and all proper charges against said property was tendered, but that if on or about June 21, 1911, the plaintiff received notices or orders from the defendant to turn over said produce to certain other dealers in Chicago, if plaintiff understood therefrom that defendant desired said produce sold and marketed, and that plaintiff did not honor said orders, then it was the duty of the plaintiff to proceed with reasonable diligence to sell such produce and apply the proceeds upon defendant's indebtedness; and that, if plaintiff arbitrarily held said produce for months after it so understood, then the plaintiff would not be permitted to charge the defendant storage for said produce while the same was so arbitrarily held, and that the plaintiff was liable to defendant for losses caused by declines in the market while said produce was so

arbitrarily held by it. The court also declared the law to be that, in making sales of produce under the terms of the collateral contract, plaintiff was not required to obtain the highest market prices for the produce sold, but that it is only required to use ordinary care to obtain a reasonable market value at the time and place of sale, and that the presumption attains that plaintiff did use ordinary care, and the burden was on the defendant to show negligence, or want of ordinary care, on the part of the plaintiff in making such sale.

[1] These declarations of law were given, as we view the record, without any objection on behalf of the plaintiff. The declarations of law as they appear in the record are preceded with this statement, "Whereupon the court declared the law to be as follows;" and at the conclusion of the declarations of law appears the following statement, "To the modification of said instructions and each of them plaintiff objected and excepted at the time." What modifications, if any, were made or by whom made, or who requested the declarations of law, if any one, or whether they were given on motion of the court, is not disclosed by the record. It therefore becomes essential for us to determine only whether there is sufficient evidence in the record upon which to base these declarations. If the case was decided by the court on the wrong theory, as shown by these declarations of law, and without objections on behalf of the plaintiff, then there is nothing before us to review as there are no refused declarations of law and none given in behalf of the defendant. We may, however, state that we are not led to an affirmation of the judgment solely upon the acquiescence of plaintiff in the declarations of law given by the court, but upon the whole record we are of the opinion that the judgment is for the right party.

[2] It was the duty of the plaintiff, under its agreement and the circumstances disclosed by the testimony, to use ordinary care and diligence to protect the defendant from any unnecessary loss on his property in its custody, and if, through its negligence or wrongful act or omission, there was a depreciation thereof to the injury of the defendant, the plaintiff should be held, as it was in this case, for such loss. *Benedict & Co. v. Inland Grain Co.*, 80 Mo. App. 449; *National Exchange Bank v. Kilpatrick*, 204 Mo. 119, 102 S. W. 499, 120 Am. St. Rep. 689.

[3] That the defendant under the facts disclosed in this case was entitled to maintain his counterclaim in the nature of an action for conversion is well settled in this state. *Schaaf, Adm'r, v. Fries*, 90 Mo. App. 111, 116; *People's State Savings Bank v. M., K. & T. Ry. Co.*, 158 Mo. App. 518, 528, 138 S. W. 915.

Brushing aside all formalities and technicalities presented in this case and looking

at it solely with a view of administering justice between the two parties, it would be unconscionable to adjudge, we think, that the plaintiff should be permitted to arbitrarily hold the property stored with it and refuse to dispose of it, at the request of the defendant, in a manner that would enable it to immediately realize a sum sufficient to pay all of defendant's indebtedness to plaintiff and then permit it to sell the property for a sum insufficient therefor and allow it to recover any balance so due from the defendant.

The judgment of the trial court is affirmed.

STURGIS, J., concurs. FARRINGTON, J., concurs in result in a separate opinion.

FARRINGTON, J. (concurring). The decision in the case of National Exchange Bank v. Kilpatric, 204 Mo. 119, 102 S. W. 499, 120 Am. St. Rep. 689, to the effect that the holder of collateral security is required to sell the same under the terms of the contract of pledge when instructed to do so by the pledgor, requires that I concur in the affirmation of this judgment; the circuit court having found upon sufficient evidence that such demand was made. But it is my opinion (without any disrespect) that the ruling of our Supreme Court in the Kilpatric Case is opposed to the great weight of authority in other jurisdictions where, according to my view, the better reasoned cases on the subject are found.

#### GATES et al. v. STECKEL et al.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913. Rehearing Denied Jan. 6, 1914.)

#### 1. MINES AND MINERALS (§ 83\*)—LICENSES—REVOCATION.

While licensees under a mining license acquired no estate or interest in the land, mines, or minerals, and had no possession sufficient to enable them to maintain any possessory action, yet they had substantial rights which the law would protect, and their right to mine could not be revoked at will or arbitrarily, in the absence of some substantial violation of the terms and conditions imposed on them by the license.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 212, 214, 215; Dec. Dig. § 88.\*]

#### 2. MINES AND MINERALS (§ 84\*)—LICENSES—REVOCATION.

The licensees under a license to mine on certain lands which authorized the licensors to forfeit the license for failing to do continuous mining, or to pay the royalties when due, or for assigning an interest in the license without the licensors' consent, owed the licensors \$4.30 as royalty, which they offered to pay, though they did not then have the money present, but were assured that they could pay it at any convenient time. The licensees made an arrangement with two persons to carry on the mining operations, not amounting to sale or assignment of the license or interest therein, but rather to a contract of employment for a percentage of the mineral ores produced. The licensees failed to do continuous mining, but though the li-

censors were aware of this fact, they made no complaint until after active mining operations had been resumed. They then declared a forfeiture, and immediately granted a new license to the other parties at a larger royalty. Held, that there was no such violation of the terms or conditions of the license as warranted a forfeiture, and a court of equity would set a forfeiture aside.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 213; Dec. Dig. § 84.\*]

#### 3. MINES AND MINERALS (§ 84\*)—LICENSES—REVOCATION.

Under a mining license by which the licensors had a right to forfeit the license for a failure to do continuous mining, where the licensees failed to do continuous mining, but the licensors, although aware of this fact, made no complaint until at least a week after the resumption of active mining operations, they could not then declare a forfeiture for the past default.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 213; Dec. Dig. § 84.\*]

Error to Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by Hattie Gates and others against Phillip Steckel and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

R. A. Mooneyham, of Carthage, for plaintiffs in error. A. G. Young, of Webb City, for defendants in error.

STURGIS, J. In this equitable proceeding the trial court, after hearing all the evidence, set aside a forfeiture of a mining license made by the defendants, Hough and wife, to the plaintiff Hattie Gates and her associates. Hough and wife, as owners of the land, granted to plaintiffs a license to mine thereon for a term of five years from October 12, 1911, and declared the same forfeited on December 7, 1911, and thereby terminated the right of said licensees to further mine on said land. The defendant licensors sought in the trial court to justify their action in this respect, on the grounds that plaintiffs had violated the terms and conditions of their mining license in failing to do continuous mining, in failing to pay the royalties when due, and in assigning an interest in such license without the consent of the licensors. Without setting out the terms and conditions of the mining license in question, it is sufficient to say that the same contained provisions of this character, and also a provision that any failure to comply with the terms and conditions of the license in good faith shall end and determine the same, and the first parties may enter upon said land without proceedings at law. The trial court, after hearing all the evidence, found that the plaintiff licensees had not violated any of the terms or conditions of the mining license in such manner as to warrant the forfeiture declared by the defendant landowners. The questions raised are largely questions of fact and, after reading the evidence, we find ourselves in accord with the result reached by the trial court.

[1] While plaintiffs were mere licensees and acquired no estate or interest in the land, mines, or mineral, and had no possession sufficient to enable them to maintain any possessory action (*Joplin Supply Co. v. West*, 149 Mo. App. 78, 93, 130 S. W. 156), and cases there cited, yet their right to mine on this land could not be revoked at will, and, having substantial rights which the law will protect, they could not be arbitrarily deprived of their rights under the license, in the absence of some substantial violation of the terms and conditions imposed on them by such mining license. *Bingo Mining Co. v. Felton*, 78 Mo. App. 210; *Boone v. Stover*, 66 Mo. 430; *Mining Co. v. Mining Co.*, 106 Mo. App. 66, 80 S. W. 12.

[2] The plaintiffs, after obtaining the mining license in question, at once commenced sinking a shaft, and did sink a suitable mining shaft to the depth of about 90 feet, at an outlay of about \$600. Only a small amount of mineral ore was taken from the mine prior to the forfeiture in question, but a more or less promising "prospect" was discovered. The mining license provides that the ownership of all ores mined shall be and remain in the first parties (licensors), and that payment for same when sold shall be made to the said first parties. It seems to be conceded, however, that the second parties were given special permission to clean and market the small amount of ore mined, and that they realized therefrom about \$33, of which there was due the licensors \$4.30, as royalty. The nonpayment of this small amount of royalty is one of the grounds of forfeiture. It is not shown just how long before the forfeiture was declared that this mineral was marketed, but there is evidence that at the time of the sale the amount necessary to pay the royalty was carefully set aside and kept ready by one of the licensees to pay the landowners, and that he informed the landowners of this fact, and, not having the money then present, offered to go and get it and make the payment, but was assured that it was all right, and he could pay it to them at any convenient time.

As to the alleged assignment of an interest in the mining license, the evidence shows that the plaintiff licensees made a verbal arrangement with two persons named Holcomb and Steckel, by which they were to carry on the mining operations "six months at a time" for a per cent. of the ores mined. The details of this agreement are not very clearly shown, but the court was justified in finding that it was not a sale or assignment of the mining license, or of any interest in the same. Under the agreement made, Holcomb and Steckel did not become owners or part owners of the mining license, but were rather employes, working for a per cent. of the mineral ores produced. The licensees were still the sole owners of the mining license, and did not lose control of the mining operations. We are not impressed with the good faith of the licensors in declaring the forfeiture in

question on this ground, as it appears that on the very day the forfeiture was declared, if not previously, a new mining license was granted to these same parties, Holcomb and Steckel, at a larger royalty. That the landowners were seeking to profit by this forfeiture and the making of a new license at a higher rate of royalty is "a fact that, if not admitted point-blank, is hardly denied, and of which the testimony leaves no doubt." *Shoe Co. v. Odd Fellows Hall Co.*, 133 Mo. App. 229, 243, 113 S. W. 253.

[3] As to the ground for forfeiture that the licensees failed to do continuous mining, the evidence shows that no work was done during November, 1911, and perhaps during the latter part of October. The defendant licensors were aware of this fact, and made no complaint at the time. About December 1st the arrangement just mentioned with Holcomb and Steckel was made by the licensees, and the active mining operations were then resumed. Such active mining work had been going on at least a week after its resumption before the licensors declared the forfeiture in question. We think the licensors could not thus silently acquiesce in the licensees stopping work and letting the mine lay idle for a month, and, after they had resumed work and mining operations were again progressing favorably, declare a forfeiture for the past default. "The lessor may, in many instances, by his overt acts, be afterward estopped to claim the right of forfeiture, as against the lessee, although his acts do not amount to an absolute recognition of the lessee's rights under the lease. As where the lessor stands by and sees the lessee make subsequent discoveries and expenditures, without objection, which are much more valuable than the damages resulting from his breach." *White on Mines and Mining Remedies*, § 256.

In *Shoe Co. v. Odd Fellows Hall Co.*, 133 Mo. App. 229, 245, 113 S. W. 253, 258, the court said: "If a lessor would forfeit the term for breaches of contract by the lessee, he must be prompt in his declaration of forfeiture after he learns of the breaches, and cannot hold his decision in reserve to speculate for some advantage to himself, while he suffers the tenant to incur expense in the belief that he will not be disturbed. 18 Am. & Eng. Ency. Law (2d Ed.) pp. 382, 383, and citations in notes; *Garnhart v. Finney*, 40 Mo. 449 [93 Pac. 303]; *Hawes v. Favor*, 161 Ill. 440 [43 N. E. 1076]." See, also, 2 *Taylor, Landlord and Tenant* (9th Ed.) § 498.

We think this is a proper case for a court of equity to grant relief against a forfeiture, and that the learned chancellor who tried the case below reached a correct and just conclusion. The judgment will therefore be affirmed.

FARRINGTON, J., concurs. ROBERTSON, P. J., not sitting.

## TAYLOR v. GEORGE.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913. Rehearing Denied Jan. 6, 1914.)

## 1. WORK AND LABOR (§ 7\*)—IMPLIED CONTRACT—CONTRACT BETWEEN RELATIVES.

There is no presumption that services rendered by a daughter to her aged mother are to be paid for, and, to recover therefor, the daughter must show a contractual relation by proving an intention and obligation on one side to pay, and intention and right on the other to receive pay, for such services.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½–22; Dec. Dig. § 7.\*]

## 2. WITNESSES (§ 144\*)—COMPETENCY—TESTIMONY OF AGENT—CONTRACT WITH DECEDENT.

Under Rev. St. 1909, § 6354, providing that, in actions where one of the original parties to the contract in issue is dead, the other party shall not testify for himself, where the other party to the contract sued on is dead, the agent of the living party, who made the contract for such party, is disqualified from testifying in an action to enforce the contract.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625–643; Dec. Dig. § 144.\*]

## 3. WITNESSES (§ 144\*)—COMPETENCY—CONTRACT WITH DECEDENT.

Rev. St. 1909, § 6354, providing that no person shall be disqualified as a witness by reason of interest in the event, provided that, in actions where one of the original parties to the contract in issue is dead, the other party shall not testify for himself, is both an enabling and a disabling statute; the proviso disabling one from testifying on account of the other's death.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625–643; Dec. Dig. § 144.\*]

## 4. WITNESSES (§ 144\*)—COMPETENCY—CONTRACT WITH DECEDENT—CONSTRUCTION OF STATUTE.

Rev. St. 1909, § 6354, providing that, in actions where one of the original parties to a contract in issue is dead, the other party to the contract or cause of action shall not testify for himself, should be construed to accomplish its evident purpose of preventing by law one party to a contract from testifying, where death has prevented the other from testifying.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625–643; Dec. Dig. § 144.\*]

## 5. HUSBAND AND WIFE (§ 25\*)—AGENCY FOR WIFE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action by a daughter against her mother's estate to recover for personal services in caring for her mother, held not to show that plaintiff's husband was her agent for making a contract with her mother to pay for the latter's care.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 42; Dec. Dig. § 25.\*]

Appeal from Circuit Court, Dallas County; C. H. Skinker, Judge.

Action by S. E. Taylor against John George, executor of Mrs. E. G. Munhollon, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

J. W. Miller and Levi Engle, both of Buffalo, and L. C. Mayfield, of Lebanon, for appellant. John S. Haymes and O. H. Scott, both of Buffalo, for respondent.

STURGIS, J. This suit has for its basis the same claim against the estate of Mrs. E.

G. Munhollon as was the subject of the appeal in Taylor v. George, 159 Mo. App. 160, 140 S. W. 611. After the decision in that case, plaintiff brought suit in the circuit court to establish her claim as a judgment for allowance against that estate. The plaintiff is the daughter of the deceased. Her claim is made up of several items, by far the largest of which is for boarding, supporting, and taking care of her mother during the last 10 or 12 years of her life and during the last two of which it is alleged her mother was almost entirely helpless, requiring almost constant care. After hearing the evidence, the court excluded this item and two others of minor importance from the consideration of the jury and permitted plaintiff to recover for two other items for taxes paid and purchase of a coffin for deceased. The plaintiff has appealed.

There is no formal assignment of error in this court, but the "points" made in appellant's brief relate to the action of the court with reference to this item for care and support of plaintiff's mother. The evidence abundantly shows, and it will be conceded, that the deceased mother, an aged widow lady, lived with her daughter during the last several years of her life, and that during the last year or more she was in a rather helpless condition both mentally and physically and required much care and attention. That the daughter, plaintiff here, gave her mother a home and bestowed on her kind and patient care and attention, administering to her every want as best she could from her limited means and humble home, goes without question.

[1] It must be conceded, however, that, on account of the relationship of these parties and the circumstances under which the mother went to live with the daughter in her old age, however meritorious and valuable were the services, care, and attention rendered by the daughter to the mother, this case falls within that class of cases where no presumption arises that such services are to be paid for. Unlike it would be between strangers, no implied contract to pay for same arises from the performance by one of a family of valuable services for another. Such services are in such cases presumed to be rendered on account of the moral obligations arising from the family relation and to be gratuitous. Before one party can recover from another a money consideration under such circumstances, there must be proof of a contractual relation, showing both an intention and obligation on the one party to pay and an intention and right on the other party to demand and receive pay for such services. The law applicable to this and like cases is well expressed and the authorities collated by the Kansas City Court of Appeals in Brand v. Ray, 156 Mo. App. 622, 630, 137 S. W. 623, 624, as follows: "That the family rela-

tion existed is not a matter of doubt or dispute. In such instances there is no presumption, as in cases between strangers, that services rendered by one member to the other are to be paid for. Such services are, however, the subject of contract, and they can only be made the ground of an action when they are rendered under a contract between the parties. The contract need not necessarily be in the form of express terms. It may be implied; but, before an implication will arise, it must be shown that there was a contractual intention and understanding and an expectation to pay wages by one party and an expectation to receive wages by the other. *Bircher v. Boemler*, 204 Mo. 554, 562, 563 [103 S. W. 40]; *Kostuba v. Miller*, 137 Mo. 161, 175, 38 S. W. 946; *Erhart v. Detrich*, 118 Mo. 418 [24 S. W. 188]; *Morris v. Barnes*, 85 Mo. 412; *Guenther v. Birkicht*, 22 Mo. 439. And so the Courts of Appeals have time and again followed these decisions. *Woods v. Land*, 30 Mo. App. 176; *Brock v. Cox*, 38 Mo. App. 40; *Lawrence v. Bailey*, 84 Mo. App. 107; *Sloan v. Dale*, 90 Mo. App. 87; *Fitzpatrick v. Dooley*, 112 Mo. App. 165 [86 S. W. 719]; *Birch v. Birch*, 112 Mo. App. 157 [86 S. W. 1106]. The expression of an intention to bestow a bounty and an expectation to receive a bounty will not suffice; an expectation to be made the beneficiary in a will is not sufficient. There must be an understanding of a debtor and creditor relation, capable of enforcement in law. There must be brought into existence a legal obligation."

The cases of *Bircher v. Boemler*, 204 Mo. 554, 103 S. W. 40, and *Woods v. Land*, 30 Mo. App. 176, show that there must be something more than a mere intention to make, or expectation to receive, compensation at some time and in some way for such services in order to constitute the same an enforceable claim against an estate. The claimant must show such an agreement between the parties as will compel the beneficiary to make payment, whether he so desires or not.

The claimant in this case, in recognition of this requirement of the law, attempted to show a promise and agreement by the deceased with her daughter binding the deceased to pay her daughter for boarding and taking care of her. It is conceded that such agreement was shown, if at all, only by the evidence of the plaintiff's husband. The trial court excluded his evidence as being incompetent, and this is the principal question in the case.

[2] The husband would be a competent witness for his wife only by reason of his being her agent and then only as to some matter of business or business transaction had with or conducted by him as her agent. Section 6359, R. S. 1909. Granting that he was, and acted in this matter as, his wife's agent and as such made a contract for her binding his mother-in-law to pay her daughter for board-

ing and caring for her, we are then confronted with the proposition that, the other party to this contract being dead, he is an incompetent witness under the proviso contained in section 6354, R. S. 1909. The insistence is that the statute disqualifying one party to a contract when the other is shown to be dead includes the agent of such living party where the contract was made by and through such agent. This has been a much mooted question in this state. The decisions are conflicting. It was at one time held that the statute did not disqualify a party to a contract or cause of action in issue unless such party was also a party to the suit. *Looker v. Davis*, 47 Mo. 140; *Jackson v. Smith*, 139 Mo. App. 691, 123 S. W. 1026, and cases cited. Such, however, is not now the law. *McClure v. Clement*, 161 Mo. App. 23, 25-28, 143 S. W. 82, and cases cited; *Meier v. Thieiman*, 90 Mo. 433, 2 S. W. 435; *Cleveland v. Coulson*, 99 Mo. App. 468, 73 S. W. 1105; *Griffin v. Nicholas*, 224 Mo. 275, 328, 123 S. W. 1063. There is also a line of decisions based on the theory that the statute is an enabling one only and not a disabling one, and that whether the witness has or has not an interest in the controversy is a fact to be considered in determining his competency. This doctrine is to the effect that, where a witness is not a party to a suit or interested therein, he is not disqualified at common law, even though the other party to the contract in issue is dead, and the statute, being an enabling one only, does not disqualify one who is not disqualified by the common law. *Baer v. Pfaff*, 44 Mo. App. 35, 40; *Ring v. Jamison*, 66 Mo. 424; *Curd v. Brown*, 148 Mo. 82, 49 S. W. 990; *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616. Some of these cases have been expressly overruled, and this doctrine has been abandoned, and it is now held that the death of the other party is the only controlling factor in determining the competency of a witness. *Weiermueller v. Scullin*, 203 Mo. 466, 471, 473, 101 S. W. 1088; *Jackson v. Smith*, 139 Mo. App. 691, 700, 123 S. W. 1026; *Carroll v. Railroad*, 157 Mo. App. 247, 274, 277-279, 137 S. W. 303; *McClure v. Clement*, 161 Mo. App. 23, 25, 143 S. W. 82.

[3] The main provision of this statute is an enabling one by removing the disability of interest, but the proviso is a disabling one on account of the death of the other party. *Griffin v. Nicholas*, 224 Mo. 275, 327, 123 S. W. 1063; *Banking House v. Rood*, 132 Mo. 256, 262, 33 S. W. 816.

The identical question now presented to this court has recently undergone a thorough examination by both of the other Courts of Appeals in *Carroll v. Railroad*, 157 Mo. App. 247, 137 S. W. 303, and *Jackson v. Smith*, 139 Mo. App. 691, 123 S. W. 1026. In the *Jackson v. Smith* Case the Kansas City Court of Appeals, basing its decision on *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616, held directly that, where the husband made a contract for his wife as



her agent, the statute in question did not disqualify him as a witness. That court, however, mentioned the fact that the decisions were not harmonious and conceded that, where a corporation or partnership acts by agent, the death of the agent would disqualify the other party and vice versa. *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429; *Nichols, Shepard & Co. v. Jones*, 32 Mo. App. 637; *Columbia Brewing Co. v. Rohling*, 133 Mo. App. 65-67, 112 S. W. 767. Besides, the *Jackson v. Smith* Case, *supra*, following *Clark v. Thias*, *supra*, was partially, at least, based on the erroneous theory that, because the agent was neither a party to the record nor interested in the suit, the statute did not disqualify him, which it does not on the ground of interest but does on the ground that the other party to the contract at issue is dead. This same court in the later case of *McClure v. Clement*, 161 Mo. App. 23, 143 S. W. 82, stated that in deciding *Jackson v. Smith*, *supra*, it had overlooked the fact that this statute has been amended since the decision of *Looker v. Davis*, 47 Mo. 140, and that that case and those following it were no longer authority as to that point.

In the case of *Carroll v. Railroad*, 157 Mo. App. 247, 275, 137 S. W. 303, the St. Louis court, basing its decision on the case of *Griffin v. Nicholas*, 224 Mo. 275, 326, 123 S. W. 1063, as being the last controlling decision of the Supreme Court, declined to follow *Jackson v. Smith*, *supra*, and held that, where the plaintiff contracted by agent, the death of the other contracting party disqualified such agent. This is a well-considered case and we think announces the correct rule of law.

[4] There is no longer a doubt but that the statute should be construed according to its spirit and intent rather than its strict letter and in such a way as to accomplish its evident purpose of closing the mouth of one party by law where death has closed the mouth of the other. *Weiermueller v. Scullin*, 203 Mo. 466, 472, 101 S. W. 1088. In so construing it there is no doubt, as said by *Macfarlane, J.*, in *Banking House v. Rood*, 132 Mo. 256, 33 S. W. 816, that "'a party to the contract' has been construed to mean the person who negotiated the contract rather than the person in whose name and interest it was made." *Brim v. Fleming*, 135 Mo. 597, 606, 37 S. W. 501; *McKee v. Downing*, 224 Mo. 115, 140, 124 S. W. 7; *Commercial Sav. Bank v. Slattery*, 166 Mo. 620, 633, 634, 66 S. W. 1066. We are also impressed with the correctness of the reasoning and justness of the conclusion of the *Carroll* Case, *supra*, that there is no just reason for holding that a contracting agent of a corporation is disqualified by the death of the other party to the contract, but that the contracting agent of an individual is not so disqualified. That a corporation always acts and contracts by agents, and that individuals only so act and

contract part of the time, is certainly no valid reason for applying the rule to individuals when they do so act or contract.

We think our decision in this case will be found in full accord with *Green v. Ditsch*, 143 Mo. 1, 7, 8, 44 S. W. 799; *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429; *Brim v. Fleming*, 135 Mo. 597, 606, 37 S. W. 501; *Real Estate Co. v. Bldg. Co.*, 196 Mo. 358, 93 S. W. 1111; *Robertson v. Reed*, 38 Mo. App. 32; *Donnell Newspaper Co. v. Jung*, 81 Mo. App. 577; *Wendover v. Baker*, 121 Mo. 273, 297, 25 S. W. 918; *Waltemar v. Schnick's Estate*, 102 Mo. App. 133, 76 S. W. 1053; *Edwards v. Warner*, 84 Mo. App. 200. The present ruling certainly conforms to the evident purpose of the statute, makes it uniform in its application, and aids in preventing inequality and false swearing in that, in all cases where one of the active parties in making a contract or conducting a business transaction, whether as principal or agent, is dead and such contract or transaction becomes the basis of a lawsuit, then the other active party is disqualified as a witness with relation thereto. Keeping this intent and purpose of the proviso to the statute in view, much of the difficulty in the construction of the statute vanishes by applying these principles: That the spirit of the statute includes in the term "party to the contract or cause of action" the agent who negotiated the contract or conducted the business; that the statute makes no distinction in this respect between corporations or partnerships and individuals when acting by agent, and there is no distinction in principle; that the proviso to the statute makes the death of the other party to a contract or cause of action the sole ground and test of such disability without any reference to the witness' interest in the controversy or his competency at common law. We therefore hold that the trial court did not err in holding that plaintiff's husband is not a competent witness as to making any contract as agent of his wife with the deceased and in excluding his evidence as to such matter.

[5] We also hold that there is no sufficient showing that the husband was in fact acting as agent of his wife in making or attempting to make any such contract. The husband did not testify that his wife authorized, requested, or directed him to make any agreement with her mother binding the mother to pay the daughter for boarding and caring for her, except, possibly, in so stating as a mere conclusion of the witness drawn from certain remarks or conversations with his wife, which, when given in evidence, refuted any such idea. The witness said that he generally tended to all his wife's business, looked after and tended the farm, did everything she directed, etc., and then said that his wife told and directed him to go after and bring his mother-in-law to their home, which he did. But this falls far short of proving

that he was authorized to make a contract for his wife compelling his mother-in-law to pay for her board and any and all care that might become necessary in case of sickness. He also testified as to hearing his mother-in-law tell his wife in a conversation between them that she would pay her for boarding and caring for her, but he certainly was not acting as agent of his wife in listening to the making of any contract directly between them. "These were matters about which he could as well testify had he never been agent, so far as obtaining his information by reason of his agency is concerned. It did not grow out of his agency, nor was it connected therewith in the sense of the statute." *White v. Chaney*, 20 Mo. App. 389, and cases cited; *Flannery v. Railroad*, 44 Mo. App. 396.

Other points are discussed by counsel in their briefs but what we have said is decisive of the case. It therefore results that the case, having been properly tried, is affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

PONCOT v. ST. LOUIS, I. M. & S. RY. CO.  
(Springfield Court of Appeals. Missouri. Dec. 11, 1913. Rehearing Denied Jan. 6, 1914.)

1. APPEAL AND ERROR (§ 301\*)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL.

Under Rev. St. 1909, § 2083, requiring the Supreme Court and Courts of Appeals to examine the record and award a new trial, reverse or affirm, or give such judgments as the circuit court ought to have given, and section 2081, providing that no exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court except such as have been expressly decided by such court, matters of exception not embraced in a motion for a new trial cannot be considered by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.\*]

2. APPEAL AND ERROR (§ 544\*)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL.

A motion to strike an amended petition on the ground of departure from the original petition is not equivalent to a demurrer and is not a part of the record proper, and hence the ruling of the court thereon must not only be made a part of the record by a bill of exceptions, but must be embraced in a motion for a new trial giving the circuit court an opportunity to correct the alleged error before it can be considered or reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.\*]

3. APPEAL AND ERROR (§ 866\*)—SCOPE OF REVIEW.

Where plaintiff, after the striking of his amended petition on the ground of departure from the original petition, failed to prosecute the suit, whereupon the court dismissed the cause, on an appeal from the judgment of dis-

missal, the dismissal alone could be complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.\*]

4. DISMISSAL AND NONSUIT (§ 60\*)—WANT OF PROSECUTION.

Where plaintiff after the striking of his amended petition on the ground of departure from the original petition failed to prosecute the suit, and such failure was not induced by the striking of such petition, the court properly dismissed the cause.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.\*]

5. RAILROADS (§ 108\*) — CONSTRUCTION — DITCHES AND CULVERTS.

Under Rev. St. 1909, § 3150, requiring railroad companies to construct and maintain suitable openings across and through the right of way and roadbed and suitable ditches and drains along each side of the roadbed to connect with ditches, drains, or water courses so as to afford sufficient outlet to drain and carry off the water, including the surface water along the railroad whenever the draining thereof has been destroyed or rendered necessary by the construction of such railroad, where the lateral drain on the south side of the roadbed was not constructed in a negligent manner, was not an unsuitable one, and was not made to drain more territory or surface water than was necessary in complying with the statute, and there was no other ditch, drain, or water course affording an outlet for such lateral ditch, the company was not liable because the ditch after passing through the roadbed and leaving the right of way overflowed the land on the north side of the same; the opening through the roadbed and ditch on the right of way being sufficient, the company merely having done what it was authorized to do by the statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 335-336; Dec. Dig. § 108.\*]

Appeal from Jasper Circuit Court; D. E. Blair, Judge.

Action by A. F. Poncot against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment dismissing the cause for failure to prosecute, plaintiff appeals. Affirmed.

Shannon & Phelps, of Carthage, for appellant. R. T. Railey, of St. Louis, and A. E. Spencer, of Joplin, for respondent.

ROBERTSON, P. J. Plaintiff has appealed from the following judgment entered June 18, 1913: "It appearing to the court that the plaintiff has failed to appear and prosecute this cause, it is therefore ordered by the court that this cause be and the same is hereby dismissed; that the defendant be discharged and recover of and from the plaintiff the costs of this case; and that execution issue therefor."

The history of the case is as follows: On May 17, 1912, the plaintiff filed in the circuit court his original petition seeking to recover for damages to his crops caused by the flooding of his land by the defendant in the years 1907, 1908, 1909, 1910, and 1911. On the first day of the return term, June 3, 1912, the defendant appeared and answered by a general denial. At the November, 1912,

term, on the commencement of the trial before a jury, upon motion to require the plaintiff to elect upon which cause of action he would proceed, the court sustained the same, and thereupon the plaintiff filed an amended petition, stating the several causes of action embraced in the original petition in five separate counts. Afterwards, during the progress of the trial, the plaintiff further amended his petition by striking out certain portions of each count of said amended petition and interlining certain words in each count, which interlineations were by the court stricken out on the ground that they constituted a departure from the original petition and stated a new and different cause of action. The court discharged the jury, made an order continuing the cause, and gave the plaintiff leave to file another amended petition. On December 14, 1912, the plaintiff filed another amended petition containing five counts, and on December 17, 1912, the defendant filed a motion to strike out each count of said last-amended petition for the reason assigned that said amended petition stated different causes of action from those contained in the original petition. On January 4, 1913, the last day of the November term of said court, the court sustained the said motion, and the plaintiff was given until the third day of the February, 1913, term of said court in which to file his bill of exceptions. The next record disclosed in the case is that of the filing of the bill of exceptions on February 17, 1913, the first day of the February, 1913, term of court, and the only other record is that of the judgment of dismissal, above set out, on June 13, 1913, for failure to prosecute said cause. Plaintiff has taken the necessary steps to perfect his appeal to this court from the judgment of dismissal, but no motion for a new trial was filed by him in the circuit court. This, we think, precludes a review by this court of the errors complained of here by the appellant.

[1, 2] Section 2083, R. S. 1909, makes it our duty to examine the record in all cases irrespective of any exceptions in motions for new trial or in arrest of judgment; but under section 2081, R. S. 1909, we overstep our bounds when we seek to decide questions which are wholly matters of exception but in which either no exceptions were saved, or of which no complaint was made in the motion for new trial. In short, we should be careful not to convict the trial court of an error of which full opportunity was not given, as provided for by law, for correction before the case reaches this court.

Thus, it is necessary that we determine whether the motion in this case to strike out the last amended petition of plaintiff from the files is a part of the record proper. Matters of exception, such as complaint of striking out portions of pleadings, not embraced in a motion for new trial, cannot be considered by this court. *Acock v. Acock*, 57 Mo. 154, 156; *Gardner v. Met. St. Ry.*

*Co.*, 223 Mo. 389, 412, 122 S. W. 1068, 18 Ann. Cas. 1166; *Coffey v. Carthage*, 200 Mo. 616, 629, 98 S. W. 562; *Barrett v. Stoddard Co.*, 246 Mo. 501, 509, 152 S. W. 43; *Williams v. Railway Co.*, 112 Mo. 463, 485, 20 S. W. 631, 34 Am. St. Rep. 403.

The case of *Blick v. Dry*, 134 Mo. App. 589, 114 S. W. 1145, is a case directly in point, holding that a motion and the action of the court in striking out the petition on the ground that there is a departure are matters of exception and not a part of the record proper, so that it necessarily follows that they should be incorporated in the bill of exceptions; and, under the rulings in the *Acock*, *Gardner*, *Coffey*, *Barrett*, and *Williams* Cases, supra, it was essential that a motion in the nature, at least, of a motion for a new trial, should have been filed, or that some opportunity should have been given the trial court to have corrected the errors of which complaint is now made.

In *Bateson v. Clark*, 37 Mo. 31, 34, it is said that the record proper is the petition, summons, and all subsequent pleadings, including the verdict and judgment, and that these the law has made it our duty to examine and revise whether any exceptions are taken or not. In the opinion in the case of *In re Estate of Howard*, 128 Mo. App. 482, 490, 106 S. W. 116, 118, are collected and classified numerous authorities, and, after the statement that there are various motions, the rulings on which may be reviewed without being mentioned in a motion for new trial, is the following: A motion "to strike out an entire pleading, which motion is equivalent to a demurrer. *O'Connor v. Koch*, 56 Mo. 253." The case cited, upon which this instance is given, involved in effect a demurrer to the petition.

In the case of *Heman v. Glann*, 129 Mo. 325, 334, 31 S. W. 589, after a motion to strike out an amended petition on the ground of departure was sustained, the plaintiffs excepted, afterwards moved the court to set aside its order striking out said amended petition, and, after that was overruled, the plaintiffs again excepted, and thereupon took a nonsuit with leave to move to set the same aside, and afterwards filed said motion, which was overruled, and plaintiffs excepted and thereupon perfected their appeal.

In the case of *Ross v. Mineral Land Co.*, 162 Mo. 317, 328, 62 S. W. 984, upon the sustaining of a motion to strike out, the plaintiffs excepted and announced that they would stand upon their petition and declined to plead further. The court then gave judgment for the defendants, to which plaintiffs excepted and in due time filed their motion to set aside the order striking out their amended petition and to set aside the judgment rendered for the defendants and to permit the plaintiffs to proceed to trial. Upon the overruling of this motion, the plaintiffs excepted and perfected their appeal.

In the case of *Beattie Mfg. Co. v. Gerardi*, 166 Mo. 142, 152, 65 S. W. 1035, the defend-

ant sought to reach the defect of departure, or change of cause of action, by means of a demurrer, and the Supreme Court held (168 Mo. 153, 65 S. W. 1035) that, as a demurrer only goes to some defect apparent on the face of the petition demurred to, the question could only have been raised by a motion to strike out. Thus, it is apparent that a motion of this character is not and cannot, under any circumstances, be considered in the nature of a demurrer or as a part of the record proper, and the appellant in the case at bar so understood, and therefore made the motion, and his exception to the action of the court sustaining it, a part of the record by a bill of exceptions; but he did not file any further motion in the nature of a motion for a new trial giving the circuit court an opportunity to correct the alleged error.

[3, 4] This case also presents the peculiar situation that, long after the appellant had filed his bill of exceptions and made his last appearance in the case, the court dismissed the cause for failure to prosecute. It appears from the conduct of plaintiff in this regard that he had abandoned the case, and he should now be heard to complain of nothing except the dismissal. The record does not disclose that the judgment from which the plaintiff has appealed was induced by the matters of which he now complains, but it appears to have been brought about as a result of his failure to prosecute his suit. The record does not disclose that his failure to proceed with his case was because of the action of the court in striking out his last amended petition. In this dismissal the court committed no error.

We feel that this case should not be passed without the suggestion that, while we prefer to dispose of cases on the merits rather than upon questions of practice, we should not be expected to ignore the statutory provisions that are enacted for a fair and full presentation to the circuit court of all matters to which error is here assigned. The rule requiring a motion for a new trial is a just one and one which in fairness to the lower courts should be enforced when the occasion arises and the attention of the appellate court is called thereto. If the appellant had pursued an orderly course in the lower court, it might have been unnecessary for him to seek a review here. After the circuit dismissed his case for failure to prosecute, he then proceeded here too rapidly.

Finding no error of which the trial court can be convicted, it is our duty to affirm the judgment.

Affirmed.

STURGIS and FARRINGTON, JJ., concur herein and file a separate opinion.

STURGIS, J. [5] I fully concur with ROBERTSON, P. J., in the foregoing opin-

ion and think the case should be affirmed for another reason.

Even if the motion to strike out the amended petition be regarded as having the force and effect of a demurrer and for that reason no motion for a new trial is necessary, yet the action of the court should be sustained for the reason that the amended petition so stricken out does not state facts sufficient to constitute a cause of action. The amended petition in effect alleges that the defendant constructed an embankment east and west so as to obstruct the natural flow northward of surface water on his adjacent farm on the south; that it constructed a ditch on the south side of this embankment to connect and drain the surface water westward into a ditch running north and crossing defendant's right of way; that this ditch running north overflowed the land on the north side of the right of way because insufficient to carry off all the surface water running into the same. It is not alleged and in fact the overflow on the north side of the embankment could not be caused by an insufficient opening through the same or any obstruction on the right of way. The petition merely alleges that defendant did what the statute (section 3150, R. S. 1909) authorizes and required it to do, to wit, construct a suitable ditch and drain along the side of the roadbed to connect with the ditches and drains passing through its roadbed, so as to afford a sufficient outlet to drain and carry off the surface water. The statute does not require railroads to be built on open trestle work, so as to in no way obstruct the flow of surface water, but authorizes solid embankments with sufficient openings where there are ditches and drains or water courses to pass through and the construction of lateral ditches and drains to connect with and drain the surface water into the same. *Graves v. Railroad*, 69 Mo. App. 579; *Cooper v. Railroad*, 123 Mo. App. 141, 100 S. W. 494; *Ranney v. Railroad*, 137 Mo. App. 537, 119 S. W. 484. To the extent to which railroads are permitted and required by this statute to construct and maintain ditches and drains along its roadbed to carry surface water into other ditches, drains, or water courses, they cannot be held liable for so doing or for any damage resulting therefrom. It is not alleged that the lateral drain was constructed in a negligent manner or was not a "suitable" one, or that it was made to drain more territory or more surface water than was necessary in complying with the statute, or that there was any other ditch, drain, or water course affording an outlet for this lateral ditch. The rule forbidding the collection of surface water into ditches and discharging it in increased volume on other lands is not applicable to this case.

FARRINGTON, J., concur.

## JOHNSON v. SPRINGFIELD TRACTION CO.

(Springfield Court of Appeals. Missouri. Dec. 11, 1913. Rehearing Denied Jan. 6, 1914.)

## 1. STREET RAILROADS (§ 117\*)—PERSONAL INJURIES—QUESTION FOR JURY.

On evidence, in an action for personal injuries from a collision of defendant's street car with a wagon on which plaintiff was riding, *held*, that a demurrer to the evidence was properly overruled.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

## 2. TRIAL (§ 260\*)—REFUSAL OF INSTRUCTIONS—MULTIPLICITY.

Courts should not give too many instructions in any case, as they tend to confuse rather than to enlighten the jury, and, having given an instruction fairly and clearly presenting an issue, further instructions differently worded but covering the same point or making nice legal distinctions are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

## 3. PLEADING (§ 8\*)—CONCLUSIONS—CONTRIBUTORY NEGLIGENCE.

The mere general statement of a conclusion that if defendant was negligent the plaintiff was also guilty of negligence contributing thereto is bad pleading which, in the absence of waiver, is insufficient to raise any such issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

## 4. STREET RAILROADS (§ 99\*)—TRAVELERS' USE OF STREET—NEGLIGENCE.

The mere use of a public street, no part of which was set apart for the exclusive use of a street railway, by driving on the part of the street occupied by its car track, is not negligence which will preclude recovery for injuries received by being run into by a street car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.\*]

## 5. NEGLIGENCE (§ 93\*)—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

Where plaintiff, in an action against a street railway for personal injuries from a collision, was not driving or directing the wagon on which she was riding with her husband, and he was not her agent in so doing, his negligence in driving, if any, was not imputable to her, where she did not concur in or expressly sanction it, or knowing the danger fail to protect herself.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.\*]

## 6. TRIAL (§ 296\*)—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—CURE OF OMISSION.

In an action against a street railway for personal injuries from a collision, a defense like contributory negligence, which must be pleaded and proved by defendant, may properly be left to a separate instruction, so that a general instruction for plaintiff omitting any reference to such defense is not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

## 7. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Error, if any, in a general instruction for plaintiff, in an action against a street railway for personal injuries, omitting any reference to contributory negligence, was harmless where it and the instruction for defendant, pointing out all acts of plaintiff alleged to constitute contributory negligence, supplemented

each other and when read together made a harmonious whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

## 8. STREET RAILROADS (§ 118\*)—PERSONAL INJURIES—INSTRUCTIONS—NEGLIGENCE.

In an action against a street railway for personal injuries from a collision, an instruction stating generally the duty of defendant, followed with a specific application of the doctrine so stated to the facts in issue, was proper.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.\*]

## 9. STREET RAILROADS (§ 81\*)—PERSONAL INJURIES—DUTY OF VIGILANT WATCH.

The vigilant watch doctrine is in force as part of the common law, without any city ordinance to that effect.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.\*]

## 10. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACT.

In an action against a street railway for personal injuries from a collision, an instruction that if a jury found from the evidence that the motorman saw, or by ordinary care could have seen, the plaintiff's wagon moving along its track in dangerous nearness thereto, was not objectionable as assuming that the car was "in dangerous nearness thereto" without the qualification "if you so find."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

## 11. STREET RAILROADS (§ 90\*)—PERSONAL INJURIES—AVOIDABLE INJURY.

In an action for personal injuries received in a collision with a street car, plaintiff might recover where defendant could have prevented injury either by sounding the gong or stopping the car and failed to do so, and could also recover on defendant's negligence in not stopping the car, even if the gong was being sounded.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-193; Dec. Dig. § 90.\*]

## 12. TRIAL (§ 243\*)—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.

In an action for personal injuries received in a collision with a street car, an instruction, permitting a recovery if defendant could have prevented the accident by either sounding a gong or stopping the car and failed to do so, was not in conflict with an instruction permitting recovery for negligent failure to stop the car even if the gong was being sounded, since, if it was defendant's duty to do both of such things to avoid injury, the doing of one only would not excuse its failure to do the other when the doing of the other would have avoided injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.\*]

## 13. STREET RAILROADS (§ 90\*)—OPERATION—"VIGILANT WATCH"—"FIRST APPEARANCE OF DANGER."

The doctrine of "vigilant watch," as applying to the operation of a street railway, requires that a motorman on the "first appearance of danger" to a vehicle on the track shall stop the car in the shortest time and space possible; and where he has an unobstructed view of the vehicle either on the track or so near as to be in danger, and he sees, or by due care might see, the danger in time to control or stop his car before collision, the time and place where his duty to do so arose is somewhere between the place of vision and the collision.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-193; Dec. Dig. § 90.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**14. STREET RAILROADS (§ 117\*)—PERSONAL INJURIES—QUESTION FOR JURY—AVOIDABLE INJURY.**

In an action against a street railway for personal injuries from a collision of its car with plaintiff's wagon, it is for the jury to determine when plaintiff's danger first appeared.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

**15. APPEAL AND ERROR (§ 882\*)—RIGHT TO COMPLAIN—PARTY ALLEGING ERROR.**

A party cannot complain of error in the theory on which the case was submitted, when its own instruction submitted the same theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**16. NEGLIGENCE (§ 119\*)—ISSUES—LAST CLEAR CHANCE—PLAINTIFF'S NEGLIGENCE.**

The humanitarian or last clear chance doctrine is an exception to and defeats the rule that contributory negligence is a complete defense, and arises not because of, but in spite of, plaintiff's negligence, so that, where the facts found call for the application of the doctrine, the fact that plaintiff's negligence is not pleaded or admitted is unimportant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.\*]

**17. TRIAL (§ 194\*)—INSTRUCTIONS—PROVINCE OF JURY.**

Whether positive evidence of witnesses who said that they heard the gong of a street car sounded was entitled to greater weight than negative evidence of witnesses, who said that they were in a position to hear it, but did not hear it, is a question to be weighed by the jury, who are the sole judges of the weight to be given the testimony of any witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

**18. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICATION TO EVIDENCE.**

In an action against a street railway for personal injuries from a collision, where there was no proof of plaintiff's expectancy of life at her age, it was not error to refuse an instruction that, in determining the amount of damages, her age and expectancy should be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

Appeal from Circuit Court, Greene County; Arch A. Johnson, Judge.

Action by Martha A. Johnson against the Springfield Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant appeals from a judgment for \$6,000 in favor of plaintiff for personal injuries sustained by her by reason of defendant's trolley car colliding with a wagon on which she was riding with her husband, whereby plaintiff was thrown to the pavement. The injury occurred on Jefferson, a north and south street, in Springfield, Mo., on Labor Day, 1912. The plaintiff and her husband, both very old people, were moving from the country to town and were hauling certain household goods, including an "old fashioned" kitchen safe, on a one-horse spring wagon; they sitting on a spring seat with this kitchen safe fastened crosswise on the wagon bed just behind this seat. This

safe was some 6 or 7 feet high, and when laid across the wagon bed projected over either side some 18 to 24 inches. The wagon was traveling south, as was the trolley car which struck it, and, while there is some conflict of the evidence on this point, the jury were warranted in finding that shortly before the actual collision one wheel of the wagon was running inside the west rail with the driver trying to turn to the west so as to entirely clear the track. The car overtook the wagon just after the wagon wheel passed over the rail to the west side and while the wagon was yet so near the track that, while the car cleared the wagon, it struck the projecting end or legs of this kitchen safe, forcing it forward against the seat and precipitating both plaintiff and her husband onto the pavement a few feet from the curb on the west side of the wagon. The force of the blow was such that, while plaintiff was on the east end of the seat next to the colliding car, she was thrown over her husband lighting nearest to the west curb. The husband died from the effects of his injuries, and this plaintiff had several bones broken and received severe and permanent injuries. This suit is for her personal injuries and not for the death of her husband. It is shown that Jefferson is a much traveled street at and near the place of the accident, and that at the time and place thereof there were one or two automobiles near the west curb, so that plaintiff's wagon was to some extent hemmed in so as to prevent turning westward to clear the track. Plaintiff testified that she remembered well of their driving along the street in the wagon, but knew nothing of the accident or what caused it until she regained consciousness at the hospital some days later and was told how she got hurt. As the husband was killed, it is mere conjecture that he ever knew of the approach of the car from the rear or what happened to him.

It is undisputed that those in charge of the car had an unobstructed view of the wagon as it proceeded up the track for a block before the wagon was reached; it was a clear day, the track in good condition, the car equipped with modern appliances and running upgrade. There is also much evidence, though this is not contradicted, that the car was running eight to ten miles per hour, the speed not slackened until the actual collision, and that no gong or other alarm was sounded to give warning of the car's approach from the rear. The following substance of the evidence of the witness Horn, who saw the accident, will show how it occurred: "I operated an electric car as motorman about two years at Kansas City. Am reasonably familiar with the operation of these cars and with the appliances on them. This was a two-truck car. I was in Springfield on September 2, 1912, on Labor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Day. I did not know Mr. and Mrs. Johnson at that time. I witnessed the collision. When I first saw the wagon, it was going south, one wheel on the left-hand side being about on the west rail of the track. The car was about 60 feet from the wagon when I first noticed it. The car was going eight or ten miles an hour and did not slow up after I saw it until it struck the wagon. It kept on at the same rate of speed. I did not hear any alarm sounded. At the time the car struck the wheel of the wagon had gotten off of the track. I do not think the car struck the wagon, but it struck the legs of the safe lying on top of the wagon and threw it against the seat. The safe extended over the sides of the wagon. The effect of the collision was the pushing of the safe forward and striking the seat and throwing the old people out. At the speed this car was going it could have been stopped in about 30 or 40 feet."

The grounds of negligence alleged in the petition and on which the case went to the jury are that the persons in charge of the car saw or by the exercise of ordinary care could have seen, the wagon and plaintiff on the track or in dangerous nearness thereto in time to have prevented the accident by sounding the gong or stopping the car and negligently failed to do so. The answer is in effect a general denial, except admitting the collision, coupled with a general statement that if defendant "was guilty of any negligence, as alleged in the petition, which defendant denies, and that such alleged negligence caused said collision and injury, which defendant denies, the negligence of the plaintiff and the negligence of her said husband directly contributed thereto."

Delaney & Delaney, of Springfield, for appellant. George Pepperdine and Patterson & Patterson, all of Springfield, for respondent.

STURGIS, J. (after stating the facts as above). [1] The defendant asked a demurrer to the evidence, but the above statement of the salient facts of the case will leave no doubt that the trial court correctly overruled the same.

The principal errors assigned here relate to the giving and refusal of instructions. The court gave five instructions for plaintiff, one of which, defining ordinary care and negligence is not criticised, and gave eight instructions for defendant, as asked, and one other slightly modified; enough, we think, to abundantly and redundantly present all the issues in the case. Nevertheless, defendant complains and assigns error on the refusal of each and all of fourteen other instructions.

[2] We are not advised whether the trial court exercised its right to refuse some or all of those so refused on the ground of their multiplicity on the theory that too many

instructions tend to confuse rather than enlighten the jury on the issues. *Sidway v. Land Co.*, 163 Mo. 342, 356, 63 S. W. 705; *Norton v. Railway*, 40 Mo. App. 642; *Crawshaw v. Sumner*, 56 Mo. 517; *Coe v. Griggs*, 76 Mo. 619. We will not so treat the case, as we are aware that the courts, by justifying at times the refusal of instructions upon the ground of their not being so accurately worded or drawn as to present a strictly correct statement of the law as applied to the particular facts of that case, make necessary the practice which they condemn. We do hold, however, that courts should not give too many instructions in any case, as they tend to confuse rather than enlighten the jury, and that, having given an instruction which fairly presents an issue in such manner that the ordinary juror will understand the same, then further instructions, differently worded but covering the same point or making nice legal distinctions, are properly refused. What we have here said is not a mere general observation, but is directly applicable to this case and disposes of numerous alleged errors in the refusal of instructions.

To set out all of the instructions given and refused and mention each and all of the very many objections urged against them would extend this opinion beyond reasonable limits. We will therefore only mention such as seem to be specially relied on or which on first thought would seem to have some merit. The first instruction given told the jury that: "The court instructs the jury that it is the duty of a motorman operating a street car in a public street to keep a strict watchout for persons or vehicles in the pathway of the car, or so near the pathway of the car that they are likely to get in the pathway of the car; and a failure to do so is negligence." Then, after enumerating certain facts to be found as to the track and method of traveling and condition of the wagon and safe thereon, proceeds: "And that defendant's motorman caused and suffered said car to collide with plaintiff's wagon, and thereby injured plaintiff; and that defendant's motorman saw, or by the exercise of ordinary care could have seen, the said wagon moving along the defendant's said track, as aforesaid, in dangerous nearness thereto; and that thereafter said motorman, by sounding the gong of the car, or by stopping said car in the shortest time and space practicable, with the means and appliances at hand, could have prevented said car from colliding with said wagon and the said safe that it contained; and that said motorman negligently and carelessly failed so to do—then you will find the issues in favor of the plaintiff."

The first criticism leveled against this instruction is that it is one purporting to cover the whole case and directing a verdict for plaintiff on the facts there stated,

and that it is erroneous because not mentioning the defense of contributory negligence. We have much doubt as to there being any contributory negligence in the case as applied to plaintiff, either in the pleadings or evidence.

[3] The courts have again and again condemned this method of pleading contributory negligence by a mere general statement of a conclusion that, if defendant was negligent, the plaintiff was also guilty of negligence contributing thereto, and have held the same bad pleading and insufficient (absent some waiver) to raise any such issue. *Cain v. Wintersteen*, 144 Mo. App. 1, 128 S. W. 274; *Wallower v. City of Webb City*, 171 Mo. App. 214, 156 S. W. 48, and cases there cited.

[4] Considering the evidence on this point, this was a public street, no part of which was set aside for the exclusive use of the defendant, and the mere use for driving thereon of the part of the street occupied by the car track was not negligence.

[5] The plaintiff was not driving or directing the management of the wagon; nor was her husband her agent in so doing. Any negligence on his part, though we do not hold there was any, as to where and how he was driving, is not to be imputed to her. His negligence was not hers. *Moon v. Transit Co.*, 237 Mo. 425, 435, 141 S. W. 870, Ann. Cas. 1913A, 183; *Munger v. City of Sedalia*, 66 Mo. App. 629; *Hedges v. City of Kansas*, 18 Mo. App. 62; *Stotler v. Railroad*, 200 Mo. 107, 146, 98 S. W. 509; *Becke v. Railroad*, 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157; *Sluder v. Transit Co.*, 189 Mo. 107, 138, 88 S. W. 648, 5 L. R. A. (N. S.) 186. Nor is there anything in this case to bring this plaintiff within the exceptions to the rule just stated on the ground that she concurred in, or gave express sanction to, any negligent act of the husband, or, knowing the danger, failed to protect herself. *Sluder v. Transit Co.*, 189 Mo. 107, 142, 88 S. W. 648, 5 L. R. A. (N. S.) 186.

[6, 7] But, granting that there is evidence of contributory negligence sufficient to take that issue to the jury, yet the court gave an instruction asked by the defendant pointing out all the acts of both plaintiff and her husband which it thought would constitute contributory negligence and winding up by telling the jury that if they found such conduct contributed to the collision and injury to find for defendant. Instruction numbered 5, given for plaintiff, also submitted this same issue to the jury. The insistence here is that these "belated" instructions, though properly submitting this issue, do not cure the error of omitting this defense in instruction numbered 1. It is broadly asserted that any instruction which, by its terms and meaning, covers the whole case and on the facts therein stated directs a verdict for plaintiff is erroneous, if it fails to include the defense interposed, and such error is not

cured by other instructions correctly submitting such defense. The decisions may be hard to reconcile on this proposition, and the rule is probably too general to fit all cases either way. Such an instruction may or may not be error, depending on the peculiar facts of the particular case. To say, however, that such an instruction, if standing alone, is erroneous, is one thing, and that the error cannot be cured by another proper instruction is quite another. All the cases cited by defendant do not sustain its broad contention, as it is plainly held in *Austin v. Transit Co.*, 115 Mo. App. 146, 152, 91 S. W. 450, 452, that, while such an instruction is erroneous, "but where the omission is cured by other instructions plainly and intelligently submitting the omitted evidence to the jury and directing the result that should be reached if such evidence is found to be true, the error would be corrected." *Gordon v. Burris*, 153 Mo. 223, 54 S. W. 546; *Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448; *Orscheln v. Scott*, 79 Mo. App. 534; *Lemser v. Mfg. Co.*, 70 Mo. App. 209; *Larson v. Mining Co.*, 71 Mo. App. 512." Such, also, is the ruling in *Johnson v. Railway Co.*, 117 Mo. App. 308, 311, 93 S. W. 866; *Abbott v. Mining Co.*, 112 Mo. App. 550, 556, 87 S. W. 110. As applied to the particular point now at issue, it has been frequently ruled that a defense like contributory negligence or assumption of risk which must be pleaded and proved by defendant may properly be left to a separate instruction, and an instruction, like the one complained of, omitting any reference to such defense, is not erroneous. *Underwood v. Railroad*, 125 Mo. App. 490, 102 S. W. 1045, and cases cited. It is said in *Melly v. Railroad*, 215 Mo. 567, 114 S. W. 1013, that no case except that of *Sullivan v. Railroad*, 88 Mo. 169, has ever so held, and that it was overruled by *Owens v. Railroad*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39, and a number of other cases cited. We therefore rule this point against appellant and think our ruling will be found to be in accord with *Deschner v. Railway Co.*, 200 Mo. 310, 333, 98 S. W. 737, and *Tranbarger v. Railroad*, 250 Mo. 46, 156 S. W. 694. We are, of course, now speaking of cases, of which this is one, where the instructions supplement each other and, when read together, make a harmonious whole, and not of cases where an incorrect instruction is sought to be excused or cured on the ground that another given instruction, covering the same point, but contradictory, is correct. In such cases they would not supplement and aid each other, making a harmonious whole, but would be contradictory and destructive, one of the other, and presumptively such would be error. Such is the reason underlying some of the cases relied on by appellant, as for instance, *Stewart v. Andes*, 110 Mo. App. 243, 248, 84 S. W. 1134.



[8] The first part of "preamble" of this instruction numbered 1, above quoted, is also criticised as being a mere abstract principle of law too general to be a guide to the jury and affording the jury too much of a roving commission. It is certainly the common practice to preface an instruction in negligence cases with a general statement of the duty of the operator of machinery, etc., to those using it or likely to come in contact therewith and to follow the same, as was done in this case, with a specific application of the doctrine thus stated generally to the particular facts in issue. We know of no case condemning such an instruction, and a similar one received the approval of this court in *Overby v. Mears Mining Co.*, 144 Mo. App. 363, 374, 128 S. W. 813.

[9] It is also assigned as error that this preamble puts in force the vigilant watch doctrine without any city ordinance being in force to that effect. Such doctrine, however, is in force as part of the common law of the land without any city ordinance. *Sluder v. Transit Co.*, 189 Mo. 107, 136, 88 S. W. 648, 5 L. R. A. (N. S.) 186, and cases cited; *McFern v. Gardner*, 121 Mo. App. 1, 11, 97 S. W. 972; *Mertens v. Transit Co.*, 122 Mo. App. 304, 312, 99 S. W. 512.

[10] It is also said that this instruction numbered 1 is erroneous in saying, "The court further instructs the jury that if they believe and find from the evidence \* \* \* that the defendant's motorman saw, or by the exercise of ordinary care could have seen, the said wagon moving along the defendant's said track, as aforesaid, in dangerous nearness thereto, etc.," in that it assumes that the car in question was "in dangerous nearness thereto," and that same should have been qualified by saying "if you so find," or some equivalent expression. We see no merit in this contention. Certainly any juror would understand that he was required to find as a prerequisite to plaintiff's recovery not only that the motorman saw the wagon in a dangerous position, but that it was in a dangerous position when he saw it. While instructions should be carefully drawn so as not to assume a controverted fact, yet the habit, due, possibly, to the technicality of the courts in that respect, of inserting after every clause of an instruction such phrases as "if any," and "if you so find," is apt to cause more confusion than it clears up.

[11, 12] It is next complained that instructions numbered 1 and 2, given for plaintiff, are in conflict, in that No. 1 permits a recovery if the defendant could have prevented the accident by either sounding the gong or stopping the car and failed so to do; while No. 2 permits a recovery for the negligent failure to stop the car even if the gong was being sounded. We cannot see why both propositions are not correct. If it was the duty of defendant to do both these things if thereby the injury could have been avoided, then the doing of one only would not excuse

the failure to do the other when the doing of the other would have avoided the injury.

[13, 14] Another complaint is that the motorman in charge of the car, although seeing the wagon on the track or dangerously near thereto, had a right to presume that the plaintiff and her husband would leave the track on the approach of the car, and that the motorman owed them no duty to stop the car or check its speed until it became apparent that the wagon would not or could not do so, and that the jury should have been so instructed. We fail, however, to find any such instruction among the numerous refused ones asked by the defendant. But it is said that plaintiff's instructions should have told the jury when defendant's duty to stop the car arose. As applied to street cars easily controlled and stopped and being operated on a much traveled street, the doctrine just stated has a very limited application. If it is meant that such cars may be run and kept running at such a rate of speed under such conditions in reliance on a wagon moving out of the danger zone until too late to avoid the injury by stopping the car, then we cannot give assent to it. We have shown that the vigilant watch doctrine is but declaratory of the common law and exists without any ordinance, and that doctrine requires that the motorman "on the first appearance of danger to such vehicle shall stop the car in the shortest time and space possible." It is a question for the jury to determine when the first appearance of danger accrues under the facts of any particular case. When there is an unobstructed view of a wagon, either on the track or so near thereto as to be in the danger zone, so that the jury is warranted in finding that the motorman either saw or by due care could have seen such wagon in the place of danger in abundant time to control or stop his car before colliding with it, then the time and place where his duty in this regard arose is necessarily somewhere between the place of first vision and the collision. The first instruction predicates negligence on the failure to stop the car after the motorman saw or with due care could have seen the wagon "moving along the track in dangerous proximity thereto," and the second one on such failure to stop or attempt to stop the car after so seeing the wagon "in the pathway of the car" and before the time of collision. These instructions conform to the amended instruction approved in *Bunyan v. Railway Co.*, 127 Mo. 12, 15, 16, 29 S. W. 842, and do not conflict with *Boyd v. Railway Co.*, 105 Mo. 871, 880, 16 S. W. 909, or *Hutchinson v. Railway Co.*, 88 Mo. App. 376, relied on by appellant. See *Wise v. Transit Co.*, 198 Mo. 546, 558, 559, 95 S. W. 898. We rule this point also against the appellant.

[15, 16] We are also met with the novel suggestion that the court should not have submitted the case on the humane or last chance doctrine because plaintiff does not plead or admit her own negligence, and it is

asserted that this doctrine rests only on conceded negligence, citing *Bectenwald v. Railway Co.*, 121 Mo. App. 595, 601, 97 S. W. 557. Aside from the fact that defendant submitted the same theory by its instruction numbered 6, and cannot now be heard to complain (*Sepetowski v. Transit Co.*, 102 Mo. App. 110, 76 S. W. 693), we do not think that it is either usual or necessary for the plaintiff to plead or admit his own negligence in pleading the facts invoking such doctrine. In those cases in which the humanitarian doctrine is an exception to and defeats the rule that contributory negligence is a complete defense, this doctrine arises, not because of, but in spite of, plaintiff's negligence. *Hutchinson v. Railway Co.*, 88 Mo. App. 376. Negligence in such cases is more often found by the jury against plaintiff's denial than by his admission, and the plaintiff is allowed to recover notwithstanding the finding against him of his contributory negligence. The more correct doctrine is that, where the facts found call for the application of the humanitarian doctrine, the question of plaintiff's negligence becomes of no importance one way or the other.

[17] Nor can we convict the trial court of error in refusing the instruction asked that positive evidence, to wit, the evidence of witnesses who say that they heard the gong sounded, is entitled to greater weight than negative evidence, to wit, of those who say that they were in a position to hear but did not hear any gong. This is a question to be weighed by the jury, who are the sole judges of the weight to be given the evidence of any witness. *State ex rel. v. Railroad*, 70 Mo. App. 634, 641; *Milligan v. Railroad*, 79 Mo. App. 393, 397.

[18] Nor was it error to refuse to instruct the jury that in determining the amount of damages to take into consideration the age and expectancy of the plaintiff, as there was no proof of her expectancy at her age.

We have examined the numerous other assigned errors, inclusive of the instruction on the measure of damages and the remarks of counsel to the jury during the argument, but find no reversible error therein.

The judgment is therefore affirmed.

ROBERTSON, P. J., and FARRINGTON, J., concur.

## MEMORANDUM DECISIONS

**RAUM v. BOARD OF COUNCIL OF CITY OF DANVILLE** (two cases). (Court of Appeals of Kentucky. Dec. 11, 1913.) Appeals from Circuit Court, Boyle County. Nash Raum was convicted in two cases of violating the local option law in the city of Danville, and he appeals. Affirmed. Robert Harding and Jno. W. Rawlings, both of Danville, for ap-

pellant. Chenault Huguey, of Danville, for appellee.

**NUNN, J.** Appellant was convicted for violation of the local option law in two cases. In one he was fined \$80, and in the other \$60, with 20 days' imprisonment. The facts and legal propositions involved are the same as those reported in the case decided November 11, 1913. 155 Ky. 690, 160 S. W. 255. For the reasons stated in that opinion, the judgment in both of these cases is affirmed.

**COLLINS v. STATE.** (Court of Criminal Appeals of Texas. Dec. 17, 1913.) Appeal from Dallas County Court at Law; W. F. Whitehurst, Judge. Sarah Collins was convicted of keeping a disorderly house, and she appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** The appellant was convicted for keeping a disorderly house under article 496, P. C., and her punishment fixed at a fine of \$200 and 20 days in jail. There is no statement of facts or bills of exceptions, in the absence of which no question is raised that this court can consider. The judgment is therefore affirmed.

**DAVILLO v. STATE.** (Court of Criminal Appeals of Texas. Dec. 10, 1913.) Appeal from Dallas County Court at Law; W. F. Whitehurst, Judge. Pancho Davillo was convicted of unlawfully carrying a pistol, and he appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

**HARPER, J.** Appellant was convicted of unlawfully carrying a pistol, and his punishment assessed at a fine of \$100 and imprisonment in jail for 6 months. The record contains neither a statement of facts nor any bill of exception. Under such circumstances, there is no ground stated in the motion for a new trial we can review. Affirmed.

**HARDY v. STATE.** (Court of Criminal Appeals of Texas. Dec. 17, 1913.) Appeal from District Court, San Augustine County; A. E. Davis, Judge. Dorsey Hardy was convicted of aggravated assault, and he appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** Upon an indictment for assault with intent to kill, appellant was convicted of aggravated assault, and his punishment fixed at a fine of \$200 and 60 days' confinement in jail. There is neither a statement of facts nor a bill of exception in the record. There is nothing raised by the motion for new trial that can be reviewed, in the absence of these. The judgment is affirmed.

**HART v. STATE.** (Court of Criminal Appeals of Texas. Dec. 23, 1913.) Appeal from Wichita County Court; C. B. Felder, Judge. Lizzie Hart was convicted of keeping a disorderly house, and she appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

**PRENDERGAST, P. J.** From a conviction, with the penalty prescribed by law inflicted, for keeping a disorderly house, appellant prosecutes an appeal. There is no statement of facts nor bills of exceptions in the record. Nothing is raised which can be considered in the absence of this. The judgment is affirmed.

DAVIDSON, J., absent.

**HOUSE v. STATE.** (Court of Criminal Appeals of Texas. Dec. 10, 1913.) Appeal from Criminal District Court, Dallas County; W. L. Crawford, Judge. Charles House was convicted of manslaughter, and he appeals. Af-

firmed. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was convicted of manslaughter, and his punishment assessed at 4 years' confinement in the state penitentiary. As the record contains no statement of facts, no question is presented which calls for a review of the action of the court. Affirmed.

JOHNSON v. STATE. (Court of Criminal Appeals of Texas. Dec. 8, 1913.) Appeal from District Court, Bexar County; W. S. Anderson, Judge. Clarence Johnson was convicted of burglary, and appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. From a conviction for burglary, appellant prosecutes this appeal, without any statement of facts or bills of exceptions. No question is attempted to be raised which we can consider in the absence of these. The judgment is therefore affirmed.

KYLE v. STATE. (Court of Criminal Appeals of Texas. Nov. 12, 1913. Rehearing Denied Dec. 10, 1913.) Appeal from Nolan County Court; Jno. H. Cochran, Jr., Judge. Mat Kyle was convicted of aggravated assault, and appeals. Affirmed. W. T. Potter, of Austin, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

DAVIDSON, J. Appellant was convicted of aggravated assault; his punishment being assessed at a fine of \$100 and 90 days' imprisonment in the county jail. This record is before us without a statement of facts or bill of exceptions. In that condition the record presents no revisable matter. The judgment is affirmed.

ORTH v. STATE. (Court of Criminal Appeals of Texas. Dec. 23, 1913.) Appeal from Wichita County Court; C. B. Felder, Judge. T. R. T. Orth was convicted of maintaining a house of prostitution, and appeals. Affirmed. Charles C. Huff and Orville Bullington, both of Wichita Falls, for appellant. C. E. Lane, Asst. Atty. Gen., for the State.

HARPER, J. Appellant was prosecuted and convicted under an indictment charging that he "was the owner of a house then and there situate, which said house he did then and there unlawfully keep, was concerned in keeping, and knowingly permitted to be kept as a house for the purpose of prostitution, and where prostitutes were permitted to resort and reside for the purposes of plying their vocation." He was convicted, and his punishment assessed at

a fine of \$200 and imprisonment in the county jail for 20 days. At the threshold we are met with the motion of the Assistant Attorney General to strike out the bills of exception and statement of facts contained in the record, because they were not filed within the time prescribed by law. Appellant's able counsel have filed a brief in which they earnestly insist we are wrong in the construction heretofore given to the acts of the Legislature governing these matters. Every contention of appellant is disposed of in the case of Durham v. State, 155 S. W. 222, and, as we see no reason to change our views in this matter, we respectfully refer to that opinion, and the motion of the Assistant Attorney General is sustained. See, also, De Friend v. State, 153 S. W. 881, and cases there cited. This of necessity disposes of all questions presented in the motion for a new trial, except the one wherein the sufficiency of the indictment is challenged. All questions raised by him were decided adversely to his contention in the cases of Willis v. State, 34 Tex. Cr. Rep. 148, 29 S. W. 787; Merrell v. State, 29 S. W. 41; Schulze v. State, 56 S. W. 918, and cases cited in these opinions. Affirmed.

DAVIDSON, J., absent.

WHITE v. STATE. (Court of Criminal Appeals of Texas. Dec. 23, 1913.) Appeal from Angelina County Court; E. B. Robb, Judge. Frank White was convicted of giving liquor to a minor, and he appeals. Affirmed. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. From a conviction for giving liquor to a minor, appellant has appealed. No statement of facts is in the record. The judgment is therefore affirmed.

DAVIDSON, J., absent.

YOUNG v. STATE. (Court of Criminal Appeals of Texas. Nov. 26, 1913.) Appeal from District Court, Jasper County; A. E. Davis, Judge. Will Young was convicted of assault with intent to kill, and he appeals. Affirmed. See, also, 151 S. W. 1046. C. E. Lane, Asst. Atty. Gen., for the State.

PRENDERGAST, P. J. The appellant was convicted of an assault with intent to kill and murder, and his punishment fixed at 15 years' confinement in the penitentiary. There is no statement of facts in the case. Neither is there any bill of exception. Nothing is raised by the motion for new trial that we can consider in the absence of a statement of facts. The judgment is therefore affirmed.



# INDEX-DIGEST



## THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and  
Prior Reporter Volume Index-Digests

### ABANDONMENT.

See Contracts, § 323; Dedication, § 63; Homestead, § 181; Husband and Wife, § 283.

### ABATEMENT AND REVIVAL.

See Appeal and Error, § 334; Death, § 10.

### III. DEFECTS AND OBJECTIONS AS TO PARTIES AND PROCEEDINGS.

§ 22 (Tex.Civ.App.) The fact that plaintiff corporation had not paid its franchise tax, so that it was not entitled to maintain an action under Rev. Civ. St. 1911, art. 7399, could only be urged by a plea in abatement.—Clegg v. Roscoe Lumber Co., 161 S. W. 944.

§ 39 (Ark.) Under Kirby's Dig. § 6285, relating to abatement and revival, causes of action in favor of an industrial insurance company for slander, libel, malicious prosecution, fraudulent conspiracy to injure and destroy its business, etc., did not survive.—Arkansas Life Ins. Co. v. American Nat. Life Ins. Co., 161 S. W. 136.

### V. DEATH OF PARTY AND REVIVAL OF ACTION.

(A) Abatement or Survival of Action.

§ 54 (Tex.Civ.App.) A petition, in an action by a surviving widow for personal injuries to her husband, is insufficient as stating a cause of action, under Rev. Civ. St. 1911, art. 5686, for injuries not resulting in death, when it did not allege whether the injuries were or were not the cause of the husband's death.—Black v. Texas & P. Ry. Co., 161 S. W. 1077.

No action can be maintained under Rev. Civ. St. 1911, art. 5686, providing that rights of action for personal injuries not resulting in death shall survive, unless the injury did not cause decedent's death.—Id.

### ABDUCTION.

See Seduction.

### ABORTION.

See Indictment and Information, § 191; Physicians and Surgeons, § 11.

§ 6 (Mo.) Under an information charging accused with causing a woman to take drugs to procure an abortion, resulting in the death of her child, the state must prove that the death was occasioned by the use of some drug.—State v. Sonner, 161 S. W. 723.

The state had the burden of proving that the use of the drug was not necessary to preserve the life of the woman or that of her unborn child.—Id.

### ABSENCE.

See Continuance, § 12.

### ABSTRACTS.

See Appeal and Error, §§ 584, 586, 653, 671, 690.

### ABUTTING OWNERS.

See Municipal Corporations, §§ 408-487, 648, 663.

### ACCEPTANCE.

See Dedication, §§ 35, 37, 38; Sales, § 178.

### ACCESSORIES.

See Criminal Law, §§ 81, 792.

### ACCIDENT INSURANCE.

See Insurance, §§ 452, 646.

### ACCOMMODATION PAPER.

See Bills and Notes, §§ 237, 434.

### ACCOMPLICES.

See Criminal Law, §§ 507-510, 780.

### ACCORD AND SATISFACTION.

See Novation; Payment; Release.

### ACCOUNT.

See Appeal and Error, § 1028; Limitation of Actions, § 100; Mortgages, § 199; Pleading, § 330.

### ACCOUNT, ACTION ON.

§ 4 (Mo.App.) Where plaintiff accepted a note in payment of an account, and defendant's counsel agreed not to set up the giving of a note as a defense in case it was returned, and plaintiff failed to return the note, defendant did not waive his right to interpose that defense.—Barton Lumber Co. v. Gibson, 161 S. W. 357.

Action on an account, for the amount of which a note had been given, before maturity of the note *held* premature.—Id.

§ 13 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 3712, denial of verified account alleging that it was not correct and true, that it was not due, and that defendant did not owe it or any item thereof, *held* sufficient.—Continental Lumber & Tie Co. v. Miller, 161 S. W. 927.

### ACCOUNT STATED.

See Justices of the Peace, § 91; Pleading, §§ 330, 424; Reference, § 8.

§ 12 (Ark.) An account in which items have been entered or omitted through fraud, mistake, or undue advantage may be surcharged even after there has been a settlement and payment

of the balance found due.—*Loewer v. Lonoke Rice Milling Co.*, 161 S. W. 1042.

One seeking to surcharge an account for fraud, mistake, accident, or undue advantage must proceed within a reasonable time after the discovery of the fraud.—*Id.*

Where credits on corporation's books, upon which settlement with employé who was also a director was based, were made by his direction, without the knowledge or consent of the other directors, the settlement was not conclusive, and the account was properly opened to correct such credits.—*Id.*

§ 19 (Ark.) One seeking to surcharge an account for fraud, after a settlement and payment of the balance found due, has the burden of establishing the fraud by convincing evidence.—*Loewer v. Lonoke Rice Milling Co.*, 161 S. W. 1042.

Evidence held to show that credits on corporation's books in favor of employé and director, upon which a settlement was based, were made by the bookkeeper at such director's order, without the knowledge or consent of the other directors.—*Id.*

## ACKNOWLEDGMENT.

See Limitation of Actions, §§ 141, 142.

### I. NATURE AND NECESSITY.

§ 4 (Mo.) An unacknowledged deed is valid and sufficient to convey the title as between the parties.—*Schroeder v. Turpin*, 161 S. W. 716.

## ACTION.

See Abatement and Revival; Dismissal and Nonsuit; Pleading, §§ 193, 228, 369.

### II. NATURE AND FORM.

§ 25 (Tex.Civ.App.) The rule that an equitable demand cannot be pleaded in a court of law in set-off against a legal demand has been abolished in this state.—*Reeves v. White*, 161 S. W. 43.

§ 32 (Mo.) There is but one form of action for the enforcement or protection of private rights or the redress or prevention of private wrong.—*Norton v. Reed*, 161 S. W. 842.

## ADJOINING LANDOWNERS.

See Agriculture, § 8; Boundaries; Railroads, §§ 113, 364.

§ 8 (Ky.) Where injuries to premises adjoining a railroad right of way are caused by blasting operations casting rock and soil thereon, the railroad company is liable independent of the question of negligence or want of skill.—*Lexington & E. Ry. Co. v. Baker*, 161 S. W. 228.

## ADMINISTRATION.

See Executors and Administrators.

## ADMISSIONS.

See Criminal Law, § 406; Evidence, §§ 208-243.

## AD VALOREM TAX.

See Taxation, § 117.

## ADVANCES.

See Landlord and Tenant, §§ 209-246.

## ADVERSE CLAIM.

See Quieting Title.

## ADVERSE POSSESSION.

See Appeal and Error, §§ 877, 1056, 1068; Life Estates, § 8; Limitation of Actions; Municipal Corporations, § 648; Partition, § 13; Tenancy in Common, § 15.

## I. NATURE AND REQUISITES.

### (A) Acquisition of Rights by Prescription in General.

§ 7 (Tex.Civ.App.) Where the state of Texas placed grants made by any former sovereign on the same footing as those made by the state, rights originating by treaty or under the Constitution or laws of the state were not violated, and such grants were not protected from the operation of the statute of limitations.—*Campbell v. Gibbs*, 161 S. W. 430.

§ 13 (Tex.Civ.App.) One who has adverse, peaceable, and continuous possession of land for more than ten years acquires a prescriptive title.—*Frazier v. Houston Oil Co.*, 161 S. W. 20.

### (B) Actual Possession.

§ 14 (Tex.Civ.App.) To sustain a presumption of the existence or execution of a deed from circumstances, actual possession is not necessary, but open claim of ownership and acquiescence by the holder of the adversary title with knowledge of his interest held essential.—*Le Blanc v. Jackson*, 161 S. W. 60.

§ 16 (Mo.) Person held to exercise usual acts of ownership over unfenced and uncultivated portion of tract, within Rev. St. 1990, § 1882, by cutting and selling timber, keeping trespassers off, and protecting the timber.—*Thompson v. Stillwell*, 161 S. W. 681.

§ 22 (Tex.Civ.App.) A person who fenced land and used it continuously, exclusively, peaceably, and notoriously for a pasture for live stock had sufficient possession thereof within the five-years statute.—*Griswold v. Comer*, 161 S. W. 423.

§ 25 (Tex.Civ.App.) Where a lease gave the tenant the right to possession of the entire tract of land, only part of which was improved, the tenant could not, by limiting his claims to the improved portion, defeat the lessor's constructive possession of the entire tract.—*Frazier v. Houston Oil Co.*, 161 S. W. 20.

### (C) Visible and Notorious Possession.

§ 31 (Tex.Civ.App.) Heir of holder of recorded tax deed, to whom land was granted by partition deed held not guilty of fraud or concealment of her ownership because she did not record the partition deed or leases of the land by her.—*Griswold v. Comer*, 161 S. W. 423.

### (E) Duration and Continuity of Possession.

§ 43 (Tex.Civ.App.) Where a party who held land in trust for another, although his conveyance was absolute on its face, possessed the property adversely to other claimants, the trustee's adverse holding inured to the benefit of the cestui que trust.—*Ratcliff v. Ratcliff*, 161 S. W. 30.

### (F) Hostile Character of Possession.

§ 65 (Mo.) That fencing of portion of land to which defendant's grantor had color of title was by mistake held not to prevent such grantor's possession from being adverse where the third person who did such fencing subsequently occupied the tract as such grantor's tenant.—*Thompson v. Stillwell*, 161 S. W. 681.

§ 73 (Tex.Civ.App.) Junior patentees of the state, or persons holding under the patentees, hold under the sovereignty of the soil within the three-year statute of limitations.—*Campbell v. Gibbs*, 161 S. W. 430.

§ 78 (Tex.Civ.App.) A tax deed held not insufficient as a basis for prescription because of an incorrect reference to the name of the survey and the certificate number.—*Griswold v. Comer*, 161 S. W. 423.

Where heirs of holder of recorded tax deed partitioned the land, an heir's possession thereafter held under a registered deed within the

five years statute as to the whole tract, though she did not record her own deed.—*Id.*

For a tax deed to be sufficient as a basis for prescription under the five-years statute, all the prerequisites of the law need not be complied with in making the tax sale.—*Id.*

§ 80 (Tex.Civ.App.) Under the five-year statute of limitation, which requires the adverse possession relied upon to give title to be under a deed duly registered, the deed must describe the land with sufficient certainty to identify it.—*Griswold v. Comer*, 161 S. W. 423.

§ 85 (Mo.) Evidence held to show that person claiming under sheriff's deed to quarter section in good faith took and for 20 years held possession of part of the west half in the name and under claim of title to the whole.—*Thompson v. Stillwell*, 161 S. W. 681.

§ 85 (Mo.) Evidence in partition proceedings held not to show that defendants held the land adversely so as to prevent partition.—*Boothe v. Cheek*, 161 S. W. 791.

§ 85 (Tex.Civ.App.) In trespass to try title, where plaintiff claimed by adverse possession, evidence held sufficient to support a finding that the possession was not adverse for the whole period of limitation.—*Ratcliff v. Ratcliff*, 161 S. W. 30.

#### (G) Payment of Taxes.

§ 95 (Tex.Civ.App.) Evidence of failure to pay taxes on land while it was alleged that adverse possession was being asserted was admissible as against the claimants by adverse possession.—*Houston Oil Co. of Texas v. Jones*, 161 S. W. 92.

§ 95 (Tex.Civ.App.) Evidence held not insufficient to show payment of taxes by one claiming title by prescription merely because the tax receipts gave a wrong certificate number.—*Griswold v. Comer*, 161 S. W. 423.

### II. OPERATION AND EFFECT.

#### (A) Extent of Possession.

§ 100 (Mo.) Under Rev. St. 1909, § 1882, making possession under color of title of part of a tract possession of the whole, sheriff's deed issued to purchaser at execution sale held to be color of title to the whole of the land covered thereby.—*Thompson v. Stillwell*, 161 S. W. 681.

§ 103 (Ky.) One who, claiming under deed embracing an interference with an earlier patent, though living outside the interference, cleared land, erected fences, and cultivated land within the interference held to have possession of it all.—*Bassett v. Lush*, 161 S. W. 227.

#### (B) Title or Right Acquired.

§ 104 (Tex.Civ.App.) The execution of a deed may be proved by circumstances, or by the presumption from the existence of such muniments of title as are necessary to give lawful origin to a title long openly asserted on one side, with acquiescence in such claim on the other.—*Le Blanc v. Jackson*, 161 S. W. 60.

The execution of a deed or other muniment of title may be presumed from mere silence or failure to object to another's known assertion of title, without any corroborating act evidencing such acquiescence.—*Id.*

The presumption of the execution or existence of a deed from the facts and circumstances shown is a presumption of fact.—*Id.*

The rule that parol evidence cannot be offered over objection to prove a sale of land in this state has no application to a case where circumstances are relied on to support a presumption of a deed.—*Id.*

§ 106 (Mo.) Adverse possession transfers the title from the owner to the occupant as effectually as would a deed, and the occupant, after his title has ripened by prescription, stands just as

any other landowner.—*Norton v. Reed*, 161 S. W. 842.

§ 107 (Tex.Civ.App.) Rev. Civ. St. 1911, art. 5678, providing that adverse possession shall be construed to embrace not more than 160 acres, contemplates that a possessor shall receive 160 acres in a body, and he cannot acquire title to a parcel in one corner of a survey and another parcel in another corner; the total aggregating 160 acres.—*Mixon v. Wallis*, 161 S. W. 907.

Where a third person acquiring by adverse possession title to 160 acres in a survey claimed by defendant conveyed other 160 acres to defendant, who surrendered to plaintiff, plaintiff was not prejudiced by the conveyance and could not appropriate the land acquired by the third person.—*Id.*

### III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 112 (Mo.) A defendant who sets up adverse possession has the burden of proof.—*Norton v. Reed*, 161 S. W. 842.

§ 114 (Tex.Civ.App.) Where it appears more probable that a deed or other muniment of title in question had been executed than that it had not been, the jury would be authorized to presume that it had been so executed.—*Le Blanc v. Jackson*, 161 S. W. 60.

§ 115 (Tex.Civ.App.) Evidence held sufficient to go to the jury on the issue of plaintiff's claim to the specific land described in his petition and in the field notes of the surveyor, and of such claim for the period of limitations.—*Houston Oil Co. of Texas v. Lambert*, 161 S. W. 6.

§ 115 (Tex.Civ.App.) In trespass to try title, where plaintiff claimed under a prescriptive title, evidence held to raise a question for the jury and not to warrant a directed verdict in plaintiff's favor.—*Zimmerman v. Baugh*, 161 S. W. 943.

### AFFIDAVITS.

See Appeal and Error, §§ 197, 361, 543, 586, 688, 714; Attachment, §§ 119, 122; Continuance, § 33; Criminal Law, § 958; Divorce, § 105; Executors and Administrators, § 227; Injunction, § 122; Justices of the Peace, § 189; Remainders, § 16.

### AGENCY.

See Principal and Agent.

### AGRICULTURE.

§ 8 (Tex.Civ.App.) Rev. Civ. St. 1911, arts. 6601, 6602, prohibiting railroad companies from permitting Johnson grass to mature on the right of way, and imposing a penalty in favor of contiguous landowners for its violation, is penal, and should be strictly construed.—*International & G. N. R. Co. v. Boles*, 161 S. W. 914.

Land which was separated from a railroad right of way only by a parallel public road, which was condemned from the owner, was "contiguous" to the right of way within Rev. Civ. St. 1911, art. 6602, permitting one owning land contiguous to the right of way of a railroad company which has permitted Johnson grass to mature on its land to recover a certain sum and actual damages.—*Id.*

### AIDER BY VERDICT.

See Pleading, §§ 403-433.

### ALIBI.

See Criminal Law, §§ 775, 814.

### ALLOTMENT.

See Homestead, § 190.

## ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

§ 4 (Ark.) Alteration of a contract for the sale of goods, so as to require the payment of \$2.08 instead of \$2.00 per week, was a material one and sufficient to vitiate the contract.—*Outcault Advertising Co. v. Young Hardware Co.*, 161 S. W. 142.

§ 8 (Tex.Civ.App.) If, after signing, a bill of lading was altered by adding the words "charges guaranteed," the alteration was material and would not bind the consignor.—*Chicago, R. I. & G. Ry. Co. v. Floyd*, 161 S. W. 954.

## AMENDMENT.

See Appeal and Error, § 653; Parties, § 75; Pleading, §§ 237-257, 356; Statutes, §§ 141, 230.

## ANIMALS.

See Appeal and Error, § 231; Evidence, § 122; Justices of the Peace, §§ 91, 100; Municipal Corporations, §§ 591, 611; Negligence, § 29; Pleading, § 34; Railroads, §§ 337, 407-447; Sales, §§ 279, 284; Trial, §§ 191, 234.

## ANNULMENT.

See Wills, §§ 229-329.

## ANSWER.

See Pleading.

## APPEAL AND ERROR.

See Certiorari; Contempt, § 66; Courts, § 231; Criminal Law, §§ 1017-1186; Divorce, §§ 181, 184; Drains, § 36; Exceptions, Bill of; Habeas Corpus, §§ 3, 113; Homicide, §§ 340, 349; Justices of the Peace, §§ 141-189; New Trial.

## V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

§ 170 (Mo.) Where defendant did not claim in a proceeding against it to enforce the penalty imposed by Rev. St. 1909, §§ 3039, 3040, that it was denied the right of trial by jury, it cannot first make that claim on appeal.—*State ex rel. Jones v. Howe Scale Co. of Illinois*, 161 S. W. 789.

§ 172 (Mo.) In a suit by a cemetery association to enjoin the enforcement of a municipal ordinance prohibiting future burials, lot owners cannot upon appeal obtain a decree requiring the association to do certain work on the lots; that question not being presented by the pleadings or evidence.—*Union Cemetery Ass'n v. Kansas City*, 161 S. W. 261.

§ 173 (Tex.Civ.App.) The contention that failure to object to the introduction of a deed by the heirs of the grantor claiming her title barred them from objecting to its validity on appeal was not sound, where the latter objection was as to the legal sufficiency of the deed to convey the grantor's interest.—*Le Blanc v. Jackson*, 161 S. W. 60.

§ 173 (Tex.Civ.App.) Notwithstanding failure of defendant's pleadings to attack the validity of a contract, under which the notes sued on were executed, the appellate court will consider the validity of the contract, where it is apparent upon the record that it is void.—*Crandall v. Scott*, 161 S. W. 925.

(B) Objections and Motions, and Rulings Thereon.

§ 193 (Mo.) Under Rev. St. 1909, § 2119, cls. 8, 9, 14, where an objection that the petition in ejectment defectively alleged that defendant was retaining possession was not called to the trial court's attention by demurrer or by ob-

jection to the entry of judgment, defendants could not present such objection on appeal.—*Fitzpatrick v. Garver*, 161 S. W. 714.

§ 193 (Mo.App.) The objection that the petition does not state a cause of action is available at any stage of the proceedings, even in the appellate court.—*Rundelman v. John O'Brien Boiler Works Co.*, 161 S. W. 609.

§ 194 (Tex.Civ.App.) Exceptions to the answer of an intervener, where not called to the attention of the trial court, must be regarded as waived.—*Ratcliff v. Ratcliff*, 161 S. W. 30.

§ 197 (Mo.App.) Under Rev. Stat. 1909, § 1846, held, that a party must interpose timely objection to the admission of evidence outside of the scope of the pleadings, grounded upon such variance and supported by affidavit setting forth the respect in which he has been misled.—*Rundelman v. John O'Brien Boiler Works Co.*, 161 S. W. 609.

§ 207 (Mo.App.) Where an objection was sustained to an improper question before answer, and no request was made for a reprimand or that the jury be discharged, and the matter was not mentioned by defendant in his motion for a new trial, error could not be predicated thereon.—*Marts v. Powell*, 161 S. W. 871.

§ 216 (Tex.Civ.App.) Any error in not limiting the recovery for loss of time to the sum alleged in the petition to have been lost because of personal injuries was one of omission of which defendant cannot complain, where he did not ask a special charge correcting such omission.—*Trinity & B. V. Ry. Co. v. Blackshear*, 161 S. W. 395.

§ 216 (Tex.Civ.App.) Where a charge correct in law directs a verdict for defendant on the finding of certain facts, its defect in embracing more facts than were necessary to support the defense held an omission unavailable in the absence of a requested charge.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 231 (Ark.) To raise the point that one of plaintiff's instructions was in conflict with one given at defendant's request, it was necessary for the objection to be specific.—*Reich v. Workman*, 161 S. W. 180.

§ 231 (Ky.) Error in admitting evidence in a stock killing case, wherein the killing was admitted, before defendant introduced evidence to sustain the burden of disproving negligence, placed upon it by Ky. St. § 809, could not be considered on appeal, where such evidence was not objected to on the ground that it was admitted out of its proper order.—*Chesapeake & O. Ry. Co. v. Burton*, 161 S. W. 1116.

§ 231 (Mo.App.) A party cannot complain on appeal that evidence incompetent for certain reasons was improperly admitted, where the objection below did not point out the reason of incompetency.—*Winfrey v. Matthews*, 161 S. W. 583.

§ 232 (Ark.) Where plaintiff saved only a general objection to instructions as to an alleged gift, he could not object that the instructions did not charge that delivery was an essential element of a gift.—*Fancher v. Kenner*, 161 S. W. 166.

(C) Exceptions.

§ 254 (Mo.) An adverse ruling on a general demurrer may be reviewed without an exception.—*Hynds v. Hynds*, 161 S. W. 812.

§ 260 (Mo.) The appellate court will not review the rulings of the trial court upon the admissibility of evidence, where no exceptions were taken thereto in the lower court.—*Turner v. Butler*, 161 S. W. 745.

§ 265 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 1990, where facts found sustained judgment and there was no exception to any conclusion of fact or request for additional findings, and no finding was attacked for want of



evidence, judgment will be affirmed.—*Landers v. McCutchan*, 161 S. W. 960.

Judgment against debtor's fraudulent grantee for title and possession of land *held* not erroneous, though the evidence showed defendant's equitable ownership of the land, where no finding on this question was made or requested, and no exception taken to the failure to find.—*Id.*

#### (D) Motions for New Trial.

§ 281 (Tex.Civ.App.) Assignments of error not supported by a motion for new trial cannot be considered.—*Vinson v. W. T. Carter & Bro.*, 161 S. W. 49.

§ 301 (Mo.) Where no complaint of the assessment of costs is made in the motion for new trial or in arrest, the question will not be considered on appeal.—*Wolz v. Venard*, 161 S. W. 760.

§ 301 (Mo.App.) Where an objection was sustained to an improper question before answer, and no request was made for a reprimand or that the jury be discharged, and the matter was not mentioned by defendant in his motion for a new trial, error could not be predicated thereon.—*Marts v. Powell*, 161 S. W. 871.

§ 301 (Mo.App.) Under Rev. St. 1909, §§ 2081, 2083, matters of exception not embraced in a motion for a new trial cannot be considered.—*Poncot v. St. Louis, I. M. & S. Ry. Co.*, 161 S. W. 1190.

§ 302 (Tex.Civ.App.) Assignments of error not distinctly specifying the ground of error, and distinctly setting them forth in the motion for new trial, as required by rule 24 of Courts of Civil Appeals rules (142 S. W. xii), are not ground for reversal.—*Adams v. Burrell*, 161 S. W. 51.

#### VI. PARTIES.

§ 334 (Ark.) Under Kirby's Dig. § 6313, where appellants, defendants, suggested the death of one of the plaintiffs but did not within one year give notice of a motion to revive, the appeal as to him would be dismissed.—*Bank of Des Arc v. Moody*, 161 S. W. 134.

#### VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

##### (B) Petition or Prayer, Allowance, and Certificate or Affidavit.

§ 361 (Mo.) Facts *held* to show that an affidavit for appeal was sworn to before the circuit clerk, and plaintiffs were not entitled to a dismissal because the jurat did not contain the signature of the clerk.—*Davidson v. Laclede Land & Improvement Co.*, 161 S. W. 686.

§ 361 (Tex.) Where Court of Civil Appeals refused to consider assignments of error, motion for rehearing and petition to Supreme Court for writ of error *held* not defective because they complained only of the "overruling" of the assignments.—*Chicago, R. I. & G. Ry. Co. v. Pemberton*, 161 S. W. 2.

##### (C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 395 (Tex.Civ.App.) Where an appeal bond was not filed within the time required by law, the appeal was properly dismissed on motion.—*Le Blanc v. Jackson*, 161 S. W. 60.

#### IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

§ 467 (Tex.Civ.App.) That a married woman who was a party could not legally sign the supersedeas bond did not affect its validity if the sureties were sufficient.—*Duller v. McNeill*, 161 S. W. 45.

#### X. RECORD AND PROCEEDINGS NOT IN RECORD.

##### (A) Matters to be Shown by Record.

§ 499 (Tex.Civ.App.) Assignments of error based on the refusal to give a peremptory in-

struction must be overruled in the absence of anything in the record to show that such instruction was ever asked or acted on.—*Houston Oil Co. of Texas v. Jones*, 161 S. W. 92.

§ 499 (Tex.Civ.App.) A bill of exceptions to the exclusion of evidence which does not state what the objection to the evidence was will not be considered.—*Autrey v. Collins*, 161 S. W. 413.

§ 509 (Tex.Cr.App.) An appeal will be dismissed where the record contains no notice of appeal.—*Murgatroyd v. State*, 161 S. W. 962.

##### (B) Scope and Contents of Record.

§ 516 (Mo.) The date of the institution of the action is a part of the record proper.—*Mahaffey v. Lebanon Cemetery Ass'n*, 161 S. W. 701.

§ 518 (Mo.) The pleadings are a part of the record proper.—*Mahaffey v. Lebanon Cemetery Ass'n*, 161 S. W. 701.

§ 518 (Mo.) An exception to the ruling on a motion to strike out parts of an amended answer, on grounds, some of which could only be reached by demurrer, but others of which could be reached by motion to strike, should be saved by bill of exceptions, in order to bring up the grounds of the motion separable from the demurrer.—*Hynds v. Hynds*, 161 S. W. 812.

§ 518 (Tex.Civ.App.) Where an appeal was taken from an order granting a preliminary injunction before answer, and the answer, subsequently filed, was not shown to have been called to the attention of the court by motion to vacate the writ or otherwise, it was not properly in the record on appeal.—*Howell v. City of Sweetwater*, 161 S. W. 948.

§ 529 (Mo.) The judgment constitutes a part of the record proper.—*Mahaffey v. Lebanon Cemetery Ass'n*, 161 S. W. 701.

§ 533 (Mo.App.) A written opinion, prepared by the trial judge on sustaining a motion for a new trial, to be available as disclosing the grounds for which new trial was granted must have been spread of record in the case.—*Clarkson v. Garvey*, 161 S. W. 664.

§ 543 (Ky.) Where two maps used at the trial were lost before the bill of exceptions was signed, they could be supplied only in the manner provided by Ky. St. §§ 3991-4000; and hence a map with an affidavit showing it to be a correct copy of those used at the trial, filed with the clerk, could not become a part of the record.—*Ferrell v. Bauer Cooperage Co.*, 161 S. W. 1120.

##### (C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 544 (Mo.App.) Motion to strike amended petition for departure *held* reviewable only where made a part of the record by a bill of exceptions.—*Poncot v. St. Louis, I. M. & S. Ry. Co.*, 161 S. W. 1190.

##### (E) Abstracts of Record.

§ 584 (Mo.) It was proper for the abstract of record to group under "entries of the court" copies of the pleadings and other matters going to make up the record proper, after which the abstract stated "end of record proper," which was followed by the bill of exceptions.—*Mahaffey v. Lebanon Cemetery Ass'n*, 161 S. W. 701.

§ 586 (Mo.) A statement in the abstract that defendant filed in due form its affidavit for appeal to the Supreme Court, and the trial court finding the same sufficient after approving the appeal bond granted the appeal, sufficiently showed that a sufficient affidavit for appeal was filed.—*Mahaffey v. Lebanon Cemetery Ass'n*, 161 S. W. 701.

A statement in the abstract of record that defendant filed in due form its affidavit for appeal and the trial court, finding the same sufficient, after approving the appeal bond did grant said appeal, when taken with the presumption that

the affidavit complied with the statute sufficiently showed that the order for appeal was granted.—*Id.*

The Supreme Court will read into the abstract of the record the certified copy of the judgment and order granting the appeal.—*Id.*

**(H) Transmission, Filing, Printing, and Service of Copies.**

§ 625 (Tex.Civ.App.) Where defendant in error filed a complete transcript of the record on motion to affirm on certificate, and the motion was denied as prematurely filed, the transcript would be considered a sufficient filing of the record to warrant a consideration of the case on its merits.—*Bartley v. Robinson*, 161 S. W. 386.

**(I) Defects, Objections, Amendment, and Correction.**

§ 635 (Ark.) Defendants' appeal will not be dismissed for failure of their transcript to contain the contract upon which suit was brought, where plaintiffs admitted the existence of the contract and the pleadings contained most of its terms.—*Russellville Water & Light Co. v. Sauerman*, 161 S. W. 502.

Where plaintiffs, who were successful below, moved to dismiss the appeal and in the alternative for the court to consider as part of their brief and argument that brief and argument filed in a similar case by another plaintiff against the same defendant wherein the contract in suit was fully copied, plaintiffs' alternative motion supplied the omission in the transcript.—*Id.*

§ 653 (Mo.) The Supreme Court may in its discretion in a proper case permit the amendment of an abstract of record after lapse of the time prescribed in the statutes and court rules for filing the abstract.—*Mahaffey v. Lebanon Cemetery Ass'n*, 161 S. W. 701.

Appellant *held* not entitled to amend the abstract.—*Id.*

§ 659 (Ark.) After drainage proceedings in the county court were taken by appeal to the circuit court and on further appeal to the Supreme Court, an addition to the record of the county court, filed in the circuit court and brought to the Supreme Court on certiorari, could not be considered.—*Drainage Dist. No. 1 of Cross County v. Rolfe*, 161 S. W. 1034.

§ 659 (Ky.) Unless a view of the original papers is important, the Court of Appeals will not order them brought up unless they are bulky parts of the record, and the circuit clerk will not be compelled to file original depositions, consisting of only a little more than 500 typewritten pages, but he will be required to file exhibits offered with the depositions, when an inspection of them will be of assistance to the court.—*Yenawine v. Tycrete Concrete Products Co.*, 161 S. W. 1127.

**(J) Conclusiveness and Effect, Impeaching and Contradicting.**

§ 664 (Ark.) Facts *held* to show that a recorded lease sent up on a writ of certiorari and not another lease between the same parties contained in the bill of exceptions was the one which plaintiff offered in evidence.—*Pennsylvania Mining Co. v. Bailey*, 161 S. W. 200.

**(K) Questions Presented for Review.**

§ 671 (Mo.App.) In action against brokers for damages for fraudulent representations to induce exchange of property, *held*, that under the abstract the court could not pass on defendant's contention that title to the property transferred by plaintiff had failed or that it was of no value.—*Kaufman v. Davis*, 161 S. W. 1180.

§ 688 (Ky.) Alleged improper argument *held* not reviewable, where the bill of exceptions did not authenticate the fact that it was used, though it showed the filing of an affidavit of opposing counsel that it was used.—*Southern*

*Ry. Co. in Kentucky v. Thacker's Adm'r*, 161 S. W. 236.

§ 688 (Ky.) Alleged improper argument of defendant's attorney could not be reviewed in the absence of a bill of exceptions containing the evidence.—*Fish v. Welch's Adm'r*, 161 S. W. 512.

§ 690 (Tex.Civ.App.) An assignment of error to the exclusion of evidence, not supported by the bill of exceptions applicable to the assignment, does not raise any question on appeal.—*Ellerd v. Campfield*, 161 S. W. 392.

§ 695 (Tex.Cr.App.) Where the facts are not sent up with the record, an objection that the evidence was insufficient to support a conviction cannot be reviewed.—*Leonard v. State*, 161 S. W. 966.

§ 697 (Ark.) A bill of exceptions *held* to implicitly show that it contained all of the evidence in the case, though not expressly so stating.—*Warden v. Middleton*, 161 S. W. 151.

§ 699 (Mo.App.) Where the record discloses that instructions were given which are not brought up, there can be no reversal for error in the instructions, unless substantially prejudicial.—*Perry v. Van Matre*, 161 S. W. 643.

§ 699 (Mo.App.) Though abstract stated, as required by Springfield Court of Appeals rule 8, that there was evidence to prove the facts upon which a refused instruction was based, this refusal *held* not reviewable where the instructions given were not brought to the Court of Appeals.—*Kaufman v. Davis*, 161 S. W. 1180.

§ 699 (Mo.App.) It appearing merely that there was objection and exception to modification of the instructions, and not appearing what the modifications were, there is nothing for review.—*Union Cold Storage & Warehouse Co. v. Pitts*, 161 S. W. 1182.

§ 706 (Mo.App.) Where the record does not show on what ground a motion for new trial was granted, the trial court's action must be sustained if it was proper, on any one of the grounds set forth in the motion.—*Clarkson v. Garvey*, 161 S. W. 664.

**(L) Matters Not Apparent of Record.**

§ 714 (Ky.) Where misconduct of the court in refusing to discharge the jury because some of the members had acted in other cases during a suspension of the present trial was not shown by the bill of exceptions but only by appellant's affidavit, it could not be reviewed.—*Sams v. Gray*, 161 S. W. 553.

**XI. ASSIGNMENT OF ERRORS.**

§ 719 (Tex.Civ.App.) When conclusions of fact are voluntarily filed by the trial court, neither party is required to take notice, and no exception to the conclusions and no assignments of error are required of parties against whom such findings are made to entitle them to attack the judgment on the ground that it is unsupported by the evidence.—*Le Blanc v. Jackson*, 161 S. W. 60.

§ 719 (Tex.Civ.App.) The impropriety of a charge, making a wife's right to sell community land to provide necessities after the husband's desertion contingent upon her having minor children to support, will not authorize a reversal, where the error was not assigned.—*Adams v. Wm. Cameron & Co.*, 161 S. W. 417.

§ 719 (Tex.Civ.App.) In a personal injury action, where there was no assignment that the verdict, as reduced by the court, was excessive, a judgment for plaintiff will not be disturbed because of improper argument of counsel, which went to the amount of recovery only.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 724 (Tex.Civ.App.) Courts of Civil Appeals Rules 24 and 25 (142 S. W. xii), requiring assignments to specify the grounds of error and to refer to the part of the motion for new trial in which error is complained of, *held* in conflict with Rev. Civ. St. 1911, art. 1612, as

amended by Acts 33d Leg. c. 136, providing that an assignment directing the attention of the court to the error complained of is sufficient.—*Conn v. Rosamond*, 161 S. W. 73.

§ 724 (Tex.Civ.App.) Assignments of error, which do not show the objection made below, but leave it to the appellate court to go to the record and dig it out of the bill of exceptions, will not be considered on appeal.—*Childress v. Robinson*, 161 S. W. 78.

§ 732 (Tex.Civ.App.) An assignment that the court erred in refusing to grant specified defendants' amended motion for new trial was too general to present any question for review.—*Brown v. Brenner*, 161 S. W. 14.

§ 732 (Tex.Civ.App.) Assignment that the court erred in denying a motion for new trial because jury allowed the full amount claimed by plea in reconvention, except amount claimed as damages for breach of warranty, *held* too general.—*Gillispie v. Ambrose*, 161 S. W. 937.

§ 736 (Tex.Civ.App.) Certain assignments of error *held* multifarious.—*Fidelity & Deposit Co. v. Bankers' Trust Co.*, 161 S. W. 45.

§ 742 (Tex.) Under Rule 31 for Courts of Civil Appeals (142 S. W. xiii), the statement subjoined to a proposition under an assignment of error need not refer to the page of the transcript where the motion for a new trial may be found, unless the motion is necessary to support the proposition.—*Chicago, R. I. & G. Ry. Co. v. Pemberton*, 161 S. W. 2.

Where statement subjoined to propositions did not refer to the pages of the transcript as required by Rule 31 for Courts of Civil Appeals (142 S. W. xiii), the refusal of that court to consider the assignments will not be reviewed by the Supreme Court.—*Id.*

§ 742 (Tex.Civ.App.) A proposition that the court erred in permitting witnesses to give their opinion as to the mental capacity of the grantor in a deed *held* not germane to an assignment that the court erred in denying defendant's motion for a new trial because a finding of want of capacity was not sustained by the evidence.—*Brown v. Brenner*, 161 S. W. 14.

A proposition that the court erred in canceling deeds but should have directed a verdict for defendants *held* not germane to an assignment that the court erred in not granting defendants a new trial because the evidence was insufficient to justify a finding that defendants had notice of their incapacity at the time they took the deeds.—*Id.*

§ 742 (Tex.Civ.App.) Assignments of error complaining of the charge, when not followed by propositions subjoined to a sufficient statement to explain the propositions, as required by rule 31 (142 S. W. xiii), will not be considered.—*Willett v. Herrin*, 161 S. W. 26.

§ 742 (Tex.Civ.App.) Rules requiring each assignment of error in a brief to be followed by a proposition and a sufficient statement from the record *held* not in conflict with Rev. Civ. St. 1911, art. 1612, as amended by Acts 33d Leg. c. 136, declaring an assignment directing the attention of the court to the error complained of to be sufficient.—*Conn v. Rosamond*, 161 S. W. 73.

§ 742 (Tex.Civ.App.) Rev. Civ. St. 1911, art. 1612, referring to assignments of error, though repealing Rule 25 (142 S. W. xii), *held* not to abrogate Court Rules 30 and 31 (142 S. W. xiii), requiring each point in assignment to be stated as a proposition.—*Childress v. Robinson*, 161 S. W. 78.

An assignment of error which merely refers to the bill of exceptions, wherein the proceedings complained of were set out, cannot be considered, not being followed by a sufficient statement.—*Id.*

An assignment of error, reciting that the court erred in overruling the general demurrer of the plaintiffs, contained in their first supplemental petition, to the answer of defendants as appears

by the bill of exceptions, cannot be considered as a proposition, and so need not be considered on appeal.—*Id.*

Assignments of error complaining of the exclusion of evidence, which do not show the objection made below, and are followed by no proposition or statement except to see the bill of exceptions, will not be considered on appeal.—*Id.*

Assignments of error complaining of the exclusion of evidence, followed by a proposition which merely stated the purpose for which it was offered, cannot be considered; the proposition not being sufficient.—*Id.*

Assignments of error followed by neither propositions nor statements cannot be considered on appeal.—*Id.*

§ 742 (Tex.Civ.App.) An assignment of error complaining of exclusion of evidence will be overruled, where the statement of facts does not contain that part of the evidence and the judge's qualification of the bill of exceptions shows that that part was excluded.—*Risinger v. Sullivan*, 161 S. W. 397.

§ 742 (Tex.Civ.App.) An assignment of error not followed by a sufficient statement of the evidence tending to support it, as required by Courts of Civil Appeals Rule 31 (142 S. W. xiii), *held* not entitled to consideration.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 742 (Tex.Civ.App.) An assignment of error which attacks the judgment as unsupported by the evidence will not be considered where no statement is made under the assignment.—*Fahey v. Benedetti*, 161 S. W. 896.

An assignment that the court erred in overruling the special exception of defendant to plaintiff's failure to allege a contract in writing will not be considered, where no statement is submitted and the court on appeal does not know to what ruling complaint is made.—*Id.*

§ 742 (Tex.Civ.App.) Propositions under an assignment complaining of the admission of evidence *held* not to require consideration, being too general, and not pointing out any specific error.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 743 (Tex.) Where assignments of error, though not in literal compliance with Rules 23, 24, and 25 for Courts of Civil Appeals (142 S. W. xii), substantially confined appellant to errors raised below showed that the error assigned was urged in the motion for a new trial, and enabled Court of Appeals to verify the identity of the errors, they should be considered.—*Chicago, R. I. & G. Ry. Co. v. Pemberton*, 161 S. W. 2.

Assignments of error, referring by number to the paragraphs of the motion for a new trial where the errors were complained of, but not referring to the page of the transcript where they might be found, *held* in literal compliance with rules 24 and 25 for Courts of Civil Appeals (142 S. W. xii).—*Id.*

§ 743 (Tex.Civ.App.) An assignment of error that the court erred in directing a verdict will not be considered, where it does not refer to the paragraphs of the motion for new trial in which the questions were presented, and the statement does not contain such reference, and the motion contains no reference to the grounds urged in the assignment.—*Fahey v. Benedetti*, 161 S. W. 896.

§ 748 (Tex.Civ.App.) Where an appellant's assignments of error are not prepared in compliance with the court rules, the court may, either on the motion of the appellee or its own motion, refuse to consider them.—*Childress v. Robinson*, 161 S. W. 78.

## XII. BRIEFS.

§ 758 (Tex.Civ.App.) The Supreme Court will notice as fundamental error the rendition of a judgment for plaintiffs on a substituted petition, though not briefed, when defendants had not

been cited and had not filed an answer thereto or otherwise appeared.—*J. M. Radford Grocery Co. v. Owens*, 161 S. W. 911.

§ 760 (Ky.) Where appellant's brief, in an action involving an account for services, etc., does not point out any item as to which the trial court erred, and there are some 433 issues of fact and 250 pages of conflicting testimony thereon, the appellate court will not search the record for errors.—*Garvey v. Garvey*, 161 S. W. 526.

§ 760 (Tex.Civ.App.) A ruling on the admission of testimony cannot be reviewed where there is nothing in appellant's brief to indicate that an objection was interposed and the brief does not refer to bills of exception taken to the ruling.—*Brown v. Brenner*, 161 S. W. 14.

§ 766 (Tex.Civ.App.) The printed argument cannot be looked to to supply vital defects in the brief.—*Childress v. Robinson*, 161 S. W. 78.

§ 767 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 1614, and rule 37 (142 S. W. xiii), typewritten brief containing 40 pages held violative of the statute and rule, and to be stricken.—*Waterman Lumber & Supply Co. v. Holmes*, 161 S. W. 70.

§ 773 (Tex.Civ.App.) In view of a postponement granted to the appellee and of the absence of any allegation of injury or want of time to file a brief after service of appellant's brief, held, that a motion to dismiss on the ground of delay would be denied.—*International & G. N. R. Co. v. Walters*, 161 S. W. 916.

§ 773 (Tex.Civ.App.) On appeal from judgment for plaintiff and for defendant as to part of its counterclaim, where defendant appealed, but filed no briefs, held, on plaintiff's brief filed according to rule 42 (142 S. W. xiv), that under the express terms of the rule the judgment was one that might be affirmed upon the case as presented by appellee.—*Record Co. v. Popplewell*, 161 S. W. 930.

### XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (Mo.) Where, pending appeal in a suit to enjoin the enforcement of a city ordinance regulating rates and electric service, the statute under which the ordinance was passed was repealed and the ordinance therefore nullified, the appeal will be dismissed as involving a mere moot question.—*Union Electric Light & Power Co. v. City of St. Louis*, 161 S. W. 1166.

### XV. HEARING AND REHEARING.

§ 835 (Tex.Civ.App.) An objection to an instruction in a libel action that it erroneously submitted certain publications as a ground for recovery because the petition did not justify such submission cannot be first raised in a motion for rehearing on appeal.—*Autrey v. Collins*, 161 S. W. 413.

### XVI. REVIEW.

#### (A) Scope and Extent in General.

§ 837 (Mo.App.) Where the bill of exceptions did not contain the evidence taken, but did contain finding of facts made by the court at the request of the parties without objection, such findings of fact might be considered to determine whether proper conclusions of law were drawn therefrom.—*Shull v. Cummings*, 161 S. W. 360.

§ 837 (Tex.Civ.App.) In considering the propriety of the action of the lower court in sustaining a demurrer to the petition, the appellate court cannot consider the allegations of a supplemental petition.—*Swanson v. Nacogdoches*, 161 S. W. 83.

§ 842 (Ark.) Evidence held to make question of fact for the chancellor as to whether defendant loaned money to plaintiff to carry out contract for purchase of land taking deed as security or whether he purchased the land and resold it to plaintiff.—*Prickett v. Williams*, 161 S. W. 1023.

§ 842 (Mo.App.) Under Rev. St. 1909, § 10-023, whether person who indorsed a stolen check to accommodate the thief was a holder in due course held a question of fact.—*Greisser v. Emmons*, 161 S. W. 613.

§ 843 (Mo.) Where the court trying a case without a jury admitted evidence which was not considered by the trial court in determining the issue on which the decision on appeal depended, the court on appeal will not pass on the admissibility of the evidence.—*Merrill v. Thompson*, 161 S. W. 674.

§ 854 (Mo.App.) It is the duty of the appellate court to affirm a judgment if there is any ground upon which the action of the court below may be properly sustained.—*Muth Realty Co. v. Timmerberg*, 161 S. W. 539.

§ 854 (Mo.App.) The appellate court will not reverse an order granting a new trial because it specifies an erroneous reason for such action if other valid reasons raised by the motion exist, but the burden is on respondent to show such other reasons.—*Roney v. Organ*, 161 S. W. 868.

§ 866 (Mo.App.) Where plaintiff, after the striking of his amended petition for departure from the original petition, failed to prosecute the suit, whereupon the court dismissed the cause, on an appeal from the judgment of dismissal, the dismissal alone could be complained of.—*Poncot v. St. Louis, I. M. & S. Ry. Co.*, 161 S. W. 1190.

§ 867 (Mo.App.) In determining whether the trial court erred in granting defendant a new trial the appellate court must decide, not whether defendant could complain of the verdict on appeal, but rather whether the new trial was granted for good cause shown.—*Roney v. Organ*, 161 S. W. 868.

#### (C) Parties Entitled to Allege Error.

§ 877 (Tex.Civ.App.) In trespass to try title, where plaintiff counted on adverse possession, and defendant set up the property was deeded to her as trustee, and she held for the beneficiary, plaintiff cannot complain that the court allowed the beneficiary to intervene, setting up the same facts as those alleged by defendant; the rights of the beneficiary under the trust not affecting his claim.—*Ratcliff v. Ratcliff*, 161 S. W. 30.

§ 879 (Tex.Civ.App.) Where an intervenor neither appealed nor assigned errors, the effect of the decision of the appellate court on his rights cannot be considered, though he filed a brief asking that judgment for plaintiff be affirmed.—*Brown v. Bay City Bank & Trust Co.*, 161 S. W. 23.

§ 880 (Ky.) Appellant could not object to the overruling of a motion to quash the return of the summons against its codefendant, to whose rights in the property in controversy it had succeeded, where the latter did not appeal from the judgment against it.—*Chesapeake & O. Ry. Co. v. Weddington's Adm'r*, 161 S. W. 208.

§ 882 (Ark.) In an action against a telegraph company for damages for delay in the transmission of a death message, where proof of the giving of written notice within 60 days of intention to claim damages for delay was excluded on the company's objection, it cannot urge on appeal the failure to give notice as ground for reversal.—*Western Union Telegraph Co. v. Hearn*, 161 S. W. 1025.

§ 882 (Ark.) A party requesting an instruction cannot complain of an instruction given containing the error repeated in the instruction requested.—*St. Louis, I. M. & S. R. Co. v. Thurman*, 161 S. W. 1054.

§ 882 (Ky.) Railroad company held not entitled to complain of instruction to find for plaintiff, in action for death at a crossing under certain circumstances, where it requested an instruction to find for it if the circumstances were the opposite of those stated in the first instruction.—*Southern Ry. Co. in Kentucky v. Thacker's Adm'r*, 161 S. W. 236.

§ 882 (Mo.) Defendant could not complain that instructions correctly applying the humanitarian doctrine conflicted with instructions given at his request, which ignored that doctrine.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

§ 882 (Mo.App.) Where defendant in its own requested charge adopted the language of an instruction given for plaintiff, it cannot complain of errors in such language.—*Livingston v. City of St. Joseph*, 161 S. W. 304.

§ 882 (Mo.App.) A party who assumes the burden of proof while it rested on an adverse party may not complain of an instruction placing the burden on him.—*Keet-Rountree Dry Goods Co. v. Hodges*, 161 S. W. 862.

§ 882 (Mo.App.) A party cannot complain of error in the theory on which the case was submitted, when its own instruction submitted the same theory.—*Johnson v. Springfield Traction Co.*, 161 S. W. 1193.

§ 882 (Tex.Civ.App.) Where defendants by their answer sought partition of the land in suit, they cannot on appeal attack their own pleadings, as insufficient to warrant partition.—*Gutheridge v. Gutheridge*, 161 S. W. 892.

§ 882 (Tex.Civ.App.) Where defendant railroad set up contributory negligence, and the court charged on that issue, defendant's request of a special charge on that question will not, upon the theory of invited error, preclude it from attacking the sufficiency of the evidence to warrant any verdict for plaintiff.—*International & G. N. Ry. Co. v. Walker*, 161 S. W. 961.

#### (D) Amendments, Additional Proofs, and Trial of Cause Anew.

§ 894 (Mo.) In an equity case, all the testimony should be brought up by the party seeking a reversal.—*Hynds v. Hynds*, 161 S. W. 812.

Appellants, who in their bill of exceptions had made a call for an exhibit which had been mislaid, held not in fault within the Supreme Court rule 7 (73 S. W. v.), requiring that in an equity case all the testimony be brought up.—*Id.*

#### (E) Presumptions.

§ 901 (Mo.App.) The burden is on the appellant to show by the record that prejudicial error was committed.—*Marts v. Powell*, 161 S. W. 871.

§ 907 (Ark.) Ordinarily, where the record of the evidence is incomplete, a presumption will be indulged on appeal that the omitted matter support the chancellor's finding.—*Bank of Des Arc v. Moody*, 161 S. W. 134.

Where exhibits to a complaint related only to matter as to which there was no dispute and had no bearing on the issues involved, their omission from the record of the evidence did not justify a presumption that they supported the finding below.—*Id.*

In stockholders' action against directors of bank and new bank which had purchased defunct bank's assets, omission of exhibit to answer showing a list of such assets held not to justify presumption that the exhibit supported the finding below.—*Id.*

§ 916 (Tex.Civ.App.) In determining, on appeal, whether a plea of privilege to be sued in the county of defendant's residence was properly sustained it will be presumed that the allegations of the petition which are material for the purposes of determining the proper venue are true.—*Theodore Keller Co. v. Mangum*, 161 S. W. 19.

§ 926 (Tex.Civ.App.) On a trial to the court, it would be presumed that letters, cards, etc., showing the market price of millet seed, were not considered as evidence of market value, but only as bearing on the weight of the testimony of witnesses as to the market.—*Barteldes Seed*

*Co. v. Bennett-Sims Mill & Elevator Co.*, 161 S. W. 399.

§ 927 (Mo.App.) In determining whether demurrer to evidence should have been sustained, held, that it would be assumed that a train was backed against a standing car, under which plaintiff was, intentionally and without the usual warning.—*Featherstone v. Kansas City Terminal Ry. Co.*, 161 S. W. 284.

§ 927 (Mo.App.) In reviewing a ruling overruling a demurrer to plaintiff's evidence, plaintiff should be given the benefit of every reasonable inference fairly deducible from the evidence.—*Battles v. United Rys. Co. of St. Louis*, 161 S. W. 614.

§ 933 (Mo.App.) In deciding on defendant's appeal from an order refusing to set aside an order granting plaintiff a new trial, the facts should be considered in the light most favorable to plaintiff.—*Wilt v. Coughlin*, 161 S. W. 888.

§ 934 (Ky.) Where the petition in mandamus showed that petitioner was examined for a teacher's certificate by the board of examiners, but did not show that before entering thereupon he subscribed the oath required by St. 1903, § 4425, as amended by Act March 16, 1906 (Laws 1906, c. 29), it would be presumed in support of a judgment for the board that it did not improperly admit him to examination without his making the required oath.—*Flynn v. Barnes*, 161 S. W. 523.

§ 934 (Mo.App.) Where there was a finding in favor of plaintiff, only plaintiff's evidence need be considered in determining the propriety of the finding.—*Winfrey v. Matthews*, 161 S. W. 583.

#### (F) Discretion of Lower Court.

§ 957 (Mo.App.) In the case of default judgments, the appellate courts look with favor upon the exercise of the lower court's discretion in favor of a trial on the merits and are less apt to interfere when the judgment is set aside than when it is not.—*Muth Realty Co. v. Timmerberg*, 161 S. W. 589.

The action of the trial court in declining to set aside a default judgment will not be reviewed on appeal, unless appellant make a prima facie showing of a meritorious case.—*Id.*

§ 977 (Ky.) The Court of Appeals cannot interfere with the grant of a new trial unless discretion is abused.—*Nantz v. Sizemore*, 161 S. W. 552.

§ 977 (Mo.App.) It is the duty of the appellate court to reverse an order sustaining a motion for a new trial, made through a mistake in construing the law.—*Wilt v. Coughlin*, 161 S. W. 888.

§ 979 (Mo.App.) Award of a new trial, on the ground that the verdict is against the weight of the evidence, should be sustained, unless there appears an abuse of discretion.—*Clarkson v. Garvey*, 161 S. W. 684.

#### (G) Questions of Fact, Verdicts, and Findings.

§ 989 (Tex.Civ.App.) The court, in passing on an assignment that the finding of the court is contrary to the evidence, will only determine whether there is sufficient evidence to authorize the finding.—*Campbell v. Gibbs*, 161 S. W. 430.

§ 994 (Mo.) A finding sustained by the testimony of a credible witness will not be disturbed because several witnesses contradicted his testimony.—*Merrill v. Thompson*, 161 S. W. 674.

§ 999 (Ark.) A verdict for plaintiff must be tested by taking the view of the testimony most favorable to plaintiff.—*St. Louis, I. M. & S. Ry. Co. v. Reilly*, 161 S. W. 1052.

§ 999 (Tex. Civ. App.) Where the appellate court is unable to say that the jury were wrong, the verdict will not be disturbed.—*Missouri, K. & T. Ry. Co. of Texas v. Leabo*, 161 S. W. 382.

§ 1001. Where there is any evidence to support a verdict it cannot be disturbed on appeal.—(Mo.App.) Rubey Trust Co. v. Weidner, 161 S. W. 383;

(Tex.Civ.App.) Texas Midland R. R. v. Wiggins, 161 S. W. 445.

§ 1001 (Mo.App.) On evidence tending to support the verdict, it could not be disturbed.—Sails v. Funk, 161 S. W. 1175.

§ 1003 (Mo.App.) A verdict will not be disturbed on appeal when supported by substantial evidence, though against the preponderance of the evidence, and though the reviewing court would have found a different verdict.—Marts v. Powell, 161 S. W. 871.

§ 1003 (Tex.Civ.App.) A verdict may be overruled on appeal, when it is so against the weight of the evidence as to be manifestly wrong.—Texas Midland R. R. v. Wiggins, 161 S. W. 445.

§ 1008 (Mo.App.) A finding of facts has the same force on appeal whether requested below or not.—Barton Lumber Co. v. Gibson, 161 S. W. 357.

§ 1008 (Mo.App.) In cases tried by the court, where no findings of fact are requested and no declarations of law given, the judgment will be affirmed, unless it is so manifestly erroneous that it cannot be sustained under the evidence.—Greisser v. Emmons, 161 S. W. 613.

§ 1009 (Ark.) The chancellor's findings of fact will not be disturbed unless against the preponderance of the evidence.—Prickett v. Williams, 161 S. W. 1023; Shackelford v. Campbell, Id., 1019.

§ 1009 (Ky.) A finding based on conflicting evidence will not be reversed, where the court is not convinced that the chancellor has erred to the prejudice of the substantial rights of the appellant.—McDowell v. Edwards' Adm'r, 161 S. W. 534.

§ 1009 (Mo.App.) Since a suit for separate maintenance by the wife is in the nature of an equitable proceeding, the trial court's findings are not binding on appeal, though they will be largely deferred to, where the evidence sharply conflicts.—Kindorf v. Kindorf, 161 S. W. 318.

§ 1010 (Mo.) In an action, under Rev. St. 1909, § 2535, to determine title to land, where there is nothing in it of an equitable character, the court's finding, if supported by substantial evidence, will be affirmed.—Thompson v. Stillwell, 161 S. W. 681.

§ 1010 (Mo.App.) Where the cause was submitted to the trial court without any declarations of law being asked or given, the judgment should be sustained if there is any substantial evidence in support of the finding on the facts.—Winfrey v. Matthews, 161 S. W. 583.

§ 1011 (Ky.) A finding by the trial court as to the value of the services of an expert witness, based on sharply conflicting evidence, will not be disturbed on appeal.—McCormack v. Louisville & N. R. Co., 161 S. W. 518.

§ 1012 (Mo.) Where the facts in evidence are about evenly balanced, the findings of the trial court will not be disturbed.—Ryan v. Strop, 161 S. W. 700.

§ 1012 (Mo.) Where the trial judge decided the case on a transcript taken before another judge and on depositions, and the only witness who testified orally did not testify as to the contract relied on, and none of the witnesses resided in the circuit court over which the trial judge presided, he could not be presumed to be in a position to more advantageously weigh the evidence than the appellate court.—Hersman v. Hersman, 161 S. W. 800.

(H) Harmless Error.

§ 1027 (Tex.Civ.App.) Where, in an action on vendor's lien notes, the issue was whether the time for payment had been extended under an agreement between an agent of plaintiff and defendant, and the jury specifically found that no agreement was made, rulings involving the

authority of the agent to make the agreement were immaterial.—Miller v. Campfield, 161 S. W. 392.

§ 1027 (Tex.Civ.App.) Where, in trespass to try title against a husband and wife, the judgment for plaintiff involved only a finding that the property was community property, the error, if any, as to a wife's separate property, held not prejudicial.—Treadwell v. Walker County Lumber Co., 161 S. W. 397.

§ 1028 (Mo.App.) Where an action on an account was prematurely brought, held, that a judgment against defendant will be reversed, though he owed the account or a note given therefor; costs alone being a substantial right.—Barton Lumber Co. v. Gibson, 161 S. W. 357.

§ 1031 (Ark.) Where it does not clearly appear from the record that an erroneous instruction was harmless, the judgment must be reversed.—Conway v. Coursey, 161 S. W. 1030.

§ 1032 (Mo.App.) Where appellant complains of the giving of an instruction, he must show, not only that it was erroneous, but that it was prejudicial.—Perry v. Van Matre, 161 S. W. 648.

§ 1033 (Ky.) A master held not entitled to complain of a ruling that certain persons were fellow servants of plaintiff, and that recovery could only be had in case the master furnished an insufficient number of persons to perform the duties imposed upon such persons.—Louisville & N. R. Co. v. Moore, 161 S. W. 1129.

§ 1033 (Tex.Civ.App.) After judgment for plaintiff, defendant could not complain on appeal of the action of the trial court in submitting a ground of defense not supported by the evidence.—Missouri, K. & T. Ry. Co. of Texas v. Leabo, 161 S. W. 382.

§ 1033 (Tex.Civ.App.) A charge that plaintiff could not recover unless the jury found certain facts, as to some of which there was no dispute, if erroneous, held favorable to defendant.—St. Louis Southwestern Ry. Co. of Texas v. Martin, 161 S. W. 405.

§ 1033 (Tex.Civ.App.) The burden of proof of the defense of failure of consideration, in an action on a note, being on defendants, failure to so instruct was not prejudicial to them.—Lattimore v. Puckett & Wear, 161 S. W. 951.

§ 1036 (Ky.) Where a grantee pendente lite, in an action for breach of a crossing covenant in a railroad right of way deed, actively conducted the action for the grantor and was his principal witness, he was estopped to claim any part of the recovery, and defendants were not prejudiced by failure to make him a party.—Chesapeake & O. Ry. Co. v. Weddington's Adm'r, 161 S. W. 203.

§ 1039 (Ky.) Where an injured servant attempted to plead in the alternative under the federal Employers' Liability Act and the common law, denial of the master's motion to compel election is harmless, where the court at the close of the evidence ruled that the case did not come within the federal act.—Louisville & N. R. Co. v. Moore, 161 S. W. 1129.

§ 1042 (Mo.App.) Where a case was tried as though the matters alleged in defendants' special answer had not been stricken, the appellate court may disregard the action of the lower court in striking the principal allegations of defense.—Citizens' Bank of Senath v. Douglass, 161 S. W. 601.

§ 1042 (Tex.Civ.App.) Where, though the county court on an appeal from justice court denied a motion to strike out a cause of action not set up in the justice court, when made, the judgment recited that it was sustained, thus indicating that the new cause of action was not considered, the error was cured.—McKneely v. Beatty, 161 S. W. 18.

§ 1043 (Ark.) Since upon affirmance of a judgment for plaintiff he is entitled to judgment against defendant and his sureties on the supersedeas bond, there was no prejudicial er-

ror in that, upon the dissolution of an injunction staying proceedings on a decree, the chancellor rendered judgment against defendant and the sureties on the injunction bond, where the same persons also signed the supersedeas bond on the appeal from the judgment enjoined.—*Felker v. Rice*, 161 S. W. 162.

§ 1048 (Mo.App.) In an action for damages for the loss of plaintiff's mare killed in a collision on the highway with defendant's horse and buggy, error in examination of plaintiff's son, who was riding the mare, *held* not ground for reversal.—*Hodges v. Hill*, 161 S. W. 633.

§ 1048 (Mo.App.) Error in overruling an objection to a question is harmless, where the question is not answered.—*Perry v. Van Matre*, 161 S. W. 643.

§ 1050 (Ky.) In an action for damages for breach of a railroad's covenant to install crossings, defendant *held* not prejudiced by the admission of evidence as to the probable cost of the construction of a haul road off the right of way to enable plaintiff to use the crossing constructed on the lower end of the track so as to render the upper end accessible.—*Chesapeake & O. Ry. Co. v. Weddington's Adm'r*, 161 S. W. 208.

§ 1050 (Ky.) Defendant in an action for injuries was not prejudiced by evidence of plaintiff that he thought he was going to die for about two weeks, where plaintiff's physicians testified in substance to the same fact.—*Board of Council of City of Frankfort v. Kirby*, 161 S. W. 1115.

§ 1050 (Ky.) In a personal injury action by a servant, the admission of evidence that he had to do what little he could to keep from sending his children to the orphans' home, and the failure of the court to admonish the jury that evidence of the servant's sobriety and industry could be considered only on the question of damages, was harmless, though erroneous.—*Louisville & N. R. Co. v. Moore*, 161 S. W. 1129.

§ 1050 (Mo.App.) In an action for the killing of plaintiff's mare in a collision with defendant's horse and buggy upon the highway, where the evidence was such as would only sustain a judgment for defendant, *held* that any error in the admission of evidence that plaintiff's son was accustomed to ride along the highway at a fast rate was not ground for reversal.—*Hodges v. Hill*, 161 S. W. 633.

§ 1050 (Mo.App.) The admission of evidence as to a matter concerning which another witness had testified fully without objection, if erroneous, was harmless.—*Perry v. Van Matre*, 161 S. W. 643.

§ 1050 (Tex.Civ.App.) In a personal injury action, the admission without objection of certain evidence *held* to render any error in the subsequent admission of similar testimony harmless.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 1053 (Tex.Civ.App.) The error in admitting improper evidence is not ground for reversal where the court specifically withdrew it, and directed the jury not to consider it.—*Kirby Lumber Co. v. Stewart*, 161 S. W. 372.

§ 1056 (Tex.Civ.App.) Refusal to admit evidence of failure to pay taxes on land while it was claimed by adverse possession was reversible error.—*Houston Oil Co. of Texas v. Jones*, 161 S. W. 92.

§ 1060 (Tex.Civ.App.) In a personal injury action by one run down at a railroad crossing, argument of counsel, *held* harmless.—*Texas Midland R. R. v. Wiggins*, 161 S. W. 445.

§ 1064 (Ark.) In an action for personal injuries while attempting to board a train, as plaintiff was entitled to do after having been denied opportunity to purchase a ticket, instruction as to right to rely on direction of defendant's agent *held* not prejudicial.—*St. Louis, I. M. & S. Ry. Co. v. Green*, 161 S. W. 148.

§ 1064 (Ky.) In an action for death by being struck by a train while crossing the track in the course of decedent's work in constructing a coal tippie, and error in admitting evidence of the trainmen's failure to give warning at crossings near the tippie *held* not prejudicial.—*Cincinnati, N. O. & T. P. Ry. Co. v. Winingham's Adm'r*, 161 S. W. 506.

§ 1064 (Tex.Civ.App.) Repeated charges allowing recovery in case plaintiff was either physically or mentally incapacitated *held* prejudicial.—*Texas Cent. Ry. Co. v. Rose*, 161 S. W. 387.

§ 1066 (Ark.) An inapplicable instruction as to the ordinary duty to hold a train a reasonable time for passengers to board it, *held* not prejudicial where it must have been understood as relating to the facts in the case.—*St. Louis, I. M. & S. Ry. Co. v. Green*, 161 S. W. 148.

§ 1066 (Mo.App.) Where, plaintiff admitted an express warranty that the jack was sound and a good breeder, an instruction on implied warranty, though not warranted by the evidence, was harmless, and, under R. S. 1909, §§ 1850, 2082, requiring that errors not injurious be disregarded, was not ground for reversal.—*Perry v. Van Matre*, 161 S. W. 643.

§ 1068 (Mo.) An instruction on acquisition of title by prescription, if erroneous, *held* harmless, where the undisputed evidence showed that the defendant and its predecessors had been in actual, open, exclusive, notorious, and continuous possession for more than ten years.—*Quinn v. St. Louis & S. F. R. Co.*, 161 S. W. 820.

§ 1068 (Tex.Civ.App.) Error in charging that the jury might find for plaintiffs, with 10 per cent. interest, is harmless, where the judgment provided only for 6 per cent.—*Willett v. Herlin*, 161 S. W. 26.

§ 1068 (Tex.Civ.App.) On evidence, in a switchman's action for injuries, such that only a verdict for plaintiff could have been rendered, error, if any, in an instruction as to the negligence of defendant's foreman and yardmaster *held* not ground for reversal.—*Missouri, K. & T. Ry. Co. of Texas v. Leabo*, 161 S. W. 382.

§ 1070 (Tex.Civ.App.) Where the petition alleged that a described tract contained 160 acres, and sought recovery of an undivided one-half, that the verdict and judgment awarded an undivided one-half of the land set forth in plaintiff's petition, without more definite description, was not a fundamental error.—*Houston Oil Co. of Texas v. Jones*, 161 S. W. 92.

#### (J) Decisions of Intermediate Courts.

§ 1092 (Mo.App.) The court's discretion as to affirmance of a judgment of a justice of the peace for nonpayment of the fee for filing the transcript will not be disturbed except for abuse.—*Muth Realty Co. v. Timmerberg*, 161 S. W. 589.

§ 1092 (Tenn.) The reduction of the verdict, in an action for death, being upheld by the Court of Civil Appeals, will not be interfered with by the Supreme Court.—*Carolina, C. & O. Ry. v. Shewalter*, 161 S. W. 1136.

#### (K) Subsequent Appeals.

§ 1097 (Mo.) Matters determined on a previous appeal in the same action become the law of the case and will not again be reviewed.—*Armor v. Frey*, 161 S. W. 829.

### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

#### (B) Affirmance.

§ 1127 (Tex.Civ.App.) Where defendant in error's motion to affirm was denied at the term at which the transcript should have been filed, because made within the 90 days allowed, a similar motion at the next term will be denied



because filed too late.—*Bartley v. Robinson*, 161 S. W. 386.

§ 1133 (Tex.Civ.App.) In the absence of a statement of fact, bills of exception, and motion for new trial, a judgment will be affirmed, unless fundamental error appears on the face of the record proper.—*National Aëroplane Co. v. McCormick*, 161 S. W. 375.

§ 1140 (Tex.Civ.App.) Where verdict for defendant on plea of reconvention showed that jury allowed part of a claim which should not have been submitted, *held*, that the judgment would be reversed unless the entire amount of such claim was remitted.—*Gillispie v. Ambrose*, 161 S. W. 937.

#### (D) Reversal.

§ 1170 (Mo.App.) A new trial should not be granted to defendant in an action for libel in charging perjury because the verdict for plaintiff only found exemplary damages for him, without mentioning actual damages, in view of Rev. St. 1909, § 1850, requiring the court to disregard defects not affecting the substantial rights of the parties.—*Roney v. Organ*, 161 S. W. 868.

§ 1170 (Tex.Civ.App.) A charge correct in law, which directed a verdict for the defendant on the finding of certain facts, *held* not ground for reversal, though the defense could be sustained by a finding of fewer facts than were embraced in the hypothesis.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 1171 (Tex.Civ.App.) Where the jury did not follow erroneous instructions as to the measure of damages, and it did not appear what evidence they considered in arriving at an excessive verdict, such verdict will be reversed.—*Louisiana Rio Grande Canal Co. v. Quinn*, 161 S. W. 375.

§ 1172 (Tex.Civ.App.) Under rule 62a for Courts of Civil Appeals (149 S. E. x), the appellate court may, in an action by a woman to set aside her former husband's deeds to their community property, reverse only that part of the judgment which erroneously granted partition without evidence of value.—*Gutheridge v. Gutheridge*, 161 S. W. 892.

§ 1175 (Ark.) In an action against a telegraph company, where it was only liable for nominal damages, the case will be reversed and judgment for nominal damages entered.—*Fulkerson v. Western Union Telegraph Co.*, 161 S. W. 168.

§ 1178 (Ark.) Where a suit in equity was not tried on the proper theory, it could be sent back for further proof and for reference to a master if that course was found necessary.—*Bank of Des Arc v. Moody*, 161 S. W. 134.

#### (F) Mandate and Proceedings in Lower Court.

§ 1207 (Ark.) On affirmation in part and reversal in part of a decree of a chancery court relating to homestead rights and a remand with direction to enter a decree in accordance with the opinion, *held*, that a subsequent decree disposing of land not in controversy and not disposed of by the former decree was in excess of the mandate, and to that extent would be reversed.—*Felton v. Brown*, 161 S. W. 194.

### XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1241 (Mo.App.) Where defendants gave an appeal bond in favor of a corporate plaintiff, they cannot after affirmation, raise the issue of the corporate existence of plaintiff in an action on the bond, for that matter could have been raised in the original action, and that judgment is conclusive.—*Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 161 S. W. 320.

### APPLIANCES.

See Master and Servant, §§ 101-129, 265.

### APPROPRIATION.

See States, § 137; Statutes, § 5.

### ARBITRATION AND AWARD.

See Partition, § 22; Reference; Specific Performance, § 80.

### I. SUBMISSION.

§ 16 (Mo.) A statutory submission to arbitration of the rights of distributees to lands acquired from their ancestor was revoked by the bringing of suit by one of the parties for partition, before actual submission to the arbitrators.—*Ferrell v. Ferrell*, 161 S. W. 719.

### ARGUMENT OF COUNSEL.

See Appeal and Error, § 766; Criminal Law, §§ 711-730; Trial, § 106.

### ARRÊT.

See Municipal Corporations, § 745.

### ARSON.

§ 25 (Mo.) In a prosecution for burning insured property, in violation of Rev. St. 1909, § 4509, it is not necessary to prove that the insurer of the property is a corporation.—*State v. Ruckman*, 161 S. W. 705.

§ 37 (Mo.) In a prosecution for arson in the third degree, evidence *held* insufficient to sustain a conviction.—*State v. Ruckman*, 161 S. W. 705.

Evidence of motive uncorroborated by incriminatory facts and circumstances is insufficient to establish a prima facie case of guilty.—*Id.*

### ARTICLES.

See Corporations, § 18.

### ASSAULT AND BATTERY.

See Homicide, § 292; Mayhem; Municipal Corporations, § 745; Rape, § 66.

### I. CIVIL LIABILITY.

(A) Acts Constituting Assault or Battery and Liability Therefor.

§ 2 (Ky.) An assault is an attempt with force or violence to do a corporal hurt to another; while a battery is an unlawful touching of the person of another by the aggressor himself.—*Hixson v. Slocum*, 161 S. W. 522.

§ 12 (Ky.) Plaintiff who attempted to compel defendant to leave the sidewalk where he had a right to be, attempting to use force therefor, is the aggressor in the assault, though defendant applied profane epithets towards him.—*Hixson v. Slocum*, 161 S. W. 522.

#### (B) Actions.

§ 35 (Mo.App.) Evidence, in an action for damages for an assault, *held* to sustain a verdict for plaintiff.—*Marts v. Powell*, 161 S. W. 871.

### II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 74 (Mo.App.) Information for assault *held* not defective as charging that accused struck, beat, and wounded himself or as failing to show whom he struck, beat, or wounded.—*State v. Schomers*, 161 S. W. 1177.

§ 77 (Mo.App.) An information for common assault may be good without averments as to striking, beating, or wounding.—*State v. Schomers*, 161 S. W. 1177.



**ASSESSMENT.**

See Municipal Corporations, §§ 408-586; Taxation, §§ 301, 463.

**ASSETS.**

See Marshaling Assets and Securities.

**ASSIGNMENT OF ERRORS.**

See Appeal and Error, §§ 281, 302, 361, 499, 690, 719-748; Criminal Law, § 1130.

**ASSIGNMENTS.**

See Chattel Mortgages, §§ 204, 225; Limitation of Actions, § 49; Mines and Minerals, § 64; Witnesses, § 143.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS.**

See Bankruptcy.

**ASSUMPSIT, ACTION OF.**

See Money Lent; Work and Labor.

**ASSUMPTION.**

See Mortgages, §§ 280-292.

Of risk, see Carriers, § 298; Master and Servant, §§ 203-226.

**ATTACHMENT.**

See Justices of the Peace, § 173; Malicious Prosecution, §§ 55, 71; Sequestration.

**III. PROCEEDINGS TO PROCURE.****(B) Affidavits.**

§ 119 (Tex.Civ.App.) Where the affidavit and bond for attachment were sufficient, the fact that the petition was subject to general demurrer will not render the attachment void.—*Baker v. Hahn*, 161 S. W. 443.

§ 122 (Tex.Civ.App.) Where the affidavit and bond for attachment were sufficient, the petition, though subject to general demurrer, may be amended without suing out a new writ of attachment.—*Baker v. Hahn*, 161 S. W. 443.

**VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

§ 211 (Tex.Civ.App.) Where an action against a nonresident is commenced by attachment, a default judgment on a petition, not stating a cause of action, will not warrant a foreclosure of the attachment.—*Baker v. Hahn*, 161 S. W. 443.

**VIII. CLAIMS BY THIRD PERSONS.**

§ 302 (Mo.App.) An interplea filed by a claimant of the property levied on in attachment is a separate suit, wherein the interpleader is plaintiff, while plaintiff in the main action is defendant.—*Keet-Rountree Dry Goods Co. v. Hodges*, 161 S. W. 862.

§ 308 (Mo.App.) One claiming the ownership of property levied on in attachment issued against defendant in possession has the burden to show title.—*Keet-Rountree Dry Goods Co. v. Hodges*, 161 S. W. 862.

A defendant in possession of personalty levied on in attachment may not, where a third person interpleads, introduce evidence to support the third person's claim.—*Id.*

§ 311 (Mo.App.) An instruction, on a trial of an interplea filed by a third person claiming goods levied on in attachment issued against defendant, *held* misleading.—*Keet-Rountree Dry Goods Co. v. Hodges*, 161 S. W. 862.

An instruction should have added the element

that the third person's indicia of ownership should have been continuous.—*Id.*

An instruction *held* not so framed as to enable the jury to apply the law to the proof of a voluntary conveyance of defendant's goods, by the aid of the third person, to his wife.—*Id.*

**ATTENDANCE.**

See Jury, § 75.

**ATTORNEY AND CLIENT.**

See Contempt, § 10; Continuance, § 12; District and Prosecuting Attorneys; New Trial, § 32; Partition, § 114; Trial, § 106.

**IV. COMPENSATION AND LIEN OF ATTORNEY.****(A) Fees and Other Remuneration.**

§ 135 (Mo.App.) Where an attorney renders valuable services which are accepted by his client, there is an implied agreement to pay therefor.—*Connor Realty Co. v. St. Louis Union Trust Co.*, 161 S. W. 865.

**(B) Lien.**

§ 189 (Ky.) A judgment for a client, which has been reversed on appeal, has no effect to limit his right to settle the controversy with his opponent, irrespective of his contract with his attorney for a fee based on the amount of the recovery.—*McCormack v. Louisville & N. R. Co.*, 161 S. W. 518.

§ 190 (Ky.) Where defendant in a personal injury action compromised directly with plaintiff, its liability to an attorney who had a contract with plaintiff for a contingent fee on the percentage basis must be measured by treating the sum paid to plaintiff as the entire recovery, and not merely the percentage to which plaintiff was entitled.—*McCormack v. Louisville & N. R. Co.*, 161 S. W. 518.

**AUTHORITY.**

See Justices of the Peace, §§ 36-45; Levees, §§ 7, 34; Principal and Agent, §§ 103, 123.

**AUTOMOBILES.**

See Estoppel, § 119; Licenses, §§ 6, 7; Master and Servant, §§ 107, 247, 258, 285, 289; Negligence, § 134; Railroads, §§ 333, 348; Statutes, § 79.

**BAIL.****II. IN CRIMINAL PROSECUTIONS.**

§ 68 (Tex.Cr.App.) A recognizance on appeal, failing to provide that the appellant would abide the judgment of the Court of Criminal Appeals "in this case," is fatally defective.—*Matula v. State*, 161 S. W. 965.

§ 68 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 919, a recognizance, omitting the concluding words "in this case," is insufficient to confer jurisdiction upon the Court of Criminal Appeals of an appeal in a misdemeanor case.—*Darnell v. State*, 161 S. W. 971.

**BAILMENT.**

See Pledges; Warehousemen.

§ 12 (Mo.App.) Bailee of a deed without reward *held* bound to exercise ordinary care thereof, and, in action to recover expenses of litigation necessitated by his destruction thereof and procurement of a deed to a third person, instructions to find for him unless he acted fraudulently and in bad faith were sufficiently liberal.—*Sails v. Funk*, 161 S. W. 1175.

§ 29 (Mo.App.) In an action to recover the expenses of a suit to quiet title from one whose destruction of a deed made it necessary, plain-

tiff's wife who, though she had an interest in the property, paid no part of such expenses, *held* neither a necessary nor a proper party.—*Sails v. Funk*, 161 S. W. 1175.

## BANKRUPTCY.

### III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

#### (C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 192 (Tenn.) Relative to the question of certain creditors of a bankrupt contractor being entitled to priority as having filed notices of lien within 80 days of completion of a building, the bankrupt's trustee is bound by the agreement of the contractor and building owner in extending time for the completion.—*Harrison v. Knapp*, 161 S. W. 1003.

## BANKS AND BANKING.

See Appeal and Error, § 907; Forgery, § 29; Frauds, Statute of, §§ 23, 26, 158; Garnishment, § 108; Guaranty, §§ 36, 70, 77-90; Judgment, § 251; Novation, § 5; Principal and Surety, §§ 14, 46.

### II. BANKING CORPORATIONS AND ASSOCIATIONS.

#### (C) Stockholders.

§ 47 (Ark.) Stockholder of bank *held* entitled to have the liability of other stockholders on their subscriptions enforced, and the directors had no right to cancel the notes for the stock subscriptions.—*Bank of Des Arc v. Moody*, 161 S. W. 134.

#### (D) Officers and Agents.

§ 54 (Ark.) Directors of bank negligently permitting the cashier to make bad loans resulting in the insolvency of the bank *held* liable to the stockholders for their negligence.—*Bank of Des Arc v. Moody*, 161 S. W. 134.

Director of bank who was never notified of his election and never acted as such *held* not liable to stockholders for his failure to prevent the cashier from making bad loans.—*Id.*

### III. FUNCTIONS AND DEALINGS.

#### (B) Representation of Bank by Officers and Agents.

§ 105 (Mo.App.) In view of Rev. St. 1909, § 1112, one who had not been removed as cashier though he is principally occupied with other business in another city, is authorized to bind the bank.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

§ 109 (Mo.App.) The cashier of a bank has *prima facie* authority to extend the time for payment of negotiable paper, this being particularly true where he has virtual control of the bank's entire business.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

§ 116 (Mo.App.) Where the cashier of a bank in his private capacity learned that payment of a note given by defendants had been assumed by third persons, and he later extended the time of payment of the note, the bank was chargeable with his knowledge.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

#### (C) Deposits.

§ 154 (Ark.) A depositor has a right of action to recover the amount of a deposit in a bank, if payment thereof is refused.—*Bank of Des Arc v. Moody*, 161 S. W. 134.

### IV. NATIONAL BANKS.

§ 246 (Ky.) A stockholder in a national bank *held* to have the absolute right under Rev. St. U. S. § 5210 (U. S. Comp. St. 1901, p. 3498), to examine the list of stockholders at any prop-

er time, whatever may be his motive.—*Murray v. Walker*, 161 S. W. 512.

In a proceeding by an alleged stockholder of a national bank to compel an examination of the bank's stock books, evidence that plaintiff was not a stockholder in good faith or at all *held* admissible.—*Id.*

§ 253 (Ky.) The directors of a national bank are regarded as trustees for the stockholders, and the strictest performance of their duties as such is required.—*First Nat. Bank v. Doherty*, 161 S. W. 211.

## BAR.

See Limitation of Actions.

## BEQUESTS.

See Wills.

## BEST AND SECONDARY EVIDENCE.

See Criminal Law, §§ 400, 408; Evidence, §§ 168, 185.

## BIAS.

See Jury, §§ 99, 107.

## BIDS.

See Counties, § 116.

## BIGAMY.

See Jury, § 99; Witnesses, §§ 193, 268.

§ 8 (Tex.Cr.App.) In a prosecution for bigamy, the fact that a child was born to the first alleged wife *held* inadmissible, as it would have no tendency to show that defendant was the person who, under another name, had married her at a certain place.—*Harris v. State*, 161 S. W. 125.

## BILL OF LADING.

See Alteration of Instruments, § 8; Carriers, §§ 55, 59, 69.

## BILLS AND NOTES.

See Account, Action on, § 4; Appeal and Error, § 842; Banks and Banking, §§ 109, 116; Cancellation of Instruments; Carriers, §§ 55, 57, 59; Corporations, § 327; Costs, § 32; Husband and Wife, § 156; Judgment, § 713; Justices of the Peace, § 44; Limitation of Actions, §§ 49, 105, 123; Malicious Prosecution, §§ 58, 67; Novation, § 5; Pleading, §§ 257, 355; Principal and Surety, §§ 14, 46, 104, 108, 162; Sales, §§ 347, 359; Set-Off and Counterclaim, §§ 28, 33; Subrogation, § 4; Trial, § 252; Usury, §§ 2, 48, 80.

### I. REQUISITES AND VALIDITY.

#### (B) Form and Contents of Promissory Notes and Duebills.

§ 49 (Mo.App.) Persons signing for accommodation, but as joint makers, are persons primarily liable to pay the note within Negotiable Instruments Law.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

#### (E) Consideration.

§ 94 (Tex.Civ.App.) A previous debt, though barred by limitation, was a sufficient consideration for the execution of a new note to the extent that it was given for such indebtedness.—*Helmke v. Uecker*, 161 S. W. 17.

#### (F) Validity.

§ 102 (Mo.App.) Where defendant signed a note without taking any precautions to ascertain its terms, he is not entitled to cancellation on the ground of mistake because the terms were not as he thought they should be.—*Avery Co. v. Powell*, 161 S. W. 335.

**V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.****(A) Indorsement Before Delivery to or Transfer by Payee.**

§ 237 (Mo.) An accommodation indorser is a surety, and equally bound with the maker to pay the note when it became due.—*Havlin v. Continental Nat. Bank of St. Louis*, 161 S. W. 741.

An accommodation indorser of a note warrants that, if the note is dishonored, he will, upon notice thereof, pay the same.—*Id.*

**(D) Bona Fide Purchasers.**

§ 352 (Mo.App.) Under Negotiable Instruments Law, a wife who received a note from her husband as a gift was not a bona fide purchaser.—*Greer v. Orchard*, 161 S. W. 875.

**VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.**

§ 397 (Mo.) Where a note, payable to a bank and at the bank, was owned by the bank at maturity, presentment and demand were not necessary.—*Havlin v. Continental Nat. Bank of St. Louis*, 161 S. W. 741.

**VII. PAYMENT AND DISCHARGE.**

§ 429 (Tex.Civ.App.) A note for \$200, executed by plaintiff to defendant, was satisfied and discharged if plaintiff afterwards presented to defendant a bill for \$200 for services in satisfaction of the note, and requested that the note be returned, and defendant impliedly acquiesced in such means of payment.—*Autrey v. Collins*, 161 S. W. 413.

§ 434 (Mo.) Payment of a note by an accommodation indorser, after dishonor by the maker, was not a voluntary payment.—*Havlin v. Continental Nat. Bank of St. Louis*, 161 S. W. 741.

**VIII. ACTIONS.**

§ 462 (Tex.Civ.App.) A petition in an action on a note *held* not to state a cause of action.—*Baker v. Hahn*, 161 S. W. 443.

§ 485 (Mo.App.) Under Rev. St. 1909, § 1985, the execution of a note alleged to have been procured by fraud is admitted, and the fraud cannot be relied upon unless the answer setting it up be verified.—*Avery Co. v. Powell*, 161 S. W. 335.

§ 489 (Ky.) Where, after reference to commissioner, and report and motion by plaintiff for judgment, defendant, who admitted the execution of the note sued on, and who offered no evidence, filed an amended answer, *held* that plaintiff would have been entitled to judgment even if such answer had not been stricken for want of verification.—*Taulbee v. Lewis & Chambers*, 161 S. W. 1100.

§ 497 (Mo.App.) Under Negotiable Instrument Law (Rev. St. 1909, §§ 10022, 10025, and 10029), in a suit on a note by an indorsee on proof that the title of the payee was defective because the instrument was obtained by fraud, the burden shifts to the plaintiff to prove that he acquired title as a holder in due course.—*Hill v. Dillon*, 161 S. W. 881.

Mere want or failure of consideration for a note sued on by an indorsee, not coupled with negotiation in breach of faith, or under such circumstances as to amount to a fraud, does not constitute defective title so as to change the burden of proof of bona fide holder under Rev. St. 1909, § 10029.—*Id.*

§ 499 (Mo.App.) A defendant pleading payment of a note has the burden of proof.—*Winfrey v. Matthews*, 161 S. W. 583.

§ 520 (Mo.App.) In a suit against the guarantor of a note, where he set up fraud in the procurement of his guaranty, evidence *held* insufficient to show any fraud on the part of plain-

tiff's agent.—*Avery Co. v. Powell*, 161 S. W. 335.

§ 520 (Tex.Civ.App.) In an action on vendor's lien notes, evidence *held* to show that the notes by mistake recited that the conveyance was from the payee to the maker instead of that the conveyance was from a third person to the maker.—*Brown v. Bay City Bank & Trust Co.*, 161 S. W. 23.

§ 537 (Mo.App.) Where, in an action by an indorsee of a note, defendant introduced proof that the execution of the note was induced by fraud, and plaintiff offered uncontradicted evidence that he was a holder in due course, the issue whether he was such holder was for the jury.—*Hill v. Dillon*, 161 S. W. 881.

**BLASTING.**

See Adjoining Landowners, § 8.

**BOARD OF EDUCATION.**

See Schools and School Districts, § 97.

**BOARD OF HEALTH.**

See Physicians and Surgeons, § 11.

**BONA FIDE PURCHASERS.**

See Bills and Notes, §§ 352, 537; Vendor and Purchaser, §§ 229-243.

**BONDS.**

See Appeal and Error, §§ 395, 1043, 1241; Bail; Elections, § 65; Evidence, § 83; Habeas Corpus, §§ 3, 113; Justices of the Peace, § 159; Levees, § 84; Mandamus, § 57; Principal and Surety; Schools and School Districts, § 97.

**BOOMS.**

See Navigable Waters, §§ 21, 26.

**BOUNDARIES.**

See Partition, § 9; Pleading, § 129; Trial, §§ 248, 253.

**II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.**

§ 37 (Mo.) Evidence *held* not to show that defendant's fence was 12 feet too far north, or that the boundary was as claimed by plaintiff.—*Clark v. McAtee*, 161 S. W. 698.

§ 37 (Tex.Civ.App.) In an action for cutting and removing timber from land, evidence on the issue of boundaries *held* to show that the timber was cut and removed from a tract of plaintiff.—*Kirby Lumber Co. v. Stewart*, 161 S. W. 372.

§ 40 (Tex.Civ.App.) Where a latent ambiguity in a call for a boundary arises because the proof shows that a line run in accordance with the call will not reach the corner called for, the manner of ascertaining the true corner is for the jury.—*Kirby Lumber Co. v. Stewart*, 161 S. W. 372.

§ 41 (Ark.) An instruction on the issue of agreed boundary line *held* proper.—*Turquett v. McMurray*, 161 S. W. 175.

**BREACH.**

See Sales, §§ 161-181, 279, 284, 428-446.

**BREACH OF THE PEACE.**

See Municipal Corporations, § 663.

**BRIDGES.**

See Railroads, §§ 99, 411.

**BRIEFS.**

See Appeal and Error, §§ 742, 758-773, 879; Criminal Law, § 1130.

**BROKERS.**

See Appeal and Error, § 671; Evidence, §§ 108, 471; Fraud, § 49; Principal and Agent, § 123.

**IV. COMPENSATION AND LIEN.**

§ 49 (Ark.) That a broker did not notify the owner of the name of his prospective purchaser *held* no defense to an action for a commission.—*Reich v. Workman*, 161 S. W. 180.

§ 54 (Mo.App.) It is sufficient if the purchaser is ready to complete the purchase within a reasonable time.—*Bunyard v. Farman*, 161 S. W. 640.

§ 54 (Tex.Civ.App.) A broker was not required to prove that his purchasers were ready, willing, and able to buy, where defendants on receiving notice of the sales wrote plaintiff and the proposed purchasers confirming the same.—*E. R. & D. C. Kolp v. Brazier*, 161 S. W. 899.

§ 56 (Ark.) A broker *held* entitled to commission where he interested the purchaser and was the procuring cause of the sale, although it was consummated by defendant.—*Reich v. Workman*, 161 S. W. 180.

§ 60 (Mo.App.) Owner *held* entitled, after production of purchaser by broker, to reasonable time in which to make deed, prepare abstract, and correct any curable defects therein and not liable for commissions if the purchaser refuses to allow such reasonable time.—*Bunyard v. Farman*, 161 S. W. 640.

What is a reasonable time for an owner of land to make a deed, prepare an abstract, and correct any curable defects therein after the production of a purchaser by a broker depends on the facts of each case.—*Id.*

**V. ACTIONS FOR COMPENSATION.**

§ 85 (Mo.App.) Where the owner claimed that the purchaser refused to complete the purchase because of curable defects in the title, a decree correcting a misdescription in the owner's deed *held* admissible to show the owner's ability to cure such defect, though not recorded, shown by the abstract, or known to the broker.—*Bunyard v. Farman*, 161 S. W. 640.

§ 86 (Tex.Civ.App.) A broker's evidence that he made the contracts *held* to establish a prima facie case without proof by each of the purchasers.—*E. R. & D. C. Kolp v. Brazier*, 161 S. W. 899.

§ 88 (Mo.App.) Evidence *held* to make a question for the jury as to whether the prospective purchaser was ready, willing, and able to purchase.—*Bunyard v. Farman*, 161 S. W. 640.

Where the owner claimed that a prospective purchaser, upon examination of abstract, refused to complete the purchase under any circumstances, an instruction *held* erroneous as denying the owner a reasonable time within which to cure defects in his title.—*Id.*

**BURGLARY.**

**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 3 (Tex.Cr.App.) If the wrecking of saloons was for the purpose of stealing goods from them, all present and engaging in it would be guilty of burglary, but if the breaking was actuated only by a mob and riot spirit, with no intent to appropriate the property, there was no burglary.—*Jobe v. State*, 161 S. W. 966.

**II. PROSECUTION AND PUNISHMENT.**

§ 41 (Mo.) Evidence *held* to sustain a finding that defendant broke into a corner.—*State v. Duff*, 161 S. W. 683.

§ 42 (Tex.Cr.App.) Two saloons having been raided at the same time, evidence that defendant had some whisky shortly after, and that he said it came from the raid, is insufficient to convict him of burglary of one of the places, though whisky of that kind was in such saloon.—*Jobe v. State*, 161 S. W. 966.

**CALENDARS.**

See Trial, § 11.

**CANCELLATION OF INSTRUMENTS.**

See Appeal and Error, §§ 742, 1172; Bills and Notes, § 102; Chattel Mortgages, § 241; Costs, § 32; Justices of the Peace, § 44; Quietting Title; Reformation of Instruments; Sales, § 28.

**I. RIGHT OF ACTION AND DEFENSES.**

§ 6 (Mo.App.) Makers of a note, who later became only sureties by third persons assuming payment, on being discharged by extension of time of payment, were not entitled to a cancellation of the instrument.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

**CARNAL KNOWLEDGE.**

See Rape.

**CARRIERS.**

See Appeal and Error, §§ 1064, 1066; Commerce, §§ 16, 47; Judgment, § 715; Master and Servant, § 86; Release, § 57; Trial, § 228.

**II. CARRIAGE OF GOODS.**

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 55 (Tenn.) A "bill of lading" is not a negotiable instrument but is merely a contract by a carrier to deliver the goods described at a particular place according to the usual course of transportation.—*Fourth Nat. Bank v. Nashville, C. & St. L. Ry. Co.*, 161 S. W. 1144.

§ 57 (Mo.App.) A purchaser of goods shipped subject to the consignor's order, with draft attached, before honoring the draft, has no right to maintain replevin against the carrier to obtain possession of the goods.—*Burgeas v. St. Louis & S. F. R. Co.*, 161 S. W. 858.

§ 59 (Tenn.) Where the draft originally attached to a bill of lading held by complainant bank by transfer, as well as three other drafts against the same bill, were dishonored and taken up by the maker before the fifth draft was made, at which time the bill which covered a domestic shipment was more than three months old, *held*, that the bank was not an innocent transferee of the bill of lading.—*Fourth Nat. Bank v. Nashville, C. & St. L. Ry. Co.*, 161 S. W. 1144.

§ 69 (Tenn.) Though a railroad company wrongfully delivered grain without the surrender of the bill of lading, the consignor had no right of action against it where they were not injured because they had received payment for their goods.—*Fourth Nat. Bank v. Nashville, C. & St. L. Ry. Co.*, 161 S. W. 1144.

In an action by the holder of a bill of lading for surrendering freight without presentation of the bill of lading, evidence *held* to show that defendant's negligence was not the proximate cause of the bank's loss.—*Id.*

(F) Loss of or Injury to Goods.

§ 132 (Tex.Civ.App.) There is no presumption that property, when delivered to a carrier for carriage, was in the same condition as when delivered to the consignee, where there was evidence that it was in good condition when delivered to the company and was damaged when delivered to the consignee.—*Missouri, K. & T. Ry. Co. of Texas v. Western Automatic Music Co.*, 161 S. W. 380.

§ 134 (Tex.Civ.App.) Evidence, in an action for damage to a piano while being shipped on defendant's railroad, *held* to sustain a finding of ownership of the piano in plaintiff.—Missouri, K. & T. Ry. Co. of Texas v. Western Automatic Music Co., 161 S. W. 380.

(J) Charges and Liens.

§ 194 (Tex.Civ.App.) As a rule a consignor with whom a contract of shipment is made is impliedly liable for the freight charges, irrespective of whether he is owner.—Chicago, R. I. & G. Ry. Co. v. Floyd, 161 S. W. 954.

While a consignor is ordinarily liable for the freight charges, if the owner is the real consignor, and the person making the shipment, to the carrier's knowledge, only acts as the consignor's agent, the owner, and not his agent, is liable for the freight charges.—Id.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 239 (Ark.) Under the statutes, a person who goes to a railroad station for the purpose of becoming a passenger on a train, but is given no opportunity to purchase a ticket, has the right to board the train as a passenger without a ticket.—St. Louis, I. M. & S. Ry. Co. v. Green, 161 S. W. 148.

§ 241 (Mo.App.) A railway postal clerk is a passenger.—Farmer v. St. Louis, I. M. & S. Ry. Co., 161 S. W. 327.

§ 246 (Ark.) In an action for personal injuries, evidence *held* to show that plaintiff before attempting to board a train was given no opportunity to purchase a ticket.—St. Louis, I. M. & S. Ry. Co. v. Green, 161 S. W. 148.

(D) Personal Injuries.

§ 280 (Mo.App.) A mail clerk assumes the risk of injuries incident to his transportation in a mail car, though the carrier is required to exercise toward him the same high degree of care generally imposed in favor of passengers.—Farmer v. St. Louis, I. M. & S. Ry. Co., 161 S. W. 327.

§ 286 (Ark.) Railroad companies must keep in a safe condition all parts of their platforms and approaches thereto to which the public would naturally resort, and all parts of their station grounds reasonably near to the platform where passengers boarding or leaving trains would ordinarily be likely to go.—St. Louis & S. F. R. Co. v. Grider, 161 S. W. 1032.

§ 286 (Tex.Civ.App.) A railroad company which maintains an unlighted and unguarded station platform elevated four or five feet above the ground is guilty of negligence towards its passengers.—Stamp v. Eastern Ry. Co. of New Mexico, 161 S. W. 450.

§ 287 (Ark.) A railroad company denying an intending passenger opportunity to purchase a ticket, and, on his attempting to board the train without one, told him to go back and procure one, *held* bound to give him a reasonable time to do so.—St. Louis, I. M. & S. Ry. Co. v. Green, 161 S. W. 148.

§ 290 (Tex.Civ.App.) A carrier of passengers must furnish a reasonably safe car and exercise the highest degree of care to ascertain and repair defects in the car, as by furnishing an experienced inspector, etc.—St. Louis Southwestern Ry. Co. v. Moore, 161 S. W. 378.

§ 298 (Mo.App.) A passenger on a freight train necessarily assumes the risk of perils arising from jolts, jars, or lurches ordinarily incident to the operation of such trains.—Farmer v. St. Louis, I. M. & S. Ry. Co., 161 S. W. 327.

§ 307 (Tex.Civ.App.) Where, before statehood, a railroad company in the territory of

New Mexico gave plaintiff a pass for an intrastate trip, a condition in the pass exempting the company from all liability, whether caused by its own negligence or not, was valid.—Stamp v. Eastern Ry. Co. of New Mexico, 161 S. W. 450.

A pass given as a gratuity is none the less a free pass because the carrier requires the person using to sign an agreement exempting it from liability for injuries.—Id.

A pass given by a railroad company to the mother of one of its employes is none the less a free pass because the giving of such pass was customary, where the employe could not have recovered in case of the carrier's refusal.—Id.

§ 316 (Tex.Civ.App.) In an action by a passenger who fell while alighting from a train from her dress catching upon something, where there was no showing that it caught on any projection upon the platform, the doctrine of *res ipsa loquitur* does not raise an inference of negligence.—Gulf, C. & S. F. Ry. Co. v. Davis, 161 S. W. 932.

While a railroad company must exercise a high degree of care to furnish suitable cars and platforms, it is not an insurer in this respect, and one injured upon a car platform has the burden of proving the company's negligence.—Id.

§ 317 (Ark.) In an action for personal injuries while attempting to board a moving train, advice of defendant's agent to board the train and his offer of help *held* admissible on the question of negligence.—St. Louis, I. M. & S. Ry. Co. v. Green, 161 S. W. 148.

§ 317 (Ark.) In an action for injuries to a passenger by the derailment of a car, evidence that track was in bad condition about five months after the accident *held* admissible to show the condition of the track at the time of the accident.—St. Louis, I. M. & S. R. Co. v. Thurman, 161 S. W. 1054.

§ 318 (Ark.) Evidence *held* to warrant finding that the station platform was one which passengers would be likely to use, and that defendant's duty was not discharged by having a safe waiting room and a safe approach therefrom to the train.—St. Louis & S. F. R. Co. v. Grider, 161 S. W. 1032.

§ 318 (Tex.Civ.App.) In an action for injuries received by a passenger who fell while alighting from a car, a judgment in her favor cannot be upheld, where the testimony showed that the accident was as reasonably attributable to a nonactionable cause as to the company's negligence.—Gulf, C. & S. F. Ry. Co. v. Davis, 161 S. W. 932.

§ 320 (Ark.) Whether defendant should be charged with knowledge that the platform through which plaintiff fell and which was intended for freight would be used by passengers was for the jury.—St. Louis & S. F. R. Co. v. Grider, 161 S. W. 1032.

§ 320 (Ark.) In an action for injuries to a passenger by the derailment of a car, the question of the carrier's negligence *held* for the jury.—St. Louis, I. M. & S. R. Co. v. Thurman, 161 S. W. 1054.

§ 320 (Mo.App.) In an action by a railroad mail clerk injured by a jar when the engine was coupled, *held*, that the presumption of negligence arising under the doctrine of *res ipsa loquitur* was sufficient to carry the case to the jury.—Farmer v. St. Louis, I. M. & S. Ry. Co., 161 S. W. 327.

§ 321 (Ark.) In an action for personal injury by falling through a platform at defendant's station, which was in fact intended for freight, but was not so designated, and was seldom so used, *held*, that defendant's requested instructions as to its duty to maintain in proper con-

dition were properly refused.—*St. Louis & S. F. R. Co. v. Grider*, 161 S. W. 1032.

§ 321 (Tex.Civ.App.) A special charge that common carriers are held to the highest degree of care in operation for the protection of passengers was correct so far as it went.—*St. Louis Southwestern Ry. Co. v. Moore*, 161 S. W. 378.

#### (E) Contributory Negligence of Person Injured.

§ 323 (Tex.Civ.App.) That a railroad company owes the highest degree of care to a passenger upon its premises will not excuse the contributory negligence of the passenger.—*Stamp v. Eastern Ry. Co. of New Mexico*, 161 S. W. 450.

§ 327 (Ark.) A passenger, injured by falling through a platform while waiting at defendant's station for a train, could not recover therefor if he failed to exercise ordinary care for his own safety, which failure contributed in any degree to his injury.—*St. Louis & S. F. R. Co. v. Grider*, 161 S. W. 1032.

§ 327 (Tex.Civ.App.) A passenger, unfamiliar with a railroad station, in walking around in the dark is guilty of contributory negligence barring recovery for a fall from the unlighted and unguarded platform.—*Stamp v. Eastern Ry. Co. of New Mexico*, 161 S. W. 450.

§ 330 (Mo.App.) Where a passenger, ordered by the porter to remain in the smoking car, remained without protest, and no one knew that the smoke was making him sick, he could not recover.—*Russell v. St. Louis & S. F. R. Co.*, 161 S. W. 638.

§ 347 (Ark.) A passenger's attempt to board a moving train was not necessarily negligence, that being a question for the jury on all the circumstances of the case.—*St. Louis, I. M. & S. Ry. Co. v. Green*, 161 S. W. 148.

§ 347 (Ark.) Ordinary care did not require a passenger as a matter of law to remain in a waiting room until the arrival of his train.—*St. Louis & S. F. R. Co. v. Grider*, 161 S. W. 1032.

#### (F) Ejection of Passengers and Intruders.

§ 353 (Tex.Civ.App.) Though plaintiff purchased a ticket, yet if he refused to deliver it to the conductor, and informed him that he had no money to pay his fare, the carrier's servants may eject him, whether he was intoxicated or not.—*Texas Cent. Ry. Co. v. Rose*, 161 S. W. 387.

§ 366 (Tex.Civ.App.) Where the employés do not know of the intoxicated condition of a passenger, they may act upon the presumption that he will exercise care to avoid injury.—*Texas Cent. Ry. Co. v. Rose*, 161 S. W. 387.

Where a carrier ejected an intoxicated passenger, its liability depends upon whether the place of ejection was such a one as a prudent person would have considered safe under the circumstances.—*Id.*

### CARRYING WEAPONS.

See Weapons.

### CASHIERS.

See Banks and Banking, §§ 105-116.

### CEMETERIES.

See Appeal and Error, § 172; Constitutional Law, §§ 129, 316; Injunction, § 128; Municipal Corporations, §§ 434, 586, 592, 609.

§ 3 (Ky.) It is sound public policy to protect the sepulcher of the dead.—*Cave Hill Cemetery Co. v. Gosnell*, 161 S. W. 980.

§ 3 (Mo.) Neither the state nor the municipal can preclude itself from enacting laws prohibiting burials in places where they constitute a public nuisance.—*Union Cemetery Ass'n v. Kansas City*, 161 S. W. 261.

Where the location of a cemetery to a large extent blocked the growth of one part of a city, an ordinance, enacted, not to protect the public health, but to benefit speculators and landowners in the vicinity, which prohibited subsequent burials in the cemetery and would tend to work the destruction of the cemetery, is unreasonable, tyrannical, and invalid.—*Id.*

§ 22 (Ky.) Under Ky. St. § 1336, the sanctity of a burial ground does not depend upon whether the particular portion is filled with graves.—*Cave Hill Cemetery Co. v. Gosnell*, 161 S. W. 980.

### CERTIFICATE.

See Mandamus, § 79.

### CERTIORARI.

See Appeal and Error, §§ 659, 664.

### II. PROCEEDINGS AND DETERMINATION.

§ 64 (Tenn.) In a suit to dissolve a corporation and distribute its assets, where the preferred stockholders were not before the court, it would be improper for the court to construe the charter in relation to the rights of the preferred and common stockholders; that being a moot question not presented by the record.—*Adams v. Chattanooga Co.*, 161 S. W. 1131.

### CHALLENGE.

See Jury, §§ 99, 107.

### CHANGE OF VENUE.

See Criminal Law, §§ 121-137; Venue, §§ 36-72.

### CHARACTER.

See Criminal Law, §§ 376, 776; Witnesses, §§ 266½, 336-361.

### CHARGE.

To jury, see Criminal Law, §§ 755½-830; Trial, §§ 191-296.

### CHARTER.

See Colleges and Universities, § 9; Municipal Corporations, §§ 14-17, 592, 609.

### CHATTEL MORTGAGES.

See Estoppel, § 37; Homestead, § 108; Usury, § 80.

### I. REQUISITES AND VALIDITY.

#### (B) Form and Contents of Instruments.

§ 48 (Ark.) A chattel mortgage describing the property as the entire crop to be raised on plaintiff's farm in Faulkner county, or elsewhere in that county, is sufficiently definite to give all persons notice of the lien on any crop raised by the mortgagor on defendant's land in the county.—*Storthz v. Smith*, 161 S. W. 183.

### III. CONSTRUCTION AND OPERATION.

#### (D) Lien and Priority.

§ 138 (Tex.Civ.App.) In view of Rev. Civ. St. 1911, art. 5475, giving a landlord a preference lien upon crops, etc., for rent, *held*, that a landlord's lien, operative before the tenant's crop was planted, was superior to the lien of a previously executed chattel mortgage.—*Ivy v. Fugh*, 161 S. W. 939.

### IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 170 (Tex.Civ.App.) Whoever, with actual or constructive notice of the chattel mortgage, is directly or indirectly the instrumentality through which a conversion of mortgaged property is

brought about is liable for the conversion.—*Nunn v. Padgitt Bros.*, 161 S. W. 921.

## **VI. ASSIGNMENT OF MORTGAGE OR DEBT.**

§ 204 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 5661, providing that all persons shall be charged by the registration of a chattel mortgage with notice thereof and of the rights of mortgagee's assignee, and article 5659 requiring a mortgage to be satisfied by acknowledging satisfaction upon the registry, the failure of the purchaser of chattel mortgage notes to have their assignment to him recorded would not prevent one purchasing the property from being charged with notice of his rights under the mortgage.—*Nunn v. Padgitt Bros.*, 161 S. W. 921.

## **VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.**

### **(A) Rights and Liabilities of Parties.**

§§ 220-222 (Tex.Civ.App.) While a chattel mortgagor in possession may sell the property in recognition of the mortgagee's right, a sale in denial of such right would be a conversion by the mortgagor.—*Nunn v. Padgitt Bros.*, 161 S. W. 921.

Where a mortgagee of chattels assigned the mortgage notes to plaintiff and subsequently purchased the mortgaged property, he became, in effect a mortgagor in possession as to plaintiff; and hence his subsequent sale of the property in denial of plaintiff's rights was a conversion.—*Id.*

§ 225 (Tex.Civ.App.) A sale by a chattel mortgagor in denial of the right of the mortgagee would amount to a conversion by the purchaser if persisted in by him.—*Nunn v. Padgitt Bros.*, 161 S. W. 921.

That a chattel mortgagor denied, when he sold property covered by a recorded chattel mortgage, that the property was incumbered would not be a defense to the right of the mortgagee to sue the purchaser of the property for its conversion by the denial of such mortgagee's rights.—*Id.*

The fact that the county clerk advised purchasers of property covered by a recorded chattel mortgage that the property was not mortgaged would not prevent the purchasers of the property from being liable to the mortgagee for its conversion.—*Id.*

That defendant agreed to advance money with which to purchase property covered by a recorded chattel mortgage only on condition that mortgagors should first convey to her that she might convey to her son and in that method give her what she considered greater security for the money advanced would not prevent defendant's purchase in denial of the mortgagee's rights from being a conversion of the property as to mortgagee.—*Id.*

An assignee of notes secured by a recorded chattel mortgage was not negligent in permitting the property to remain in the possession of one who he knew had purchased it from mortgagor so as to prevent him from recovering for its conversion by sale, in view of Rev. Civ. St. 1911, art. 5665, making chattel mortgages void against subsequent purchasers, etc., unless registered, where the property remains in mortgagor's possession.—*Id.*

§ 229 (Tex.Civ.App.) Where the value of converted property covered by a recorded chattel mortgage exceeds the debt, the judgment, in an action by a mortgagee for such conversion, should be for the debt, and, if the debt exceeds the value of the property, should be for such value.—*Nunn v. Padgitt Bros.*, 161 S. W. 921.

## **VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.**

§ 241 (Tex.Civ.App.) Execution of larger note by the maker of a smaller note secured by a

chattel mortgage, upon an agreement that the holder and mortgagee would surrender the note and cancel the mortgage, *held* to operate as a present cancellation of the mortgage.—*Helmke v. Uecker*, 161 S. W. 17.

Such agreement *held*, if not a present cancellation of the mortgage, to be a covenant to cancel it, enforceable in a suit on the mortgage note.—*Id.*

On facts stated, *held*, that the holder of a larger note executed by the maker of a smaller note secured by a chattel mortgage was entitled to judgment on the larger note, with foreclosure of the mortgage to the extent of the smaller note.—*Id.*

## **CHURCHES.**

See Religious Societies.

## **CIRCUMSTANTIAL EVIDENCE.**

See Criminal Law, § 784; Jury, § 107.

## **CITATION.**

See Process.

## **CITIES.**

See Municipal Corporations.

## **CLAIM AND DELIVERY.**

See Replevin.

## **CLAIMS.**

See Executors and Administrators, §§ 221-227; Justices of the Peace, § 91.

## **CLOUD ON TITLE.**

See Quieting Title.

## **COLLATERAL ATTACK.**

See Insane Persons, § 26; Judgment, § 490.

## **COLLATERAL INHERITANCE TAXES.**

See Taxation, §§ 867, 893.

## **COLLATERAL SECURITY.**

See Pledges.

## **COLLEGES AND UNIVERSITIES.**

See Torts, § 10.

§ 9 (Ky.) College authorities may make any regulations for their government which a parent could make for the same purpose without interference from the courts, unless the regulations are unlawful or against public policy.—*Gott v. Berea College*, 161 S. W. 204.

A college may prescribe requirements for the admission of students and rules of conduct governing them, unless it is supported by public appropriations, and then a student entering college impliedly agrees to conform to such rules.—*Id.*

Under its charter provisions, *held*, that Berea College could adopt a rule prohibiting its students from entering eating houses and places of amusement in the town, not controlled by the college, on pain of dismissal.—*Id.*

Even if such rule was unreasonable, one who ran a restaurant near the campus, which was largely patronized by students, but who had no children in the school, could not object to such rule.—*Id.*

## **COLOR OF TITLE.**

See Adverse Possession, § 100.

## **COMBINATIONS.**

See Monopolies, § 12.

**COMITY.**

See Courts, § 511.

**COMMERCE.**

See Master and Servant, § 86; Pleading, § 369.

**II. SUBJECTS OF REGULATION.**

§ 16 (Tenn.) "Commerce" among the states consists of intercourse and traffic, including the transportation of persons and property, as well as the purchase and exchange of commodities.—*Interstate Amusement Co. v. Albert*, 161 S. W. 488.

A contract to furnish theatrical companies as agent to the owners of various theaters for a certain sum and a percentage of the amount paid the actors, by which complainant agreed to furnish such companies for defendant's theater, *held* not to involve interstate commerce.—*Id.*

§ 27 (Ky.) In an action for death of a railroad employé, train on which he was at work *held* not engaged in interstate commerce at the time he was killed, and hence plaintiff was not entitled to maintain an action under the federal Employers' Liability Act.—*Louisville & N. R. Co. v. Strange's Adm'r*, 161 S. W. 239.

§ 27 (Ky.) A brakeman engaged in switching cars for transportation from one state to another is engaged in interstate commerce, though the train on which he is employed runs only between two points in a state.—*Nashville C. & St. L. Co. v. Banks*, 161 S. W. 554.

§ 47 (Tex.Civ.App.) In case of a passenger traveling on a pass good from one point in the territory of New Mexico to another point, there is no interstate carriage or question of interstate commerce.—*Stamp v. Eastern Ry. Co. of New Mexico*, 161 S. W. 450.

**COMMERCIAL PAPER.**

See Bills and Notes.

**COMMISSION AND COMMISSIONERS.**

See Drains, § 17; Levees, §§ 2-34.

**COMMISSIONS.**

See Brokers.

**COMMON LAW.**

See Evidence, § 80; Libel and Slander, § 1½; Monopolies, § 12; Pleading, § 369; Railroads, § 90; Sodomy, § 5; Street Railroads, § 81; Telegraphs and Telephones, § 34; Wills, § 839.

§ 11 (Mo.) Georgia is one of the states originally under the common law.—*Armor v. Frey*, 161 S. W. 829.

**COMMON SCHOOLS.**

See Schools and School Districts.

**COMMUNITY PROPERTY.**

See Husband and Wife, §§ 249-273; Vendor and Purchaser, § 229.

**COMPARATIVE NEGLIGENCE.**

See Negligence, § 101.

**COMPENSATION.**

See Attorney and Client; Brokers; Corporations, § 308; District and Prosecuting Attorneys, § 5; Eminent Domain, §§ 79-172; Partition, § 85.

**COMPETENCY.**

See Evidence, § 539½; Jury, §§ 99, 107; Witnesses, §§ 143-193.

**COMPLAINT.**

See Pleading.

**COMPOSITIONS WITH CREDITORS.**

See Compromise and Settlement.

**COMPROMISE AND SETTLEMENT.**

See Attorney and Client, § 190; Payment; Release.

§ 23 (Tex.Civ.App.) Evidence, in an action upon a turpentine contract, *held* not to sustain a finding that plaintiff accepted defendant's order for money in full settlement of damages for the breach.—*Conn v. Rosamond*, 161 S. W. 73.

**COMPUTATION.**

See Limitation of Actions, §§ 47-130.

**CONCEALED WEAPONS.**

See Weapons.

**CONCLUSION.**

See Pleading, §§ 8, 192, 214.

**CONCLUSIVENESS.**

See Appeal and Error, § 1241; Judgment, §§ 693-715.

**CONDEMNATION.**

See Eminent Domain.

**CONFESSION.**

See Criminal Law, §§ 517, 518.

**CONFIDENTIAL RELATIONS.**

See Witnesses, § 193.

**CONFLICT OF LAWS.**

See Exemptions, § 2; Statutes, § 79; Usury, § 2; Wills, § 839.

**CONNECTING LINES.**

See Telegraphs and Telephones, § 55.

**CONSIDERATION.**

See Bills and Notes, §§ 94, 497; Contracts, §§ 71, 101-142, 237; Deeds, § 17; Exchange of Property, § 3.

**CONSPIRACY.**

See Abatement and Revival, § 39; Injunction, §§ 101, 114; Monopolies, § 12; New Trial, § 72.

**I. CIVIL LIABILITY.**

(A) Acts Constituting Conspiracy and Liability Therefor.

§ 1 (Mo.App.) A combination of two or more persons by some concerted action, either for the purpose of accomplishing an unlawful act or for the purpose of accomplishing a lawful act by unlawful means, constitutes a conspiracy.—*Clarkson v. Laiblan*, 161 S. W. 660.

§ 8 (Mo.App.) It is unlawful for several persons to conspire to oppress another through substantial injury to his lawful business or means of livelihood, as by coercing his employer to discharge him and to cancel a subcontract.—*Clarkson v. Laiblan*, 161 S. W. 660.

**(B) Actions.**

§ 19 (Mo.App.) In an action against the business agent and other officers of a union for conspiracy, plaintiff had the burden of proof that the other defendants conspired with or were responsible for or ratified the business agent's acts.—*Clarkson v. Garvey*, 161 S. W. 664.



**CONSTABLES.**

See Sheriffs and Constables.

**CONSTITUTIONAL LAW.**

See Adverse Possession, § 7; Counties, §§ 64, 127, 190; Courts, § 200½; Criminal Law, § 1206; Death, § 9; Elections, § 65; Eminent Domain, § 2; Jury, § 24; Licenses, § 7; Mandamus, § 79; Monopolies, § 2; Municipal Corporations, §§ 73, 611, 863, 867; Navigable Waters, § 1; Physicians and Surgeons, § 11; Railroads, § 90; Searches and Seizures, § 2; Statutes, §§ 5, 79, 141; Taxation, §§ 29, 38, 47; Telegraphs and Telephones, § 10.

**II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.**

§ 40 (Ky.) When the Constitution has expressly denied the Legislature the right to require a particular thing to be done, it cannot by indirection require it to be done by attaching it as a condition to the exercise of some other power granted.—*Kenton Water Co. v. City of Covington*, 161 S. W. 988.

§ 42 (Ky.) One who is not interested in the subject of a statute, and is not injuriously affected thereby, cannot attack its provisions.—*City of Newport v. Merkel Bros. Co.*, 161 S. W. 549.

§ 42 (Ky.) The rule that the obligation of a contract, valid when made by the laws of the state as then construed, cannot be impaired by any subsequent decision of its courts altering its construction cannot be invoked by a party going into court as a confessed violator of the law, and asking relief from a condition resulting from its willful violation of a penal statute.—*Oliver Co. v. Louisville Realty Co.*, 161 S. W. 570.

§ 48 (Ky.) A construction which will uphold an act is to be preferred to one which would render it void.—*Flynn v. Barnes*, 161 S. W. 523.

§ 48 (Mo.) A statute will not be held unconstitutional unless there is no reasonable doubt.—*Board of Com'rs of Tuberculosis Hospital Dist. of Buchanan County v. Peter*, 161 S. W. 1155.

§ 48 (Tenn.) A presumption is always in favor of the constitutionality of an act.—*State v. Woollen*, 161 S. W. 1006.

**III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.****(A) Legislative Powers and Delegation Thereof.**

§ 60 (Mo.) The state cannot surrender or bargain away its police power.—*Union Cemetery Ass'n v. Kansas City*, 161 S. W. 261.

§ 63 (Ky.) Legislative power to assume control and supervision of the highways of the state may be delegated to a subdivision of the state.—*Christian-Todd Telephone Co. v. Commonwealth*, 161 S. W. 543.

**(B) Judicial Powers and Functions.**

§ 70 (Ky.) Courts can only pass upon the validity of a statute and have nothing to do with its wisdom.—*Kenton Water Co. v. City of Covington*, 161 S. W. 988.

§ 75 (Tex.Civ.App.) In a suit to foreclose vendor's lien notes on land, where there were several who claimed the surplus, if any, after foreclosure sale, it was improper for the court to direct a sheriff to pay the surplus proceeds to such person as he might conclude was the equitable owner of the land; that question being a judicial one, and the court having no right to delegate its authority.—*Brown v. Bay City Bank & Trust Co.*, 161 S. W. 23.

**VII. OBLIGATION OF CONTRACTS.****(A) Powers of States in General.**

§ 115 (Tenn.) The matter of proper crossings of streets over railroads is one within the police power, future exercise of which a city cannot bargain away, so that, notwithstanding a prior contract of a city with a railroad to maintain a bridge, Acts 1907, c. 149, § 25, empowering the city to require the company to build a new bridge, and an ordinance pursuant thereto, do not contravene Const. U. S. art. 1, § 10, forbidding laws impairing obligation of contracts.—*City of Chattanooga v. Southern Ry. Co.*, 161 S. W. 1000.

§ 116 (Ky.) The obligation of a contract, valid when made under the laws of the state as then expounded, cannot be impaired by any subsequent decision of the courts altering the construction of the law.—*Oliver Co. v. Louisville Realty Co.*, 161 S. W. 570.

**(B) Contracts of States and Municipalities.**

§ 129 (Mo.) The state cannot preclude itself by a charter to a cemetery association from enacting laws prohibiting burials in places where they constitute a public nuisance.—*Union Cemetery Ass'n v. Kansas City*, 161 S. W. 261.

**IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.**

§ 205 (Ark.) Acts 1913, p. 1118, prohibiting nonresidents from hunting and fishing in specified counties, held violative of Ark. Const. art. 2, § 18.—*Lewis v. State*, 161 S. W. 154.

Regulations of the propagation and preservation of wild game and fish, for the use of the public, must bear with equal weight on all members of the community alike.—Id.

Where necessity for the preservation of wild game and fish exists in certain territories of the state, they may be segregated; but the privileges of taking and using fish and game therein must be extended to the people of the state outside the territory on the same terms as are prescribed for those residing within the territory.—Id.

§ 205 (Ky.) Ky. St. § 319, prohibiting any church or society of Christians from taking more than 50 acres of land, applies to all religious organizations of whatever faith, and not to societies of Christians only, and hence is not discriminatory against Christians.—*Compton v. Moore*, 161 S. W. 540.

**XI. DUE PROCESS OF LAW.**

§ 301 (Mo.) Rev. St. 1909, § 5425, providing that when a person shall die from an injury received through the negligence of any person engaged in running a locomotive, car, etc., the owner of the vehicle shall pay as a penalty, etc., the sum of not less than \$2,000 and not exceeding \$10,000, in the discretion of the jury, held not to deprive one of his property without due process of law.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

§ 312 (Tex.Civ.App.) The enforcement of a judgment obtained against property of a non-resident on levy of an attachment is not a deprivation of property without due process.—*Baker v. Hahn*, 161 S. W. 443.

§ 316 (Mo.) For the Supreme Court to render a decree settling the duty of plaintiff, a cemetery association, to lot owners, as to the care of their lots, when the issue was not raised below and the lot owners were not even parties, would work a deprivation of plaintiff's property without due process of law.—*Union Cemetery Ass'n v. Kansas City*, 161 S. W. 261.

## CONSTRUCTION.

See Chattel Mortgages, § 138; Constitutional Law, §§ 40-48; Contracts, §§ 153, 175; Deeds, §§ 93, 97; Guaranty, § 36; Insurance, §§ 146-179½.

## CONTEMPT.

See Habeas Corpus, § 92.

### I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 10 (Tex.Cr.App.) The mere act of the county attorney in stating in the presence of the court that he severed his connection with the case *held* not to justify a fine for contempt.—*Ex parte Coffee*, 161 S. W. 975.

### II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 36 (Ark.) The mayor of an incorporated city, under Kirby's Dig. § 5586, merely giving him the powers and jurisdiction of a justice of the peace, has no power to punish for contempt except that committed in the presence of the court or in disobedience of its process, under section 726, relating to all inferior courts in the absence of statute conferring more.—*Ex parte Patterson*, 161 S. W. 173.

§ 44 (Tex.Cr.App.) It is essential to the power to punish for contempt that the court have jurisdiction of the subject-matter and the person and authority to render a judgment upon the facts.—*Ex parte Coffee*, 161 S. W. 975.

§ 66 (Tex.Cr.App.) Appeal will not lie from a judgment in proceedings in accordance with Code Cr. Proc. 1911, art. 528 et seq., fining one for contempt of court in refusing to obey a subpoena.—*Pegram v. State*, 161 S. W. 458.

## CONTINUANCE.

See Criminal Law, §§ 594-600, 1052, 1151.

§ 12 (Ky.) It was not error to overrule defendant's motion for a continuance for the sickness and absence of its chief counsel, where it was ably represented by two other attorneys.—*Louisville, H. & St. L. Ry. Co. v. Wilson's Ex'r*, 161 S. W. 513.

§ 33 (Ky.) Denial of a motion for continuance for absence of a witness was not error, when the affidavit was read as the witness' deposition and substantially the same facts were proven by other witnesses.—*Chesapeake & O. Ry. Co. v. Weddington's Adm'r*, 161 S. W. 208.

§ 33 (Ky.) Under Civ. Code Prac. § 315, the trial court did not abuse its discretion in refusing a continuance, where the affidavit was read as the deposition of the absent witness.—*Louisville, H. & St. L. Ry. Co. v. Wilson's Ex'r*, 161 S. W. 513.

## CONTRACTS.

See Alteration of Instruments; Appeal and Error, § 173; Bills and Notes; Cancellation of Instruments; Carriers, §§ 55, 194; Chattel Mortgages; Compromise and Settlement; Constitutional Law, §§ 42, 115-129; Corporations, §§ 309, 327, 482, 657, 659; Counties, §§ 113-127, 196; Covenants; Damages, §§ 62, 124; Deeds; Estoppel, § 107; Evidence, §§ 441, 448; Exchange of Property; Frauds, Statute of; Guaranty; Husband and Wife, § 25; Indemnity; Injunction, § 59; Insurance; Interest; Justices of the Peace, § 91; Landlord and Tenant, § 223; Lotteries, § 12; Master and Servant, §§ 20-41; Mechanics' Liens; Money Lent; Monopolies, § 12; Mortgages; Novation; Partition, §§ 22, 114; Partnership; Payment; Pledges; Principal and Agent; Principal and Surety; Reformation of Instruments; Release; Sales; Schools and School Districts, § 135; Specific Performance; Stipulations; Subrogation;

Telegraphs and Telephones, §§ 34, 65; Trial, §§ 89, 95, 136, 191, 219, 244; Usury, §§ 2-80, 115; Vendor and Purchaser; Venue, § 21; Warehousemen; Waters and Water Courses, § 183; Witnesses, § 144; Work and Labor.

## I. REQUISITES AND VALIDITY.

### (A) Nature and Essentials in General.

§ 10 (Ky.) A want of mutuality in the terms of a contract is no defense in the case of an executed contract.—*Victoria Limestone Co. v. Hinton*, 161 S. W. 1109.

§ 10 (Tex.Civ.App.) A stipulation, in a conveyance of trees on certain land, that the agreed time for removing them may be extended as long as the buyer "may want" upon payment of a certain rental, is not unilateral.—*Davis v. Conn*, 161 S. W. 39.

### (D) Consideration.

§ 71 (Ark.) An agreement not to exercise a legal right is a sufficient consideration to support a contract.—*Brinkley Car Works & Mfg. Co. v. Cook*, 161 S. W. 1065.

### (E) Validity of Assent.

§ 94 (Mo.App.) To warrant setting aside a written obligation on the ground of fraud there should be real fraud to excuse the signer from the failure to know the contents of the instrument.—*Avery Co. v. Powell*, 161 S. W. 335.

§ 96 (Ky.) A transfer of property by persons mentally or physically infirm to those having custody of them will be set aside in equity, where influence has been acquired and abused, or confidence reposed and betrayed.—*McDowell v. Edwards' Adm'r*, 161 S. W. 534.

§ 99 (Ky.) Evidence *held* to require a finding that a transfer of all of decedent's property a few days before his death, to the husband of his niece, in consideration of care, had been obtained by undue influence, and was therefore void.—*McDowell v. Edwards' Adm'r*, 161 S. W. 534.

### (F) Legality of Object and of Consideration.

§ 101 (Mo.App.) Where the parties intended that a contract should be governed by the law of a particular state, the rule that it will be presumed that the contract was made with reference to the law which recognizes it as valid does not obtain.—*J. I. Case Threshing Mach. Co. v. Tomlin*, 161 S. W. 286.

§ 111 (Mo.App.) Any agreement for divorce, or any collateral bargaining promotive of it, is void.—*McDonald v. McDonald*, 161 S. W. 850.

§ 117 (Tenn.) Provision of a contract of sale of a stock of goods and store fixtures, that seller will not in that town for five years engage in business in competition with the buyer, does not "tend to lessen free and full competition," in violation of Acts 1903, c. 140, § 1.—*Baird v. Smith*, 161 S. W. 492.

§ 142 (Mo.App.) Where the acts of parties surrounding the making of a contract indicated that they intended it to be governed by the law of Missouri and not of Kansas, and the testimony was not conflicting, the question was for the court.—*J. I. Case Threshing Mach. Co. v. Tomlin*, 161 S. W. 286.

## II. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

§ 153 (Ky.) A construction of a written contract which will make it binding upon the parties will be preferred to one making it not binding.—*First Nat. Bank v. Doherty*, 161 S. W. 211.

§ 175 (Tex.Civ.App.) Evidence as to terms of a contract for construction of a dam across a creek to form a fishpond, *held* sufficient to sustain a finding that it did not require the contractor to build a foundation of such depth and

nature as to prevent the water escaping below it.—*Lattimore v. Puckett & Wear*, 161 S. W. 951.

**(B) Parties.**

§ 187 (Ky.) A bank could sue on a contract, made for its benefit by corporate officers, to be jointly bound to the bank on the corporation's obligation, even if it was a stranger to the consideration.—*First Nat. Bank v. Doherty*, 161 S. W. 211.

§ 187 (Mo.App.) A bank may enforce a contract whereby third persons agreed to assume payment of a note defendants had executed in its favor.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

**(D) Place and Time.**

§ 216 (Ky.) When the time of service, under a contract for the hauling of stone by barge, was left indefinite, either party could terminate it at any time.—*Victoria Limestone Co. v. Hinton*, 161 S. W. 1109.

In an action upon a contract for the hauling of stone by barges to average three barge loads a week, indefinite as to time of service, but executed from June 28 to November 4, 1912, when plaintiff exercised his right to terminate it, agreement as to the average number *held* properly construed as applying to the time for which the contract was executed, instead of for a longer time.—*Id.*

**III. MODIFICATION AND MERGER.**

§ 237 (Mo.App.) A new contract made in the place of an existing contract must be supported by a consideration.—*Goller v. Henseler Mercantile Oil & Supply Co.*, 161 S. W. 584.

§ 238 (Mo.App.) A written contract may be subsequently modified by a new parol contract.—*Goller v. Henseler Mercantile Oil & Supply Co.*, 161 S. W. 584.

§ 245 (Mo.App.) All prior negotiations as to the subject-matter are merged in a written contract in absence of fraud, accident, or mistake.—*Goller v. Henseler Mercantile Oil & Supply Co.*, 161 S. W. 584.

**V. PERFORMANCE OR BREACH.**

§ 323 (Tex.Civ.App.) In action for refusal to permit plaintiff to perform contract, evidence *held* to make question for jury as to plaintiff's abandonment of the contract before defendant's cancellation thereof.—*Waterman Lumber & Supply Co. v. Holmes*, 161 S. W. 70.

**VI. ACTIONS FOR BREACH.**

§ 328 (Tex.Civ.App.) In an action for extracting turpentine on lands on which defendants were not entitled to enter by their lease, the answer, alleging that the land leased contained less acreage than was represented, *held* to state a good defense.—*Conn v. Rosamond*, 161 S. W. 73.

§ 335 (Tex.Civ.App.) Petition, in an action by a materialman against the owner of a building on an order given by the contractor, *held* not fatally defective for failure to aver that the contractor had obtained and furnished receipts for materials used in the construction of the building so as to entitle him to the amount specified in the order.—*Sweetwater Lumber Co. v. Hammer*, 161 S. W. 1075.

§ 342 (Tex.Civ.App.) In an action for the breach of a contract, defendant's allegation that he intended that a deposit should be the extent of his liability, and that if the contract did not show that, it was a mistake of the parties, *held* not sufficient as an allegation of mutual mistake.—*Conn v. Rosamond*, 161 S. W. 73.

§ 346 (Mo.App.) While the parties may modify the terms of an existing written contract, recovery must be had upon the original con-

tract as modified.—*Goller v. Henseler Mercantile Oil & Supply Co.*, 161 S. W. 584.

§ 346 (Tex.Civ.App.) Under allegations of fraud or mutual mistake in the execution of a contract, evidence would be admissible to show that it did not express the real agreement of the parties and to show what the agreement in fact was.—*Conn v. Rosamond*, 161 S. W. 73.

**CONTRADICTION.**

See Witnesses, §§ 379-410.

**CONTRIBUTORY NEGLIGENCE.**

See Negligence, §§ 85-101.

**CONVERSION.**

See Trover and Conversion.

§ 15 (Mo.) Under a will which bequeathed \$1,000 to each of testator's three children, and provided that the personal property and certain farms be sold, and that after the three children got their shares an equal share should go to each living grandchild, etc., *held* that testator's intention was that the property be sold, and the bequest to the children paid and the residue be equally divided among testator's grandchildren.—*Griffith v. Witten*, 161 S. W. 708.

If testator clearly intended that all of his estate be converted into cash and be distributed under the will, equity will consider the real estate as money.—*Id.*

§ 19 (Mo.) The equitable conversion of testator's realty into money continues until by the beneficiary's election there has been a reconversion, which may take place at any time before the actual conversion; the constructive or equitable conversion taking place as of the date of the will or testator's death, and the actual conversion taking place as of the date of the sale of the realty.—*Griffith v. Witten*, 161 S. W. 708.

§ 22 (Mo.) Where equity considers real estate as money as authorized by the intent of testator, the beneficiaries may elect to reconvert.—*Griffith v. Witten*, 161 S. W. 708.

While in case of adult beneficiaries there must be an election to reconvert the proceeds of land, directed to be sold and distributed under the will, into realty, a court of equity may make such election for infant beneficiaries if the case requires it for the infant's best interest.—*Id.*

**CONVEYANCES.**

See Executors and Administrators, § 397; Mortgages; Partition; Partnership, § 246; Vendor and Purchaser.

**COPY.**

See Appeal and Error, § 586; Criminal Law, § 403.

**CORPORATIONS.**

See Abatement and Revival, § 22; Account Stated, §§ 12, 19; Banks and Banking; Carriers; Certiorari, § 64; Drains; Electricity; Judgment, § 188; Limitation of Actions, § 123; Malicious Prosecution, §§ 58, 67; Municipal Corporations, § 586; Pleading, §§ 35, 403; Railroads; Religious Societies; Street Railroads; Taxation, § 117; Telegraphs and Telephones; Waters and Water Courses, § 183.

**I. INCORPORATION AND ORGANIZATION.**

§ 18 (Ky.) Both stockholders and officers of a corporation are chargeable with knowledge of the provisions of the articles of incorporation which are a contract between the stockholders and the corporation.—*Crouniger v.*

Bethel Grove Camp Ground Ass'n, 161 S. W. 230.

#### IV. CAPITAL, STOCK, AND DIVIDENDS.

##### (D) Transfer of Shares.

§ 116 (Mo.App.) Where defendants gave notes for stock in a mining corporation without exacting any warranty in connection therewith and with knowledge of the property which the corporation owned, together with the incumbrances thereon, the fact that the property was not as valuable as expected and did not turn out to be profitable did not show a failure of consideration for the notes.—Hill v. Dillon, 161 S. W. 881.

§ 121 (Mo.App.) In an action on a note given for the price of certain mining stock, evidence of a third person tending to show that he had been defrauded by false representations of one connected with the payee of the note in a similar transaction *held* inadmissible.—Hill v. Dillon, 161 S. W. 881.

#### V. MEMBERS AND STOCKHOLDERS.

##### (D) Liability for Corporate Debts and Acts.

§ 279 (Ark.) A court of equity is the appropriate forum to enforce the right of a stockholder who has paid his subscription against one who has not paid, where the corporation has ceased to perform its functions.—Bank of Des Arc v. Moody, 161 S. W. 134.

#### VI. OFFICERS AND AGENTS.

##### (C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 308 (Ark.) Where employé was to have one-half of profits on sales up to the date of his contract, *held*, that he was entitled to the amount shown to be due by a statement prepared by the employer's bookkeeper, where there was no testimony showing that this was not the correct amount of his profits up to that date.—Loewer v. Lonoke Rice Milling Co., 161 S. W. 1042.

Person employed to buy rice and render other assistance from July 1st to April 1st, who discharged his duties as buyer during the buying season, and who was not thereafter asked to render other assistance, *held* entitled to his salary for the full time, though he entered the employment of a third person.—Id.

A person employed to buy rice and render other assistance, who by his contract was to receive 25 per cent. of the net profits on seed rice, was only entitled to such percentage of the profits on seed rice sold by him, and not on seed rice sold by the employer through other employes.—Id.

§ 308 (Mo.App.) One who though called treasurer, and secretary and treasurer, of a corporation, was neither a director nor stockholder, but merely a hired employé, *held* entitled to recover the reasonable value of his services, rendered with the knowledge and consent of the company's officers and directors, notwithstanding a resolution that no salary should be paid.—St. Louis Sanitary Co. v. Reed, 161 S. W. 315.

§ 309 (Ky.) Contract between a director and a corporation *held* ultra vires.—Croninger v. Bethel Grove Camp Ground Ass'n, 161 S. W. 230.

A corporation cannot retain the benefits of an ultra vires contract and also refuse to perform, but the rule is not applicable to the case of a director, who, knowing that the company is indebted up to the legal limit, advances money to it, agreeing to repayment only out of surplus earnings.—Id.

§ 310 (Ky.) A corporation director is a trustee for the stockholders, and he is responsible for failure to conduct the corporate business according to the rules relating to such trust and is liable to the stockholders for loss resulting from failure to perform his duties.—

Croninger v. Bethel Grove Camp Ground Ass'n, 161 S. W. 230.

§ 313 (Ark.) A director of a corporation, also employed by it on a salary to purchase rice for it, was bound to deal with it in the utmost good faith, and to buy rice for it and not for himself.—Loewer v. Lonoke Rice Milling Co., 161 S. W. 1042.

§ 314 (Ark.) A person employed by a corporation to buy rice for it could not act for it in the sale of rice owned by him.—Loewer v. Lonoke Rice Milling Co., 161 S. W. 1042.

A person employed by a corporation to buy rice and who purchased a crop of rice for it could not resell it to the corporation at a profit unless it repudiated his purchase and affirmatively consented to treat it as a purchase by him personally.—Id.

##### (D) Liability for Corporate Debts and Acts.

§ 327 (Ky.) An agreement by corporate officers of a corporation, in consideration of loans already made and to be made by a bank to the corporation, to be jointly bound on all obligations of the corporation indorsed by them is valid if the bank in fact granted renewal notes or accepted new notes on the faith thereof.—First Nat. Bank v. Doherty, 161 S. W. 211.

Under Negotiable Instruments Act, requiring an indorsement to be made upon the instrument or an attached paper, a separate instrument signed by corporate officers agreeing, in consideration of loans made to the corporation by a bank, to be jointly bound to the bank on the corporation's obligations did not make the signers liable merely as indorsers.—Id.

§ 361 (Ky.) In an action on an instrument signed by corporate officers, evidence *held* to show that it was executed for plaintiff's benefit, and not merely as a memorandum of a private agreement among themselves.—First Nat. Bank v. Doherty, 161 S. W. 211.

#### VII. CORPORATE POWERS AND LIABILITIES.

##### (A) Extent and Exercise of Powers in General.

§ 391 (Ky.) Power to grant a franchise to a corporation carries with it the power to impose such reasonable regulations as will effectuate the purposes for which it is granted.—Christian-Todd Telephone Co. v. Commonwealth, 161 S. W. 543.

##### (B) Representation of Corporation by Officers and Agents.

§ 413 (Ky.) Where a contract with a corporation provided that one advancing money to it should be repaid "out of the first surplus remaining from the earnings, after provisions for current expenses and interest on bonded debt," such creditor was only entitled to repayment from any surplus remaining from the earnings and could not enforce his claim against any other fund.—Croninger v. Bethel Grove Camp Ground Ass'n, 161 S. W. 230.

§ 432 (Ark.) In action by corporation against person formerly employed to buy rice, evidence *held* to show that corporation's manager, who purchased defendant's interest in a crop of rice at a higher price than that paid for the other interest therein, was authorized to make the purchase.—Loewer v. Lonoke Rice Milling Co., 161 S. W. 1042.

##### (D) Contracts and Indebtedness.

§ 482 (Ky.) Application of surplus after the sale of corporate property under a mortgage to payment of a general claim against the corporation *held* violative of provision of the articles of incorporation exempting property of stockholders on corporate debts.—Croninger v. Bethel Grove Camp Ground Ass'n, 161 S. W. 230.

## (F) Civil Actions.

§ 514 (Mo.App.) In an action by a supposed corporation, Rev. St. 1909, § 1985, declaring that it shall not be necessary to prove the fact of incorporation, unless put in issue by affidavit filed with the pleadings, does not make the affidavit part of the answer, so as to render unnecessary a denial of corporate existence in the answer.—*Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 161 S. W. 320.

§ 518 (Mo.App.) In an action by a corporate plaintiff, where there was no issue as to its incorporation, evidence tending to show that it was not incorporated is inadmissible.—*Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 161 S. W. 320.

§ 519 (Ark.) Evidence held to show that a crop of rice on which person employed by corporation to buy rice claimed a profit, as against the corporation, was purchased for it and that it did not repudiate the purchase.—*Loewer v. Lonoke Rice Milling Co.*, 161 S. W. 1042.

## XII. FOREIGN CORPORATIONS.

§ 634 (Tenn.) A foreign corporation domesticated under Acts 1877, c. 31, Acts 1891, c. 122, and Acts 1895, c. 81, is not a new entity, distinct from the foreign organization, and is domestic only as to property and acts within the jurisdiction.—*Adams v. Chattanooga Co.*, 161 S. W. 1131.

§ 642 (Tenn.) Engaging in booking theatrical companies with theaters in the state as agent for the owners held "doing business" within the state, within Acts 1877, c. 31, Acts 1891, c. 122, and Acts 1895, c. 81.—*Interstate Amusement Co. v. Albert*, 161 S. W. 488.

A foreign corporation is "doing business" within the state when it transacts therein some substantial part of its ordinary business, and its operations within the state do not consist of mere casual or occasional transactions.—*Id.*

§ 645 (Ky.) Ky. St. § 571, requiring all corporations doing business in the state to show, by statement filed with the Secretary of State, a regular place of business and the name of an agent to receive service of process, held intended as a police regulation for the protection of the people of the state, who have a right to know whether parties with whom they deal are individuals or corporations.—*Oliver Co. v. Louisville Realty Co.*, 161 S. W. 570.

§ 657 (Ky.) Under Ky. St. § 571, requiring corporations doing business in the state to have a known place of business and an agent to receive service of process, and requiring a statement thereof to be filed with the Secretary of State, and making noncompliance therewith a misdemeanor, but not in terms declaring contracts made in violation thereof to be illegal, held that a contract in violation thereof was void.—*Oliver Co. v. Louisville Realty Co.*, 161 S. W. 570.

§ 659 (Ky.) One contracting with a corporation which had violated Ky. St. § 571, held not estopped from setting up such violation thereof in defense to an action on the contract.—*Oliver Co. v. Louisville Realty Co.*, 161 S. W. 570.

§ 661 (Tenn.) A foreign corporation, which does not comply with Acts 1877, c. 31, Acts 1891, c. 122, and Acts 1895, c. 81, cannot maintain an action arising out of business transacted within the state, even though the illegality of such transactions only appears from the proof, and not from the pleading.—*Interstate Amusement Co. v. Albert*, 161 S. W. 488.

§ 668 (Ky.) Under Ky. St. § 571, relating to the appointment of process agents by foreign corporations, service of process on the agent whose name was filed with the Secretary of State is good as against the foreign corporation, even though the agency had been terminat-

ed.—*S. B. Reese Lumber Co. v. Licking Coal & Lumber Co.*, 161 S. W. 1124.

§ 691 (Tenn.) Chancery will not, at the instance of resident stockholders, dissolve a foreign corporation domesticated in the state, where all of its assets are in a foreign jurisdiction, regardless of its authority to act, for its decree would be unenforceable.—*Adams v. Chattanooga Co.*, 161 S. W. 1131.

Shannon's Code, §§ 5187, 6108, 6104, referring to the distribution of a corporation's property, apply not only to domestic but to foreign corporations, and authorize the court to dissolve them as to their property within the jurisdiction.—*Id.*

A foreign corporation cannot be dissolved under Shannon's Code, § 5187, where it was not insolvent, and was authorized by its foreign charter to carry on the business of holding stocks of other companies, and is so doing.—*Id.*

## COSTS.

See Appeal and Error, §§ 301, 1028; Executors and Administrators, § 456; Injunction, § 188; Justices of the Peace, § 158; Partition, § 114.

## I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 32 (Mo.App.) Under Rev. St. 1909, §§ 2263, 2275, held that plaintiff prevailing in a suit to cancel a note and deed of trust, and to enjoin defendant from selling the land in question, was entitled to costs.—*Bridwell v. Spencer*, 161 S. W. 874.

§ 60 (Ark.) In a suit between a crop mortgagee and the lessor, who had a lien on the crop for his rent, held, that costs were improperly assessed solely against the lessor, who claimed more than was due; it not appearing that the mortgagee tendered him rent.—*Storthz v. Smith*, 161 S. W. 183.

§ 71 (Ky.) Under the direct provisions of Civ. Code Prac. § 93, a defendant who fails to demur to a petition which does not state a cause of action is liable for all costs after the filing of the answer, though judgment on the pleadings was directed in its favor after the close of the case.—*Farnsley's Adm'r v. Philadelphia Life Ins. Co.*, 161 S. W. 1111.

## COTENANCY.

See Tenancy in Common.

## COUNCIL.

See Municipal Corporations, § 110.

## COUNTERCLAIM.

See Set-Off and Counterclaim.

## COUNTIES.

See Eminent Domain, § 317; Estoppel, § 85; Highways; Telegraphs and Telephones, § 10.

## II. GOVERNMENT AND OFFICERS.

## (B) County Seat.

§ 34 (Ark.) The county court has exclusive original jurisdiction to determine the result of an election on the question of the removal of a county seat.—*Schuman v. George*, 161 S. W. 1039.

## (D) Officers and Agents.

§ 64 (Tenn.) Under Const. art. 2, § 25, making a defaulting collector or holder of public moneys ineligible to office, and Shannon's Code, § 1069, declaring the election of defaulters to the treasury void, held, that defendant's disqualification by reason of default existing at the time of a popular election operated as a disqualifi-

cation for the entire term of office, so that, after the default was settled, the county court could not elect him for the remnant of the term.—Day v. Sharp, 161 S. W. 994.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

#### (B) Contracts.

§ 113 (Ky.) The fiscal court has only limited jurisdiction, and can do only such things as the statute permits.—Taylor v. Riney, 161 S. W. 203.

Ky. St. § 1840, giving the fiscal court jurisdiction "to regulate and control the fiscal affairs and property of the county," authorized it to contract for the employment of an accountant for the purpose of investigating the affairs of county officers.—Id.

§ 116 (Ky.) If the fiscal court could employ an accountant for investigating the affairs of county officers, they could, in their discretion, accept the proposal of the particular bidder for the work who, in their judgment, was best qualified, though his bid was higher than that of others.—Taylor v. Riney, 161 S. W. 203.

§ 127 (Ark.) Notwithstanding Const. art. 19, § 16, and the statutes requiring public contracts to be let to the lowest bidder, commissioner held to have power, in the absence of bad faith, to authorize changes in a contract for the construction of an annex to a courthouse which in the course of the work appeared necessary.—Shackelford v. Campbell, 161 S. W. 1019.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 160 (Ky.) Though there was no tax levy for that purpose, the fiscal court could order the amount of a contract made by it for services to be paid out of the general fund of the county, which presumably consists of the surplus remaining from funds appropriated for other purposes.—Taylor v. Riney, 161 S. W. 203.

§ 190 (Mo.) Laws 1911, p. 130, § 8, as amended by Laws 1913, p. 143 et seq., creating the tuberculosis hospital district of B. county, and providing for a tax equal to 25 cents on the \$1.00 valuation, held violative of Const. art. 10, § 11, limiting the tax rate for county purposes, and was invalid.—Board of Com'rs of Tuberculosis Hospital Dist. of Buchanan County v. Peter, 161 S. W. 1155.

§ 196 (Ark.) In a taxpayers' suit to restrain performance of a contract for erection of courthouse annex, evidence as to fraud or good faith in authorizing modifications in the contract held to support chancellor's finding for defendants.—Shackelford v. Campbell, 161 S. W. 1019.

## COUNTS.

See Indictment and Information, § 130.

## COURTS.

See Appeal and Error, §§ 742, 743, 748, 767, 773, 894; Constitutional Law, §§ 70, 75; Contempt; Counties, §§ 34, 113, 116; Eminent Domain, § 172; Executors and Administrators, § 519; Ferries, § 31; Highways, §§ 99, 118, 165; Jury, § 24; Justices of the Peace; Telegraphs and Telephones, § 26; Trial, §§ 191, 194, 349, 370, 397.

### I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 36 (Mo.) The presumptions in favor of the action of the probate court over matters within its jurisdiction are the same as arise in case of courts of general jurisdiction.—Norton v. Reed, 161 S. W. 842.

### II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

#### (C) Rules of Court and Conduct of Business.

§ 78 (Tex.Civ.App.) When a rule prescribed by the Supreme Court conflicts with the statute, the rule must yield.—Conn v. Rosamond, 161 S. W. 73.

§ 85 (Tex.Civ.App.) Under Sayles' Ann. Civ. St. 1897, art. 947, authorizing the Supreme Court to make and enforce rules, court rules adopted by that tribunal have the force and effect of statutes.—Childress v. Robinson, 161 S. W. 78.

#### (D) Rules of Decision, Adjudications, Opinions, and Records.

§ 89 (Ky.) Unless there is something manifestly erroneous, or the rule of decision has been changed by statute, the court will, under the doctrine of stare decisis, follow earlier precedents.—McCormack v. Louisville & N. R. Co., 161 S. W. 518.

§ 89 (Ky.) Rule of stare decisis in relation to its effect upon private affairs held to be nothing more than the application of the doctrine of estoppel to court decisions.—Oliver Co. v. Louisville Realty Co., 161 S. W. 570.

In view of Ky. St. § 571, requiring a corporation doing business in the state to have a known place of business and an agent to receive service of process, and making a violation thereof a misdemeanor, held that a corporation, knowingly and in bad faith entering into a contract in violation thereof, could not rely on the doctrine of former decisions that the other party to the contract could not defend on the ground of its violation of the statute.—Id.

§ 90 (Ky.) When a rule has once been deliberately declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very cogent reasons and upon a clear manifestation of error.—Oliver Co. v. Louisville Realty Co., 161 S. W. 570.

The rule of stare decisis does not positively forbid the questioning of prior decisions under any circumstances, but where the future public benefit is of greater moment than any former erroneous decision, or where a correction can be made without working more harm than good, it may be the duty of the court to overrule its own previous decision.—Id.

§ 95 (Tex.Civ.App.) While all courts may change their decisions, the court, in determining the law of a foreign state, must presume that an authoritative announcement of the law will not be changed.—Stamp v. Eastern Ry. Co. of New Mexico, 161 S. W. 450.

§ 96 (Tex.Civ.App.) The binding effect of decisions of the Supreme Court upon the territory of New Mexico was not changed by act of Congress of March 3, 1911, providing that the amount in controversy, upon which the right to appeal to the federal Supreme Court depended, should be ascertained under oath; that being a mere matter of pleading and procedure.—Stamp v. Eastern Ry. Co. of New Mexico, 161 S. W. 450.

§ 100 (Ky.) Where cases holding that one contracting with a corporation which had not complied with Ky. St. § 571, requiring it to have a known place of business and an agent to receive service of process in this state, was estopped from defending on the ground of the corporation's noncompliance therewith were not overruled until after the transaction out of which a similar action arose, the corporation was not deprived of its right to rely on the doctrine of stare decisis.—Oliver Co. v. Louisville Realty Co., 161 S. W. 570.

§ 106 (Ky.) Where the opinion of the lower court is contained in the record, the appellate court may, without impropriety, adopt it as

its own.—*Kenton Water Co. v. City of Covington*, 161 S. W. 988.

§ 107 (Tex.Civ.App.) Where an appellate court withdraws an opinion, it should, in deference to the court's wishes, be treated as if never rendered.—*Mixon v. Wallis*, 161 S. W. 907.

#### IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 169 (Tex.Civ.App.) In an action between former partners, where defendant by counterclaim sought to recover the specific sum of \$990 alleged to have been received by the plaintiff, who refused payment thereof, the court was not called upon to adjudicate a partnership transaction of double that amount so as to exceed the jurisdiction of the court.—*Reeves v. White*, 161 S. W. 43.

#### V. COURTS OF PROBATE JURISDICTION.

§ 200½ (Ark.) Under Const. art. 7, § 34, and Kirby's Dig. § 1840, probate courts have no jurisdiction to hear contests as to the title of property between an executor and third persons.—*Fancher v. Kenner*, 161 S. W. 166.

#### VI. COURTS OF APPELLATE JURISDICTION.

##### (B) Courts of Particular States.

§ 231 (Mo.) On appeal from a conviction for a misdemeanor, where no constitutional question was raised save by a motion to quash, and alleged error in the overruling of it was not called to the attention of the court on motion for a new trial, no constitutional question was presented, and the Supreme Court had no jurisdiction.—*State v. Humfeld*, 161 S. W. 735.

§ 231 (Mo.) Where, in a suit to have a deed of trust declared satisfied, the only question was whether the deed was satisfied by an extension without consent of the sureties, the Supreme Court had no jurisdiction of an appeal transferred from the Kansas City Court of Appeals; title not being involved.—*Hardwicke v. Barnes*, 161 S. W. 744.

§ 231 (Mo.) That the penalty imposed by Rev. St. 1909, § 3040, upon foreign corporations doing business without a license, when collected, must go into the school fund under Const. art. 11, § 8, is immaterial to the corporation, so that any invalidity in the provision directing recovery to go to the county revenue fund would not raise a constitutional question, so as to give the Supreme Court jurisdiction on appeal in a proceeding to enforce the penalty.—*State ex rel. Jones v. Howe Scale Co. of Illinois*, 161 S. W. 789.

Where the sole question in such proceeding is whether the statute provided for the collection of the penalty by a civil action, and it was not claimed that the statute infringed the fourteenth amendment to the federal Constitution, there was no construction of the fourteenth amendment involved.—*Id.*

The question of who is authorized under Rev. St. 1909, § 3040, to enforce the penalty against foreign corporations doing business in the state without a license is one of statutory construction, so that the fact that that question is involved would not give the Supreme Court jurisdiction of an appeal.—*Id.*

§ 231 (Mo.) Since the validity of Rev. St. 1909, § 9253, delegating to municipalities the power to impose a license tax upon insurance companies, has been settled, a controversy involving such power cannot confer jurisdiction of an appeal upon the Supreme Court on the ground that it involves a constitutional question.—*City of Richmond v. Creel*, 161 S. W. 794.

No construction of a revenue law is involved, which would confer jurisdiction of an appeal on the Supreme Court.—*Id.*

#### VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

##### (C) Courts of Different States or Countries.

§ 511 (Mo.App.) The courts of one state commonly recognized the laws of another state, where the general policy of the states on the subject is the same.—*John H. Schroeder Wine & Liquor Co. v. Willis Coal & Mining Co.*, 161 S. W. 352, 356; *Schroeder v. Same.*, *Id.* 357.

#### COVENANTS.

See Appeal and Error, §§ 1036, 1050; Landlord and Tenant, § 125; Limitation of Actions, § 47; Railroads, § 72.

#### II. CONSTRUCTION AND OPERATION.

##### (D) Covenants Running with the Land.

§ 67 (Ky.) Under grant of standing timber to grantee, his heirs and assigns, with covenant of warranty and a provision that the trees might remain on the land so long as the grantee desired, *held*, that they passed as realty, and that the covenant of title would follow them into the hands of any vendee.—*Shepherd v. Bank of Montreal*, 161 S. W. 214.

#### CREDIBILITY.

See Witnesses, §§ 317-410.

#### CREDITORS.

See Bankruptcy; Executors and Administrators, § 423; Marshaling Assets and Securities; Subrogation; Wills, § 839; Witnesses, § 143.

#### CRIME AGAINST NATURE.

See Sodomy, § 5.

#### CRIMINAL LAW.

See Abortion; Arson; Assault and Battery, §§ 74, 77; Bail; Bigamy; Burglary; Escape; Forgery; Gaming; Homicide; Indictment and Information; Intoxicating Liquors, §§ 224-239; Larceny; Libel and Slander, § 156; Mayhem; Perjury; Prostitution; Rape; Robbery; Searches and Seizures; Seduction; Sodomy; Telegraphs and Telephones, § 79; Weapons.

#### II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 53 (Ark.) Voluntary intoxication is no excuse for crime.—*Alford v. State*, 161 S. W. 497.

#### III. PARTIES TO OFFENSES.

§ 81 (Ark.) Where accused was tried on an indictment charging him not only with murder but with being an accessory before the fact, and he did not move to have the state elect, the record of the conviction of the principal is admissible against him.—*Tiner v. State*, 161 S. W. 195.

#### V. VENUE.

##### (A) Place of Bringing Prosecution.

§ 111 (Tex.Cr.App.) Where the evidence showed that the robbery was committed within 50 feet of the county line, accused was subject to prosecution in either county, as provided by Code Cr. Proc. 1911, art. 238.—*Madrid v. State*, 161 S. W. 93.

##### (B) Change of Venue.

§ 121 (Mo.) The granting of a change of venue for local prejudice against accused is with-



in the sound discretion of the trial court.—*State v. Shaffer*, 161 S. W. 805.

Evidence on a motion for change of venue, in a prosecution for grand larceny, on the ground of local prejudice *held* not to show an abuse of discretion in denying the motion.—*Id.*

§ 134 (Mo.) On a motion to change the venue, in a prosecution for grand larceny by hog theft, on the ground of prejudice against accused, evidence that more than 20 years ago, when accused was only 5 or 6 years of age, his brother and three cousins were charged with a notorious murder in the county was properly excluded.—*State v. Shaffer*, 161 S. W. 805.

§ 137 (Ark.) Though one of accused's counsel, in withdrawing a petition for a change of venue, did so without the consent of accused or his other attorney and in their absence, their failure to request a ruling on the petition *held* equivalent to a withdrawal thereof.—*Threat v. State*, 161 S. W. 139.

### X. EVIDENCE.

#### (A) Judicial Notice, Presumptions, and Burden of Proof.

§ 308 (Tex.Cr.App.) In a prosecution under Acts 32d Leg. c. 23, for pandering *held*, that there was a presumption of innocence in defendant's favor.—*Currington v. State*, 161 S. W. 478.

#### (B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338 (Tex.Cr.App.) Evidence of conviction of another party for murder in connection with the same difficulty *held* improperly admitted.—*Lara v. State*, 161 S. W. 99.

Evidence that other parties had been indicted for their participation in the difficulty in which the alleged assault occurred, and such indictments themselves, were improperly admitted.—*Id.*

Evidence that other parties indicted for their participation in the same difficulty had forfeited their bonds and fled *held* improperly admitted.—*Id.*

§ 338 (Tex.Cr.App.) "Relevancy" as applied to evidence means that which conduces to prove a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue.—*Belcher v. State*, 161 S. W. 459.

§ 338 (Tex.Cr.App.) Where waybills for shipments of whisky, addressed to person accused of selling a half pint, described it as quarts and pints, testimony of express agent that shipments so marked, addressed to other persons, contained half pint bottles *held* incompetent, though he could testify to the condition of packages addressed to accused.—*Cowley v. State*, 161 S. W. 471.

§ 338 (Tex.Cr.App.) Where, in a perjury case, defendant's father was not a witness, it was error to admit evidence showing that he had left another county under suspicious circumstances.—*Poulter v. State*, 161 S. W. 475.

In a prosecution for perjury, it was prejudicial error to admit evidence that defendant's father, several years before, had stolen a log chain; the father not being a witness.—*Id.*

§ 363 (Tex.Cr.App.) Officer who claimed that after he was notified of pending trouble, and, after demanding a knife from accused, he was assaulted by accused; that he then arrested four persons, and was again assaulted—*held* properly permitted to testify, on accused's trial for assault to murder, as to the details of both difficulties.—*Lara v. State*, 161 S. W. 99.

§ 364 (Mo.) In a prosecution for murder, evidence that after accused returned home, and within a few minutes after the shooting, he took down a shotgun, loaded it, and stated that he would go back and kill every d—d one of them *held* admissible as a part of the res gestæ.—*State v. Rogers*, 161 S. W. 770.

§ 366 (Tex.Cr.App.) A witness who was half a mile from the place of the shooting but who ran there upon hearing it, when decedent voluntarily told him the circumstances, could testify thereto.—*Christian v. State*, 161 S. W. 101.

#### (C) Other Offenses, and Character of Accused.

§ 369 (Mo.) It was error to permit witnesses to testify that, while acting as deputy sheriffs, they had arrested defendant and his daughter upon a similar charge.—*State v. Duff*, 161 S. W. 683.

§ 369 (Mo.) In a prosecution for picking prosecutor's pocket on a street car, evidence that prior to the offense defendant was seen on another car, shoving himself between witness and witness' father, was admissible to show defendant's presence in the vicinity, and was not objectionable as tending to show another offense.—*State v. Gordon*, 161 S. W. 721.

§ 369 (Tex.Cr.App.) Where defendant was on trial for perjury, evidence of other offenses committed by him in other counties, under different circumstances, and for which he had never been indicted, was inadmissible.—*Poulter v. State*, 161 S. W. 475.

§ 369 (Tex.Cr.App.) Independent and disconnected crimes cannot ordinarily be proven against an accused on his trial for another different and distinct crime.—*Currington v. State*, 161 S. W. 478.

§ 371 (Ark.) Evidence of the commission of similar offenses is not admissible, except in cases where the act may be either lawful or criminal, depending upon the intent when such evidence is admissible to show intent.—*Setzer v. State*, 161 S. W. 190.

§ 371 (Tex.Cr.App.) In a prosecution under Acts 32d Leg. c. 23, for attempting to procure a woman to enter a house of prostitution, *held*, that evidence of other distinct offenses were so related to the offense charged as to be admissible to show intent.—*Currington v. State*, 161 S. W. 478.

§ 372 (Ark.) In a prosecution for stealing hogs, evidence *held* admissible that during the same winter witness thought he recognized accused and another carrying a hog near accused's house and heard one of the men say it was better than they got the day before.—*Setzer v. State*, 161 S. W. 190.

§ 372 (Ark.) Evidence that accused had on other occasions taken other females to his place for the purpose of prostitution was admissible on the issue whether he was in the practice of procuring females to enter a disorderly house.—*Boyle v. State*, 161 S. W. 1049.

§ 372 (Mo.) On a trial for sodomy the admission of evidence that accused had the reputation of committing such crime is erroneous, as practically amounting to trying accused for crimes not designated in the information, in violation of Const. art. 2, § 22.—*State v. Wellman*, 161 S. W. 795.

The attempt by the state to prove by rumor or common report that accused had committed the crime against nature on a woman not called as a witness, and had been guilty of adultery, was improper.—*Id.*

§ 376 (Mo.) Evidence of the bad character of accused is admissible solely to impeach him as a witness, and, where he does not testify or otherwise place his reputation in issue, the evidence is inadmissible.—*State v. Wellman*, 161 S. W. 795.

#### (D) Materiality and Competency in General.

§ 385 (Tex.Cr.App.) It is improper practice to permit incompetent evidence to go before the jury, and after it had been discussed to withdraw it on the court's own motion or at the suggestion of the prosecuting officer.—*Hill v. State*, 161 S. W. 118.



**(E) Best and Secondary and Demonstrative Evidence.**

§ 400 (Tex.Cr.App.) Where a marriage license offered by the state was not admissible in a prosecution for bigamy, the state could not prove its contents by oral testimony.—*Harris v. State*, 161 S. W. 125.

In a prosecution for bigamy, *held*, that the mother of the first alleged wife, identifying letters to her from defendant, could not testify as to their contents unless they had been lost or destroyed.—*Id.*

§ 403 (Mo.) A copy made from entries in a family Bible containing the date of the birth of prosecutrix *held* admissible on a trial for her seduction to establish her age; proof having been made of the correctness of the copy and of the worn condition of the Bible.—*State v. Bruton*, 161 S. W. 751.

**(F) Admissions, Declarations, and Hearsay.**

§ 406 (Ark.) In a prosecution for homicide, evidence of a statement made by accused at the coroner's inquest which conflicted with the theory of his defense is admissible, being in the nature of an admission.—*Tiner v. State*, 161 S. W. 195.

In a criminal prosecution, evidence of a party's voluntary declarations showing how the crime was committed is admissible against him, regardless of whether they were favorable or unfavorable to his interest at the time of the admission.—*Id.*

§ 406 (Tex.Cr.App.) Where defendant through her attorney agreed to plead guilty, but afterwards exercised her right not to do so, such agreement was not admissible in evidence.—*Dean v. State*, 161 S. W. 974.

§ 413 (Tex.Cr.App.) Statement of defendant, a short time before the killing, to a third person that he had been told deceased had charged defendant and his sister-in-law with improper conduct is a self-serving declaration.—*Strickland v. State*, 161 S. W. 110.

§ 414 (Tex.Cr.App.) In a prosecution for homicide, evidence of a statement alleged to have been made by defendant to decedent on the day of and prior to the killing was admissible, where one of the two witnesses who heard it recognized defendant's voice, though the other did not.—*Belcher v. State*, 161 S. W. 459.

§ 421 (Tex.Cr.App.) Testimony that defendant was reputed to be in control of a private residence is hearsay.—*Dunn v. State*, 161 S. W. 467.

**(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.**

§ 444 (Tex.Cr.App.) In a prosecution for bigamy, a license to defendant to marry the alleged former wife *held* not admissible unless proven to be the original license issued by the proper officer or unless a certified copy of it was filed with the papers at least three days before trial and notice of its filing given to defendant.—*Harris v. State*, 161 S. W. 125.

**(I) Opinion Evidence.**

§ 448 (Tex.Cr.App.) After testifying the direction, as shown by tracks, deceased's horse was traveling when near a tree, testimony that this would put the left side of the rider towards the tree was not objectionable as an opinion.—*Strickland v. State*, 161 S. W. 110.

§ 456 (Tex.Cr.App.) Nonexperts may testify as to a mental condition if they show an intimate acquaintance and knowledge of the person's habits and conduct.—*Key v. State*, 161 S. W. 130.

§ 459 (Tex.Cr.App.) Witnesses not experts are competent to testify to the finding of blood at or near the place of the killing on the next day

and for a few days thereafter.—*Belcher v. State*, 161 S. W. 459.

**(J) Testimony of Accomplices and Codefendants.**

§ 507 (Tex.Cr.App.) Witness was an accomplice in any burglary from which he obtained whisky, he having after the transaction got from defendant some of the whisky knowing beforehand that the "raid," as he termed it, was to be made, and understanding that the whisky came from it.—*Jobe v. State*, 161 S. W. 986.

§ 508 (Tex.Cr.App.) Under Code Cr. Proc. 1911, art. 791, one who was also under a separate indictment for killing decedent was properly excluded from testifying against accused, who was charged for the same offense.—*Christian v. State*, 161 S. W. 101.

§ 510 (Mo.) A conviction may be had upon the uncorroborated testimony of an accomplice.—*State v. Shaffer*, 161 S. W. 805.

**(K) Confessions.**

§ 517 (Tex.Cr.App.) In a prosecution for patricide, evidence of an oral confession of accused while in custody, containing statements concerning the identity of decedent and the manner of the killing, which were found on post mortem examination of the body to be true, *held* admissible under Code Cr. Proc. 1911, art. 810.—*Belcher v. State*, 161 S. W. 459.

§ 518 (Tex.Cr.App.) An alleged statement by accused, while under arrest before warning, that he shot his wife because she would not go home with him was not admissible for any purpose.—*Hill v. State*, 161 S. W. 118.

**(M) Weight and Sufficiency.**

§ 553 (Ark.) Objections that witnesses for the state were employed by the police department to act as detectives in securing testimony to convict accused, and had resorted to infamous conduct to procure testimony, merely go to their credibility.—*Boyle v. State*, 161 S. W. 1049.

§ 553 (Ark.) It is the duty of the jury to consider the testimony of a witness notwithstanding his impeachment if they believe his testimony to be true.—*Bruder v. State*, 161 S. W. 1067.

§ 564 (Tex.Cr.App.) Venue may be proved by other than positive testimony, and it is sufficient if the jury may reasonably conclude from the evidence that the offense was committed in the county alleged.—*Belcher v. State*, 161 S. W. 459.

**XI. TIME OF TRIAL AND CONTINUANCE.**

§ 594 (Ark.) As Kirby's Dig. § 3137 and section 3157, subsec. 3, provide that one convicted of a felony may be examined by deposition, and that such deposition shall be competent, an accused desiring the testimony of a convict must secure his deposition and is not, despite Acts 1913, p. 961, making convicts competent witnesses, entitled to a continuance to procure his actual attendance.—*Tiner v. State*, 161 S. W. 195.

§ 594 (Ark.) Denial of continuance on the ground of absence of witnesses not shown to reside within the jurisdiction of the court *held* not an abuse of the trial court's discretion.—*Bruder v. State*, 161 S. W. 1067.

§ 596 (Tex.Cr.App.) That the testimony of an absent witness was cumulative does not render a first application for continuance insufficient.—*Poulter v. State*, 161 S. W. 475.

§ 598 (Tex.Cr.App.) It was not error to refuse to allow withdrawal of announcement of ready for trial, after the state had introduced its evidence, on a statement that defendant could show facts tending to impeach a state witness; he showing no diligence.—*Miller v. State*, 161 S. W. 128.

§ 598 (Tex.Cr.App.) A motion for a continuance *held* properly denied, where defendant had not exercised diligence to procure the attendance of the only two witnesses who failed to appear.—Chappell v. State, 161 S. W. 964.

§ 600 (Ark.) Where the court found that accused's motion for a continuance on the ground of the absence of a material witness was sufficient, the continuance cannot be denied merely upon the state's agreeing to admit that the witness if present would testify to the facts alleged in the motion.—Tiner v. State, 161 S. W. 195.

## XII. TRIAL.

### (A) Preliminary Proceedings.

§ 619 (Ark.) Consolidation of separate indictments charging hog theft and the alteration of hog marks with intent to steal was proper on a showing that they related to the same transactions; accused consenting thereto.—Setzer v. State, 161 S. W. 190.

### (B) Course and Conduct of Trial in General.

§ 634 (Tex.Cr.App.) The judge should not absent himself during the trial, and lose control of the case.—Dunn v. State, 161 S. W. 467.

§ 656 (Tex.Cr.App.) A suggestion by the court to the district attorney that he ask a witness certain questions to connect evidence admitted *held* not objectionable as on the weight of the evidence.—Belcher v. State, 161 S. W. 459.

### (C) Reception of Evidence.

§ 676 (Mo.) The general reputation of a witness is a collateral issue, and the trial court has a wide discretion in limiting the number of witnesses who may testify on the issue.—State v. Miles, 161 S. W. 766.

Where accused produced six witnesses that the general reputation of a state's witness for veracity was bad, and the state, in rebuttal, used three witnesses as to his general good reputation, refusal to allow accused to present additional witnesses was not an abuse of discretion.—Id.

§ 678 (Tex.Cr.App.) Where the indictment and evidence would have justified a conviction of assault to murder, maiming, or robbery, all arising out of a single transaction, the state was required to elect the offense for which it would demand a conviction.—Madrid v. State, 161 S. W. 93.

### (E) Arguments and Conduct of Counsel.

§ 706 (Tex.Cr.App.) The court did not err in permitting the county attorney, examining a witness for the state, to hold his signed statement in front of him, and to question him therefrom.—Cooper v. State, 161 S. W. 1094.

§ 711 (Ark.) Where the court and counsel for defendant agreed that each of his counsel should have two hours for argument, *held*, that defendant could not complain that the court refused to allow one of counsel to use the time allotted to but not used by his other counsel.—Bruder v. State, 161 S. W. 1067.

§ 715 (Tex.Cr.App.) Where the defense was that deceased killed herself, it was not reversible error for the prosecuting attorney, in his argument, to hand the pistol to a juror and ask him if it were possible for deceased to have shot herself in the place where she was shot.—Borders v. State, 161 S. W. 483.

§ 718 (Tex.Cr.App.) The county attorney, in argument, should not go outside of and talk about things not in the record.—Dunn v. State, 161 S. W. 467.

§ 720 (Ark.) Argument that the jury could consider the evidence of a witness which showed that accused and the others were in the hog stealing business, and ask who got the hogs if they did not, *held* permissible.—Setzer v. State, 161 S. W. 190.

§ 720 (Mo.) In a trial for murder, where the homicide was clearly proven, the prosecuting

attorney's remark, "Men, it would be a disgrace for us to acquit the defendant under the testimony," *held* proper argument.—State v. Rogers, 161 S. W. 770.

§ 721 (Ark.) In a criminal prosecution, where accused did not take the stand in his own behalf, the prosecutor should not refer to his failure.—Tiner v. State, 161 S. W. 195.

§ 721 (Mo.) Where the testimony of an absent witness at a former trial was read, a statement by the prosecuting attorney that the witness was necessarily absent and that his testimony so read was not contradicted was not objectionable as a reference to the failure of accused to testify.—State v. Gordon, 161 S. W. 721.

§ 722½ (Mo.) Proof that accused on trial for sodomy had been convicted of adultery does not justify the prosecuting attorney in referring in his remarks to the conviction as evidence of guilt of the crime charged.—State v. Wellman, 161 S. W. 795.

§ 724 (Mo.) Where accused had gone from Chicago just prior to the commission of the theft, it was not error for the prosecuting attorney to refer to him in argument as a "foreign thief."—State v. Gordon, 161 S. W. 721.

§ 728 (Tex.Cr.App.) Argument of district attorney *held* not reversible error: no special charge in regard thereto having been requested by defendant.—Strickland v. State, 161 S. W. 110.

§ 728 (Tex.Cr.App.) It was not reversible error for prosecuting attorney, in his argument, to point his finger at accused and call him a "cold-blooded brute" and "an animal," as the record showed the murder to have been very brutal, and there was no requested charge on the point.—Borders v. State, 161 S. W. 483.

§ 730 (Ark.) In a prosecution for hog theft in which accused claimed that he took up the hogs for W., who was dead, there was no prejudicial error in the prosecuting attorney stating in argument that, if W. were here, he would tell a different tale, where on objection the statement was withdrawn and the jury admonished not to consider it.—Setzer v. State, 161 S. W. 190.

### (F) Province of Court and Jury in General.

§ 736 (Tex.Cr.App.) Whether an oral confession or statement by accused while in custody is admissible is a question of law for the court; it being only when the voluntary character of the confession is contested or the making thereof denied that the court is required to submit the issue to the jury.—Belcher v. State, 161 S. W. 459.

§ 741 (Tex.Cr.App.) The weight of the testimony is for the jury.—Christian v. State, 161 S. W. 101.

§ 741 (Tex.Cr.App.) Where the evidence would sustain a conviction, error cannot be predicated on refusal to peremptorily instruct a verdict of not guilty.—Miller v. State, 161 S. W. 128.

§ 742 (Tex.Cr.App.) The credibility of the witnesses is for the jury.—Christian v. State, 161 S. W. 101.

§ 753 (Tenn.) In a prosecution for felony, where a plea of not guilty is interposed, the court can neither direct a verdict of guilty nor can it pass on any question of fact unfavorable to accused.—Shipp v. State, 161 S. W. 1017.

§ 755½ (Mo.App.) In a prosecution for violating the local option law, an instruction that the jury to convict must find that defendant kept the whisky to protect another was not violative of Rev. St. 1909, § 5244, providing that the court shall not comment upon the evidence.—State v. Galliton, 161 S. W. 848.

§§ 763, 764 (Tex.Cr.App.) Instruction as to corroboration by letters *held* erroneous as on the weight of the evidence, assuming that prosecutrix's testimony was true, permitting the jury

to determine whether the letters were corroborative, and permitting their consideration with other evidence, though not connected with accused by any independent testimony.—*James v. State*, 161 S. W. 472.

**(G) Necessity, Requisites, and Sufficiency of Instructions.**

§ 770 (Tex.Cr.App.) Instructions must submit every phase of the case suggested by the evidence and every legitimate inference therefrom.—*Christian v. State*, 161 S. W. 101.

In submitting the issues to the jury, the court is not limited by the evidence of accused for himself but should submit every question suggested by the evidence, whether offered by the state or accused, or both.—*Id.*

The court should instruct on the law applicable to every theory of guilt or defense within the scope of the indictment, which the evidence tends to establish.—*Id.*

§ 772 (Tex.Cr.App.) The court should present accused's defenses in an affirmative way.—*Key v. State*, 161 S. W. 130.

§ 775 (Tex.Cr.App.) Certain instructions given *held* to sufficiently submit the issue of alibi and defendants' identity as the persons who committed the offense.—*Madrid v. State*, 161 S. W. 93.

§ 776 (Tex.Cr.App.) Testimony *held* not to put D.'s reputation in issue, so that there was no occasion for an instruction that, as accused put in issue D.'s reputation, the state had the right also to offer evidence on such issue in rebuttal.—*Strickland v. State*, 161 S. W. 110.

§ 778 (Ark.) It was error to instruct, in a prosecution for assault with intent to kill, defended on the ground of self-defense, that every sane man is presumed to intend the natural and probable consequences of his acts.—*Coulter v. State*, 161 S. W. 186.

§ 778 (Tex.Cr.App.) The court *held* not called upon under the evidence to give defendant's charge requiring the state to show that his statement that the killing was accidental was false.—*Cooper v. State*, 161 S. W. 1094.

§ 780 (Mo.) An instruction is correct in a proper case that an accomplice's testimony may be corroborated by the circumstances given in evidence.—*State v. Shaffer*, 161 S. W. 805.

§ 781 (Tex.Cr.App.) Where the state did not rely on an entire confession by accused to prove guilt, and exculpatory statements therein were proved by accused, the court did not err in omitting to charge that such statements must be taken as true, unless the state proved them false.—*Belcher v. State*, 161 S. W. 459.

§ 784 (Tex.Cr.App.) Defendant, the only eyewitness, having testified he shot deceased in self-defense, and others having testified that he admitted to them he shot deceased, the case did not depend solely on circumstantial evidence.—*Strickland v. State*, 161 S. W. 110.

§ 784 (Tex.Cr.App.) In a prosecution for bigamy, where there was no positive identification of defendant as the one who had married the first alleged wife, *held*, that the refusal of an instruction on circumstantial evidence was error.—*Harris v. State*, 161 S. W. 125.

§ 787 (Ark.) Under Kirby's Dig. § 3088, refusal of instruction that it was accused's privilege to decline to testify, that this was not evidence or presumption of guilt, and that it must not be considered, *held* error.—*Threet v. State*, 161 S. W. 139.

§ 789 (Mo.) Instructions should require that the reasonable doubt justifying an acquittal shall "arise from a consideration of all the evidence in the case."—*State v. Christian*, 161 S. W. 736.

§ 789 (Tex.Cr.App.) Where the court, after defining the different degrees of homicide, required the jury to find the facts, constituting each degree, to exist beyond a reasonable doubt, it was

not error to fail to charge the negative of the facts constituting each degree.—*Borders v. State*, 161 S. W. 483.

§ 792 (Tex.Cr.App.) Accused cannot claim, in a prosecution for homicide committed as alleged while accused and others were carrying away stolen goods, that an instruction on principles abstractly correct was harmful on the ground that his intention may have been only to burglarize without intent to kill, where the instructions require a finding that accused himself fired the fatal shot.—*Christian v. State*, 161 S. W. 101.

§ 800 (Tex.Cr.App.) It was not error to define the word "willful" and require that the offense must have been willfully committed, though the statute creating the offense does not in terms require that robbery be willfully done.—*Madrid v. State*, 161 S. W. 93.

§ 800 (Tex.Cr.App.) Under Acts 32d Leg. c. 23, making procurement an offense, Code Cr. Proc. 1911, art. 53, and Pen. Code 1911, art. 10, requiring words to be taken in their usual meaning except when particularly defined by law, *held*, that the refusal to define the word "procure" was not error.—*Currington v. State*, 161 S. W. 478.

§ 805 (Tex.Cr.App.) The charge in a homicide case cannot and should not all be given in a single paragraph.—*Christian v. State*, 161 S. W. 101.

§ 811 (Mo.) In a trial for murder, instruction as to the received statement of the defendant soon after the crime that he would go back and kill the whole d—d outfit *held* an erroneous singling out of part of the evidence.—*State v. Rogers*, 161 S. W. 770.

§ 811 (Mo.) A requested charge, in a prosecution for hog theft, that, unless the hog's entrails, claimed to have been found in accused's icehouse, were placed there with accused's knowledge and consent, such fact was not evidence of guilt was properly refused as commenting upon a particular phase of the evidence.—*State v. Shaffer*, 161 S. W. 806.

§ 814 (Ark.) Whether it is proper to submit to the jury the question of accused's guilt of any particular offense included in the indictment depends on whether there is evidence which would justify a conviction for that offense.—*Carlton v. State*, 161 S. W. 145.

§ 814 (Mo.) On trial for seduction, an instruction on alibi *held* properly given in view of the evidence.—*State v. Bruton*, 161 S. W. 751.

§ 814 (Mo.) The rule that the instructions must not be broader than the information, is limited to cases where it appears that the added charge in the instructions either misled or was calculated to mislead the jury, or where it was attempted by the added charge to cure a defective information.—*State v. Bunyard*, 161 S. W. 756.

§ 814 (Tex.Cr.App.) The giving of defendant's requested charge that he had the right to seek deceased and demand an explanation of his remarks was not called for; his testimony showing he did not seek, but by accident met, deceased.—*Strickland v. State*, 161 S. W. 110.

§ 814 (Tex.Cr.App.) Under an information for keeping a disorderly house in a house owned by another and leased by the defendant, an instruction authorizing a conviction if defendant himself was the owner was reversible.—*Hall v. State*, 161 S. W. 457.

§ 814 (Tex.Cr.App.) Instruction that if accused unlawfully sold liquor as D.'s agent, he was guilty *held* erroneous, where there was no evidence that he acted as agent for D.—*Cowley v. State*, 161 S. W. 471.

§ 820 (Tex.Cr.App.) The instructions must be given a reasonable construction.—*Christian v. State*, 161 S. W. 101.

§ 822 (Tex.Cr.App.) A charge should be construed as a whole and not by separate paragraphs.—*Christian v. State*, 161 S. W. 101.

§ 823 (Ark.) In a trial for homicide, where it was defendant's theory that he had been assaulted by deceased with a murderous intent when he entered his saloon, and hence was under no obligation to retreat, an instruction as to the duty to retreat predicated upon the evidence for the state was not erroneous, where defendant's theory was fully covered by other charges.—*Bruder v. State*, 161 S. W. 1067.

#### (H) Requests for Instructions.

§ 829 (Ark.) Where an instruction given fully covered that requested by defendant, the refusal of defendant's request was not error.—*Carlton v. State*, 161 S. W. 145.

§ 829 (Ark.) Requested instructions presenting the question of reasonable doubt and the presumption of innocence were properly refused, where the court had fully instructed thereon.—*Coulter v. State*, 161 S. W. 180.

A requested instruction held sufficiently covered by charges given.—*Id.*

§ 829 (Mo.) It is not error to refuse requested instructions covered by other instructions asked by defendant or given on the court's own motion.—*State v. Bruton*, 161 S. W. 751.

§ 829 (Mo.) It is not error to refuse a requested charge fully covered by the instructions given.—*State v. Miles*, 161 S. W. 766.

§ 829 (Mo.) Even if otherwise proper, a requested instruction attempting to definitely define reasonable doubt was properly refused where the court had already given instructions, at accused's request, sufficiently defining the nature of such reasonable doubt as would authorize an acquittal.—*State v. Shaffer*, 161 S. W. 805.

§ 829 (Tex.Cr.App.) In a prosecution under Acts 32d Leg. c. 23, defendant's requested instruction, that if he did not attempt to procure a certain woman as an inmate of a house of prostitution he should be acquitted, was proper, where that part of the case has been covered by the instructions given.—*Currington v. State*, 161 S. W. 478.

§ 829 (Tex.Cr.App.) It was not error to refuse instructions covered by those given.—*Tafolla v. State*, 161 S. W. 1091.

§ 829 (Tex.Cr.App.) Where the court correctly submitted the issue of excusable homicide by accident or misfortune, there was no error in refusing the defendant's special charge thereon.—*Cooper v. State*, 161 S. W. 1094.

§ 830 (Ark.) Where accused requested the court to instruct on involuntary manslaughter but did not tender a correct instruction, he cannot complain that the court did not grant his request, and the reading of the statute defining voluntary and involuntary manslaughter was sufficient.—*Carlton v. State*, 161 S. W. 145.

#### (J) Custody, Conduct, and Deliberations of Jury.

§ 857 (Tex.Cr.App.) Where a verdict of guilty of murder in the second degree is procured by the argument of certain jurors that there is a lunacy commission at the penitentiary which is better able to pass upon defendant's insanity than the doctors who testified thereon, and that if defendant is insane he will not be placed in the penitentiary, the case will be reversed.—*White v. State*, 161 S. W. 977.

§ 862 (Tex.Cr.App.) Under the statute prohibiting reception of evidence after the jury has retired, one of the jurors should not tell the others what he knows about defendant.—*Dunn v. State*, 161 S. W. 467.

§ 866 (Tex.Cr.App.) Adding up punishment which jurors desired to inflict, and adopting the result obtained as the verdict, held not to render the verdict one arrived at by lot, where the verdict was not agreed upon until after much fur-

ther discussion and several ballots.—*Dawson v. State*, 161 S. W. 469.

#### (K) Verdict.

§ 885 (Tex.Cr.App.) That the court at accused's request submitted the question of suspending the sentence, and that the jury made no recommendation on that issue, did not present error.—*Dawson v. State*, 161 S. W. 469.

### XIII. MOTIONS FOR NEW TRIAL, AND IN ARREST.

§ 938 (Tex.Cr.App.) Newly discovered evidence to justify a new trial must be such as could not by reasonable diligence have been previously discovered and be probably true and such as would probably produce a different result.—*Madrid v. State*, 161 S. W. 93.

§ 942 (Tex.Cr.App.) A motion for new trial for newly discovered evidence was properly denied, where it was impeaching.—*Chappell v. State*, 161 S. W. 964.

§ 949 (Tex.Cr.App.) An amended motion for a new trial cannot be filed without leave of court after the denial of the original motion; defendant's remedy being by motion to set aside the order of denial and to grant the amended motion for a new trial.—*Bracher v. State*, 161 S. W. 124.

§ 958 (Tex.Cr.App.) An application for a new trial for newly discovered evidence was properly denied where there was no showing of diligence.—*Madrid v. State*, 161 S. W. 93.

§ 958 (Tex.Cr.App.) An application for a new trial for newly discovered evidence must be supported by affidavit.—*Bracher v. State*, 161 S. W. 124.

### XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 992 (Mo.) Where the record shows that a defendant charged with larceny and burglary, though he pleaded not guilty, was convicted of burglary alone, but was sentenced for larceny because "he had pleaded not guilty," there is no valid judgment, and the case will be remanded.—*State v. Duff*, 161 S. W. 683.

### XV. APPEAL AND ERROR AND CERTIORARI.

#### (A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1017 (Tex.Cr.App.) Where accused on appeal to the county court from a conviction in the corporation court is deprived of the right to a trial de novo, he may enforce such right by a further appeal to the Court of Criminal Appeals.—*Matula v. State*, 161 S. W. 965.

§ 1020 (Tex.Cr.App.) Where an appeal from an inferior court to the county court is there dismissed, appellant may prosecute a further appeal to the Court of Criminal Appeals regardless of the statute prohibiting an appeal, where the fine assessed in the county court on appeal from an inferior court is less than \$100.—*Matula v. State*, 161 S. W. 965.

#### (B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1036 (Mo.) The erroneous admission of evidence of deputy sheriff that he had arrested accused and his wife on a similar charge of burglary held not reversible in absence of objection.—*State v. Duff*, 161 S. W. 683.

§ 1036 (Tex.Cr.App.) Objection to the admission of evidence comes too late after verdict and appeal.—*Floyd v. State*, 161 S. W. 974.

§ 1037 (Mo.) The court on appeal may disregard improper remarks of the prosecuting attorney in his closing argument where the remarks were not objected to.—*State v. Wellman*, 161 S. W. 795.

§ 1038 (Ark.) An instruction not objected to in the trial court is not reviewable on appeal.—*Coulter v. State*, 161 S. W. 186.

§ 1038 (Tex.Cr.App.) In the absence of any request for a special charge, error *held* not to be predicated on a statement of the district attorney to the jury.—*Miller v. State*, 161 S. W. 128.

§ 1043 (Ark.) Instruction as to impeachment and as to jury's right to disregard the testimony of any witness who has sworn falsely to any material fact, even though erroneous in part, *held* not reversible in the absence of specific objection.—*Bruder v. State*, 161 S. W. 1067.

§ 1049 (Mo.) An objection that the elisor violated the order of court in summoning the venire from the central part of the county instead of the southern part will not be considered on appeal, where no exception was saved to the order overruling the motion to quash the panel on that account.—*State v. Shaffer*, 161 S. W. 805.

§ 1052 (Mo.) Where no exception was taken to the overruling of a motion for a continuance, the point is not reviewable, though the motion, with a recital that it was overruled, was set forth in the bill of exceptions.—*State v. Miles*, 161 S. W. 786.

§ 1053 (Tex.Cr.App.) In the absence of an exception, an objection that the jury was composed wholly of "talesmen" is not ground for reversal.—*Bracher v. State*, 161 S. W. 124.

§ 1054 (Mo.) The admission of improper testimony is not reviewable where there was no objection to the testimony until after its admission.—*State v. Wellman*, 161 S. W. 795.

§ 1056 (Tex.Cr.App.) Where no exception was reserved to the failure of the court to give defendant's requested charges, the court's action could not be reviewed.—*Dean v. State*, 161 S. W. 974.

§ 1059 (Mo.) The admission of improper testimony is not reviewable where accused merely objected to the testimony without specifying any reason for its exclusion.—*State v. Wellman*, 161 S. W. 795.

§ 1064 (Mo.) Alleged error in not instructing on all of the law of the case will not be considered, where appellant's motion for new trial does not state any point upon which the court failed to instruct.—*State v. Sydnor*, 161 S. W. 692.

§ 1064 (Mo.) The point that the court erred in failing to charge that the prosecutrix was an accomplice and must be corroborated must be ruled against accused where the point is not specifically assigned in the motion for new trial.—*State v. Wellman*, 161 S. W. 795.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1081 (Tex.Cr.App.) Unless the record shows that notice of appeal was given at the term at which accused was tried, the Court of Criminal Appeals is without jurisdiction.—*Young v. State*, 161 S. W. 973.

(D) Record and Proceedings Not in Record.

§ 1086 (Mo.) Where the record entry in a criminal case states with reference to impaneling and swearing of the jury merely that, "the jury being by the clerk sworn, and after selection the following \* \* \* are chosen as jurors to try this cause," the verdict and sentence will be set aside; such record entry not showing that the trial jury was impaneled or sworn to try the cause.—*State v. Duff*, 161 S. W. 683.

§ 1088 (Mo.) A motion to quash an information is no part of the record proper.—*State v. Humfeld*, 161 S. W. 735.

§ 1090 (Tex.Cr.App.) Rulings on admissibility of evidence, complained of in motion for new trial, cannot be reviewed on appeal, in the absence of bills of exception.—*Strickland v. State*, 161 S. W. 110.

Alleged remarks of the district attorney, com-

plained of in the motion for new trial, cannot be reviewed; the fact of his making them not being verified by bills of exception.—*Id.*

§ 1090 (Tex.Cr.App.) Questions as to introduction of evidence, attempted to be raised by motion for new trial, cannot be reviewed in the absence of bill of exceptions.—*Kuykendall v. State*, 161 S. W. 130.

§ 1090 (Tex.Cr.App.) In the absence of bills of exception, grounds of motion for new trial, remarks of prosecuting officers, application for continuance, and objections to evidence cannot be considered.—*Jobe v. State*, 161 S. W. 966.

§ 1090 (Tex.Cr.App.) In the absence of bills of exceptions, grounds in the motion for new trial, complaining of the rejection of evidence, of the failure of the court to charge, and based on newly discovered evidence, cannot be reviewed.—*Leach v. State*, 161 S. W. 977.

§ 1091 (Mo.) Error in overruling a motion to quash must be preserved in the bill of exceptions.—*State v. Humfeld*, 161 S. W. 735.

§ 1092 (Mo.) Under Rev. St. 1909, § 5245, providing for the allowance and filing of exceptions in criminal cases as in civil cases, and Laws 1911, p. 139, repealing Rev. St. 1909, § 2029, and prescribing that procedure in civil cases, *held*, that the provision as to criminal cases was affected by the amendment, so that a bill of exceptions filed within the amendment was timely.—*State v. Rogers*, 161 S. W. 770.

§ 1092 (Tex.Cr.App.) Where the term at which defendant was convicted of a misdemeanor adjourned May 28th, a bill of exceptions, not filed until July 30th, could not be considered either in passing on alleged errors or as the basis for supporting the judgment.—*Hall v. State*, 161 S. W. 457.

§ 1092 (Tex.Cr.App.) Where a term of the county court adjourned on May 31st, bills of exception not filed within 20 days after adjournment of court could not be considered.—*Hart v. State*, 161 S. W. 458.

§ 1092 (Tex.Cr.App.) That the trial judge, after receiving the bill of exceptions within the time allowed for approving same, stated that he could not give his approval until he had received the statement of facts did not excuse the failure of accused to secure bills of exception in time, where he made no application for extension of the time.—*Chavarrio v. State*, 161 S. W. 972.

§ 1094 (Mo.) Though motions for new trial and in arrest of judgment were filed, only the record proper will be reviewed, if appellant did not file a bill of exceptions.—*State v. Printz*, 161 S. W. 674.

§ 1095 (Tex.Cr.App.) Bills of exception, not filed until 60 days after the adjourning of court in a misdemeanor prosecution, will be stricken on motion, in view of the stenographer's act of 1911 (Acts 32d Leg. c. 119).—*Phillips v. State*, 161 S. W. 459.

§ 1095 (Tex.Cr.App.) Bills of exceptions not filed in the trial court until the sixtieth day after adjournment for the term, and after appellant had, within 30 days allowed for filing a statement of facts and bills of exception, attempted to extend the time for another 30 days, were filed too late, and will be stricken on motion.—*Boyd v. State*, 161 S. W. 459.

§ 1095 (Tex.Cr.App.) A bill of exceptions not filed within 90 days after the adjournment of the term at which accused was convicted will be stricken.—*Dosh v. State*, 161 S. W. 979.

§ 1097 (Tex.Cr.App.) Insufficiency of evidence to support a conviction, alleged as a basis for new trial, cannot be reviewed in the absence of a statement of facts.—*Hampton v. State*, 161 S. W. 966.

§ 1097 (Tex.Cr.App.) In the absence of any statement of facts, the court cannot say whether the instructions requested should have been

given, or review those grounds in the motion complaining of the charge.—*Floyd v. State*, 161 S. W. 974.

§ 1097 (Tex.Cr.App.) In the absence of a statement of facts grounds in the motion for new trial, complaining of the rejection of evidence, of the failure of the court to charge, and based on newly discovered evidence, cannot be reviewed.—*Leach v. State*, 161 S. W. 977.

§ 1099 (Tex.Cr.App.) Where the prosecuting officers failed to agree to a statement of facts in time, or return the same, defendant's counsel should present a statement to the judge and request that he prepare and file a statement, if the one presented was not correct.—*Iovanovich v. State*, 161 S. W. 98.

§ 1099 (Tex.Cr.App.) Where transcripts were required to be filed within 90 days after sentence, under Acts 32d Leg. c. 119, § 7, and appellant was sentenced February 24th, and the statement of facts was not presented until August 30th, it was too late.—*Bracher v. State*, 161 S. W. 124.

Where accused employed his own attorney to defend him, the negligence of such attorney in failing to present the statement of facts to the judge for approval in time will be imputed to accused.—*Id.*

§ 1099 (Tex.Cr.App.) Where the term at which defendant was convicted of a misdemeanor adjourned May 28th, a statement of facts not filed until July 30th, could not be considered either in passing on alleged errors or as the basis for supporting the judgment.—*Hall v. State*, 161 S. W. 457.

§ 1099 (Tex.Cr.App.) Where a term of the county court adjourned on May 31st, a statement of facts not filed within 20 days after adjournment of court could not be considered.—*Hart v. State*, 161 S. W. 458.

§ 1099 (Tex.Cr.App.) Where accused was convicted at a term of the county court which adjourned August 16th, and his statement of facts was not filed until September 15th, it was not filed within the required 20 days after adjournment.—*Hampton v. State*, 161 S. W. 966.

§ 1101 (Tex.Cr.App.) That the stenographer refused to obey the court's order, made after accused had filed a pauper's affidavit, that he make out a statement of facts held not to excuse want of a statement of facts.—*Chavario v. State*, 161 S. W. 972.

§ 1102 (Tex.Cr.App.) A statement of facts not filed in the county court until more than 20 days after adjournment will be stricken on motion.—*Collins v. State*, 161 S. W. 115.

§ 1102 (Tex.Cr.App.) A purported statement of facts, not filed in the trial court until six months after adjournment, will be stricken.—*Arrisman v. State*, 161 S. W. 118.

§ 1102 (Tex.Cr.App.) A statement of facts, not filed until 60 days after the adjourning of court in a misdemeanor prosecution, will be stricken on motion, in view of the Stenographer's Act of 1911 (Acts 32d Leg. c. 119).—*Phillips v. State*, 161 S. W. 459.

§ 1102 (Tex.Cr.App.) A statement of facts not filed within 90 days after the adjournment of the term at which accused was convicted will be stricken.—*Dosh v. State*, 161 S. W. 979.

§ 1106 (Mo.) An appeal not perfected by the filing in the Supreme Court of a transcript within the time prescribed by Rev. St. 1909, § 5313, must on motion be dismissed, unless accused shows good cause for the delay.—*State v. Leibtig*, 161 S. W. 674.

§ 1106 (Mo.) An appeal in a criminal prosecution, not perfected by the filing a transcript within the time prescribed by Rev. St. 1909, § 5313, must on motion be dismissed, in the absence of a showing of good cause for the delay.—*State v. Wade*, 161 S. W. 680.

§ 1124 (Tex.Cr.App.) An order denying a motion for a new trial for newly discovered evi-

dence cannot be reviewed where evidence submitted on the motion is not brought up by bill of exceptions or otherwise.—*Madrid v. State*, 161 S. W. 93.

#### (E) Assignment of Errors and Briefs.

§ 1130 (Mo.App.) Although no briefs are filed and there are no assignments of error, the court will examine the record and pass judgment thereon.—*State v. Glogover*, 161 S. W. 274.

#### (G) Review.

§ 1134 (Tex.Cr.App.) The overruling of a motion for new trial, being unnecessary, presents no question for review further than would be presented by the motion itself.—*Miller v. State*, 161 S. W. 128.

§ 1144 (Tex.Cr.App.) The jury must be deemed to have placed a reasonable construction upon the charge.—*Christian v. State*, 161 S. W. 101.

§ 1144 (Tex.Cr.App.) Where the court cannot consider the statement of facts, it must presume that the trial court submitted the law as applicable to the evidence.—*Hall v. State*, 161 S. W. 457.

§ 1144 (Tex.Cr.App.) Where the question of venue was not made an issue in the trial, nor raised until motion for new trial, and the court modified appellant's bill of exceptions on such subject by stating certain evidence tending to prove venue, the Court of Criminal Appeals was required to presume that the venue was sufficiently proved, under Acts 25th Leg. c. 12, amending Code Cr. Proc. 1895, art. 904.—*Belcher v. State*, 161 S. W. 459.

§ 1144 (Tex.Cr.App.) The appellate court, in the absence of the evidence, held bound to presume that the evidence heard did not sustain the motion for new trial overruled below.—*Perales v. State*, 161 S. W. 482.

§ 1144 (Tex.Cr.App.) In the absence of a statement of facts, the court must presume that the court charged the law applicable to the evidence, and all the law necessary to be given.—*Floyd v. State*, 161 S. W. 974.

§ 1150 (Mo.) Granting a change of venue will not be disturbed, unless an abuse of discretion appears.—*State v. Shaffer*, 161 S. W. 805.

§ 1151 (Tex.Cr.App.) Refusal of a continuance on affidavit of the jailer denying defendant's alleged illness was discretionary and should not be disturbed in the absence of a showing of abuse.—*Perales v. State*, 161 S. W. 482.

§ 1153 (Tex.Cr.App.) The action of the court in permitting relatives of accused to testify after they had been in court and heard the testimony of a witness for the state after the rule had been invoked was not such an abuse of his discretion as to require a reversal.—*Cooper v. State*, 161 S. W. 1094.

§ 1159 (Tex.Cr.App.) The credibility of the witnesses and the weight of their testimony is for the jury and not for the Court of Criminal Appeals to determine.—*Christian v. State*, 161 S. W. 101.

§ 1159 (Tex.Cr.App.) A conviction supported by evidence will not be disturbed, though other evidence introduced would have authorized an acquittal.—*Chappell v. State*, 161 S. W. 964.

§ 1163 (Ark.) Accused, in the absence of a showing of prejudice, cannot complain of the separation of the jury prior to the time the court ordered them to be kept together. Kirby's Dig. § 2390.—*Carlton v. State*, 161 S. W. 145.

§ 1163 (Mo.) That injury resulted to accused from an error in the instructions must be presumed, unless the record shows the contrary, in which case the conviction will not be disturbed.—*State v. Bunyard*, 161 S. W. 756.

§ 1165 (Mo.App.) Accused could not complain of error in an instruction to her advantage.—*State v. Galliton*, 161 S. W. 848.

§ 1166 (Ark.) Under Kirby's Dig. § 2220, fact that accused was given no opportunity to chal-

lenge grand jurors *held* not ground for reversal where, on a motion to quash, he made no attempt to establish a claim that they were interested in his prosecution.—*Threet v. State*, 161 S. W. 139.

Setting case for trial in accused's absence *held* not prejudicial where the trial was had without any request for additional time to prepare for trial.—*Id.*

§ 1166½ (Ark.) Remarks of trial judge *held* not prejudicial in view of other statements by the court.—*Coulter v. State*, 161 S. W. 186.

§ 1167 (Tex. Cr. App.) Where an indictment charged assault to murder, maiming, and robbery, all committed in the same transaction, defendants were not prejudiced by the fact that the court submitted only the charge of robbery.—*Madrid v. State*, 161 S. W. 93.

§ 1169 (Mo.) The error, if any, in admitting evidence, which is merely cumulative of a necessary but uncontradicted fact established by competent proof, is harmless.—*State v. Bruton*, 161 S. W. 751.

§ 1170½ (Tex. Cr. App.) There was no reversible error, in the asking of questions by the prosecuting attorney for impeachment purposes, as to whether a certain witness was not forgetful and as to whether she had not told stories, where such questions were not answered.—*Christian v. State*, 161 S. W. 101.

§ 1171 (Mo.) The closing argument of the prosecuting attorney, to the effect that accused had lived in adultery with his wife before her marriage, and lived with a harlot at the time of the commission of the crime charged, *held* prejudicial when not justified by the evidence.—*State v. Wellman*, 161 S. W. 795.

The closing argument of the prosecuting attorney, wherein he denounced a witness for accused as a prostitute, was prejudicial where there was no evidence justifying the charge.—*Id.*

§ 1171 (Tex. Cr. App.) In a prosecution for bigamy, the district attorney's statement to the jury that if he had been allowed to introduce defendant's letters to his alleged first wife he could have shown his guilt *held* prejudicial.—*Harris v. State*, 161 S. W. 125.

§ 1172 (Ark.) Error in instructing, in a prosecution for assault with intent to kill, that every sane man is presumed to intend the natural and probable consequences of his acts was not prejudicial to accused, where he admitted that he in fact shot prosecuting witness with intent to kill for the purpose of protecting his own life.—*Coulter v. State*, 161 S. W. 186.

§ 1172 (Mo.) Error, in an instruction authorizing a conviction if accused assaulted prosecutor with a knife with intent to kill, maim, or disfigure him, while the information only charged an assault with intent to maim, *held* not prejudicial, where the jury found accused guilty as charged in the information.—*State v. Bunyard*, 161 S. W. 756.

Though the facts, in prosecution for mayhem, do not justify an instruction on self-defense, and the instruction given is improperly framed but accused is not injured thereby, he may not complain.—*Id.*

§ 1172 (Mo.) Instructions that, while both accused and his wife were competent witnesses for the defense, the jury might consider, as affecting their credibility, their interest in the result of the trial were not reversible error, though it would be better to omit such instructions.—*State v. Shaffer*, 161 S. W. 805.

§ 1172 (Tex. Cr. App.) Accused was not prejudiced by an instruction that the robbery must have been willfully committed, since such requirement only imposed an additional burden on the state.—*Madrid v. State*, 161 S. W. 93.

§ 1172 (Tex. Cr. App.) In a prosecution for robbery, the court's failure to submit the issues of simple and aggravated assault was not prejudi-

cial to defendant, where the court instructed the jury to acquit, if defendant did not take the ring, which he was charged to have taken, from off the person of another.—*Clemmons v. State*, 161 S. W. 973.

§ 1172 (Tex. Cr. App.) Under an information charging that defendant was the lessee of the premises and kept a disorderly house, where the evidence fully supported such allegation, error, in defining the offense by copying the entire statute as to such offenses was not ground for reversal.—*Dean v. State*, 161 S. W. 974.

§ 1178 (Tenn.) The facts that counsel, both for the state and for accused, took the position that he was guilty of first degree murder or entitled to an acquittal on the ground of self-defense would not operate as a waiver of accused's right to have the question of second degree murder submitted.—*Jones v. State*, 161 S. W. 1016.

#### (B) Determination and Disposition of Cause.

§ 1186 (Ark.) On reversal of conviction for rape, the state can elect to sentence accused for carnal abuse, instead of having a new trial.—*Threet v. State*, 161 S. W. 139.

§ 1186 (Tex. Cr. App.) Under Acts 25th Leg. c. 21, amending Code Cr. Proc. 1896, art. 723, a judgment of conviction should not ordinarily be reversed for unnecessary instructions in favor of accused.—*Christian v. State*, 161 S. W. 101.

### XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1206 (Tex. Cr. App.) Indeterminate sentence law (Acts 33d Leg. c. 132) *held* invalid for indefiniteness, within Pen. Code 1911, art. 6.—*Ex parte Marshall*, 161 S. W. 112.

§ 1206 (Tex. Cr. App.) Where accused was charged with having committed a murder in 1901, and was not placed on trial until July, 1913, he was entitled to have his punishment assessed by the jury under Code Cr. Proc. 1911, art. 750; the indeterminate sentence law, passed at the regular session of the 33d Legislature (Acts 33d Leg. c. 132) having been declared unconstitutional.—*Johnson v. State*, 161 S. W. 1098.

### CROPS.

See Chattel Mortgages, §§ 48, 138.

### CROSS-EXAMINATION.

See Witnesses, §§ 257-286, 336, 337, 349, 358.

### CROSSINGS.

See Railroads, §§ 304-351, 415.

### CUSTOMS AND USAGES.

§ 8 (Tex. Civ. App.) Custom among lumbermen, when lumber delivered was not up to grade, to make out a claim and forward it to the shipper and pending settlement hold the lumber subject to the shipper's order, *held* not inadmissible in evidence as in contravention of law.—*Continental Lumber & Tie Co. v. Miller*, 161 S. W. 927.

### DAMAGES.

See Agriculture, § 8; Appeal and Error, §§ 1170, 1171, 1175; Death, § 95; Fraud, § 59; Libel and Slander, § 33; Malicious Prosecution, §§ 55, 67, 71; Master and Servant, § 41; Nuisance, § 72; Sales, § 388; Telegraphs and Telephones, §§ 71, 73; Torts, § 10; Trial, §§ 191, 228, 251, 256; Vendor and Purchaser, § 343.



### III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

#### (B) Aggravation, Mitigation, and Reduction of Loss.

§ 62 (Mo.App.) A party who is damaged by the wrongful act of another should take all reasonable precautions to protect his property and minimize his damages.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

§ 62 (Tex.Civ.App.) Amount which contractor could have made in other employment by the use of his wagons and teams held to be deducted in ascertaining his damages from the refusal of the other party to permit him to perform contract for hauling and distributing railroad ties.—*Waterman Lumber & Supply Co. v. Holmes*, 161 S. W. 70.

### VI. MEASURE OF DAMAGES.

#### (B) Injuries to Property.

§ 105 (Tex.Civ.App.) In an action for the firing of plaintiff's household goods, plaintiff is competent to testify as to the value of their use, where the goods had no market value at the place of loss.—*St. Louis Southwestern Ry. Co. of Texas v. Benjamin*, 161 S. W. 379.

§ 106 (Mo.App.) The damages recoverable for maintaining a temporary obstruction in a navigable stream which prevented the rafting of logs to plaintiff's sawmill held the loss caused by the enforced idleness of the mill or the cost of removal in case it amounted to less than the loss from idleness.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

§ 111 (Ky.) Measure of damages for injuries to a house was a sum sufficient to restore the property to the condition in which it was prior to the injury, and such further sum as would compensate plaintiff for diminution in the value of the use during the continuance of the injury.—*Lexington & E. Ry. Co. v. Baker*, 161 S. W. 228.

#### (C) Breach of Contract.

§ 124 (Tex. Civ. App.) Contractor prevented from performing contract held entitled only to the net profits or difference between the contract price and expenses necessarily incident to performance.—*Waterman Lumber & Supply Co. v. Holmes*, 161 S. W. 70.

### VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 130 (Ky.) Where a boy under 16 had his ankle and foot mashed, was confined to his bed for a month and a half, an award of \$2,000 was not excessive, where two years after the accident the foot and ankle were still stiff.—*Stearns Coal & Lumber Co. v. Tuggle*, 161 S. W. 1112.

§ 132 (Ky.) In an action for injuries, a verdict allowing plaintiff \$3,500 held not excessive.—*Board of Council of City of Frankfort v. Kirby*, 161 S. W. 1115.

§ 132 (Ky.) An allowance of \$12,500 damages in favor of a carpenter who received such severe injuries that he was unable to do anything and was a physical wreck and would remain so until death is not excessive where, at the time of the injury, he was a strong, vigorous young man of 28 years.—*Louisville & N. R. Co. v. Moore*, 161 S. W. 1129.

§ 132 (Mo.) Verdict of \$17,500 for personal injuries not totally disabling plaintiff held excessive and to require a new trial unless plaintiff would remit all in excess of \$10,000.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

§ 132 (Tex.Civ.App.) Verdict of \$8,500 to switchman permanently injured in hip, ankle, elbow, and back held not excessive.—*Missouri, K. & T. Ry. Co. of Texas v. Leabo*, 161 S. W. 382.

§ 132 (Tex.Civ.App.) A verdict of \$10,500 to a brakeman, earning \$100 a month, for loss of his foot, the attendant pain and mental anguish,

the diminution of his earning capacity, and his loss of time and medical expenses held not excessive.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 132 (Tex.Civ.App.) An award of \$3,500 damages held not excessive.—*Texas Midland R. R. v. Wiggins*, 161 S. W. 445.

### VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

#### (A) Pleading.

§ 141 (Mo.App.) The petition need not allege the measure of damages, for that is a matter to be regulated by the court in the instructions.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

§ 158 (Mo.) Where petition alleged that a kidney was crushed, evidence as to discovery of blood cells in urine held not outside the issues.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

#### (B) Evidence.

§ 166 (Tex.Civ.App.) Where plaintiff's bruises were slight and he was apparently well, evidence as to a very slight bruise causing cancerous wound, and that a person died from a pin scratch, was not admissible.—*St. Louis Southwestern Ry. Co. v. Moore*, 161 S. W. 378.

§ 168 (Ky.) In a personal injury action by a servant, testimony that while unable to work he had to do what little he could to keep from sending his children to the orphan's home is incompetent.—*Louisville & N. R. Co. v. Moore*, 161 S. W. 1129.

§ 185 (Mo.) Evidence held to show sufficiently that the condition of plaintiff's kidney was caused by the injuries received in a collision with a street car.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

#### (C) Proceedings for Assessment.

§ 208 (Tex.Civ.App.) Whether plaintiff was rendered unable to sleep on his left side by reason of the injury so as to be entitled to damages on that ground held a jury question.—*Trinity & B. V. R. Co. v. Blackshear*, 161 S. W. 395.

§ 208 (Tex.Civ.App.) Evidence held to authorize the submission to the jury of plaintiff's loss of future earning capacity.—*Texas Midland R. R. v. Wiggins*, 161 S. W. 445.

A failure to prove the life expectancy of plaintiff and to absolutely establish his age held no ground for refusal to submit the question of his loss of future earning capacity.—*Id.*

§ 216 (Ky.) An instruction on the measure of damages for personal injuries held erroneous for the use of words "for injuries to his person" and the words "permanent injury to him lessening his power to earn money," in place of the expression "diminution of his power to earn money."—*Nashville, C. & St. L. R. Co. v. Banks*, 161 S. W. 554.

§ 221 (Tex.Civ.App.) In a railroad employee's action for personal injuries under Employers' Liability Act, it is the better practice to have the jury find whether plaintiff was negligent, and, if so, find the damages sustained by him and the extent his damages are diminished because of his own negligence.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

### DAMS.

See Waters and Water Courses, §§ 118, 126.

### DATE.

See Appeal and Error, § 516.

### DEATH.

See Abatement and Revival, § 54; Appeal and Error, § 1092; Commerce, § 27; Master and Servant, §§ 101, 102, 243, 276, 278, 293; Municipal Corporations, § 766; Partnership,



§ 246; Pleading, §§ 34, 345, 369; Railroads, §§ 282, 338, 351, 358, 359, 398; Robbery, § 30; Street Railroads, § 114; Telegraphs and Telephones, § 38; Trial, §§ 252, 253.

## II. ACTIONS FOR CAUSING DEATH.

### (A) Right of Action and Defenses.

§ 9 (Mo.) Rev. St. 1909, § 5425, providing that when a person dies from injury through negligence of person running locomotive, etc., the owner shall pay a penalty not less than \$2,000 nor more than \$10,000, in discretion of jury, held constitutional.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

§ 10 (Tenn.) Section 9, added by Act April 5, 1910, c. 143, § 2, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1325), to Act April 22, 1908, known as Employers' Liability Act, which by section 1, declared a railroad liable to a "person suffering injury" while employed in interstate commerce, or, in case of his death, to his personal representative, preserves, by survival, the cause of action given the employé, and has no application in case of instantaneous killing.—*Carolina, C. & O. Ry. v. Shewalter*, 161 S. W. 1136.

§ 18 (Tenn.) To authorize recovery for the benefit of the father of an adult son instantly killed while employed by a railroad in interstate commerce, under Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), merely declaring the company liable in damages, it must be shown the father had reasonable expectation of pecuniary assistance or support from deceased.—*Carolina, C. & O. Ry. v. Shewalter*, 161 S. W. 1136.

§ 32 (Mo.App.) A widow suing for the negligent death of her husband, leaving surviving children, must sue for herself and as trustee for the children, so that all the damages may be recovered in one action.—*Marquez v. Koch*, 161 S. W. 648.

### (D) Pleading and Evidence.

§ 47 (Tex.Civ.App.) A petition, in an action by a surviving widow for personal injuries to her husband, is insufficient as stating a cause of action for wrongful death, under Rev. Civ. St. 1911, art. 4694, when it did not allege whether the injuries were or were not the cause of the husband's death.—*Black v. Texas & P. Ry. Co.*, 161 S. W. 1077.

§ 58 (Mo.App.) The rule that it is presumed that a decedent was not guilty of contributory negligence, where no one saw the accident, would not apply where there was evidence by eyewitnesses tending to show contributory negligence.—*Battles v. United Rys. Co. of St. Louis*, 161 S. W. 614.

### (E) Damages, Forfeiture, or Fine.

§ 95 (Ky.) The measure of damages is such as will compensate the estate of decedent for the destruction of his earning power, in view of all the evidence bearing on the question.—*Louisville & N. R. Co. v. Stewart's Adm'x*, 161 S. W. 557.

§ 101 (Ky.) In an action under the federal Employer's Liability Act for negligent death, the jury should apportion the recovery, if any, between the beneficiaries.—*Louisville & N. R. Co. v. Stewart's Adm'x*, 161 S. W. 557.

## DEBTOR AND CREDITOR.

See Bankruptcy; Marshaling Assets and Securities; Subrogation; Witnesses, § 143.

## DECEDENTS.

See Witnesses, §§ 143, 144.

## DECLARATION.

See Pleading.

## DECLARATIONS.

See Criminal Law, §§ 413, 414; Evidence, § 271.

## DEDICATION.

### I. NATURE AND REQUISITES.

§ 35 (Tenn.) If the tract dedicated as a street is clearly defined as by a map, and the public use is practically of the whole tract dedicated, it is presumed that an act accepting a part of the tract dedicated is an acceptance of the whole.—*Doyle v. City of Chattanooga*, 161 S. W. 997.

§ 37 (Tenn.) The acceptance of a street by a municipality may be implied from a general and long-continued use thereof by the public as of right.—*Doyle v. City of Chattanooga*, 161 S. W. 997.

§ 37 (Tex.Civ.App.) Where streets were dedicated to the public, the use of them by the public, and the removal of gravel therefrom by the city under the claim that they were a public street, is sufficient to show acceptance of the dedication, even though the streets were not always kept in condition fit for travel.—*City of La Grange v. Brown*, 161 S. W. 8.

§ 38 (Tenn.) The use of a street by the general public may operate as an acceptance thereof, as to make the dedication irrevocable.—*Doyle v. City of Chattanooga*, 161 S. W. 997.

### II. OPERATION AND EFFECT.

§ 63 (Tex.Civ.App.) Mere nonuser or delay in the improvement of a street, so that parts of it became practically impassable and were not used by travelers, is insufficient to establish an abandonment by the city of that portion of the street, where it was a part of the general street system which was dedicated in laying out a subdivision.—*City of La Grange v. Brown*, 161 S. W. 8.

## DEEDS.

See Acknowledgment, § 4; Adverse Possession, §§ 80, 103, 104, 114; Appeal and Error, § 742; Bailment; Brokers, § 60; Escrows; Estoppel, § 35; Evidence, §§ 420, 441; Executors and Administrators, §§ 145, 397; Guardian and Ward; Insane Persons, § 66; Mortgages; Partition, § 9; Partnership, § 141; Pleading, § 8; Railroads, § 72; Reformation of Instruments, §§ 19, 23, 25, 36, 45; Taxation, § 776; Trespass to Try Title, § 6; Trial, § 105; Trusts, § 31; Vendor and Purchaser, §§ 229, 231, 258.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Conveyances in General.

§ 8 (Tex.Civ.App.) Where defendants recovered land possessed by plaintiff's husband and plaintiff sought to defeat the effect of the judgment by claiming the land as her own, a deed executed by the husband after the adverse judgment is wholly ineffective, even though he claimed it was confirmatory of a prior verbal gift; such gift being of no effect.—*Childress v. Robinson*, 161 S. W. 78.

§ 8 (Tex.Civ.App.) The location of land acquired by adverse possession within Rev. Civ. St. 1911, art. 5676, is fixed to a certain extent, and a purchaser from the possessor must take notice of that fact and of the fact that he acquires no title unless he purchases the land whose location is so fixed.—*Mixon v. Wallis*, 161 S. W. 907.

§ 17 (Ark.) An agreement upon the part of a grantee to support the grantor during his lifetime is a sufficient consideration for a deed conveying land.—*Fine v. Lasater*, 161 S. W. 1147.

§ 17 (Mo.) Where a son, on receiving a deed of his parents' farm and homestead, orally

agreed that when they could not care for themselves he would assist them, and after the death of his father cared for his mother according to his agreement, there was a sufficient consideration for the deed.—*Wing v. Havelik*, 161 S. W. 732.

#### (D) Form and Contents of Instruments.

§ 31 (Tex.Civ.App.) A deed is not binding upon one who signs it but who is not named in the body of the deed as one of the grantors.—*Le Blanc v. Jackson*, 161 S. W. 60.

§ 38 (Mo.) A deed failing to describe any land which could be located from the description was void.—*Schroeder v. Turpin*, 161 S. W. 716.

§ 38 (Mo.App.) A deed which did not contain a sufficient description of the land conveyed was invalid on its face, and did not convey any title.—*Barber Asphalt Paving Co. v. Field*, 161 S. W. 364.

§ 41 (Ky.) Deed referring to land as that conveyed to the grantor *held* to convey the same land, though it contained different calls than in the grantor's deed.—*Bassett v. Lush*, 161 S. W. 227.

#### (D) Delivery.

§ 59 (Ark.) The acknowledgment and filing for record of a deed was *prima facie* evidence of its delivery to the grantee.—*Felker v. Rice*, 161 S. W. 162.

§ 61 (Ark.) Deed, executed by father to daughter in consideration of support, and delivered to a bank with instructions to deliver it to the daughter's husband after father's death, *held* to be in escrow and, having been delivered to daughter's husband after grantor's death, would not be canceled.—*Fine v. Lasater*, 161 S. W. 1147.

Whether the delivery of a deed to a third party, to be delivered by him to the grantee after the grantor's death, is to be deemed a present delivery is a question of fact, depending on the conduct and intent of the parties to the transaction.—*Id.*

For the delivery of a deed to a third party, to be delivered to the grantee after the grantor's death, to constitute a present delivery, the grantor must deliver it for the grantee's use, and in some way express such intent, and must part both with the possession and with all control of the deed.—*Id.*

§ 67 (Mo.App.) A deed, which was presumptively not delivered so as to become operative until after the date of its acknowledgment, did not, when delivered, relate back to its date or to the date of a prior executed void deed between the parties, at least not for the purpose of conveying title as of those dates so as to uphold an action on a special tax bill against the grantee, who did not otherwise have title at that time.—*Barber Asphalt Paving Co. v. Field*, 161 S. W. 364.

#### (E) Validity.

§ 69 (Ark.) Under Kirby's Dig. § 1122, providing that, before the county court, which has exclusive jurisdiction to decide the result of an election upon the question of the removal of a county seat, should make any order carrying such result into effect a donor of a new location should execute a sufficient conveyance thereof to the county in fee, *held*, that deed of a donor pending an appeal, in which the order of the county court was reversed, was not invalid as having been executed by mistake.—*Schuman v. George*, 161 S. W. 1039.

§ 72 (Mo.) A deed will be set aside when obtained by the undue influence of a person other than the grantee; "undue influence" meaning any influence, however exercised, which destroys free agency, and substitutes the will of another for that of the person in whose name the act brought in judgment is done.—*Wing v. Havelik*, 161 S. W. 732.

§ 78 (Tex.Civ.App.) In suit to set aside deed, evidence *held* to authorize submission to the jury of the question whether the grantor was mentally incompetent to make the conveyance at the time he executed it.—*Brown v. Brenner*, 161 S. W. 14.

### III. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

§ 93 (Mo.) The intention of the parties to a deed must be effectuated if not in contravention of some positive rule of law.—*Garrett v. Wiltse*, 161 S. W. 694.

The intention of the parties to a deed must be gathered from its four corners.—*Id.*

§ 97 (Mo.) The habendum clause of a deed may be referred to for the removal of ambiguities and even to control and modify the granting clause when that is necessary to effectuate the grantor's plain intent.—*Garrett v. Wiltse*, 161 S. W. 694.

#### (B) Property Conveyed.

§ 111 (Tex.Civ.App.) Where by the rejection of a false and impossible part of a description which is repugnant to the general intention of a deed a perfect description will remain, the false part should be rejected and effect given to the deed.—*Griswold v. Comer*, 161 S. W. 423.

#### (C) Estates and Interests Created.

§ 120 (Mo.) A grantee, though the grantor's heir, cannot take more than the grantor has to convey.—*Boothe v. Cheek*, 161 S. W. 791.

§ 124 (Mo.) A deed *held* to give the grantee an estate in fee simple.—*Garrett v. Wiltse*, 161 S. W. 694.

At common law the word "heirs" was necessary to pass an estate of inheritance.—*Id.*

The words "heirs" in a conveyance at common law was a word of limitation and not of purchase.—*Id.*

To construe the word "heirs," when used in a deed, as a word of purchase and not of limitation, the intent not to use the word in its usual legal meaning must be unequivocally shown.—*Id.*

### IV. PLEADING AND EVIDENCE.

§ 194 (Mo.App.) It is presumed that a deed was not delivered so as to become operative until after the date of its acknowledgment.—*Barber Asphalt Paving Co. v. Field*, 161 S. W. 364.

§ 211 (Mo.) Evidence *held* sufficient to show that at the time of execution of a deed the grantor was of sound mind.—*Wing v. Havelik*, 161 S. W. 732.

Evidence *held* not to show any undue influence on the part of the grantee or his wife.—*Id.*

Evidence, in an action to set aside a deed from parents to a son, *held* insufficient to show that the will of the father was overcome by that of the mother, who was of unsound mind.—*Id.*

### DEFAMATION.

See Libel and Slander.

### DEFAULT.

See Judgment, § 138.

### DELAY.

See Telegraphs and Telephones, §§ 38, 66, 74.

### DELEGATION OF POWER.

See Licenses, § 6; Taxation, § 29.

### DELIVERY.

See Deeds, §§ 59-67; Sales, § 181; Telegraphs and Telephones, §§ 37, 38.

**DEMAND.**

See Bills and Notes, § 397.

**DEMURRER.**

See Pleading, §§ 192-228, 433.

**DEPOSITIONS.**

See Appeal and Error, § 659; Habeas Corpus, § 113.

§ 83 (Ark.) The refusal of a witness to answer questions not shown to be material was not ground for suppressing the deposition.—*Fancher v. Kenner*, 161 S. W. 166.

§ 107 (Tex.Civ.App.) Objections that answers to questions in a deposition are not responsive must be taken before announcement of ready for trial.—*E. R. & D. C. Kolp v. Brazer*, 161 S. W. 899.

**DEPOSITS.**

See Banks and Banking, § 154.

**DESCENT AND DISTRIBUTION.**

See Adverse Possession, §§ 31, 79; Equity, § 59; Estoppel, § 98; Executors and Administrators; Homestead, §§ 135, 146; Taxation, §§ 887, 893; Wills.

**III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.**

(C) Debts of Intestate and Incumbrances on Property.

§ 128 (Mo.) While a husband at common law was liable on his warranty in a deed made by him and his wife conveying her land, an heir of the husband is not liable on the covenant of warranty by reason of advancements.—*Armor v. Frey*, 161 S. W. 829.

§ 130 (Mo.) Under the express provisions of the statute of descents and distributions (Rev. St. 1909, § 332), the heir takes subject to the payment of the ancestor's debts, and the creditor's claim is somewhat in the nature of a lien.—*Armor v. Lewis*, 161 S. W. 251.

**DESCRIPTION.**

See Deeds, § 38.

**DEVICES.**

See Wills.

**DIRECTING VERDICT.**

See Criminal Law, § 753; Trial, § 178.

**DIRECTORS.**

See Banks and Banking, §§ 54, 253; Corporations, §§ 310, 313.

**DISABILITIES.**

See Negligence, § 85.

**DISCHARGE.**

See Master and Servant, §§ 20-41; Principal and Surety, §§ 104, 108; Release.

**DISCOVERED PERIL.**

See Master and Servant, § 295; Negligence, § 119; Railroads, § 338.

**DISCRETION OF COURT.**

See Appeal and Error, §§ 653, 957-979, 1092; Continuance, § 33; Criminal Law, §§ 676, 1150-1153; Jury, § 75; Justices of the Peace, § 158; New Trial, § 72; Trial, § 106; Venue, §§ 42, 72.

**DISCRIMINATION.**

See Telegraphs and Telephones, §§ 28, 34.

**DISEASE.**

See Pleading, § 34.

**DISMISSAL AND NONSUIT.**

See Appeal and Error, §§ 334, 361, 395, 509, 635, 773, 781; Criminal Law, § 1106; Divorce, § 146; Justices of the Peace, §§ 159, 164, 166; Limitation of Actions, § 130; New Trial, § 167; Quieting Title, § 34.

**II. INVOLUNTARY.**

§ 60 (Mo.App.) Where plaintiff, after the striking of his amended petition for departure from the original petition, failed to prosecute the suit, and such failure was not induced by the striking of such petition, the court properly dismissed the cause.—*Poncot v. St. Louis, I. M. & S. Ry. Co.*, 161 S. W. 1190.

**DISORDERLY HOUSE.**

See Perjury, § 11; Prostitution, §§ 1, 4.

**DISSOLUTION.**

See Corporations, § 691; Injunction, §§ 163, 188.

**DISTRICT AND PROSECUTING ATTORNEYS.**

See Contempt, § 10; Criminal Law, 706-730; Payment, §§ 87, 89; Witnesses, §§ 193, 337.

§ 5 (Ark.) One acting as a deputy prosecuting attorney under the district prosecuting attorney, whose appointment was not in writing and was not approved by the circuit court, was not a de jure but a de facto officer not entitled to collect the fees of the office.—*Williford v. Eason*, 161 S. W. 498.

**DISTRICTS.**

See Drains; Highways, § 161; Levees, §§ 2-34.

**DIVORCE.**

See Contracts, § 111.

**IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**

(C) Pleading.

§ 104 (Mo.App.) In an action for divorce, an amendment of the petition, after submission of the case at the suggestion of the court, so as to withdraw a charge of adultery which had not been sustained and make a charge of indignities more specific, held properly allowed as merely conforming the petition to the proof.—*Rea v. Rea*, 161 S. W. 278.

§ 105 (Mo.App.) Where a petition for divorce was properly sworn to originally, it was not essential that it be reverified after an amendment to conform to the proof.—*Rea v. Rea*, 161 S. W. 278.

(E) Dismissal, Trial or Hearing, and New Trial.

§ 146 (Mo.App.) In an action for divorce, an amendment of the petition, after submission to conform the petition to the proof as to a charge of indignities contained in the petition and to eliminate a charge of adultery, held not to entitle defendant to introduce further evidence.—*Rea v. Rea*, 161 S. W. 278.

(F) Judgment or Decree.

§ 167 (Mo.App.) Rev. St. 1909, § 2381, does not prohibit a suit to set aside a judgment of di-

orce on the ground of fraud in its procurement.—*McDonald v. McDonald*, 161 S. W. 850.

Where a husband obtained from his wife a waiver of summons and an agreement that the cause might be submitted for trial, she relying on his representation that she should receive notice of the trial, a decree obtained by him without notice was procured by fraud and properly set aside at the suit of the wife.—*Id.*

A decree obtained pursuant to an agreement will be set aside.—*Id.*

A divorce *held* properly set aside at the suit of the wife as obtained under a collusive agreement.—*Id.*

Where a husband procured a divorce without contest, only by consent of his wife, such consent being fraudulently obtained, the fact that the wife, after learning of the decree, executed deeds describing herself as a single woman, was no obstacle to setting aside the divorce on her application.—*Id.*

#### (G) Appeal.

§ 181 (Mo.App.) Under Rev. St. 1909, § 2380, providing for writs of error in divorce proceedings, a writ of error must be sued out within 60 days after the judgment is rendered.—*McNeill v. McNeill*, 161 S. W. 858.

§ 184 (Mo.App.) While findings of the trial court in an action for divorce are not binding on appeal, they will nevertheless be given persuasive influence and deferred to by the appellate court.—*Rea v. Rea*, 161 S. W. 278.

### DOCKETS.

See Trial, § 11.

### DOCTORS.

See Physicians and Surgeons.

### DOCUMENTS.

See Criminal Law, § 444.

### DOING BUSINESS.

See Corporations, § 642.

### DOMICILE.

See Husband and Wife, § 283; Venue, § 21.

### DRAINS.

See Appeal and Error, § 659; Injunction, § 128; Municipal Corporations, §§ 417, 459-470, 784, 791.

#### I. ESTABLISHMENT AND MAINTENANCE.

§ 17 (Ark.) Under Sp. Acts 1911, p. 218, § 2, providing that the directors of a drainage district may employ such officers and agents as they deem necessary, the board can employ a construction engineer without appointing him chief engineer.—*Keene v. Trice*, 161 S. W. 499.

§ 17 (Ark.) Under Acts 1909, p. 842, § 16, the commissioners of a drainage district are not liable for injuries to property caused by negligence in the construction of a drainage ditch.—*Wood v. Drainage Dist. No. 2 of Conway County*, 161 S. W. 1057.

§ 36 (Ark.) An appeal from an order of the county court establishing a drainage district must be granted by the court and not by the clerk, and the order fixing the amount of the bond, which is equivalent to granting the appeal, must be entered at the term when the final order establishing the district is made.—*Drainage Dist. No. 1, of Cross County v. Rolfe*, 161 S. W. 1034.

The failure to move the circuit court to dismiss an appeal from the county court establishing a drainage district, on the ground that the statutory requirements essential to perfecting an appeal were not taken, does not operate as

a waiver of the defect of the jurisdiction of the circuit court, where there is an entire absence of any thing in the record showing an appeal from the county court.—*Id.*

The circuit court on appeal from an order or the county court establishing a drainage district may, while the case is pending before it, allow the bringing up from the county court of an amendment so as to show the allowance of an appeal.—*Id.*

Where the Supreme Court reversed a judgment of the circuit court reversing an order of the county court establishing a drainage district, on the ground that there was no valid appeal to the circuit court, and remanded the case for further proceedings, the circuit court could allow the record of the county court to be amended so as to show the facts conferring jurisdiction.—*Id.*

§ 57 (Ark.) Under Acts 1909, pp. 835, 837, §§ 7, 8, drainage districts *held* not liable for damages to land caused by negligence in the construction of a drainage ditch.—*Wood v. Drainage Dist. No. 2 of Conway County*, 161 S. W. 1057.

Persons contracting with a drainage district for the construction of a ditch are liable for injuries to property caused by negligent construction under the plan adopted and the contract with the drainage commissioners.—*Id.*

In an action for injuries to property claimed to have been caused by water seeping from a drainage ditch which was being constructed, complaint which merely showed that water was allowed to stand in the ditch during construction *held* insufficient to show negligence.—*Id.*

### DRAMSHOPS.

See Intoxicating Liquors.

### DRUGS.

See Abortion, § 6.

### DRUNKARDS.

See Criminal Law, § 53; Negligence, § 8.

### DUE PROCESS OF LAW.

See Constitutional Law, §§ 301-316.

### DUPLICITY.

See Indictment and Information, § 125.

### DURESS.

See Payment, § 87.

### DYING DECLARATIONS.

See Homicide, § 203.

### EJECTION.

See Carriers, §§ 353, 366.

### EJECTMENT.

See Appeal and Error, § 193; Judgment, § 237; Limitation of Actions, § 105; Tenancy in Common, § 15; Trespass to Try Title.

#### I. RIGHT OF ACTION AND DEFENSES.

§ 16 (Mo.) Under Rev. St. 1909, §§ 2382, 2385, prior possession by plaintiff *held* not a prerequisite to the action.—*Fitzpatrick v. Garver*, 161 S. W. 714.

§ 18 (Mo.) Under Rev. St. 1909, §§ 2382, 2385, ouster by defendant *held* not a prerequisite to the right to maintain ejectment.—*Fitzpatrick v. Garver*, 161 S. W. 714.

#### III. PLEADING AND EVIDENCE.

§ 65 (Ark.) Under Kirby's Dig. § 2742, complaint in ejectment *held* insufficient because it

failed to show title in plaintiffs by descent, purchase, or operation of law, or show by what right they claimed.—*McAlister v. Harness*, 161 S. W. 185.

§ 65 (Mo.) Under Rev. St. 1909, §§ 1794, 2387, 2388, a petition in ejectment *held* sufficient as against an objection that it failed to state that plaintiff was entitled to possession on the very day suit was filed.—*Fitzpatrick v. Garver*, 161 S. W. 714.

§ 66 (Mo.) Under Rev. St. 1909, §§ 1794, 2387, 2388, a petition in ejectment *held* sufficient as against an objection that it failed to show that defendants were then unlawfully withholding possession.—*Fitzpatrick v. Garver*, 161 S. W. 714.

§ 69 (Mo.) Under the express provisions of Rev. St. 1909, § 1806, *held* that defendant in ejectment had the right to unite in his answer a general and specific denial with a statement of any new matter constituting a defense and counterclaim.—*Hynds v. Hynds*, 161 S. W. 812.

§ 86 (Mo.) Defendant who undertook to show that widow and administrator of the ancestor under whom all claimed had settled with all the heirs except himself, that she had promised him the land, bought with estate funds, as his share, and that the land in question did not exceed the value of his own share, *held* to have the burden of establishing such claim.—*Hynds v. Hynds*, 161 S. W. 812.

§ 95 (Mo.) In ejectment where the rights of the parties rested upon a resulting trust created by the acts of the administrator of their ancestor, evidence *held* to sustain defendant's claim that a settlement had been made with all the other beneficiaries except himself.—*Hynds v. Hynds*, 161 S. W. 812.

#### V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

§ 135 (Mo.) While ordinarily rents are recoverable in ejectment, no rent can be recovered in ejectment by tenants in common where their interest was subject to defendant's claim for an allowance for improvements, and the evidence failed to disclose for what the land would rent without the improvements.—*Armor v. Frey*, 161 S. W. 829.

#### ELECTION.

See Criminal Law, § 678.

#### ELECTION OF REMEDIES.

See Appeal and Error, § 1039; Pleading, § 369; Sales, § 425.

#### ELECTIONS.

See Counties, § 34; Intoxicating Liquors, § 36; Schools and School Districts, §§ 97-107; Weapons.

#### IV. QUALIFICATIONS OF VOTERS.

§ 60 (Ky.) Const. § 155, *held* to authorize Act March 12, 1912 (Laws 1912, c. 47), providing that women may vote on all school measures and questions submitted to a vote of the people.—*Stuessy v. City of Louisville*, 161 S. W. 564.

§ 65 (Ky.) An election in the city of Louisville on a tax measure *held* a school district election, within Const. § 155, conferring on the General Assembly the sole right to regulate such elections.—*Stuessy v. City of Louisville*, 161 S. W. 564.

A proposition to issue bonds of a school district for the improvement of the schools of the district was a school measure or question, within Act March 12, 1912 (Laws 1912, c. 47), providing that women may vote for school trustees and on all school measures and questions.—*Id.*

#### ELECTRICITY.

See Appeal and Error, § 781.

§ 1 (Mo.) Repeal of Rev. St. 1909, §§ 9568, 9569, 9570, authorizing the city of St. Louis to fix service rates of public utilities, by Acts 1913, p. 651, § 139, vesting such power in the Public Service Commission, nullified St. Louis city ordinance No. 24196, approved February 24, 1909, prescribing a maximum electric rate, and regulating the furnishing of electricity for light and power.—*Union Electric Light & Power Co. v. City of St. Louis*, 161 S. W. 1166.

§ 16 (Mo.) An electric light and power company *held* not liable for injury to a spectator caused by the falling of a pole by reason of a crowd pressing against the cable.—*Meehan v. Union Electric Light & Power Co.*, 161 S. W. 825.

#### EMINENT DOMAIN.

See Municipal Corporations, §§ 236-586.

#### I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (Ky.) That a corner lot has been assessed \$1 per front foot on one street for the construction of a sewer thereon will not render invalid, as a taking of private property without just compensation in violation of Const. § 242, an assessment for a sewer constructed upon the other street.—*Gesser v. McLane*, 161 S. W. 1118.

#### II. COMPENSATION.

(A) Necessity and Sufficiency in General.

§§ 79, 80 (Mo.) Plaintiffs *held* estopped to recover compensation.—*Quinn v. St. Louis & S. F. R. Co.*, 161 S. W. 820.

(B) Taking or Injuring Property as Ground for Compensation.

§ 119 (Mo.) Where a city acquires title to a street by limitations, and a railroad company, with the city's consent, appropriates such street for its tracks, the former owner of the street cannot recover compensation from the railroad company for such appropriation.—*Quinn v. St. Louis & S. F. R. Co.*, 161 S. W. 820.

#### III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 172 (Tex.Civ.App.) A county court has jurisdiction in matters of eminent domain, such jurisdiction not being taken away by Acts 32d Leg. c. 24.—*Balch v. San Antonio, F. & N. R. Co.*, 161 S. W. 1091.

#### IV. REMEDIES OF OWNERS OF PROPERTY.

§ 296 (Mo.) Where, in an action against a railroad company by the former owner of the land of a street which the company had appropriated with the city's consent, the defendant relied upon title in the city by prescription, evidence of invalid condemnation proceedings under which the street was originally taken by the city, was admissible as evidence of color of title and to fix the boundary line.—*Quinn v. St. Louis & S. F. R. Co.*, 161 S. W. 820.

Where defendant relied upon prescriptive title in the city and estoppel, a petition signed by plaintiff and others, requesting that the city permit the railroad company to use the street, and the ordinance enacted pursuant thereto, were admissible in evidence.—*Id.*

#### V. TITLE OR RIGHTS ACQUIRED.

§ 317 (Tex.Civ.App.) A county, by condemning land for a public highway, only acquires an easement therein; the fee remaining in the original owner.—*International & G. N. R. Co. v. Boles*, 161 S. W. 914.

**EMPLOYERS' LIABILITY ACTS.**

See Appeal and Error, § 1039; Commerce, § 27; Damages, § 221; Death, §§ 10, 101; Master and Servant, §§ 86, 250½, 265, 276, 278; Negligence, § 101; Pleading, § 369; Statutes, § 221.

**EMPLOYÉS.**

See Master and Servant.

**EQUITY.**

See Appeal and Error, §§ 894, 1178; Cancellation of Instruments; Conversion; Corporations, § 279; Injunction; Marshaling Assets and Securities; Partition; Quietening Title; Reformation of Instruments; Set-Off and Counterclaim; Specific Performance; Subrogation; Trial, § 11; Trusts.

Equitable estoppel, see Estoppel, §§ 52-119.

**I. JURISDICTION, PRINCIPLES, AND MAXIMS.****(O) Principles and Maxims of Equity.**

§ 59 (Mo.) Where children after their majority acquiesced for a long time in some domestic arrangement, whereby each received from their father's estate an amount nearly equal to the share that each was apparently entitled to, the maxim "Equality is equity" applied.—Hynds v. Hynds, 161 S. W. 812.

§ 65 (Mo.) Where plaintiff in a suit to rescind an exchange of property was defrauded, he was not barred from relief in equity on the theory that his hands were unclean because he overvalued his property in the exchange.—Schroeder v. Turpin, 161 S. W. 716.

**IV. PLEADING.****(E) Demurrer, Exceptions, and Motions.**

§ 241 (Tenn.) Every reasonable presumption should be exercised in favor of a bill when assailed by demurrer.—Adams v. Chattanooga Co., 161 S. W. 1131.

**X. DECREE AND ENFORCEMENT THEREOF.**

§ 418 (Ark.) Where defendant filed his answer on September 9th, and on October 12th was given ten days from that date in which to file an amended answer by an order which provided that certain evidence be taken on November 27th, but defendant did not file an amended answer, nor appear in court on November 27th, he cannot claim that the decree then rendered was prematurely entered.—Felker v. Rice, 161 S. W. 162.

§ 430 (Ark.) After the expiration of the term at which a decree is rendered, the court can only set it aside upon application under the statute for a specified cause, or by bill of review under the chancery practice.—Felker v. Rice, 161 S. W. 162.

**ERROR, WRIT OF.**

See Appeal and Error; Criminal Law, §§ 1017-1186.

**ESCAPE.**

§ 10 (Mo.) Evidence, in a prosecution for assisting one to escape with knowledge that he had stolen a horse, held not to sustain a conviction.—State v. Christian, 161 S. W. 736.

The burden was on the state to show that the person who had stolen the horse was in fact trying to escape.—Id.

**ESCROWS.**

§ 8 (Ark.) Grantor depositing deed with a bank to be delivered to trustees of a church on their payment of a mortgage debt, and receiving payments thereon, held not entitled to withdraw the deed without giving the trustees an

opportunity to comply with the conditions as to delivery.—Brown v. Albright, 161 S. W. 1036.

**ESTATES.**

See Deeds, §§ 120, 124; Descent and Distribution; Estoppel, § 98; Executors and Administrators; Landlord and Tenant; Life Estates; Partnership, § 246; Remainders; Tenancy in Common; Trusts, § 147; Wills.

**ESTOPPEL.**

See Appeal and Error, § 1036; Corporations, § 659; Eminent Domain, §§ 79, 80; Exchange of Property, § 3; Insurance, § 307; Justices of the Peace, § 36; Landlord and Tenant, § 61; Municipal Corporations, § 487; Partition, § 44; Principal and Surety, § 46; Reformation of Instruments, § 23.

**II. BY DEED.****(B) Estates and Rights Subsequently Acquired.**

§ 35 (Ark.) Where land was voluntarily conveyed to a county for county seat purposes, title to the property subsequently acquired by the grantors inured to the benefit of the county.—Schuman v. George, 161 S. W. 1039.

§ 37 (Tex.Civ.App.) A chattel mortgage upon property not in existence may become operative if the property covered subsequently comes into the possession of the mortgagor, on the equitable principle of estoppel rather than on the principle that the execution of the mortgage then creates a valid lien upon the thing mortgaged.—Ivy v. Pugh, 161 S. W. 939.

**III. EQUITABLE ESTOPPEL.****(A) Nature and Essentials in General.**

§ 52 (Tenn.) One claiming the benefit of an estoppel must have proceeded with the utmost good faith.—Fourth Nat. Bank v. Nashville, C. & St. L. Ry. Co., 161 S. W. 1144.

§ 54 (Tenn.) One relying on an estoppel must have exercised such reasonable diligence as the circumstances of the case require.—Fourth Nat. Bank v. Nashville, C. & St. L. Ry. Co., 161 S. W. 1144.

Where both parties have the same means of ascertaining the truth, no estoppel can exist.—Id.

One who conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss cannot invoke the doctrine of estoppel.—Id.

§ 56 (Tenn.) If a ground of estoppel is based on negligence, the negligence must have been the proximate cause of the conduct of the complaining party.—Fourth Nat. Bank v. Nashville, C. & St. L. Ry. Co., 161 S. W. 1144.

**(C) Persons Affected.**

§ 98 (Mo.) Where plaintiffs had an estate in remainder under the will of their grandfather, they were not estopped from claiming the remainder because their parents, who were the life tenants, sold the property and received the proceeds, for they did not take under the life tenants, but directly from the original owner.—Armor v. Frey, 161 S. W. 829.

**(E) Pleading, Evidence, Trial, and Review.**

§ 107 (Tex.Civ.App.) In an action for the price of lumber, plaintiff could not insist that defendant by asking damages for the breach of the contract was estopped to disaffirm the contract, where plaintiff based the claim of estoppel only on defendant's examination and acceptance of the lumber.—Continental Lumber & Tie Co. v. Miller, 161 S. W. 927.

§ 107 (Tex.Civ.App.) Where only pleading was verified account, instruction authorizing recovery, if defendant had led plaintiff to be-

lieve that purchaser of goods was its agent, *held* erroneous, as estoppel must be specially pleaded.—*Young Men's Christian Ass'n of Dallas v. Schow Bros.*, 161 S. W. 931.

§ 112 (Mo.App.) A plea of estoppel, to be sufficient, must plead the facts and elements of an estoppel, one of which is that the party invoking the estoppel was in some manner prejudiced thereby.—*Gillen v. New York Life Ins. Co.*, 161 S. W. 667.

§ 117 (Ark.) Declarations of the prospective seller of an automobile to a newspaper company, offering it as a prize, that the winner would get the car, and as to streamers on the car to that effect and as to its standing in front of the newspaper office, *held* admissible against his claim of ownership as against the winning contestant.—*Jones v. Burks*, 161 S. W. 177.

§ 119 (Ark.) Whether a defendant, who was represented to have sold an automobile to the newspaper which offered it as a prize, had estopped himself from claiming it, *held* for the jury.—*Jones v. Burks*, 161 S. W. 177.

## EVIDENCE

See Abortion, § 6; Account Stated, § 19; Adverse Possession, §§ 14, 85, 95, 104, 112, 114, 115; Appeal and Error, §§ 172, 197, 231, 260, 499, 688, 695, 697, 742, 837, 842, 843, 854, 894, 901-934, 989-1012, 1032, 1033, 1050-1056; Arson; Assault and Battery, § 35; Attachment, § 308; Banks and Banking, § 246; Bigamy; Bills and Notes, §§ 497, 499, 520; Boundaries, § 37; Brokers, §§ 85, 86; Burglary, §§ 41, 42; Carriers, §§ 69, 132, 134, 246, 316-318, 320, 366; Compromise and Settlement, § 23; Conspiracy, § 19; Constitutional Law, § 48; Contracts, §§ 99, 175, 346; Corporations, §§ 121, 361, 432, 519; Criminal Law, §§ 308-564, 656, 676, 678, 741, 763, 764, 778, 780, 781, 784, 811, 938-958, 1036, 1054, 1059, 1090, 1097, 1144, 1163, 1169; Customs and Usages; Damages, §§ 166-185; Death, § 58; Dedication, §§ 35, 37; Deeds, §§ 59, 194, 211; Depositions; Ejectment, §§ 86, 96; Eminent Domain, § 296; Escape, § 10; Estoppel, § 117; Exchange of Property, § 8; Executors and Administrators, § 221; Fraud, § 50; Frauds, Statute of, § 158; Fraudulent Conveyances, §§ 295-301; Guaranty, § 90; Habeas Corpus, §§ 85, 113; Highways, § 184; Homestead, § 181; Homicide, §§ 156-254; Husband and Wife, §§ 25, 273, 297; Injunction, § 128; Insurance, §§ 646, 818, 819; Intoxicating Liquors, §§ 224-236; Jury, § 107; Justices of the Peace, § 101; Landlord and Tenant, § 169; Larceny, §§ 55-65; Libel and Slander, §§ 112, 156; Limitation of Actions, § 142; Malicious Prosecution, §§ 58, 64; Marriage, §§ 40, 47; Master and Servant, §§ 265, 274-281; Money Received, § 18; Mortgages, §§ 32, 292, 463; Municipal Corporations, §§ 816, 819; Navigable Waters, § 26; Negligence, §§ 121-134; New Trial, §§ 72, 78; Partition, § 63; Partnership, § 218; Perjury, §§ 11, 32; Physicians and Surgeons, § 11; Pleading, §§ 356, 428; Principal and Agent, §§ 123, 160; Prostitution, §§ 1, 4; Railroads, §§ 348, 396, 398, 441, 443, 481; Rape, § 66; Reformation of Instruments, § 45; Release, § 57; Remainders, § 16; Robbery, §§ 20, 24; Sales, §§ 181, 359, 441; Schools and School Districts, § 107; Seduction, §§ 44, 46; Specific Performance, § 121; Stipulations, § 14; Street Railroads, §§ 112, 114; Telegraphs and Telephones, §§ 66, 71; Tenancy in Common, § 15; Trespass to Try Title, §§ 6, 35-41; Trial, §§ 75-105, 136-141, 178, 194, 229, 250-253; Usury, § 115; Vendor and Purchaser, §§ 79, 80, 242, 243, 315; Venue, § 72; Waters and Water Courses, § 126; Wills, §§ 52, 53, 163, 166, 488; Witnesses; Work and Labor, § 7.

## I. JUDICIAL NOTICE.

§ 5 (Mo.) This court will take judicial notice of the fact that telegraph poles are more than 150 feet apart.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

§ 7 (Mo.) The court knows that ordinarily cement sets and hardens in less than eight days, and an electric light and power company, erecting poles supported by bolts secured by cement about eight days before using the poles, exercises proper care.—*Meehan v. Union Electric Light & Power Co.*, 161 S. W. 825.

§ 34 (Tex.Civ.App.) The courts will take judicial notice that before statehood the decisions of the Supreme Court of the United States were the law of the land in the territory of New Mexico.—*Stamp v. Eastern Ry. Co. of New Mexico*, 161 S. W. 450.

§ 35 (Tex.Civ.App.) A foreign law is required to be proven just as any other substantive fact.—*Stamp v. Eastern Ry. Co. of New Mexico*, 161 S. W. 450.

## II. PRESUMPTIONS.

§ 65 (Mo.) Every person is presumed to know the law.—*Garrett v. Wiltse*, 161 S. W. 694.

§ 80 (Mo.) In an action for personal injuries sustained in Kansas, where neither party proved the law of Kansas, the law of Missouri applied.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

In the absence of a showing to the contrary, the laws of a sister state will be presumed to be the same as that of the former.—*Id.*

§ 80 (Mo.) Georgia being one of the states originally under the common law, it will be presumed that the common law remains in force therein.—*Armor v. Frey*, 161 S. W. 829.

§ 82 (Mo.App.) It is presumed that the courts will pursue the proper course if their power is properly invoked.—*Roney v. Organ*, 161 S. W. 868.

§ 83 (Ky.) On an issue as to whether a city had exceeded its debt limit, high school bonds previously issued would be presumed valid in the absence of evidence to the contrary.—*Southern Bitulithic Co. v. Detreville*, 161 S. W. 560.

## IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

### (A) Facts in Issue and Relevant to Issues.

§ 106 (Mo.App.) It is error to permit an interpleader claiming goods levied on in attachment to show that his general reputation for truth and veracity is good.—*Keet-Rountree Dry Goods Co. v. Hodges*, 161 S. W. 862.

§ 116 (Mo.App.) Where, in an action for damages for assault with intent to rape, defendant, in an attempt to show that a business competitor instigated the action, shows that a conversation took place between such competitor and the plaintiff's father, plaintiff's evidence that such conversation was about lodge matters, and not about the trouble out of which the litigation arose, is admissible.—*Marts v. Powell*, 161 S. W. 871.

§ 117 (Tex.Civ.App.) Testimony that when witness reached the place of the accident he found a pint whisky bottle one-third full in the debris of plaintiff's wagon is not competent, standing alone, to show intoxication.—*Texas Midland R. R. v. Wiggins*, 161 S. W. 445.

§ 117 (Tex.Civ.App.) Evidence as to finding a bottle of whisky in the debris of the wagon after the accident *held* properly excluded for lack of sufficient evidence that the driver was intoxicated or addicted to drink within a reasonable time before the accident.—*Texas Midland R. R. v. Nelson*, 161 S. W. 1088.

### (B) Res Gestæ.

§ 122 (Mo.App.) In an action for the killing of plaintiff's mare by collision with defendant's

horse and buggy on the highway, statement of plaintiff's son, who was riding the mare, that he should have to ride home fast, *held* admissible as a part of the *res gestæ*.—*Hodges v. Hill*, 161 S. W. 633.

§ 126 (Ky.) Statements made by decedent that he was jerked from a train on which he was employed, within two minutes after his injuries were received, were admissible as *res gestæ*.—*Louisville & N. R. Co. v. Strange's Adm'r*, 161 S. W. 239.

#### (C) Similar Facts and Transactions.

§ 129 (Tex.Civ.App.) Where there was nothing to show a settled system on the part of plaintiff of maintaining fictitious claims, an isolated instance of a fictitious claim by him for damages for personal injury is inadmissible to show that plaintiff was simulating his present injuries.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

### V. BEST AND SECONDARY EVIDENCE.

§ 168 (Tex.Civ.App.) In an action for broker's commissions for sales for defendants, their ex-agent with whom the transactions were had *held* properly permitted to testify that he sent letters confirming sales to the purchasers on receipt of plaintiff's telegrams that sales had been made to them.—*E. R. & D. C. Kolp v. Brazier*, 161 S. W. 899.

§ 185 (Tex.Civ.App.) Plaintiff having given defendants notice to produce correspondence and papers, and they having failed to do so, plaintiff was entitled to introduce carbon copies of letters written by him to defendants as secondary evidence.—*E. R. & D. C. Kolp v. Brazier*, 161 S. W. 899.

### VII. ADMISSIONS.

#### (A) Nature, Form, and Incidents in General.

§ 208 (Mo.) Where defendants in partition claimed by adverse possession, a petition by them in a former partition suit, alleging that they jointly owned one-half of the same lands and believed that the present plaintiffs owned the rest as heirs, was admissible as an admission that defendants were not then holding adversely, though no estoppel was pleaded in the present action.—*Boothe v. Cheek*, 161 S. W. 791.

§ 213 (Tex.Civ.App.) In trespass to try title, evidence that plaintiff offered to purchase a deed from defendants to the property *held* inadmissible, for that fact will not affect plaintiff's title, being a mere attempt to remove a possible cloud.—*Zimmermann v. Baugh*, 161 S. W. 943.

#### (C) By Grantors, Former Owners, or Privies.

§ 230 (Tex.Civ.App.) The testimony of a grantor that before the execution of the deed he, with the grantee's agent, went on the ground, and pointed out the boundary, is inadmissible against a subsequent purchaser relying on the deed duly recorded.—*Kirby Lumber Co. v. Stewart*, 161 S. W. 872.

#### (D) By Agents or Other Representatives.

§ 242 (Mo.) An assessment of the benefits and damages to certain property from the widening of a street will not be disturbed, when more favorable to the owner than his authorized agent testified would be satisfactory, though disproportionate to assessments against other property.—*In re Nineteenth St. in Kansas City*, 161 S. W. 1150.

Where a property owner authorized an agent to represent him in condemnation proceedings, he was bound by the agent's testimony that his principal would be satisfied with the assessment so long as the benefits did not exceed the damages, though such agent exceeded his instructions.—*Id.*

§ 243 (Tex.Civ.App.) Where plaintiff selling feedstuff for defendants would wire orders to defendants' agent, who would write letters of confirmation to the purchasers—sending carbon copies to plaintiff and to defendants—such letters were acts and declarations of defendants through their agent, and admissible to bind them in an action for plaintiff's commissions.—*E. R. & D. C. Kolp v. Brazier*, 161 S. W. 899.

### VIII. DECLARATIONS.

#### (A) Nature, Form, and Incidents in General.

§ 271 (Ky.) In an action to establish a trust in land, declarations of plaintiff's father bearing upon his intention to create a trust in the proceeds of purchaser's money note, payable to his wife, made when the wife was not present, *held* not competent against those claiming under her.—*Adams v. Button*, 161 S. W. 1100.

### IX. HEARSAY.

§ 317 (Mo.) In a proceeding to suspend a physician for producing abortions, the testimony of a witness, that physicians had told him that defendant had the reputation of being a criminal abortionist, was hearsay evidence.—*State ex rel. Spriggs v. Robinson*, 161 S. W. 1169.

§ 317 (Tex.Civ.App.) A witness cannot testify to declarations by the alleged husband that he quarreled with his first wife, and left the country with the woman the validity of whose marriage to him was in issue.—*Adams v. Wm. Cameron & Co.*, 161 S. W. 417.

§ 317 (Tex.Civ.App.) In an action for wrongful garnishment arising out of plaintiff's signing notes for the price of corporate stock sold to A., evidence that F. told plaintiff that L., who was negotiating the transaction, was to receive \$1,000 of the stock as a commission for making the sale, was objectionable as hearsay.—*Bennett v. Foster*, 161 S. W. 1078.

### XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

#### (A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 419 (Ark.) Parol evidence is admissible to show that a grantee agreed, as a part of the consideration, to assume and discharge a mortgage.—*Felker v. Rice*, 161 S. W. 162.

§ 420 (Ark.) A condition that a county seat would be located in a certain town could not be attached to the donors' conveyance of a site therefor by a parol agreement.—*Schuman v. George*, 161 S. W. 1039.

#### (C) Separate or Subsequent Oral Agreement.

§ 441 (Mo.App.) A written contract of employment as agent for the sale of oil, which required plaintiff to get the market prices, could not be varied by parol evidence that when the contract was executed defendant agreed to permit plaintiff to give a rebate to his customers from his commission.—*Goller v. Henseler Mercantile Oil & Supply Co.*, 161 S. W. 584.

§ 441 (Mo.App.) Where deed under Rev. St. 1909, § 2793, was to be construed as containing a covenant against incumbrances, parol evidence *held* not admissible to show an agreement to assume taxes in addition to the recited consideration; section 1974, relative to proving want or failure of consideration, having no application.—*Laclede Laundry Co. v. Freudenstein*, 161 S. W. 593.

#### (D) Construction or Application of Language of Written Instrument.

§ 448 (Tex.Civ.App.) Where there is no ambiguity in a written contract, parol evidence to explain its meaning is inadmissible.—*Conn v. Rosamond*, 161 S. W. 73.



**XII. OPINION EVIDENCE.****(A) Conclusions and Opinions of Witnesses in General.**

§ 471 (Tex.Civ.App.) In an action for broker's commissions, a statement of a witness that plaintiff sold certain parties was not objectionable as an opinion.—*E. R. & D. C. Kolp v. Brazer*, 161 S. W. 899.

§ 471 (Tex.Civ.App.) A question, asking plaintiff from the management of his business his experience, etc., what would be his reasonable income for the next three years, *held* objectionable as calling for a conclusion.—*Bennett v. Foster*, 161 S. W. 1078.

§ 471 (Tex.Civ.App.) In a personal injury action, testimony that witness had seen plaintiff using crutches when they were of no assistance to him *held* the conclusion of the witness and properly excluded.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 474 (Mo.) Witness who had ridden in street cars, noticed and estimated their speed, and whom the opposing counsel declined to examine further as to his qualifications *held* properly permitted to testify as to the speed of a street car.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

§ 474 (Mo.App.) In an action by a railroad clerk for damages for injuries caused by an unusually violent coupling, other experienced mail clerks *held* competent to testify to the unusual jarring of the coupling.—*Farmer v. St. Louis, I. M. & S. Ry. Co.*, 161 S. W. 327.

§ 477 (Ky.) A lay witness of inexperience, who had not examined an injured person, was not entitled to testify that, from seeing such person, he thought he was in a dangerous condition.—*Board of Council of City of Frankfort v. Kirby*, 161 S. W. 1115.

§ 501 (Mo.App.) Where witnesses are testifying as to their opinions upon matters within their personal knowledge or observation, the facts upon which the opinion is based should be stated by the witness.—*Farmer v. St. Louis, I. M. & S. Ry. Co.*, 161 S. W. 327.

**(B) Subjects of Expert Testimony.**

§ 528 (Mo.App.) Evidence of plaintiff's attending physician as to his diagnosis was admissible, though witness was required to state on cross-examination that it was a guess.—*Lewkowitz v. United Rys. Co. of St. Louis*, 161 S. W. 588.

**(C) Competency of Experts.**

§ 539½ (Mo.) In action against a street car company for injuries, motorman and conductor formerly in defendant's employ *held* qualified to testify as to the distance within which the car could have been stopped.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

**(D) Examination of Experts.**

§ 548 (Mo.) In an action for personal injuries, questions asked the physicians who treated the injuries and the surgeon who operated therefor, as to whether the conditions discovered could have been the result of the accident, which questions hypothesized the facts of the accident as detailed by plaintiff's witnesses, *held* proper.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

**XIV. WEIGHT AND SUFFICIENCY.**

§ 598 (Mo.) The weight of testimony does not so much depend on the number of witnesses, as on their intelligence, honesty, and veracity.—*Merrill v. Thompson*, 161 S. W. 674.

§ 598 (Tex.Civ.App.) A finding of fact in a cause tried to the court without a jury may be based upon the positive testimony of one witness, though it was contradicted by that of another.—*Ratcliff v. Ratcliff*, 161 S. W. 30.

**EXAMINATION.**

See Witnesses, §§ 257-286.

**EXCEPTIONS.**

See Appeal and Error, §§ 254-265; Criminal Law, §§ 1049-1053, 1056; Pleading, §§ 192-228, 301.

**EXCEPTIONS, BILL OF.**

See Appeal and Error, §§ 490, 518, 543, 544, 584, 664, 688, 697, 714, 724, 742, 760, 837, 866, 894, 1133; Criminal Law, §§ 1090-1092, 1094, 1095.

**II. SETTLEMENT, SIGNING, AND FILING.**

§ 39 (Mo.) Under Rev. St. 1909, § 2029, exceptions to a motion to strike part of an amended answer, saved at one term of court while the decree was entered and the bill of exceptions was filed at the succeeding term, *held* not to save the exceptions if necessary to a review.—*Hynds v. Hynds*, 161 S. W. 812.

§ 51 (Ark.) Laws 1913, pp. 962, 963, §§ 2, 3, 4, providing an official court stenographer and defining his duties in the making up of the record, *held* not to provide the exclusive method for the preparation and approval of bills of exceptions, and that it was the duty of the judge to examine and approve a bill prepared by petitioner.—*Missouri & N. A. R. Co. v. Reed*, 161 S. W. 192.

§ 53 (Ark.) Mandamus is the proper remedy to compel a circuit court judge to sign a bill of exceptions.—*Missouri & N. A. R. Co. v. Reed*, 161 S. W. 192.

**EXCESSIVE DAMAGES.**

See Damages, §§ 130, 132.

**EXCHANGE OF PROPERTY.**

See Equity, § 65.

§ 3 (Mo.) Where, by reason of the nullity of defendant's deed, delivered pursuant to an agreement to exchange property, he received 180 acres and eight city lots for \$100 in cash, the inadequacy of the consideration was so shocking as to entitle plaintiff to rescind.—*Schroeder v. Turpin*, 161 S. W. 716.

Where defendant's deed to land, delivered to plaintiff pursuant to an agreement for an exchange of property, in fact conveyed nothing, plaintiff's attempt to convey the land to a third person did not estop him to assert his right to rescind.—*Id.*

§ 5 (Mo.) Where defendant's deed to plaintiff pursuant to an agreement for an exchange of property conveyed nothing, plaintiff was entitled to rescind.—*Schroeder v. Turpin*, 161 S. W. 716.

§ 8 (Mo.) In a suit to rescind an exchange of property, defendant having been permitted to retain certain city lots concededly worth \$240, plaintiff *held* not barred from relief because he failed to tender \$100 cash and certain worthless oil stock received.—*Schroeder v. Turpin*, 161 S. W. 716.

§ 8 (Tex.Civ.App.) Evidence in a suit to rescind an exchange of property *held* sufficient to support a finding that defendant's representations that the title to the land to be conveyed to plaintiff was unincumbered, except for a \$500 mortgage, were fraudulently made.—*Willingham v. Geitzner*, 161 S. W. 376.

Evidence *held* sufficient to show that plaintiff did not undertake to determine for himself that the title offered him was clear, but relied on the false representations made to him by defendant.—*Id.*

## EXCUSABLE HOMICIDE.

See Homicide, § 125.

## EXECUTION.

See Adverse Possession, § 100; Attachment; Partnership, § 220.

### V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 161 (Mo.App.) An execution issued on a void judgment should be quashed.—State ex rel. Behrens v. Wilson, 161 S. W. 1179.

§ 172 (Tex.Civ.App.) In a suit to restrain an execution on account of fraud in obtaining the judgment, the writ should be made returnable, under the statute, to the court in which the judgment was rendered.—J. M. Radford Grocery Co. v. Owens, 161 S. W. 911.

§ 172 (Tex.Civ.App.) In a suit to enjoin the execution of a judgment, complainant cannot recover in the absence of proof that it had a valid defense to the cause of action on which the judgment was based.—Collin County Nat. Bank v. McCall Hardware Co., 161 S. W. 950.

## VII. SALE.

### (B) Title and Rights of Purchaser.

§ 272 (Mo.) A purchaser at an execution sale, with notice of a pending suit by a beneficiary in a deed of trust, executed by the execution debtor to secure a debt for the reformation of the deed so as to correctly describe the land intended to be conveyed takes with notice, and he cannot affect the beneficiary's right to reformation.—Wolz v. Venard, 161 S. W. 760.

§ 275 (Mo.) A sale under an execution not issued by the clerk of the circuit court of the county rendering the judgment, as required by Rev. St. 1909, § 2166, but issued from the office of the clerk of the circuit court of another county, conveys no title.—Wolz v. Venard, 161 S. W. 760.

### X. SUPPLEMENTARY PROCEEDINGS.

§ 413 (Ky.) The property discovered under Civ. Code Prac. § 439, giving an equitable action to discover property and subject it to the satisfaction of the judgment, can be subjected to a lien in such action without further proceedings.—Marcum v. Marcum, 161 S. W. 516.

## EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Judgment, § 822; Wills; Witnesses, § 143.

### II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 34 (Ky.) Testator's widow by remarrying becomes disqualified to continue to act as executrix.—Murphy v. Murphy, 161 S. W. 533.

### III. ASSETS, APPRAISAL, AND INVENTORY.

§ 57 (Ky.) Under Ky. St. § 654, held that insurance premiums paid to defraud creditors passes to insured's personal representative as a part of the estate, and, whether recovered by him or a creditor, belongs to the estate; and a creditor, by suing therefor, acquires no priority.—Williams v. Harth, 161 S. W. 1102.

### IV. COLLECTION AND MANAGEMENT OF ESTATE.

#### (A) In General.

§ 119 (Ky.) That decedent's administrator and the undertaker who buried decedent's body conspired to prevent defendant from burying decedent and injured it in a specified sum held a personal wrong and unavailable as a claim against decedent's estate.—National Co-Operative Burial Ass'n v. Aul's Adm'r, 161 S. W. 1123.

§ 124 (Mo.) Where only one of two executors joined in conveying land in accordance with an order of sale by the court of ordinary, the conveyance was inoperative and did not pass title.—Armor v. Frey, 161 S. W. 829.

### (B) Real Property and Interests Therein.

§ 145 (Mo.) A conveyance made by an executor under a power in the will cannot be construed to be his act as executor where on its face it appeared as his individual conveyance.—Armor v. Frey, 161 S. W. 829.

§ 152 (Tex.Civ.App.) Such of the records of administration which were not destroyed by fire held to support a finding that the administration was closed before the administrator purchased the land of one of the heirs at a tax sale.—Griswold v. Comer, 161 S. W. 423.

Where certain land of a decedent was partitioned by the probate court, held, that the administrator was not bound to pay the taxes thereafter, and could purchase the land set apart to one of the heirs at a tax sale.—Id.

### VI. ALLOWANCE AND PAYMENT OF CLAIMS.

#### (A) Liabilities of Estate.

§ 221 (Mo.App.) Where personal services are rendered to an aged and partially helpless person by an adult child, it will be presumed that he does so from motives of filial love, and not from the expectation of pecuniary reward.—Crowley v. Dagley, 161 S. W. 366.

Presumption that services rendered by a child in caring for her helpless parent are gratuitous may be rebutted by evidence that the parent intended to pay for the services, and the child expected to receive compensation.—Id.

Where plaintiff filed a claim against her mother's estate for services rendered in her last illness, the burden was on plaintiff to show the existence of a contract that the services should be paid for in money.—Id.

Evidence of declarations by plaintiff's mother that she wanted claimant well paid for the services performed in caring for her, and that her other daughters should have the balance of the estate, held insufficient to establish a contract to pay for the services enforceable against the mother's estate.—Id.

#### (B) Presentation and Allowance.

§ 227 (Ark.) There was a sufficient compliance with Kirby's Dig. § 114, requiring an affidavit of the justice of a claim against an estate to be appended to the demand, and section 113 making it a sufficient exhibition of a claim founded on a note to deliver a copy of the instrument to the administrator, construing the sections with section 119, where the affidavit was attached to a verbatim copy of the note sued on in an action against an administrator.—Davenport v. Davenport, 161 S. W. 189.

### VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

#### (A) When Authorized.

§ 329 (Mo.) Under the Homestead Act of 1895 (Rev. St. 1899, § 3620), held, that a homestead could not be sold in course of administration to pay the debts of the decedent created subsequent to his acquisition of the homestead and not charged thereon in his lifetime.—Armor v. Lewis, 161 S. W. 251.

#### (C) Sale.

§ 362 (Mo.) Under Rev. St. 1889, § 147, providing for four weeks' publication for sale of land by an administrator, a full 28 days is necessary.—Norton v. Reed, 161 S. W. 842.

Notice is an indispensable prerequisite to the jurisdiction of the probate court to order a sale of the land of a decedent.—Id.

That the judge before whom proof of publication for the sale of decedent's land was taken did not sign the blank jurat attached to the

publisher's affidavit will not invalidate proofs of publication.—Id.

**(D) Conveyance.**

§ 397 (Mo.) A conveyance made by an executor under order of court cannot be construed to be his act as executor, where on its face it appeared as his individual conveyance.—*Armor v. Frey*, 161 S. W. 829.

**X. ACTIONS.**

§ 423 (Ky.) The personal representative of a person paying insurance premiums to defraud creditors should sue for their recovery, but in the event of his refusal, a creditor may sue for himself and all other creditors, making all the creditors parties.—*Williams v. Harth*, 161 S. W. 1102.

§ 434 (Ky.) In an action against beneficiary to recover insurance premiums paid in fraud of creditors, as permitted by Ky. St. § 654, beneficiary held not entitled to set off a note due her from insured.—*Williams v. Harth*, 161 S. W. 1102.

§ 456 (Ark.) Where an executor permitted an action to proceed as a suit to recover property after it was disclosed that defendant claimed title under an alleged gift, and plaintiff recovered only one item of the property, the court properly divided the costs.—*Fancher v. Kenner*, 161 S. W. 166.

*Kirby's Dig.* § 965, giving plaintiff costs if he recovers judgment, has no application to a special statutory proceeding by an executor to recover property alleged to belong to his estate.—Id.

**XII. FOREIGN AND ANCILLARY ADMINISTRATION.**

§ 519 (Mo.App.) Where a citizen of Missouri died owning property and owing debts in Arkansas, a special administrator appointed in Arkansas, who acquired possession of intestate's property in that state, did so only for the payment of debts and had acquired no jurisdiction of assets beyond the state.—*First Nat. Bank of Corning, Ark., v. Dowdy*, 161 S. W. 859.

Where an administrator is appointed by the courts of one state, such courts reserve to themselves full and conclusive jurisdiction over the assets of the estate within the limits of that state.—Id.

§ 525 (Mo.App.) Where an ancillary administrator's powers were limited by statute of the state of appointment to the defense of a suit against the intestate, the creditor on recovering judgment was not entitled to proceed on the judgment against the domiciliary administrator in another state.—*First Nat. Bank of Corning, Ark., v. Dowdy*, 161 S. W. 859.

When an ancillary administrator, appointed in Arkansas, was only authorized by the laws of that state to defend a suit against intestate, the creditor, having recovered judgment, could not proceed thereon in Missouri under Rev. St. 1909, § 1737, authorizing foreign administrators to sue in Missouri when such authority is possessed under the laws of their own state.—Id.

**EXEMPTIONS.**

See Carriers, § 307; Garnishment, § 131; Homestead; Landlord and Tenant, § 246; Marshaling Assets and Securities, § 3; Railroads, § 72; Statutes, § 79.

**I. NATURE AND EXTENT.**

(A) Nature, Creation, Duration, and Effect in General.

§ 2 (Mo.App.) There is a comity between the several states in enforcing exemption laws.—*John H. Schroeder Wine & Liquor Co. v. Willis*

*Coal & Mining Co.*, 161 S. W. 352, 356; *Schroeder v. Same*, Id. 357.

**(C) Property and Rights Exempt.**

§ 45 (Tex.Civ.App.) Rev. Civ. St. 1911, art. 3785, subd. 5, held to exempt the presses, engine, and other articles of a newspaper publisher necessary for the conduct of his business.—*Harris v. Townley*, 161 S. W. 5.

§ 45 (Tex.Civ.App.) Conducting a butcher shop held a trade, notwithstanding the sale of the meats cut up or butchered, within Sayles' Ann. Civ. St. 1897, art. 2395, subd. 5.—*Hammond v. McFarland*, 161 S. W. 47.

Cash register and refrigerator held not tools or apparatus belonging to a butcher's trade within Sayles' Ann. Civ. St. 1897, art. 2395, subd. 5.—Id.

**EXPLOSIVES.**

See Master and Servant, § 319.

**FACTORS.**

See Brokers.

**FALSE IMPRISONMENT.**

See Malicious Prosecution.

**FALSE PERSONATION.**

§ 2 (Tex.Cr.App.) In view of Code Cr. Proc. 1911, arts. 43, 44, and Pen. Code 1911, arts. 349, 506, 561, 611, a policeman is an executive officer of the state within Pen. Code 1911, art. 424, declaring any person who shall falsely assume to be an executive officer shall be punished.—*Ex parte Preston*, 161 S. W. 115.

**FALSE SWEARING.**

See Perjury.

**FEDERAL COURTS.**

See Courts, § 96.

**FEDERAL EMPLOYERS' LIABILITY ACT.**

See Commerce, § 27; Death, § 101.

**FEES.**

See Attorney and Client; District and Prosecuting Attorneys, § 5.

**FEE SIMPLE.**

See Deeds, § 124.

**FELLOW SERVANTS.**

See Master and Servant, §§ 198, 199.

**FENCES.**

See Adverse Possession, §§ 16, 22, 65, 103; Railroads, § 411.

**FERRIES.**

**II. REGULATION AND OPERATION.**

§ 31 (Ky.) Though the courts have jurisdiction to determine rates for a ferry, yet, when the matter is once settled, it should remain so until there is some substantial change in conditions.—*Calhoun v. Alexander*, 161 S. W. 980.

**FILING.**

See Appeal and Error, § 625.

**FINDINGS.**

See New Trial, §§ 72, 78.

## FIRE INSURANCE.

See Insurance.

### FIRES.

See Arson; Railroads, § 481.

### FISH.

See Constitutional Law, § 205.

§ 1 (Ark.) Fish, *feræ naturæ*, belong to the whole people of the state collectively.—*Lewis v. State*, 161 S. W. 154.

§ 5 (Ark.) Right of land owner to take fish on his own soil is subject to the right of the state to regulate and preserve the fish and game for public use.—*Lewis v. State*, 161 S. W. 154.

§ 8 (Ark.) Where necessity for the preservation of fish exists in certain territories of the state, they may be segregated.—*Lewis v. State*, 161 S. W. 154.

§ 9 (Ark.) Acts 1913, p. 1118, prohibiting non-residents from hunting and fishing in specified counties, *held* unconstitutional.—*Lewis v. State*, 161 S. W. 154.

### FLOWAGE.

See Waters and Water Courses, §§ 118, 128.

## FORCIBLE DEFILEMENT.

See Rape.

## FORCIBLE ENTRY AND DETAINER.

See Tenancy in Common, § 38.

### I. CIVIL LIABILITY.

§ 6 (Ky.) The actual possession of plaintiff is the issue involved in forcible entry, and no question of title or right to possession is involved.—*Derrington v. Childers*, 161 S. W. 216.

§ 9 (Ky.) The possession of a cabin upon a tract having well-marked boundaries *held* sufficient possession of the entire tract.—*Derrington v. Childers*, 161 S. W. 216.

Complainant trespassing upon the actual possession of defendant did not thereby come into possession, and hence he could not maintain forcible entry.—*Id.*

Complainant, who asserted his claim, not as a joint owner with defendant but as an adverse claimant of the exclusive possession of the land, and whose entry thereon without the consent of defendant was a mere trespass, *held* to have no such actual possession as would enable him to maintain forcible entry.—*Id.*

### FORECLOSURE.

See Mortgages, § 463.

## FOREIGN CORPORATIONS.

See Corporations, §§ 634-691; Judgment, § 138.

### FORFEITURES.

See Insurance, §§ 755, 818-825; Mines and Minerals, § 84; Searches and Seizures, § 2.

### FORGERY.

§ 29 (Ky.) An indictment for forging or uttering a forged bank check must be drawn under Ky. St. § 1189, and charge that the bank was authorized by law.—*Mason v. Commonwealth*, 161 S. W. 229.

## FORNICATION.

See Prostitution; Seduction.

## FRANCHISES.

See Abatement and Revival, § 22; Mandamus, § 98; Monopolies, § 2; Municipal Corporations, § 617; Taxation, §§ 47, 117, 463; Telegraphs and Telephones, § 10.

§ 2 (Ky.) Grant of a franchise being in the nature of a vested property right, it is subject to the performance of conditions and duties imposed on the grantee.—*Christian-Todd Telephone Co. v. Commonwealth*, 161 S. W. 543.

## FRAUD.

See Abatement and Revival, § 39; Account Stated, §§ 12, 19; Adverse Possession, § 31; Appeal and Error, § 671; Bills and Notes, §§ 497, 520; Contracts, § 94; Divorce, § 167; Frauds, Statute of; Fraudulent Conveyances; Limitation of Actions, § 100; Payment, §§ 86, 87; Release, §§ 17, 57, 58; Sales, §§ 347, 388, 391; Trial, § 252; Wills, §§ 156-166, 324.

### II. ACTIONS.

#### (B) Parties and Pleading.

§ 49 (Mo.App.) In action against brokers for damages from false representations inducing plaintiff to enter into exchange of property, where the only answer was a general denial, *held*, that defense or counterclaim arising from plaintiff's fraud and deceit was not open to consideration.—*Kaufman v. Davis*, 161 S. W. 1180.

#### (C) Evidence.

§ 50 (Ky.) Where fraud implied from fiduciary relations of the parties is charged, the burden is on the person against whom the complaint is made to show the fairness of the transaction.—*McDowell v. Edwards' Adm'r*, 161 S. W. 534.

§ 50 (Mo.App.) Fraud is never presumed, and the burden of proving fraud rests upon him who asserts it.—*Avery Co. v. Powell*, 161 S. W. 335.

#### (D) Damages.

§ 59 (Mo.App.) Person induced to exchange property by false representations of brokers that the other party had title, who sued brokers for damages instead of suing to rescind, could recover the value of the property which was to be transferred to him and not merely the money paid by him.—*Kaufman v. Davis*, 161 S. W. 1180.

## FRAUDS, STATUTE OF.

See Trial §§ 89, 95.

## III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARriage OF ANOTHER.

§ 18 (Mo.App.) An agreement whereby a grantee assumes a mortgage executed by the grantor need not be incorporated in the conveyance, but may be entirely oral, not being within the statute of frauds.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

§ 23 (Ark.) A promise by a third person to pay the pre-existing debt of another founded on the original liability, without any new consideration to support it, is a collateral undertaking.—*Brinkley Car Works & Mfg. Co. v. Cook*, 161 S. W. 1065.

§ 23 (Mo.App.) Promise by one to a bank to stand personally liable for checks drawn on the bank by him as treasurer of a club *held* original and not within the statute of frauds.—*Rubey Trust Co. v. Weidner*, 161 S. W. 333.

§ 26 (Mo.App.) Defendant, who agreed with a bank to repay money advanced by the bank in honoring checks drawn by a club, upon the bank's refusal of credit to the club, could not afterwards limit the effect of his promise by only agreeing to pay in case the club did not do so.—*Rubey Trust Co. v. Weidner*, 161 S. W. 333.

§ 31 (Mo.App.) Promise of a third person to answer for the debt of another must be based either on a benefit to the promisor or harm to the promisee and must have the effect of relieving the original debtor of all liability.—*Martin v. Harrington*, 161 S. W. 275.

In an action on defendant's agreement to pay

the debt of H. to plaintiff, the petition *held* to charge that defendant's agreement was in consideration of plaintiff's release of H. and hence stated a cause of action not within the statute of frauds.—Id.

§ 33 (Ark.) Promise of defendant to pay for lumber purchased by a third person, if plaintiff would not file a lien, in reliance on which plaintiff forebore to enforce and lost its right to enforce a mechanic's lien, *held* an original promise upon a new undertaking.—Brinkley Car Works & Mfg. Co. v. Cook, 161 S. W. 1065.

## VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 63 (Tex.Civ.App.) A verbal gift of land by a husband to his wife is wholly void, being within the statute of frauds, where it appeared that the land was not purchased with the wife's separate means.—Childress v. Robinson, 161 S. W. 78.

§ 74 (Ark.) Where a mortgagee executed a warranty deed releasing a condition in a prior deed and deposited it for delivery to mortgagor when the mortgage should be discharged, and gave his receipt for \$100 paid thereon, the transaction was not a parol contract within the statute of frauds, but an executed contract to take effect when the mortgage was paid.—Brown v. Albright, 161 S. W. 1036.

## IX. OPERATION AND EFFECT OF STATUTE.

§ 138 (Ky.) It was no defense to an action to recover money paid as part of the purchase price, under a parol contract for the sale of land, that plaintiff had abandoned the purchase.—Burks v. Douglass, 161 S. W. 225.

## X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 150 (Mo.App.) A claim that the contract sued on is within the statute of frauds cannot be raised by demurrer.—Martin v. Harrington, 161 S. W. 275.

§ 150 (Tex.Civ.App.) Where the petition did not show that a contract for the sale of real estate was oral, an exception to the petition for failure to allege a contract in writing was properly overruled.—Fahey v. Benedetti, 161 S. W. 896.

§ 152 (Tex.Civ.App.) The defense of the statute of frauds is available under a general denial, if interposed by seasonable objection to testimony.—Johnson v. Tindall, 161 S. W. 401.

§ 158 (Mo.App.) That checks, paid by a bank on defendant's agreement to repay, were kept on the bank books as an account of the club on which they were drawn, was some evidence as to whether credit was given to defendant or the club.—Rubeys Trust Co. v. Weidner, 161 S. W. 333.

Evidence *held* to show that a bank looked only to defendant to repay amounts of checks drawn by a club and presented by defendant, its treasurer.—Id.

## FRAUDULENT CONVEYANCES.

See Homestead, § 180.

## I. TRANSFERS AND TRANSACTIONS INVALID.

### (B) Nature and Form of Transfer.

§ 39 (Ky.) Under Ky. St. § 654, providing that insurance premiums paid in fraud of creditors shall inure to their benefit, acceptance by beneficiary of proceeds and investment in real estate *held* not to constitute her a fraudulent grantee.—Williams v. Harth, 161 S. W. 1102.

Ky. St. §§ 654, 655, providing that insurance premiums paid in fraud of creditors shall inure to their benefit, *held* not to apply to pre-

miums paid to fraternal insurance society, in view of section 671.—Id.

### (C) Property and Rights Transferred.

§ 52 (Mo.) A creditor cannot complain of the fraudulent disposition of a homestead.—Armor v. Lewis, 161 S. W. 251.

## II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

### (A) Original Parties.

§ 176 (Mo.) If land was purchased with another's money under an arrangement with the latter for the purpose of defrauding his creditors, equity would not raise a trust in the land in favor of the person who actually furnished the money.—Boothe v. Cheek, 161 S. W. 791.

§ 183 (Mo.App.) Where a debtor had actually sold the goods with intent to defraud creditors, the purchaser, without notice, *held* entitled only to claim protection to the extent of actual payment on the price prior to the attachment.—Keet-Rountree Dry Goods Co. v. Hodges, 161 S. W. 862.

## III. REMEDIES OF CREDITORS AND PURCHASERS.

### (F) Pleading.

§ 269 (Ky.) One seeking to subject property conveyed by a husband to his wife to a judgment against the husband on the ground that the conveyance was fraudulent must allege and prove fraud.—Mount v. Fourth Street Bank, 161 S. W. 220.

### (G) Evidence.

§ 295 (Ky.) In a suit to set aside a conveyance as fraudulent, though the direct evidence shows the payment of the recited consideration, the court may be controlled by facts and circumstances appearing to be entitled to more weight.—Mount v. Fourth Street Bank, 161 S. W. 220.

§ 295 (Tex.Civ.App.) In suit by execution purchaser against debtor's fraudulent grantee, evidence *held* to support finding against defendant's claim of equitable ownership, though he testified to facts showing such ownership.—Landers v. McCutchan, 161 S. W. 960.

§ 301 (Tex.Civ.App.) In suit by execution purchaser against debtor's grantee, judgment for purchaser *held* not erroneous for insufficiency of evidence to show grantee's knowledge of the debtor's fraudulent intention.—Landers v. McCutchan, 161 S. W. 960.

## FREIGHT.

See Carriers, § 194.

## FUNDS.

See Counties, § 160.

## GAME.

See Searches and Seizures, § 2.

§ 1 (Ark.) Game, *feræ naturæ*, belong to the whole people of the state collectively.—Lewis v. State, 161 S. W. 154.

§ 3 (Ark.) Right of landowner to take game on his own soil is subject to the right of the state to regulate and preserve the fish and game for public use.—Lewis v. State, 161 S. W. 154.

§ 3½ (Ark.) Where necessity for the preservation of wild game exists in certain territories of the state, they may be segregated.—Lewis v. State, 161 S. W. 154.

§ 4 (Ark.) Acts 1913, p. 1118, prohibiting non-residents from hunting and fishing in specified counties, *held* unconstitutional.—Lewis v. State, 161 S. W. 154.

**GAMING.**

See Constitutional Law, § 205; Lotteries.

**III. CRIMINAL RESPONSIBILITY.****(A) Offenses.**

§ 72 (Tex.Cr.App.) A private residence cannot be an appurtenance to a public road, near which it is, so as to authorize prosecution for permitting gaming therein, as in a public place.—*Dunn v. State*, 161 S. W. 467.

**GARNISHMENT.**

See Evidence, § 317; Malicious Prosecution, §§ 52, 58, 64, 67; Trial, §§ 251, 256.

**V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.**

§ 105 (Tex.Civ.App.) Garnishing creditors occupy no better position with reference to the fund garnished than did their debtors at the time of the service of the writ.—*Burns & Bell v. Lowe*, 161 S. W. 942.

§ 108 (Tex.Civ.App.) Where a debtor gave to his wife money to pay rent and she deposited it in the bank in her own name and gave a check on the account to the landlord for an amount in excess of the deposit, but before the check was presented the account was garnished, the rights of the landlord were superior as to such deposit to the garnishing creditor.—*Burns & Bell v. Lowe*, 161 S. W. 942.

**VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

§ 131 (Mo.App.) Under Hurd's Rev. St. Ill. 1912, c. 82, § 14, exempting from garnishment not to exceed \$15 a week of a wage-earner's wages, and requiring every employer to pay over such amount notwithstanding garnishment proceedings, an employer may set up such exemption, though the employé does not interplead and set it up.—*John H. Schroeder Wine & Liquor Co. v. Willis Coal & Mining Co.*, 161 S. W. 352, 356; *Schroeder v. Same*, Id. 357.

In proceedings to garnish wages earned by an employé in Illinois, the employer may set up, under the doctrine of comity, the Illinois statute exempting wages to the amount of \$15 a week from garnishment, and requiring every employer to pay over such wages notwithstanding garnishment proceedings; a similar policy being adopted by Rev. St. 1909, § 2415.—Id.

**VIII. CLAIMS BY THIRD PERSONS.**

§ 217 (Mo.App.) An independent action by one interpleader against another cannot be ingrafted upon a garnishment proceeding by the mere filing of a counterclaim, and the court could not render judgment by default on such counterclaim in favor of such interpleader against the other.—*State ex rel. Behrens v. Wilson*, 161 S. W. 1179.

**GIFTS.**

See Appeal and Error, § 232; Dedication; Husband and Wife, §§ 49½, 250; Parent and Child, § 9; Taxation, §§ 867, 893; Trial, § 256.

**GOOD FAITH.**

See Vendor and Purchaser, §§ 229-243.

**GRAND JURY.**

See Criminal Law, § 1166; Perjury, § 32.

**GRAND LARCENY.**

See Larceny, § 55.

**GRANTS.**

See Monopolies, § 2; Public Lands.

**GUARANTY.**

See Indemnity; Principal and Surety.

**II. CONSTRUCTION AND OPERATION.**

§ 36 (Tex.Civ.App.) On a guaranty of certain assets of a bank transferred to plaintiff, its measure of damages was the difference between the face value of the indebtedness and its actual value.—*Young v. Bank of Miami*, 161 S. W. 436.

**III. DISCHARGE OF GUARANTOR.**

§ 70 (Tex.Civ.App.) On a guaranty of the collection of certain assets of a bank, time not being of the essence, the guarantors were not relieved from liability because the uncollected paper was not delivered to an attorney for suit within 30 days after maturity as provided for.—*Young v. Bank of Miami*, 161 S. W. 436.

**IV. REMEDIES OF CREDITORS.**

§ 77 (Tex.Civ.App.) Defendants having repudiated liability under a contract guaranteeing collection of certain of a bank's assets, plaintiff was entitled to sue at once and was not required to prove performance of all precedent conditions on its part.—*Young v. Bank of Miami*, 161 S. W. 436.

§ 82 (Tex.Civ.App.) Where defendants guaranteed certain assets of a bank on transferring them to plaintiff, the principal debtors were not necessary parties to a suit on the guaranty.—*Young v. Bank of Miami*, 161 S. W. 436.

A suit on a guaranty of certain assets of an old bank transferred to a partnership operating a new one *held* properly brought in the name of the new bank.—Id.

§ 87 (Tex.Civ.App.) In an action on a contract of guaranty, an alleged variance between the contract and the petition *held* immaterial.—*Young v. Bank of Miami*, 161 S. W. 436.

§ 90 (Tex.Civ.App.) Where a partnership operating a bank transferred its assets to a new firm consisting of one of its members and others, representations of such continuing member as to the collectibility of the paper of the bank, made to one of the retiring partners, *held* admissible on the issue of his guaranty of the assets of the bank.—*Young v. Bank of Miami*, 161 S. W. 436.

**GUARDIAN AND WARD.**

See Insane Persons, §§ 54, 65.

**IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.**

§ 111 (Tex.Civ.App.) A deed to defendant's grantor signed C. B. per S. Le B., "curator," in the absence of any authority shown for the execution of the deed by him, *held* not binding upon C. B. and insufficient to pass her title.—*Le Blanc v. Jackson*, 161 S. W. 60.

**HABEAS CORPUS.****I. NATURE AND GROUNDS OF REMEDY.**

§ 3 (Tex.Cr.App.) Where mayor or other officer refuses to approve sufficient bond of person appealing from mayor's court, mandamus, and not habeas corpus, *held* to be the proper remedy.—*Ex parte Hunt*, 161 S. W. 457.

§ 20 (Tex.Cr.App.) A lunacy proceeding is civil, and not quasi criminal, and a person convicted therein is not entitled to habeas corpus to determine the constitutionality of the statute under which the proceedings were instituted.—*Ex parte Singleton*, 161 S. W. 123.

**II. JURISDICTION, PROCEEDINGS, AND RELIEF.**

§ 85 (Tex.Civ.App.) In an action by a father for the custody of his minor child, evidence *held*

to establish that the child's maternal grandparents acquired custody lawfully.—*Ex parte Sams*, 161 S. W. 388.

§ 92 (Tex.Cr.App.) In determining, in habeas corpus in the Court of Criminal Appeals, the power to fine for contempt, the court may go behind the judgment and ascertain the facts.—*Ex parte Coffee*, 161 S. W. 975.

§ 99 (Tex.Civ.App.) A surrender of the possession of a child by its parents, whether evidenced by a written instrument or vesting in parol, is not a contract, and cannot be enforced as such, because neither the child nor its custody is a matter of contract, although the transfer will be enforced if for the benefit of the child.—*Ex parte Sams*, 161 S. W. 388.

*Held*, that a young father would not be given the custody of his minor child as against the maternal grandparents, who rightfully came into custody, where it was for the benefit of the child to remain with his grandmother.—*Id.*

§ 113 (Tex.Cr.App.) Where accused, remanded to the custody of the sheriff to be released on bond, appealed, his appeal should be dismissed for want of jurisdiction if he afterwards entered into bond.—*Ex parte Simpkins*, 161 S. W. 97.

§ 113 (Tex.Civ.App.) In habeas corpus for the custody of a child, the erroneous admission of a deposition taken in another suit is not prejudicial error where the same matters were testified to by another witness.—*Ex parte Sams*, 161 S. W. 388.

## HABENDUM CLAUSE.

See Deeds, § 97.

## HARMLESS ERROR.

See Appeal and Error, §§ 1027-1070; Criminal Law, §§ 1163-1172.

## HEARSAY EVIDENCE.

See Criminal Law, § 421; Evidence, § 317.

## HIGHWAYS.

See Appeal and Error, § 1050; Constitutional Law, §§ 63, 301; Dedication; Eminent Domain, § 317; Municipal Corporations, §§ 648, 663, 766-821; Navigable Waters; Railroads, §§ 304-351; Telegraphs and Telephones, § 10.

### I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

#### (B) Establishment by Statute or Statutory Proceedings.

§ 30 (Tex.Civ.App.) It is not essential to the legality of proceedings to establish a highway that the character of the notice given be made a matter of record.—*Ross v. Veltmann*, 161 S. W. 1073.

§ 38 (Tex.Civ.App.) An objection to notice of intention to lay out a highway, in that it was signed by only one member of the jury of view, was waived by the landowner's appearance pursuant to the notice.—*Ross v. Veltmann*, 161 S. W. 1073.

§ 41 (Tex.Civ.App.) Where the jury of view in highway proceedings were only authorized to lay out a third class road, their report was not fatally defective in reciting the laying out of a "road" instead of a "third class road."—*Ross v. Veltmann*, 161 S. W. 1073.

The law does not require notice to the landowner of the date when the commissioners' court will pass on the report of the jury of view.—*Id.*

It was not necessary that the commissioners' court should pass on the report of the jury of view at the first term or at a regular term of such court.—*Id.*

An order having been held defective in certain particulars, an objecting landowner was not entitled to notice of an intention of the

commissioners' court to pass a new order to cure the defect.—*Id.*

### III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 99 (Ky.) The county court having general authority to open public roads, under Ky. St. §§ 4287-4300, the fiscal court, under its authority over roads conferred by sections 1840 and 4306, cannot make an appropriation for a new road, its authority extending only to roads already in existence.—*Rowe v. Alexander*, 161 S. W. 508.

§ 118 (Ky.) Under Ky. St. § 1840, giving the fiscal court power to make appropriations to maintain the roads, the fiscal court cannot appropriate county funds to compensate persons who repaired the road without any contract or authority.—*Rowe v. Alexander*, 161 S. W. 508.

That citizens repaired a county road without any contract or authorization will not render the county liable on the quantum meruit.—*Id.*

### V. REGULATION AND USE FOR TRAVEL.

#### (A) Obstructions and Encroachments.

§ 161 (Mo.App.) Under Rev. St. 1909, § 10,533, imposing a penalty for the obstruction of a public road recoverable by the road district, and Rev. St. 1909, §§ 10,576-10,610, providing for the consolidation of districts, *held*, that, after consolidation of two districts, the consolidated district was the proper plaintiff in an action for the penalty.—*Boonville Special Road Dist. v. Fuser*, 161 S. W. 583.

A petition in an action for a penalty under Rev. St. 1909, § 10,533, for obstructing a public road *held* sufficient.—*Id.*

#### (B) Use of Highway and Law of the Road.

§ 165 (Ky.) In the absence of constitutional restriction, the Legislature may assume or regain control and supervision of the highways of the state in whole or in part.—*Christian-Todd Telephone Co. v. Commonwealth*, 161 S. W. 543.

The control of public roads, given the fiscal courts by Ky. St. § 4306, is a right of which they cannot be deprived without their consent except by express legislative authority.—*Id.*

§ 165 (Ky.) The Legislature can, in the exercise of the police power, regulate the use and driving of motor vehicles.—*City of Newport v. Merkel Bros. Co.*, 161 S. W. 549.

§ 184 (Mo.App.) In an action for damages for the killing of plaintiff's mare by collision with defendant's horse and buggy on the highway in the nighttime, evidence that plaintiff's son, who rode the mare at the time of the accident, was in the habit of riding her along the highway at the place of the accident at a high speed, *held* admissible.—*Hodges v. Hill*, 161 S. W. 633.

## HOMESTEAD.

See Appeal and Error, § 1207; Executors and Administrators, § 329; Fraudulent Conveyances, § 52; Marshaling Assets and Securities, § 3; Partition, § 12.

### I. NATURE, ACQUISITION, AND EXTENT.

#### (A) Nature, Creation, and Duration of Estate or Right in General.

§ 1 (Mo.) The homestead and fee are not two separable and divisible interests, but must be kept together.—*Armor v. Lewis*, 161 S. W. 251.

#### (B) Liabilities Enforceable Against Homestead.

§ 108 (Tex.Civ.App.) A debtor has the equitable right to have a chattel mortgage debt satisfied first from the proceeds of the sale of the unexempt mortgaged property before resorting to the sale of the debtor's exempt prop-

erty.—Pugh v. Whitsitt & Guerry, 161 S. W. 953.

### III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 135 (Mo.) The rights and interests of the widow and heirs of a deceased homesteader are not to be determined by the statute of descents and distributions, but by the homestead statutes which cover the whole ground.—Armor v. Lewis, 161 S. W. 251.

§ 146 (Ark.) On the death of the mortgagor of a homestead his heir was entitled to rents and profits until one of the mortgagees had asserted his right to foreclose or take possession to subject the rents and profits to the payment of the mortgages.—Armistead v. Bishop, 161 S. W. 182.

On death of the mortgagor of a homestead it was immaterial to a junior mortgagee whether the rents prior to foreclosure were paid to the heir or to the administrator.—Id.

### IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 162 (Ky.) Temporary absence when the debt was created *held* not to defeat the right of homestead.—Mount v. Fourth Street Bank, 161 S. W. 220.

§ 180 (Ky.) Where land was paid for before a debt was created, that a conveyance to the debtor's wife was fraudulent did not defeat their right to a homestead as against the creditor.—Mount v. Fourth Street Bank, 161 S. W. 220.

§ 181 (Tex.Civ.App.) The court's finding that a wife did not abandon her homestead, but merely left her husband temporarily to earn a living for herself and her minor child, *held* supported by the evidence.—Guthridge v. Guthridge, 161 S. W. 892.

### V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 185 (Mo.) A homestead is protected against a creditor's judgment lien.—Armor v. Lewis, 161 S. W. 251.

§ 199 (Ky.) Where, in suit to set aside conveyance to debtor's wife as fraudulent, the court concluded that an allotted homestead was insufficient, he could make the allotment himself instead of appointing other commissioners.—Mount v. Fourth Street Bank, 161 S. W. 220.

§ 203 (Mo.) A creditor of the owner cannot sell the homestead tract on *fi. fa.* subject to the homestead right.—Armor v. Lewis, 161 S. W. 251.

## HOMICIDE.

See Criminal Law, §§ 778, 805; Indictment and Information, § 191.

### II. MURDER.

§ 8 (Tex.Cr.App.) Under Pen. Code 1911, art. 15, one who committed a homicide in April, before the enactment of Acts 33d Leg. c. 116, effective July 1st, abolishing the degrees of murder, should be tried under the old law.—Hill v. State, 161 S. W. 118.

§ 13 (Tex.Cr.App.) In murder in the second degree malice will be implied from the fact of an unlawful killing not justified or excused.—Cooper v. State, 161 S. W. 1094.

§ 18 (Tex.Cr.App.) Where accused and others were engaged in hauling away goods stolen from a burglarized car when accused shot an officer attempting to arrest them, accused was "in the perpetration" of the burglary, within Pen. Code 1911, art. 1141.—Christian v. State, 161 S. W. 101.

### III. MANSLAUGHTER.

§ 36 (Tex.Cr.App.) Though accused used insulting epithet intending to provoke a difficulty, if he intended to provoke only an ordinary fight and was forced to kill under the circumstances, *held*, that he would not be guilty of a higher grade of homicide than manslaughter.—Reed v. State, 161 S. W. 97.

§ 54 (Ark.) Where defendant shot and killed under the belief that he was about to be assaulted, but acted too hastily and without due care, he was guilty of manslaughter.—Bruder v. State, 161 S. W. 1067.

§ 63 (Tex.Cr.App.) Person who killed another in a fight *held* guilty only of manslaughter if he entered into the fight with no purpose of killing and the court should have submitted manslaughter from the viewpoint of mutual combat.—Reed v. State, 161 S. W. 97.

§ 63 (Tex.Cr.App.) That accused was a smaller man than deceased *held* not to reduce homicide committed in a fight with a knife below the grade of manslaughter under the facts.—Dawson v. State, 161 S. W. 469.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 125 (Tex.Cr.App.) Homicide is excusable where the death of a human being happens by accident or misfortune.—Cooper v. State, 161 S. W. 1094.

### VII. EVIDENCE.

#### (B) Admissibility in General.

§ 156 (Tex.Cr.App.) Evidence as to location and extent of wounds inflicted on deceased *held* admissible on the question of whether an intent to kill was manifest from the manner of accused's use of a knife, though deceased's death from wounds inflicted by accused had already been proved.—Dawson v. State, 161 S. W. 469.

§ 158 (Tex.Cr.App.) In a prosecution for killing accused's wife, evidence as to a quarrel earlier in the morning, other than that which was the basis of the homicide, was admissible to show the relation between the parties.—Hill v. State, 161 S. W. 118.

§ 165 (Tex.Cr.App.) In the trial of accused for the murder of his wife, evidence of his ill treatment during their marriage of 13 months *held* admissible.—Cooper v. State, 161 S. W. 1094.

§ 174 (Tex.Cr.App.) Evidence that deceased, after receiving the fatal injuries, and while being taken to a doctor, asked where "the s— of a b—" (meaning accused) was, was properly excluded.—Dawson v. State, 161 S. W. 469.

§ 188 (Tex.Cr.App.) Accused was not entitled to prove by decedent's wife that decedent had served a two-year term in the penitentiary, in the absence of an offer to prove that she had informed accused of the fact prior to the killing.—Shaw v. State, 161 S. W. 963.

#### (C) Dying Declarations.

§ 203 (Tex.Cr.App.) Where decedent, while being helped into the ambulance after being shot, told witness to take decedent's gun because he would never have any more use for it, consciousness of approaching death was shown, within Code Cr. Proc. 1911, art. 808.—Christian v. State, 161 S. W. 101.

#### (E) Weight and Sufficiency.

§ 250 (Tex.Cr.App.) Evidence *held* sufficient to support a conviction for manslaughter.—Dawson v. State, 161 S. W. 469.

§ 254 (Mo.) Evidence *held* to sustain a conviction of murder in the second degree.—State v. Miles, 161 S. W. 766.

### VIII. TRIAL.

#### (B) Questions for Jury.

§ 282 (Tenn.) Under Shannon's Code, § 6441, the trial court cannot, where accused pleaded



not guilty and claimed that he fired the fatal shot by accident while attempting to rob deceased, take away from the jury the right to determine whether the offense was murder in the first degree or a lesser crime.—*Shipp v. State*, 161 S. W. 1017.

(C) Instructions.

§ 286 (Tex.Cr.App.) Where the evidence showed that accused and decedent who were strangers met suddenly in the nighttime, and accused testified that he cut decedent only once, with a pocketknife, which was not shown to have been a dangerous weapon, merely to defend himself and another against threatened attack and without intent to kill, the court should have instructed that accused should be acquitted of homicide if he had no intent to kill.—*Trevino v. State*, 161 S. W. 108.

§ 292 (Ark.) In a prosecution for assault with intent to kill, instruction as to defendant's felonious intent and as to his resumption of the difficulty after its abandonment held not erroneous as permitting a conviction without considering the element of malice aforethought.—*Alford v. State*, 161 S. W. 497.

§ 294 (Ark.) Where defendant in a prosecution for assault with intent to kill was guilty of some degree of assault, even if he was too intoxicated to form a specific intent to kill, the omission to charge as to the element of intoxication was not error.—*Alford v. State*, 161 S. W. 497.

§ 295 (Tex.Cr.App.) It was error to refuse a requested charge in a homicide case submitting the question of insulting conduct by decedent toward accused's mother, the evidence raising that issue.—*Trevino v. State*, 161 S. W. 108.

§ 300 (Ark.) An instruction, in a prosecution for assault with intent to kill, that, if accused thought he might be murderously assaulted by A., prosecuting witness, "or" the latter's brother, it was his duty to do everything in his power, consistent with his own safety, to avoid the difficulty was not erroneous, where accused testified that when he shot he believed that prosecuting witness and his brothers were making a concerted attack upon him.—*Coulter v. State*, 161 S. W. 186.

An instruction held not objectionable as permitting an inference that there was evidence that accused could have prevented the injury without shooting after drawing his pistol, where prosecutor testified that accused had his pistol in his hands before he shot.—Id.

§ 300 (Ark.) In a trial for homicide, instruction held to deal exclusively with the subject of self-defense and not to be objectionable as telling the jury that if there was really no danger to defendant, no matter how honest his belief of danger was, he would be guilty of murder.—*Bruder v. State*, 161 S. W. 1067.

§ 300 (Mo.) An instruction that accused must have believed and have had reasonable cause to believe that decedent was about to take his life, and that, in determining whether accused had reasonable cause, the jury must consider all the facts, sufficiently submitted the law of self-defense.—*State v. Miles*, 161 S. W. 766.

An instruction on self-defense held properly refused for want of evidence on which to base it.—Id.

An instruction that it was the same offense to kill a bad man as to kill a good one, and that decedent when intoxicated was a quarrelsome man, did not justify accused in killing him, held proper.—Id.

§ 300 (Tex.Cr.App.) Reasonable doubt as to necessity of a charge of manslaughter, self-defense, or defense of another should be resolved in favor of accused.—*Christian v. State*, 161 S. W. 101.

§ 300 (Tex.Cr.App.) The court having given a full charge on self-defense, without any lim-

itation on provoking the difficulty, it was not necessary to give defendant's requested instruction that he had a right to seek deceased for an explanation of remarks about him and his sister-in-law and if he anticipated danger to arm himself.—*Strickland v. State*, 161 S. W. 110.

§ 300 (Tex.Cr.App.) Evidence that decedent said to defendant, "I will fix you right now," and grabbed for an axe, whereupon defendant immediately killed him, did not require a charge on threats.—*Belcher v. State*, 161 S. W. 459.

In a prosecution for patricide, an instruction on self-defense, held not erroneous as containing a condition hypothesizing defendant's knowledge of the character and disposition of deceased and their relative strength.—Id.

§ 300 (Tex.Cr.App.) Where accused alone testified that deceased had threatened to kill him, and there was no question of any other threats, a charge as to defendant's honest belief as to the making of such a threat by deceased was not called for.—*Perales v. State*, 161 S. W. 482.

Where accused alone testified, without contradiction, that deceased had threatened to kill him, and there was no question of any other threats, a charge as to defendant's honest belief as to the making of such a threat by deceased was not called for.—Id.

§ 300 (Tex.Cr.App.) Where accused, on returning from a hunting expedition, shot decedent on a railroad right of way, the court did not err in omitting to charge that, when accused saw decedent, he had the right to arm himself and demand an explanation of prior threats.—*Shaw v. State*, 161 S. W. 963.

§ 300 (Tex.Cr.App.) An instruction on self-defense requiring the jury to find that, at the time defendant shot, he believed that he had been actually assaulted, and that he shot deceased in good faith, etc., held erroneous.—*Johnson v. State*, 161 S. W. 1098.

§ 301 (Tex.Cr.App.) A reasonable doubt as to necessity of a charge of defense of another should be resolved in favor of accused.—*Christian v. State*, 161 S. W. 101.

§ 301 (Tex.Cr.App.) An instruction on defense of another held erroneous.—*Trevino v. State*, 161 S. W. 108.

Where there was evidence in a homicide case that accused did the cutting to defend another, who was then being attacked by decedent, the issue of the killing in defense of another should have been submitted.—Id.

§ 307 (Tenn.) It is the better practice to charge upon all of the offenses embraced in the indictment, since failure to do so will be reversible if there is any doubt that accused was prejudiced by such omission.—*Jones v. State*, 161 S. W. 1016.

§ 308 (Tenn.) In view of Shannon's Code, § 6441, requiring the jury to ascertain in their verdict whether the offense is murder in the first or second degree, it was error for the court on trial of an indictment for murder not to instruct on second degree murder.—*Jones v. State*, 161 S. W. 1016.

§ 309 (Ark.) An instruction placing the burden of showing the homicide to be manslaughter was proper, where the evidence would have warranted a conviction of murder in the second degree.—*Carlton v. State*, 161 S. W. 145.

§ 309 (Tex.Cr.App.) A reasonable doubt as to necessity of a charge of manslaughter should be resolved in favor of accused.—*Christian v. State*, 161 S. W. 101.

§ 309 (Tex.Cr.App.) It was not error in a homicide case to refuse to submit in the charge on manslaughter the insulting language by decedent which consisted in calling accused a son of a whore and disgraced.—*Trevino v. State*, 161 S. W. 108.

§ 309 (Tex.Cr.App.) Evidence *held* to call for an instruction on negligent homicide in the second degree.—Hill v. State, 161 S. W. 118.

§ 309 (Tex.Cr.App.) Accused's testimony *held* insufficient to raise the issue of sudden anger or fear aroused by adequate cause; and, the state's evidence indicating a plain case of murder, the court did not err in omitting to charge on manslaughter.—Shaw v. State, 161 S. W. 963.

§ 309 (Tex.Cr.App.) Evidence *held* not to raise the issue of negligent homicide.—Cooper v. State, 161 S. W. 1094.

#### (D) Verdict.

§ 313 (Tex.Cr.App.) Where accused was charged with having committed a murder in 1901, when the punishment for murder on express malice differed from that provided for murder with implied malice, he was entitled to have the jury find whether he committed the offense with express or implied malice.—Johnson v. State, 161 S. W. 1098.

### X. APPEAL AND ERROR.

§ 340 (Ark.) In a prosecution for homicide, the giving of an instruction casting on accused the burden of showing the offense to be less than murder in the second degree was harmless, where accused was only convicted of manslaughter.—Carlton v. State, 161 S. W. 145.

§ 340 (Tenn.) Failure to instruct on second degree murder so that the jury could ascertain in its verdict whether the offense was first or second degree murder, pursuant to Shannon's Code, § 6441, was reversible error, notwithstanding Pub. Acts 1911, c. 32.—Jones v. State, 161 S. W. 1016.

§ 340 (Tex.Cr.App.) Under evidence that decedent, a deputy, stepped out from hiding and presented a gun at accused and others carrying away stolen property, any error in submitting manslaughter, self-defense, or defense of another was not prejudicial, though the only defense was alibi.—Christian v. State, 161 S. W. 101.

§ 349 (Tex.Cr.App.) Where a conviction for aggravated assault under an indictment for assault to murder is reversed, assault to murder should not be submitted on the new trial.—Lara v. State, 161 S. W. 99.

### HOSPITALS.

See Taxation, §§ 29, 38.

### HUMANITARIAN DOCTRINE.

See Master and Servant, § 295; Negligence, § 119; Railroads, § 338.

### HUSBAND AND WIFE.

See Appeal and Error, §§ 719, 1009, 1027, 1172; Bigamy; Descent and Distribution, § 128; Divorce; Frauds, Statute of, § 63; Fraudulent Conveyances, § 269; Judgment, § 693; Marriage; Partition, § 9; Pleading, § 433; Sales, § 359; Vendor and Purchaser, § 229.

#### I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 15 (Mo.) Where a wife joined with her husband in executing a power of attorney to convey land in which her husband had a life estate, and the power clearly showed that she had no interest in the land except as wife, her execution did not carry with it her contingent remainder in the land given by the will of her father-in-law.—Armor v. Frey, 161 S. W. 829.

§ 25 (Mo.App.) Upon a husband's lease of property of his wife in which he had no interest, *held*, in view of her knowledge, her claim for an accounting of the rents, etc., that there was a recognition in the lease and that the

lessee became the wife's tenant.—Shull v. Cummings, 161 S. W. 360.

§ 25 (Mo.App.) Evidence, in an action by a daughter against her mother's estate to recover for personal services in caring for her mother, *held* not to show that plaintiff's husband was her agent for making a contract with her mother to pay for the latter's care.—Taylor v. George, 161 S. W. 1187.

### III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 49½ (Ky.) Where a husband, competent to transact business, directed a note for land sold to be made payable to the wife, it would be construed as a gift to or provision for her, in the absence of any agreement to the contrary.—Adams v. Button, 161 S. W. 1100.

#### V. WIFE'S SEPARATE ESTATE.

##### (B) Rights and Liabilities of Husband.

§ 138 (Mo.App.) Though a husband who leased his wife's property did not have her written consent as the statute requires, after death of the husband or divorce, she might ratify the lease.—Shull v. Cummings, 161 S. W. 360.

##### (C) Liabilities and Charges.

§ 156 (Ark.) A married woman was not personally liable on a note executed by her for her husband's accommodation, which was given for the purchase price of a jack in which she had no interest.—Warden v. Middleton, 161 S. W. 151.

§ 171 (Mo.) That a wife signed a note and deed of trust on her home because of threats that her husband would be prosecuted for crime if she did not, constituted duress authorizing cancellation.—Ryan v. Strop, 161 S. W. 700.

#### VI. ACTIONS.

§ 221 (Ky.) Where a wife has been fully compensated for her interest in land, but her record title remains, the court ordering sale thereof under judgment against the husband should make her a party to the action.—Marcum v. Marcum, 161 S. W. 516.

#### VII. COMMUNITY PROPERTY.

§ 249 (Tex.Civ.App.) Property acquired by a husband before his wife secured a divorce is community property, even if at the time of the acquisition she was living apart from him because obliged to do so to make her own living.—Guthridge v. Guthridge, 161 S. W. 892.

§ 250 (Tex.Civ.App.) Where one entered on land as a trespasser, and occupied it for four or five years, and then orally gave it to a married daughter, and she and her husband remained in possession long enough to acquire title by adverse possession, the property was community property.—Treadwell v. Walker County Lumber Co., 161 S. W. 397.

§ 267 (Tex.Civ.App.) Where a husband deserts his wife, she may sell the community estate to provide necessities for herself, even though she has no minor children.—Adams v. Wm. Cameron & Co., 161 S. W. 417.

§ 267 (Tex.Civ.App.) Where a husband conveyed one-half of the community property of himself and wife to their infant child, the rights of the parties, upon the death of the child intestate and without issue, are the same as if no conveyance had been made.—Guthridge v. Guthridge, 161 S. W. 892.

A conveyance by a husband of the community property of himself and wife is good as to his interest in the property and should not be canceled at the suit of the wife except as to her share.—Id.

§ 268 (Tex.Civ.App.) Where first deed of trust to land, undivided half interest of which was wife's separate property and one-half community property, by husband and wife secured debt

on which wife was surety, while second deed by husband alone secured his debt, wife's right to have husband's interest sold and applied to the first debt before resorting to her interest *held* superior to the equity of the creditor.—*H. O. Wooten Grocer Co. v. Smith*, 161 S. W. 945.

§ 270 (Tex.Civ.App.) In trespass to try title to community property, it is not necessary to make the defendant's wife a party, even though the land be used as their homestead.—*Childress v. Robinson*, 161 S. W. 78.

§ 273 (Tex.Civ.App.) Where a wife died before the execution of a deed by which the surviving husband acquired title, the presumption was that the property was his separate estate, unless it were shown that title had in effect been acquired by purchase prior to the death of the wife and had been paid for with community funds.—*Le Blanc v. Jackson*, 161 S. W. 60.

### VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 283 (Mo.App.) A husband is entitled to select the family domicile; but neither spouse is entitled to demand that the other live in such manner that his or her parents cannot visit them.—*Coulter v. Coulter*, 161 S. W. 281.

Where a wife abandoned her husband, leaving the home that he had provided for her, he condoned her fault by resuming cohabitation with her under a promise to provide as soon as possible a new home more acceptable to her, consenting for her to temporarily remain with her parents.—*Id.*

A wife is entitled to a decree for separate maintenance under Rev. St. 1909, § 8295, where her husband consented to her living apart from him temporarily, and failed to make any provision for her return to him or to new home in another state.—*Id.*

§ 283 (Mo.App.) A wife may leave home and sue for separate maintenance under the statute, if her husband's wrongful conduct makes her condition while living with him intolerable.—*Kindorf v. Kindorf*, 161 S. W. 318.

There is an abandonment, entitling the wife to separate maintenance, where her husband wrongfully drives her from him or turns her out of doors.—*Id.*

To constitute an abandonment, so as to entitle the wife to a separate maintenance, there must be a failure or refusal to provide for her, as well as an abandonment.—*Id.*

A husband cannot, after turning his wife out of his home without cause, relieve himself from providing a separate maintenance by offering to support her if she returns.—*Id.*

§ 297 (Mo.App.) Evidence in an action for separate maintenance *held* to sustain a finding that defendant struck his wife and drove her from his home, and afterwards refused to provide for her unless she would return.—*Kindorf v. Kindorf*, 161 S. W. 318.

Evidence in an action for separate maintenance *held* not to show that an allowance of \$25 a month was excessive.—*Id.*

### IMPEACHMENT.

See Witnesses, §§ 317-410.

### IMPLIED CONTRACTS.

See Money Lent; Work and Labor.

### IMPROVEMENTS.

See Mechanics' Liens; Municipal Corporations, §§ 286-586, 623; Partition, § 85.

### IMPUTED NEGLIGENCE.

See Negligence, § 93.

### INCORPORATION.

See Municipal Corporations, §§ 14-17.

### INCUMBRANCES.

See Wills, § 839.

### INDEBTEDNESS.

See Wills, § 839.

### INDEMNITY.

See Principal and Surety.

§ 9 (Tex.Civ.App.) On a contract of indemnity whereby defendant had agreed to pay or discharge plaintiff's debts, *held* not to be indemnified by an attorney's fee paid by him in defending one of the creditors' suits pending the transaction.—*First State Bank of Paradise v. Wallace*, 161 S. W. 957.

§ 15 (Tex.Civ.App.) Bank's contract to pay plaintiff's debts *held* merely a contract of indemnity, and that plaintiff, to maintain his action for the breach thereof, and to recover the difference between the face of the debts and the amount actually paid by defendant for their discharge, must show that he had paid the debts in controversy.—*First State Bank of Paradise v. Wallace*, 161 S. W. 957.

### INDEPENDENT CONTRACTORS.

See Master and Servant, §§ 315, 319.

### INDICTMENT AND INFORMATION.

See Abortion, § 6; Assault and Battery, §§ 74, 77; Criminal Law, §§ 619, 1088, 1167; Forgery, § 29; Mayhem, § 4; Railroads, § 255; Robbery, §§ 17, 20, 30; Sodomy, § 5.

### IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§ 35 (Ark.) Prosecuting officers have the right to file a criminal "information" which is an accusation in the nature of an indictment, differing only in being presented by a competent public official on his oath of office instead of by a grand jury on their oath.—*State v. Williams*, 161 S. W. 159.

### V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 79 (Mo.App.) An information need not strictly conform to the rules of grammar, if it fully informs defendant of the nature and cause of the accusation.—*State v. Schomers*, 161 S. W. 1177.

§ 109 (Ark.) An indictment charging a statutory offense must allege all of the essential elements.—*State v. Chicago, R. I. & P. Ry. Co.*, 161 S. W. 1066.

§ 119 (Tex.Cr.App.) The indictment clearly charging an offense both in getting drunk and being found intoxicated in a public place, unnecessary allegations do not invalidate it but are surplusage.—*Kuykendall v. State*, 161 S. W. 130.

### VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 124 (Mo.) There was an improper joinder of parties defendant in an information charging that accused and another jointly stole a horse and also charging that accused alone assisted in the escape of such other after such other had alone stolen the same horse.—*State v. Christian*, 161 S. W. 736.

§ 125 (Ark.) Indictment for rape by force on a female under 16 *held* not defective as charg-

ing both rape and carnal abuse.—*Threet v. State*, 161 S. W. 139.

§ 130 (Mo.) A count, charging that accused and another jointly stole a horse, could not be joined with another count charging that accused assisted in the escape of such other after he alone had stolen the same horse, not being authorized by Rev. St. 1909, §§ 4523, 5103, 5104.—*State v. Christian*, 161 S. W. 736.

Only such offenses may be joined as arise out of the same transaction and are so far related that an acquittal or conviction for one would bar a prosecution for the other.—*Id.*

## IX. ISSUES, PROOF, AND VARIANCE.

§ 171 (Tex.Cr.App.) Where an indictment charged that three persons committed robbery, they were not entitled to acquittal if the evidence did not show that they acted jointly, but one or more might be convicted.—*Madrid v. State*, 161 S. W. 93.

## X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 191 (Mo.) Rev. St. 1909, § 4458, defining manslaughter in the second degree and the offense of felony of abortion, creates separate offenses, and, under an information charging manslaughter in the second degree, accused may not be convicted of abortion.—*State v. Sonner*, 161 S. W. 723.

## INDORSEMENT.

See Bills and Notes, § 237.

## INFANTS.

See Equity, § 59; Executors and Administrators, § 221; Guardian and Ward; Master and Servant, § 95; Municipal Corporations, § 786; Negligence, §§ 23, 85; Parent and Child.

## INFORMATION.

See Indictment and Information.

## INHERITANCE TAX.

See Taxation, §§ 867, 893.

## INJUNCTION.

See Appeal and Error, §§ 518, 1043; Execution, § 172; Municipal Corporations, § 623; Partnership; Schools and School Districts, § 107; Trespass to Try Title, § 6.

## II. SUBJECTS OF PROTECTION AND RELIEF.

### (C) Contracts.

§ 59 (Tex.Civ.App.) The insolvent proprietor of a moving picture show, who licensed plaintiffs to visit his show at any time without payment, will be enjoined from preventing plaintiffs from visiting his performance.—*Prickett v. Steiner*, 161 S. W. 35.

### (G) Personal Rights and Duties.

§ 99 (Mo.App.) A man's occupation partakes of the character of property entitled to the protection of an injunction.—*Clarkson v. Laiblan*, 161 S. W. 660.

§ 101 (Mo.App.) Conspiracy of officers of a trade union, who threatened plaintiff's employer with a strike, whereby plaintiff lost his place as foreman and lost a subcontract, to his substantial injury, held to authorize an injunction.—*Clarkson v. Laiblan*, 161 S. W. 660.

## III. ACTIONS FOR INJUNCTIONS.

§ 114 (Mo.App.) Where the business agent of a local union, by threats of a strike made to plaintiff's employer, according to the regulations of the union, caused plaintiff's loss of a job and of a subcontract, the other officers of the union

were also guilty of conspiracy and subject to be enjoined.—*Clarkson v. Laiblan*, 161 S. W. 660.

§ 115 (Tex.Civ.App.) Court held not authorized to grant a permanent injunction in a suit originally filed by a single plaintiff, where a substituted petition made the original plaintiff and another parties plaintiff, and there was no citation or notice to defendants after it was filed and no answer filed or other appearance made.—*J. M. Radford Grocery Co. v. Owens*, 161 S. W. 911.

§ 118 (Tex.Civ.App.) In a suit for an injunction, the rule that the allegations of the petition must be taken most strongly against complainant is reenforced by the requirement that the material elements entitling complainant to relief shall be sufficiently certain to negative every reasonable inference possible on other supposable facts to the contrary.—*Ross v. Veltmann*, 161 S. W. 1073.

§ 122 (Tex.Civ.App.) Where a supplemental petition in an injunction suit alleged a new ground for injunctive relief, it should have been verified.—*Ross v. Veltmann*, 161 S. W. 1073.

§ 128 (Ark.) In an action to compel defendant, the former engineer of a drainage district, to turn over the records of his office to his successor, evidence held to show that defendant was never elected engineer of the district but was merely engaged as a construction engineer.—*Keene v. Trice*, 161 S. W. 499.

Evidence held insufficient to show that defendant was employed until the completion of the work but to establish that he was employed for a stipulated length of time.—*Id.*

§ 128 (Mo.) In a suit to enjoin the enforcement of a municipal ordinance prohibiting further burials in a cemetery located within a municipality, evidence held to show that the ordinance was not passed for the benefit of the public health or to abate nuisances.—*Union Cemetery Ass'n v. Kansas City*, 161 S. W. 261.

## IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

### (B) Continuing, Modifying, Vacating, or Dissolving.

§ 163 (Tex.Civ.App.) Where, after a sworn answer is filed showing changed conditions that no longer entitle complainant to the temporary restraining order, it may be dissolved.—*Ross v. Veltmann*, 161 S. W. 1073.

§ 188 (Tex.Civ.App.) Where, after a sworn answer is filed showing changed conditions that no longer entitle complainant to the temporary restraining order, it is dissolved, costs so far as necessary to give complainant the relief to which she is entitled may be taxed against defendant.—*Ross v. Veltmann*, 161 S. W. 1073.

## VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 241 (Ark.) Immediately upon the dissolution of an injunction staying proceedings on a decree, the chancellor could render judgment against the principals and sureties on the injunction bond according to its terms, under Kirby's Dig. § 3998.—*Felker v. Rice*, 161 S. W. 162.

## INNOCENCE.

See Criminal Law, § 308.

## INNUENDO.

See Libel and Slander, §§ 86, 100.

## INSANE PERSONS.

See Habeas Corpus, § 20.

## II. INQUISITIONS.

§ 13 (Mo.App.) Rev. St. 1909, § 476, providing for inquisitions without notice to or the presence of the alleged insane person, is un-

constitutional.—*Citizens' State Bank of Trenton v. Shanklin*, 161 S. W. 341.

Where defendant was not notified, his mere presence in court at a subsequent proceeding wherein he was declared sane is not a judicial admission of the validity of the first inquisition; it appearing that the second was not instituted by him.—*Id.*

§ 26 (Mo.App.) A proceeding without notice is subject to collateral attack.—*Citizens' State Bank of Trenton v. Shanklin*, 161 S. W. 341.

#### IV. CUSTODY AND SUPPORT.

§ 54 (Mo.App.) An unauthorized person, acting as guardian for a lunatic, is not entitled to credits for any expenditures except for necessities for the insane person or his family.—*Citizens' State Bank of Trenton v. Shanklin*, 161 S. W. 341.

One appointed as guardian of a defendant in a void inquisition as to his sanity is not entitled to a credit for moneys furnished defendant's adult son to enable him to move to California, it not appearing how the sums furnished could be considered necessities.—*Id.*

Nor is he entitled to credits for sums furnished defendant's adult daughter to defray necessary expenses during her last illness.—*Id.*

#### V. PROPERTY AND CONVEYANCES.

§ 65 (Mo.App.) Where the guardian of defendant, appointed in an inquisition wherein he was held insane, expended money to keep up life policies previously taken out by defendant, the guardian is entitled to a credit for such expenditures even though his appointment was void.—*Citizens' State Bank of Trenton v. Shanklin*, 161 S. W. 341.

§ 66 (Tex.Civ.App.) Plaintiff was not entitled to a return of the consideration as a condition to the canceling of certain deeds executed by an insane person in the absence of proof that he had the money at the time of his death or that it had been used to purchase necessities or been invested by or for him for the benefit of his estate and was still on hand.—*Brown v. Brenner*, 161 S. W. 14.

#### INSOLVENCY.

See Bankruptcy; Limitation of Actions, § 49; Principal and Surety, § 163.

#### INSPECTION.

See Appeal and Error, § 659; Carriers, § 290; Municipal Corporations, §§ 591, 611.

#### INSTRUCTIONS.

To jury, see Criminal Law, §§ 755½-830; Trial, §§ 136, 191-296.

#### INSURANCE.

See Abatement and Revival, § 39; Executors and Administrators, §§ 57, 423, 434; Fraudulent Conveyances, § 39; Insane Persons, § 65; Judgment, § 569; Libel and Slander, § 80; Licenses, § 7; Master and Servant, § 340.

#### V. THE CONTRACT IN GENERAL.

##### (A) Nature, Requisites, and Validity.

§ 145 (Tex.Civ.App.) Where live stock insurance policies did not provide that the policy was in force only while the horse was in a certain town, and insured requested a similar renewal policy, insured could assume that the policy issued did not contain a provision so limiting the company's liability.—*Indiana & O. Live Stock Ins. Co. v. Keiningham*, 161 S. W. 384.

##### (B) Construction and Operation.

§ 146 (Mo.App.) Language of a policy is to be construed so as to effectuate the insurance,

and not so as to defeat it.—*Mitchell v. German Commercial Accident Co.*, 161 S. W. 362.

Where the language employed in a policy is in the least doubtful, it is to be more strictly construed against the insurer, and in such a way as to protect the insured.—*Id.*

§ 146 (Mo.App.) In case of ambiguity, a contract of insurance should be construed most strongly against the insurer.—*Century Realty Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 161 S. W. 624, 631; *Same v. Travelers' Ins. Co.*, *Id.* 630.

§ 146 (Tex.Civ.App.) Insured is ordinarily bound by the terms of the policy, whether he reads it or not.—*Indiana & O. Live Stock Ins. Co. v. Keiningham*, 161 S. W. 384.

Every doubt must be resolved against the company in case of inconsistent provisions in an insurance policy.—*Id.*

§ 151 (Tex.Civ.App.) Where a live stock policy made the application a part of it, the application would control if the policy provided that the horse should be insured only while it remained in a certain county and the application did not so limit the liability.—*Indiana & O. Live Stock Ins. Co. v. Keiningham*, 161 S. W. 384.

§ 179½ (Mo.App.) An express promise being made by the insured to repay a loan and redeem the policy pledged therefor, the contract created a personal obligation on the insured, and, though the pledge was void, the personal obligation remained.—*Gillen v. New York Life Ins. Co.*, 161 S. W. 667.

#### VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 239 (Mo.App.) Under Rev. St. 1899, § 7900, providing for the surrender of life policies for an adequate consideration, the insured could, after default in premiums, surrender the policy on cancellation of a personal indebtedness.—*Gillen v. New York Life Ins. Co.*, 161 S. W. 667.

§ 240 (Mo.App.) A pledge of a life policy by the insured to the company to secure a loan held not a surrender of the policy, under Rev. St. 1899, § 7900.—*Gillen v. New York Life Ins. Co.*, 161 S. W. 667.

§ 241 (Mo.App.) The insured could consent to a surrender of the policy and the application of its proceeds to the payment of his loan, either directly or by way of estoppel.—*Gillen v. New York Life Ins. Co.*, 161 S. W. 667.

#### X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

##### (E) Nonpayment of Premiums or Assessments.

§ 367 (Mo.App.) Under Rev. St. 1899, § 7897, providing for purchase of extended insurance, a loan contract by which the insured agreed that the net reserve should be applied to the payment of the loan held void.—*Gillen v. New York Life Ins. Co.*, 161 S. W. 667.

Where the insured was not sufficiently informed of his rights, his failure to reply to a notice from the company and protest against the application of the proceeds of the net reserve of his policy to the satisfaction of a personal indebtedness created by a loan was not an acquiescence by estoppel to such action by the company.—*Id.*

#### XII. RISKS AND CAUSES OF LOSS.

##### (E) Accident and Health Insurance.

§ 452 (Mo.App.) Accident policy held not to cover the death of one killed while attempting to board a street car, but who had not become a passenger.—*Mitchell v. German Commercial Accident Co.*, 161 S. W. 362.

**XVIII. ACTIONS ON POLICIES.**

§ 646 (Ky.) The presumption that death by drowning was accidental, and not suicidal, arises only after evidence of the circumstances surrounding the death compatible either with the theory of accidental death, or with suicide, and cannot be based on mere proof of drowning.—*Farnsley's Adm'r v. Philadelphia Life Ins. Co.*, 161 S. W. 1111.

§ 666 (Mo.App.) Though an indemnity policy fixed \$5,000 as the limit for any one injured, the insurer, being entitled to conduct the defense and bound to pay the costs and expenses thereof, held bound to defray the interest accrued on a judgment pending appeal in accordance with Rev. St. 1909, § 7181, though the judgment was for \$5,000.—*Century Realty Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 161 S. W. 624, 631; *Same v. Traveler's Ins. Co.*, Id. 630.

§ 668 (Ky.) Where the defense was cancellation by notice accepted by the insured's agent, and there was no evidence that the agent had any authority other than to procure the policy, a peremptory instruction was properly given for plaintiffs.—*Dixie Fire Ins. Co. v. A. Layne & Bro.*, 161 S. W. 530.

**XX. MUTUAL BENEFIT INSURANCE.****(B) The Contract in General.**

§ 723 (Tex.Civ.App.) False statements that one had never had dysentery or any disease of the genital organs or undergone a surgical operation are material to the risk, within Acts 31st Leg. (1st Extra Sess.) c. 36.—*Supreme Ruling of Fraternal Mystic Circle v. Hansen*, 161 S. W. 54.

**(D) Forfeiture or Suspension.**

§ 745 (Tex.Civ.App.) Acts 31st Leg. (1st Extra Sess.) c. 36, declaring untrue statements in an application for membership in a fraternal beneficiary association shall not prevent recovery on the benefit certificate unless shown to be material, does not govern a certificate on a member reinstated before the act took effect.—*Supreme Ruling of Fraternal Mystic Circle v. Hansen*, 161 S. W. 54.

§ 751 (Mo.App.) Where the by-laws required notice of contributions called to be mailed to the member at his regular address, the mailing of such notice was a condition precedent to the right of the association to declare a forfeiture of death benefits.—*Bange v. Supreme Council Legion of Honor of Missouri*, 161 S. W. 652.

Parties to an insurance contract may agree that the mailing of notices for contributions shall constitute notice to the member.—Id.

§ 755 (Mo.App.) Waiver of forfeiture of a benefit certificate for nonpayment of dues by the acceptance of a premium is not based on contract or actual intention, but on estoppel to insist on conditions inconsistent with the acceptance or rejection of the premium.—*Keys v. National Council, Knights & Ladies of Security*, 161 S. W. 345.

A forfeiture of a benefit certificate once waived cannot afterwards be revived.—Id.

As between the association and a beneficiary, the rule that actual knowledge of the cause of forfeiture must be shown to work a waiver will not be applied, if it should have known of the facts by proper attention to its business.—Id.

A waiver of a forfeiture of a mutual benefit certificate may be inferred when the association, after knowledge of the cause of forfeiture, requires insured under the policy to do some act or incur some expense.—Id.

Knowledge of the local financial officer of a mutual benefit association that insured was more than 60 days in arrears when she was reinstated charged the association with such knowledge.—Id.

The conduct of a mutual benefit association in not unequivocally declaring a forfeiture when

it learned of insured's death on the day after paying dues in arrears, but instead, requesting the appointment of an administrator for insured, knowing that she had no other property, could be considered in determining whether it had knowledge of her illness while retaining her premiums prior to her death, as well as on the question of waiver of the forfeiture after her death.—Id.

A forfeiture for nonpayment of premiums is waived where a benefit association, with knowledge of the cause of forfeiture, causes plaintiff to incur additional expense in furnishing proof.—Id.

By accepting and retaining back premiums with knowledge of insured's ill health when they were paid, a mutual benefit association waived a forfeiture for nonpayment.—Id.

Though a mutual benefit association did not know that its agent had accepted back premiums after the time within which they could be paid, or while insured was in bad health, it ratified the agent's act by retaining them after learning that she was in bad health when the agent received them, so as to waive the forfeiture as of the time the agent accepted the premiums.—Id.

§ 756 (Mo.App.) Under the by-laws held that a suspension did not become effective, even though the member was notified of his default, until the council declared him to be suspended.—*Bange v. Supreme Council Legion of Honor of Missouri*, 161 S. W. 652.

To sustain a forfeiture for nonpayment of contributions, it must appear that the notice of suspension was received by the member in time for him to have acted upon it, where it was not delivered to his regular address.—Id.

For the notice of suspension to conclude a forfeiture, it must be an official one.—Id.

The question of the regular address of a member of an insurance order is not identical with that of domicile, which depends on intention, the expression "regular address" merely referring to the place where the member would be likely to get his mail.—Id.

For acquiescence in an illegal suspension to bind the beneficiary, it need not appear that the member had official notice of his suspension.—Id.

§ 757 (Mo.App.) Where a member acquiesced in a suspension, his beneficiary is bound by such acquiescence, even though the suspension was not legal.—*Bange v. Supreme Council Legion of Honor of Missouri*, 161 S. W. 652.

§ 761 (Tex.Civ.App.) An application for reinstatement in a fraternal mutual benefit association held a warranty that the member had had none of the diseases mentioned in the original application after the certificate was issued.—*Supreme Ruling of Fraternal Mystic Circle v. Hansen*, 161 S. W. 54.

In the absence of a statute limiting the effect of a breach of warranty, on which one is reinstated to membership in a fraternal mutual benefit association which has issued a benefit certificate on his life, that he has not had certain diseases, the breach works a forfeiture of the contract.—Id.

**(F) Actions for Benefits.**

§ 818 (Mo.App.) In an action on a certificate defended on the ground of forfeiture for nonpayment of premiums, evidence of the retention of back premiums paid after actual notice of insured's ill health when paying them was admissible upon the association's intention in originally receiving the premiums.—*Keys v. National Council, Knights & Ladies of Security*, 161 S. W. 345.

In an action on a certificate defended on the ground of forfeiture by nonpayment of back premiums until insured was ill, evidence that insured's neighbors knew that she was sick was not admissible to show that the company had actual knowledge of her sickness.—Id.

§ 819 (Mo.App.) Slight evidence showing an intention to waive a forfeiture of a mutual benefit certificate for nonpayment of premiums will prevent a forfeiture.—*Keys v. National Council, Knights & Ladies of Security*, 161 S. W. 345.

In an action on a certificate defended on the ground of forfeiture by nonpayment of premiums until after sickness, evidence that the association retained back premiums after notice of insured's ill health when she paid them was admissible, as showing a waiver of forfeiture by ratifying the act of the association's agent in theretofore accepting back premiums without a health certificate, so as to show that insured could rely on such a course.—Id.

§ 819 (Mo.App.) Evidence held to make out a prima facie case, casting on the defendant the burden of establishing its defense.—*Bange v. Supreme Council of Legion of Honor of Missouri*, 161 S. W. 652.

§ 825 (Mo.App.) The question whether a fraternal benefit association has followed a course of conduct as might waive a forfeiture of a certificate for nonpayment of dues is usually for the jury.—*Keys v. National Council, Knights & Ladies of Security*, 161 S. W. 345.

In an action on a mutual benefit certificate, defended on the ground of forfeiture by nonpayment of premiums for three months, and offering to pay such arrears while ill, whether the association, by accepting such dues and requesting the appointment of an administrator, waived the forfeiture held a jury question.—Id.

Evidence held to make it a jury question whether the forfeiture was waived by failing to unequivocally declare a forfeiture on learning that the premiums were paid while insured was sick.—Id.

§ 825 (Mo.App.) The question of the insured's regular address held for the jury.—*Bange v. Supreme Council Legion of Honor of Missouri*, 161 S. W. 652.

## INTENT.

See Deeds, § 93; Homicide, §§ 156, 286; Mortgages, § 32; Wills, §§ 104, 440-488.

## INTEREST.

See Appeal and Error, § 1068; Malicious Prosecution, § 67; Usury.

## II. RATE.

§ 31 (Tex.Civ.App.) Where an obligation providing for the return of money did not stipulate any rate of interest, the obligee can recover only the legal rate of 6 per cent.—*Willett v. Herrin*, 161 S. W. 28.

## INTERMEDIATE COURTS.

See Appeal and Error, § 1092.

## INTERPLEADER.

See Attachment, § 302; Garnishment, § 217.

## INTOXICATING LIQUORS.

### III. LOCAL OPTION.

§ 36 (Tex.Cr.App.) Under Rev. Civ. St. 1911, art. 5728, objection to notice of local option election must be made by contest and cannot be made on prosecution for selling intoxicating liquors in prohibition territory.—*Miller v. State*, 161 S. W. 128.

### VI. OFFENSES.

§ 146 (Tex.Cr.App.) Person who, on behalf of himself and others, contributing part of the purchase price, bought whisky which they then drank, held not guilty of selling whisky.—*McLain v. State*, 161 S. W. 117.

§ 169 (Tex.Cr.App.) Person who in procuring whisky acted merely as agent of purchaser held not guilty of selling it.—*Cowley v. State*, 161 S. W. 471.

## VIII. CRIMINAL PROSECUTIONS.

§ 224 (Mo.App.) Under Rev. St. 1909, §§ 7227, 7228, every keeping for another of intoxicating liquors in a local option county is prima facie unlawful and when admitted places the burden of explanation upon the accused.—*State v. Galliton*, 161 S. W. 848.

§ 230 (Tex.Cr.App.) The prosecution being for pursuing the occupation of selling intoxicating liquors, testimony that defendant at various other times, after selling to witness, solicited him to make purchases is admissible.—*Miller v. State*, 161 S. W. 128.

Evidence of whisky and alcohol being frequently shipped and delivered to defendant is admissible, on a prosecution for pursuing the business of selling intoxicating liquors.—Id.

§ 233 (Tex.Cr.App.) On trial for selling intoxicating liquors, evidence as to receipt by accused of liquor about and prior to the alleged sale held competent.—*Cowley v. State*, 161 S. W. 471.

Where accused testified that he procured whisky from D. at request of prosecuting witness, exclusion of testimony that accused inquired for D., was directed to him, started in that direction, and immediately thereafter delivered to the prosecuting witness a half pint of whisky held erroneous.—Id.

§ 236 (Mo.App.) Evidence in a prosecution for keeping for another intoxicating liquors, in violation of local option law (Rev. St. 1909, § 7227), held to sustain a conviction.—*State v. Galliton*, 161 S. W. 848.

§ 239 (Tex.Cr.App.) The charge on prosecution for pursuing the occupation of selling intoxicating liquors held not to authorize a conviction merely for making two sales.—*Miller v. State*, 161 S. W. 128.

## INTOXICATION.

See Criminal Law, § 53; Homicide, § 294.

## INVITED ERROR.

See Appeal and Error, § 882.

## JOHNSON GRASS.

See Agriculture, § 8.

## JOINDER.

See Indictment and Information, §§ 124, 130; Parties, § 14.

## JOINT TENANCY.

See Tenancy in Common.

## JUDGES.

See Criminal Law, §§ 634, 656; Exceptions, Bill of, § 51; Justices of the Peace; Venue, § 72.

## JUDGMENT.

See Appeal and Error; Constitutional Law, § 312; Divorce, § 167; Equity, §§ 418, 430; Execution; Justices of the Peace, §§ 147-162, 189; Larceny, §§ 55, 65; Libel and Slander, § 156; Limitation of Actions, § 105; Partition, § 63; Pleading, §§ 345, 403-433; Principal and Surety, § 163; Process, § 142; Prostitution, §§ 1, 4; Railroads, § 348; Robbery, § 24; Seduction, § 46; Trespass to Try Title, § 6; Trial, § 397.

## I. NATURE AND ESSENTIALS IN GENERAL.

§ 17 (Tex.Civ.App.) A judgment awarding execution as on a personal judgment is unauthorized.



ized in an action against a nonresident commenced by substituted service and attachment.—*Baker v. Hahn*, 161 S. W. 443.

Under district court rules 13 and 14 (142 S. W. xviii), an original petition after amendment is no longer part of the pleadings, and hence, in an action against a nonresident begun by attachment, the service upon the nonresident of the original petition, after amendment, will not support a judgment.—*Id.*

#### IV. BY DEFAULT.

##### (B) Opening or Setting Aside Default.

§ 138 (Ky.) The failure of an agent, appointed by a foreign corporation to receive service of process, to inform the corporation of the service of a writ, is not an unavoidable casualty or misfortune within the meaning of Civ. Code Prac. § 518, subsec. 7.—*S. B. Reese Lumber Co. v. Licking Coal & Lumber Co.*, 161 S. W. 1124.

A judgment against a foreign corporation will not be vacated because service was made on one who, though not actually its agent to receive service, was so designated in the statement filed with the Secretary of State.—*Id.*

#### VI. ON TRIAL OF ISSUES.

##### (A) Rendition, Form, and Requisites in General.

§ 199 (Tex.Civ.App.) Judgment non obstante veredicto is permissible only when there is undisputed evidence, outside of the facts found by the jury, on which a verdict should have been directed.—*Mixon v. Wallis*, 161 S. W. 907.

##### (B) Parties.

§ 237 (Mo.) In ejectment, where the land sued for is held in separate possession by different defendants, the plaintiff may be compelled to elect against which he may proceed, but where such election is not required, judgment may be rendered against each defendant.—*Norton v. Reed*, 161 S. W. 842.

##### (C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 251 (Ark.) Plaintiffs held not entitled to a decree against a bank for an amount which had been deposited to their credit and their right to which had not been disputed; their action being to recover a larger amount from the depositors.—*Bank of Des Arc v. Moody*, 161 S. W. 134.

§ 251 (Mo.) Where the pleadings in a suit to reform a deed of trust and to quiet title, under Rev. St. 1909, § 2535, did not raise any issue as between defendants, a decree which not only granted the relief demanded by plaintiff but which purported to settle the rights of defendants as between themselves was erroneous because beyond the issues.—*Wolz v. Venard*, 161 S. W. 760.

Cross-actions as between codefendants must be germane to plaintiff's bill and in the nature of a defense to give the court jurisdiction to found a decree thereon.—*Id.*

§ 251 (Tex.Civ.App.) In an action to foreclose vendor's lien notes, where the plea of intervention filed by the purchaser of the maker's interest was stricken, the court could not in its judgment determine the rights of the intervener to the surplus, if any, after foreclosure; such determination having no support in the pleadings.—*Brown v. Bay City Bank & Trust Co.*, 161 S. W. 23.

§ 252 (Tex.Civ.App.) If defendant prays for relief and shows himself entitled thereto by the evidence, the court may grant it notwithstanding the pleadings of the plaintiff do not request it.—*Gutheridge v. Gutheridge*, 161 S. W. 892.

§ 253 (Mo.App.) A judgment in excess of the amount claimed is improper, and will be reversed.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

#### VII. ENTRY, RECORD, AND DOCKETING.

§ 289 (Mo.) Where a judgment recites valid notice, this recital only refers to the facts appearing in the judgment roll, when such facts are so preserved; and the recitals contained in the roll may be used to overthrow those in the judgment.—*Norton v. Reed*, 161 S. W. 842.

#### XI. COLLATERAL ATTACK.

##### (B) Grounds.

§ 490 (Mo.) In a suit to quiet title as against a tax deed, plaintiffs held not entitled to question the sufficiency of a notice by publication on nonresident owners on the ground that the order of publication was not spread of record by the clerk.—*Davidson v. Laclede Land & Improvement Co.*, 161 S. W. 686.

#### XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

##### (A) Judgments Operative as Bar.

§ 569 (Ky.) A judgment on the pleadings in an action on an accident policy, in favor of defendant for plaintiff's failure to allege that the death was accidental, is in effect a dismissal for failure to state a cause of action and is not a bar to a future action.—*Farnsley's Adm'r v. Philadelphia Life Ins. Co.*, 161 S. W. 1111.

##### (B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 622 (Mo.App.) Where a defendant urged a set-off the judgment is an adjudication of the right to set-off, and that matter cannot be urged in a subsequent action on the judgment.—*Mallory v. Patterson*, 161 S. W. 306.

#### XIV. CONCLUSIVENESS OF ADJUDICATION.

##### (B) Persons Concluded.

§ 693 (Tex.Civ.App.) Where defendants in a previous action of trespass to try title recovered a judgment against plaintiff's husband, the then owner of the land, that judgment was conclusive as to the question whether the land constituted plaintiff's homestead.—*Childress v. Robinson*, 161 S. W. 78.

§ 693 (Tex.Civ.App.) A judgment for plaintiff, in trespass to try title against a husband, is conclusive on the rights of the wife, where the property was community property.—*Treadwell v. Walker County Lumber Co.*, 161 S. W. 397.

§ 707 (Ark.) A decree of the chancery court, in a suit instituted by courthouse commissioners against the dedicator of certain land to the public, that such dedication was a mistake, and that the owner intended to convey it to the county for courthouse purposes and setting aside such dedication, held not to affect the rights of the public or of any one not a party to the suit.—*Schuman v. George*, 161 S. W. 1039.

##### (C) Matters Concluded.

§ 713 (Mo.App.) Defendant, against whom a judgment was recovered for his fraud in obtaining plaintiff's signature to a mortgage and notes for a greater amount than was agreed upon, cannot, in a subsequent action on the judgment, set up as a partial defense his possession of one of the mortgage notes, where that defense was not urged.—*Mallory v. Patterson*, 161 S. W. 306.

A judgment of revivor is res adjudicata as to all matters which were or might have been set up in the proceedings to revive, and hence a defense raised in a proceeding to revive a judgment cannot be raised in a subsequent action on the judgment revived.—*Id.*

§ 713 (Tex.Civ.App.) Judgment against plaintiff on his note to the amount of \$76 held conclusive as against his right to recover for damages to that extent on the ground of fraud in obtaining the note, as such claim could have been interposed.—*Edwards v. Dennington*, 161 S. W. 929.



§ 715 (Ky.) Judgment reversing judgment for shipper in railroad's action for undercharges of freight and holding that the road was entitled to recover *held* a bar to the shipper's subsequent suit to recover the amount paid on the ground that the road had fraudulently furnished him the lower rate intending to exact the lawful higher rate.—Allen v. Louisville & N. R. Co., 161 S. W. 203.

§ 715 (Mo.App.) In an action on a judgment, defenses set up and adjudicated in an action in aid of the judgment are res adjudicata, and cannot be again urged.—Mallory v. Patterson, 161 S. W. 306.

#### **XVII. FOREIGN JUDGMENTS.**

§ 822 (Mo.App.) A judgment against an ancillary administrator furnishes no cause of action, and is not even evidence, against the domiciliary executor or administrator.—First Nat. Bank of Corning, Ark., v. Dowdy, 161 S. W. 859.

Where judgment was recovered against an ancillary administrator, the refusal of the court having charge of the domiciliary administration to permit the enforcement of the judgment against the estate was not a violation of the full faith and credit clause of the United States Constitution.—Id.

#### **XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.**

§ 866 (Mo.) Under Rev. St. 1909, §§ 2125-2132, providing for the revival of judgments, a judgment can be revived only in the court rendering it, notwithstanding section 2535, authorizing suits to determine interest in real estate and quiet title thereto.—Wolz v. Venard, 161 S. W. 760.

#### **XXI. ACTIONS ON JUDGMENTS.**

##### **(A) Domestic Judgments.**

§ 910 (Ky.) Where surety paid a judgment, but his principal made no new promise to him, and made no payment during the period of limitations, the judgment is barred by the lapse of 20 years; it appearing that no execution was issued during that time.—Davis v. Strange, 161 S. W. 217.

#### **XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.**

§ 948 (Mo.App.) The conclusiveness of a prior adjudication must ordinarily be pleaded.—Iroquois Mfg. Co. v. Annan-Burg Milling Co., 161 S. W. 320.

#### **JUDICIAL NOTICE.**

See Evidence, §§ 5-35.

#### **JUDICIAL SALES.**

See Execution, §§ 272, 275.

#### **JURISDICTION.**

See Contempt, §§ 36, 44; Counties, §§ 34, 113; Courts; Criminal Law, § 1020; Eminent Domain, § 172; Executors and Administrators, § 519; Justices of the Peace, §§ 36-45, 91, 100, 141; Telegraphs and Telephones, § 26.

#### **JURY.**

See Appeal and Error, § 170; Criminal Law, §§ 755½-830, 857-866, 1086; Highways, § 41; Trial, §§ 136-296, 370.

#### **II. RIGHT TO TRIAL BY JURY.**

§ 24 (Tex.Cr.App.) Constitutional right of trial by jury does not entitle the accused to have the punishment assessed by the jury after they

have determined his guilt.—Ex parte Marshall, 161 S. W. 112.

#### **IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.**

§ 75 (Ark.) It is within the discretion of the trial court to excuse a juror on account of sickness.—Bruder v. State, 161 S. W. 1087.

#### **V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.**

§ 99 (Tex.Cr.App.) A juror in a trial for bigamy, who, before the trial, had said that in such case he would convict the defendant, *held* incompetent by reason of his fixed and expressed opinion of defendant's guilt.—Harris v. State, 161 S. W. 125.

§ 107 (Tex.Cr.App.) Where the state depended on circumstantial evidence, the court properly sustained a challenge to jurors who had conscientious scruples against inflicting the death penalty upon such evidence.—Borders v. State, 161 S. W. 483.

### **JUSTICES OF THE PEACE.**

See Appeal and Error, § 1092.

#### **III. CIVIL JURISDICTION AND AUTHORITY.**

§ 36 (Tex.Civ.App.) An action for \$137 rent due from defendant, as plaintiff's tenant, is within the jurisdiction of the justice court; the rule estopping a tenant from disputing the title of his landlord rendering the question of title immaterial.—Standley v. Currey, 161 S. W. 416.

§ 44 (Tex.Civ.App.) Where the petition stated a cause of action for the recovery of \$200 delivered to defendant under an agreement that he should repay on demand, the jurisdiction of the justice court is not ousted by the general averment of \$500 for the defendant's refusal to pay.—Willett v. Herrin, 161 S. W. 26.

§ 44 (Tex.Civ.App.) Suit to cancel a note for \$65 secured by a chattel mortgage on property valued at more than \$200 with plea of a former judgment on the note for \$78 and a reply seeking damages in the amount of such judgment *held* a suit for damages to the amount of the judgment, within the original jurisdiction of the justice's court.—Edwards v. Dennington, 161 S. W. 929.

§ 45 (Tex.Civ.App.) Where defendant set up a counterclaim alleging several amounts, the total of which exceeded \$200, the counterclaim was beyond the jurisdiction of the justice, even though defendant prayed for a recovery of only \$200.—Willett v. Herrin, 161 S. W. 26.

#### **IV. PROCEDURE IN CIVIL CASES.**

§ 90 (Tex.Civ.App.) Pleadings are as essential to make an issue in the justice court as in a court of record.—Young Men's Christian Ass'n of Dallas v. Schow Bros., 161 S. W. 931.

§ 91 (Mo.App.) Statement of account filed in justice's court *held* sufficiently definite and specific.—Rundelman v. John O'Brien Boiler Works Co., 161 S. W. 609.

A very liberal rule prevails with respect to statements filed before justices of the peace.—Id.

§ 91 (Mo.App.) A statement against a railroad company for killing of animal on its track, alleging that the company by its employees negligently ran its train against the animal, and that by ordinary care the accident could have been avoided, sufficiently stated a cause of action.—Martin v. Butler County R. Co., 161 S. W. 631.

§ 91 (Tex.Civ.App.) A petition *held* to state a cause of action on contract, and the claim, being for interest eo nomine and not as damages, does not oust the justice of jurisdiction.—Willett v. Herrin, 161 S. W. 26.

§ 100 (Mo.App.) A party cannot bring a suit before a justice on one cause of action and recover on another.—*Rundelman v. John O'Brien Boiler Works Co.*, 161 S. W. 609.

§ 100 (Mo.App.) Where a suit for killing stock is brought against a railroad in a township other than that where the stock was killed, the fact that the townships adjoined is jurisdictional and must be averred and proved.—*Martin v. Butler County R. Co.*, 161 S. W. 631.

§ 101 (Mo.App.) Objection in a justice's court to the reception of any evidence under the petition for failure to state a cause of action merely challenges its sufficiency for a total failure to state a cause of action and cannot fulfill the purpose of a motion to make more definite and certain.—*Rundelman v. John O'Brien Boiler Works Co.*, 161 S. W. 609.

## V. REVIEW OF PROCEEDINGS.

### (A) Appeal and Error.

§ 141 (Tex.Civ.App.) The county court acquires no jurisdiction on appeal where the justice was without jurisdiction.—*Willett v. Herrin*, 161 S. W. 26.

§ 141 (Tex.Civ.App.) In determining the jurisdiction of the county court upon an appeal from the justice's court, averments in plaintiff's supplemental petition, filed in answer to defendant's plea to the jurisdiction first filed in the county court, cannot be considered.—*Standley v. Currey*, 161 S. W. 416.

§ 147 (Tex.Civ.App.) Under Rev. Civ. St. 1911, arts. 747, 2393, order of justice's court more than two years after judgment refusing to enter nunc pro tunc order setting aside the judgment, and granting new trial, *held* not appealable.—*Southwestern Land Corporation v. Neese*, 161 S. W. 1090.

§ 148 (Tex.Civ.App.) When a judgment nunc pro tunc is entered by a justice of the peace, it becomes the final judgment of the court, and an appeal may be taken therefrom, and a reversal of the entire proceedings had.—*Southwestern Land Corporation v. Neese*, 161 S. W. 1090.

§ 158 (Mo.App.) Under Rev. St. 1909, §§ 2273, 7568, *held*, that a judgment may be affirmed where appellant does not within apt time pay the requisite filing fee to the circuit clerk.—*Muth Realty Co. v. Timmerberg*, 161 S. W. 589.

The payment of the fee for filing the transcript of an appeal from a judgment of the justice is not jurisdictional, and affirmance for failure to pay rests in the discretion of the court.—*Id.*

Where plaintiffs left the conduct of appeal from a justice to their attorney, failure to pay filing fee within apt time will be excused where the attorney was stricken with mortal illness before the time to pay.—*Id.*

§ 159 (Tex.Civ.App.) Where plaintiffs' cause of action was dismissed and the only judgment against them was for costs, no bond is required to perfect an appeal to the county court; and hence a defect in the bond given was not ground for dismissal.—*Willett v. Herrin*, 161 S. W. 26.

§ 162 (Tex.Civ.App.) An appeal from a judgment of the justice's court annuls the judgment.—*Southwestern Land Corporation v. Neese*, 161 S. W. 1090.

§ 164 (Ark.) Under Kirby's Dig. § 4670, providing that, before the first day of the circuit court next after the appeal shall have been granted, the justice shall file his transcript, the appellant must see that this is done, although the statute imposes the duty on the justice.—*Hart v. Lequeieu*, 161 S. W. 201.

Kirby's Dig. § 4670, while directory, cannot be ignored, and the appeal must be dismissed for failure to file the transcript within the time prescribed, unless the appellant shows an excuse for the delay.—*Id.*

§ 166 (Ark.) Where the circuit court dismisses an appeal from a justice court, it may at the

same term reinstate the appeal for a good excuse shown.—*Hart v. Lequeieu*, 161 S. W. 201.

§ 173 (Tex.Civ.App.) An agreement, in an action begun by attachment in justice court, that the attachment should be quashed and the court should enter such judgment as might be just *held* not to preclude defendant from asserting on appeal his claim for damages for wrongful attachment.—*Johnson v. Tindall*, 161 S. W. 401.

§ 174 (Mo.App.) Under Rev. St. 1909, § 7588, where defendant pleaded a counterclaim before a justice of the peace, he could not enlarge his demand by amendment on appeal to the circuit court.—*Excelsior Stove Mfg. Co. v. Million*, 161 S. W. 298.

§ 174 (Mo.App.) Noncompliance with Rev. St. 1909, § 7413, requiring filing of items of account *held* waived on appeal from the justice to the circuit court by failure to make motion therefor.—*Barton Lumber Co. v. Gibson*, 161 S. W. 357.

§ 174 (Tex.Civ.App.) Where plaintiff in justice court claimed only \$152, an amendment on appeal claiming \$350 additional should have been stricken.—*McKneely v. Beatty*, 161 S. W. 18.

§ 174 (Tex.Civ.App.) Where defendant's counterclaim was beyond the jurisdiction, defendant cannot complain that the county court improperly allowed plaintiffs to interpose a defense thereto not pleaded in the justice court.—*Willett v. Herrin*, 161 S. W. 26.

§ 174 (Tex.Civ.App.) Rev. Civ. St. 1911, art. 759, authorizing plaintiff to plead new matter on removal of case from justice court to county court by certiorari, *held* to apply also to appeals.—*Young Men's Christian Ass'n of Dallas v. Schow Bros.*, 161 S. W. 931.

§ 189 (Mo.App.) Where a judgment appealed from the justice's court is affirmed because of failure to diligently prosecute, the appellant must not only show facts sufficient to excuse his failure to prosecute the appeal but must also make a prima facie showing that he had a meritorious defense or cause of action.—*Muth Realty Co. v. Timmerberg*, 161 S. W. 589.

An affirmance of a judgment appealed from a justice's court for failure to prosecute the appeal cannot be vacated merely upon an affidavit alleging that the appellant had a meritorious defense.—*Id.*

## JUSTIFIABLE HOMICIDE.

See Homicide, § 125.

## KNOWLEDGE.

See Corporations, § 18.

## LANDLORD AND TENANT.

See Adverse Possession, § 25; Chattel Mortgages, § 138; Costs, § 60; Garnishment, § 108; Husband and Wife, § 25; Justices of the Peace, § 36; Limitation of Actions, § 28; Logs and Logging, § 3; Mines and Minerals, § 64.

## III. LANDLORD'S TITLE AND REVERSION.

### (A) Rights and Powers of Landlord.

§ 55 (Tex.Civ.App.) Under a turpentine lease whereby defendant agreed to pay the owner a specified sum for each tree destroyed, burned, etc., during the work, and under which \$1,000 was deposited to secure the obligation, the amount of the deposit *held* not to measure the defendant's liability, when that was expressly fixed by the contract.—*Conn v. Rosamond*, 161 S. W. 73.

### (B) Estoppel of Tenant.

§ 61 (Tex.Civ.App.) A tenant is estopped to deny the title of his landlord.—*Standley v. Currey*, 161 S. W. 416.

## VI. TENANCIES AT WILL AND AT SUFFERANCE.

§ 120 (Mo.App.) Under the express provision of R. S. 1909, § 7883, a tenant at will is entitled to 30 days' notice to quit.—*Shull v. Cummings*, 161 S. W. 360.

## VII. PREMISES. AND ENJOYMENT AND USE THEREOF.

### (A) Description, Extent, and Condition.

§ 125 (Mo.App.) There is no implied covenant by the landlord that the premises are in good repair when let.—*Wilt v. Coughlin*, 161 S. W. 888.

### (D) Repairs, Insurance, and Improvements.

§ 150 (Mo.App.) In the absence of a covenant to repair, the landlord is not liable for failure to keep the premises in repair.—*Wilt v. Coughlin*, 161 S. W. 888.

### (E) Injuries from Dangerous or Defective Condition.

§ 162 (Mo.App.) A landlord is liable for injuries proximately resulting from hidden dangers on the leased premises.—*Wilt v. Coughlin*, 161 S. W. 888.

§ 166 (Mo.App.) Where a tenant's horse was kept in the barn lot some 60 or 70 feet in the rear of the house upon the leased premises, and the lease did not contemplate that it should be kept in the front yard, the landlord was not liable for injury to the horse by falling into a cesspool, covered by boards and earth, in the front yard, the existence of which the tenant knew.—*Wilt v. Coughlin*, 161 S. W. 888.

§ 169 (Mo.App.) Evidence, in an action by a tenant for injuries to his horse by falling into a cesspool in the front yard, *held* to show that the parties did not contemplate that that part of the premises would be used by the tenant to run horses on.—*Wilt v. Coughlin*, 161 S. W. 888.

## VIII. RENT AND ADVANCES.

### (A) Rights and Liabilities.

§ 209 (Ark.) Under Kirby's Dig. § 5035, a subtenant of farm land is liable to the owner only for the rent on the land for which he contracted.—*Storthez v. Smith*, 161 S. W. 183.

### (B) Actions.

§ 223 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 1330, in landlord's action for rent and compensation for the use of farming implements and mules, breach of warranty of horses which defendant bought from landlord in part consideration for the lease *held* a proper counterclaim.—*Gillispie v. Ambrose*, 161 S. W. 937.

### (C) Lien.

§ 246 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 5490, a landlord had no lien on property of the tenant which was exempt from forced sale.—*Harris v. Townley*, 161 S. W. 5.

## IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 306 (Mo.App.) Where the petition alleged merely a right to possession in plaintiff, an answer of general denial was merely a denial of such right of possession and was sustained by a failure to give notice to quit.—*Shull v. Cummings*, 161 S. W. 360.

## LANDS.

See Public Lands.

## LAPSE.

See Partition, § 44.

## LARCENY.

See Burglary; Criminal Law, §§ 369, 372; Indictment and Information, § 130; Libel and Slander, § 100; Robbery.

## II. PROSECUTION AND PUNISHMENT.

### (B) Evidence.

§ 55 (Mo.) Evidence in a prosecution for grand larceny for hog theft *held* to sustain a conviction.—*State v. Shaffer*, 161 S. W. 805.

§ 64 (Mo.) Where the manner of obtaining actual possession of recently stolen property is fully explained, and the only issue is whether accused holds such possession feloniously or innocently, no presumption of guilt arises from the mere fact of possession.—*State v. Christian*, 161 S. W. 736.

§ 65 (Mo.App.) Evidence *held* to sustain a conviction of petit larceny.—*State v. Powell*, 161 S. W. 600.

## LAST CLEAR CHANCE.

See Master and Servant, § 295; Negligence, § 119; Railroads, § 338.

## LAW OF THE CASE.

See Appeal and Error, § 1097.

## LAWYERS.

See Attorney and Client.

## LEASE.

See Landlord and Tenant.

## LEGACIES.

See Wills.

## LEGACY TAX.

See Taxation, §§ 867, 893.

## LEGISLATIVE POWER.

See Municipal Corporations, §§ 64-73.

## LETTERS.

See Criminal Law, § 400; Evidence, §§ 168, 185; Seduction, § 46; Witnesses, §§ 193, 268.

## LEVEES.

§ 2 (Ark.) Act March 24, 1913 (Laws 1913, p. 791), in authorizing the commissioners of Helena Improvement District to make an additional improvement in its levee without the consent of a majority in value of the property owners, is not invalid, the district including suburban as well as urban territory, and the constitutional provision regulating improvement districts applying only to one embracing exclusively urban property.—*Cunningham v. Keeshan*, 161 S. W. 170.

§ 7 (Ark.) Authority of commissioners of Helena Improvement District, under Act March 24, 1913 (Laws 1913, p. 791) § 1, is to be considered as authorizing improvement of the whole levee, that north of Walker street as well as that south, in view of Act May 31, 1897 (Laws 1897 [Ex. Sess.] p. 22), creating the district with Walker street as the northerly boundary, Act 1907 extending the district a mile further north, and the need of improvement of the whole levee; "which begins," etc., being mere words of description.—*Cunningham v. Keeshan*, 161 S. W. 170.

§ 25 (Ark.) The commissioners of Helena Improvement District, under the authority of Act March 24, 1913 (Laws 1913, p. 791), to cause assessments for an enlargement and strengthening of the levee of the district, to be made, in

accordance with Act May 31, 1897 (Laws 1897 [Ex. Sess.] p. 22), creating the original district, have power to increase the assessment on discovering that it is insufficient.—*Cunningham v. Keeshan*, 161 S. W. 170.

§ 34 (Ark.) The authority to borrow money to enlarge and strengthen a levee, given by Act March 24, 1913 (Laws 1913, p. 791), implies the power to issue interest-bearing bonds.—*Cunningham v. Keeshan*, 161 S. W. 170.

## LEVY.

See Taxation, §§ 301, 463.

## LEWDNESS.

See Prostitution.

## LIBEL AND SLANDER.

See Abatement and Revival, § 39; Appeal and Error, §§ 835, 1170.

### I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 1½ (Mo.App.) Rev. St. 1909, § 4818, defining libel, is merely declaratory of the common law.—*Skelley v. St. Louis & S. F. R. Co.*, 161 S. W. 877.

§ 7 (Mo.App.) A bare statement that one has sworn falsely in court imputes the crime of perjury.—*Roney v. Organ*, 161 S. W. 868.

A charge of perjury is actionable per se.—*Id.*

§ 7 (Mo.App.) A statement by a railroad freight agent in a freight expense bill, charging a specified sum for certain fence posts "confiscated" by plaintiff in the shipment of certain logs, *held* not to import a larceny of the posts, and not therefore libelous.—*Skelley v. St. Louis & S. F. R. Co.*, 161 S. W. 877.

§ 33 (Mo.App.) The law presumes that damage results from the publication of words actionable per se.—*Roney v. Organ*, 161 S. W. 868.

## IV. ACTIONS.

### (B) Parties. Preliminary Proceedings, and Pleading.

§ 80 (Ark.) In an action by one insurance company against another, allegations as to slander by agents working for defendants against plaintiff's credit *held* not to state a cause of action.—*Arkansas Life Ins. Co. v. American Nat. Life Ins. Co.*, 161 S. W. 136.

§ 86 (Mo.App.) The function of an innuendo in an action for libel is to point out the meaning which plaintiff claims to be the true meaning of the libelous language, and is required where the language is ambiguous, whether the ambiguity is patent or latent.—*Skelley v. St. Louis & S. F. R. Co.*, 161 S. W. 877.

Where plaintiff, in an action for libel by innuendo, puts a meaning on the language published, he is bound by it.—*Id.*

§ 100 (Mo.App.) Where a petition alleged that defendant falsely charged plaintiff with larceny by publishing a charge that plaintiff "confiscated" posts belonging to a railroad company, plaintiff could not recover, in the absence of proof of his innuendo, unless the charge of confiscation necessarily imported larceny.—*Skelley v. St. Louis & S. F. R. Co.*, 161 S. W. 877.

### (C) Evidence.

§ 112 (Tex.Civ.App.) Evidence, in an action for libel in publishing a statement during plaintiff's campaign for state senator, that he had not paid a certain note given by him to defendant *held* to sustain a finding that the debt evidenced by the note had been satisfied at the time, and that both plaintiff and defendant so considered it.—*Autrey v. Collins*, 161 S. W. 413.

## VI. CRIMINAL RESPONSIBILITY.

### (B) Prosecution and Punishment.

§ 156 (Mo.App.) Evidence in a prosecution for falsely and maliciously stating that another had committed perjury *held* sufficient to sustain a conviction.—*State v. Glogover*, 161 S. W. 274.

## LICENSES.

See Courts, § 231; Criminal Law, § 400; Mines and Minerals, §§ 83, 84; Railroads, §§ 356, 358; Statutes, § 79; Taxation, § 117.

### I. FOR OCCUPATIONS AND PRIVILEGES.

§ 6 (Ky.) Though a city had power from the state to tax, and could, by ordinance, reasonably regulate the use of motor vehicles on its streets, either or both of these powers could be withdrawn from the city at any time by the Legislature.—*City of Newport v. Merkel Bros. Co.*, 161 S. W. 549.

§ 6 (Mo.) The state has power to tax all trades, professions, and occupations, and to delegate such power to municipalities.—*City of Richmond v. Creel*, 161 S. W. 794.

§ 7 (Ky.) Act 1910, known as the "Motor Vehicle Law," regulating the use of motor vehicles within the state, is not a revenue measure, but was enacted under the police power of the state.—*City of Newport v. Merkel Bros. Co.*, 161 S. W. 549.

A city ordinance, requiring all persons using motor vehicles on its streets to pay license fee, *held* invalid as to nonresidents because in conflict with Act 1910, c. 81, § 7, exempting nonresidents where they have already complied with similar laws of their own state.—*Id.*

§ 7 (Mo.) When the power to impose a license tax upon insurance companies has been delegated to municipalities, it may be exercised by them without any infringement of Const. art. 10, § 3, providing that taxes shall be uniform upon the same class of subjects within the territory limits of the authority levying the tax.—*City of Richmond v. Creel*, 161 S. W. 794.

## LIENS.

See Attorney and Client; Chattel Mortgages, § 138; Constitutional Law, § 75; Descent and Distribution, § 130; Execution, § 413; Homestead, § 185; Judgment, § 251; Landlord and Tenant, § 246; Mechanics' Liens; Municipal Corporations, §§ 558-586; Physicians and Surgeons, § 11; Pledges; Vendor and Purchaser, §§ 258-267.

## LIFE ESTATES.

See Remainders; Wills, § 614.

§ 8 (Mo.) A life tenant cannot, by his acts or declarations, set up pretensions to an absolute estate so as to make his possession adverse to the reversioner or remaindermen; those persons having no right to the estate until the termination of the life estate.—*Armor v. Frey*, 161 S. W. 829.

## LIFE INSURANCE.

See Insurance.

## LIMITATION OF ACTIONS.

See Adverse Possession; Judgment, § 910; Remainders, § 17; Stipulations, § 14.

### I. STATUTES OF LIMITATION.

#### (B) Limitations Applicable to Particular Actions.

§ 28 (Ky.) A claim for rent of real property for a period prior to August 28, 1905, was barred by limitations, and was not recoverable in an action instituted March 27, 1911.—*Burks v. Douglass*, 161 S. W. 225.

## II. COMPUTATION OF PERIOD OF LIMITATION.

### (A) Accrual of Right of Action or Defense.

§ 47 (Tex.Civ.App.) Limitations against an action for breach of a covenant of warranty do not run until actual or constructive eviction under a superior outstanding title.—*Hays v. Talley*, 161 S. W. 429.

Where there was a conflict in title which required judicial determination, limitations against an action for breach of warranty began to run from the final judgment of the Supreme Court adjudging that the county had title as against plaintiff in such action.—*Id.*

§ 49 (Ky.) The liability of the assignor of a note is barred five years after the maker is judicially declared insolvent.—*Arnett v. Howard*, 161 S. W. 531.

§ 55 (Ky.) A right of action immediately accrued to plaintiff for injury to his land by defendant railroad company dumping earth from its cut on plaintiff's land, so that an action therefor was barred after five years.—*Louisville Ry. Co. v. Wiggington*, 161 S. W. 209.

### (F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 100 (Mo.App.) In action for value of stock and for an accounting, for fraud in representing that stock transferred to plaintiff was his pro rata share of that held by defendant as trustee for plaintiff and others, facts held insufficient to bring the case within Rev. St. 1909, § 1889, subd. 5, providing that causes of action for fraud are not deemed to have accrued until the discovery of the fraud.—*Heisler v. Clymer*, 161 S. W. 337.

Under Rev. St. 1909, § 1889, subd. 5, actions for relief on the ground of fraud must be brought within five years and not within ten years of the discovery of the facts constituting the fraud.—*Id.*

### (G) Pendency of Legal Proceedings, Injunction, Stay, or War.

§ 105 (Ky.) A void judgment against the assignor on a note will not suspend the running of limitations in his favor against an action against him on the note.—*Arnett v. Howard*, 161 S. W. 531.

§ 105 (Mo.) In view of Rev. St. 1909, § 2391, referring to actions in ejectment against several defendants, a previous suit against defendant who occupied land adversely, though praying cancellation of the deed to him, held identical with a subsequent action of ejectment, and to toll the statute of limitations.—*Norton v. Reed*, 161 S. W. 842.

### (H) Commencement of Action or Other Proceeding.

§ 119 (Ky.) Under Ky. St. § 2524, declaring an action to be commenced by summons and Civ. Code Prac. § 39, declaring an action commenced by filing with the clerk a petition, etc., held that, where plaintiff has filed such petition, and caused summons to issue, he could not be prejudiced by a mistake of the clerk.—*Casey v. Newport Rolling Mill Co.*, 161 S. W. 528.

The mere direction to the clerk to issue summons where in fact no summons was issued was not sufficient to commence an action so as to stop the running of limitations.—*Id.*

§ 123 (Tex.Civ.App.) The fact that when plaintiff corporation sued on notes it was not legally entitled to sue under Rev. Civ. St. 1911, art. 7399, because it had not paid its franchise tax, would not cause the action to be barred by the four-year limitation, though before an amended petition was filed showing compliance with the statute more than four years had elapsed since maturity of the last note.—*Clegg v. Roscoe Lumber Co.*, 161 S. W. 944.

§ 130 (Mo.) Where plaintiffs, the owners of land, instituted an action before the running of the period of limitations, they could thereafter suffer a voluntary nonsuit, and within a year institute a new action, which would not be barred by limitations even though the period had then run, provided it involved the same issues as the first.—*Norton v. Reed*, 161 S. W. 842.

## III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 141 (Ky.) In order to toll the statute of limitations, the debtor must, within the statutory period, expressly promise to pay the obligation, or acknowledge it as an existing debt.—*Davis v. Strange*, 161 S. W. 217.

§ 142 (Ky.) The acknowledgment of the debt must be made to the creditor or one authorized to act for him, and evidence of statements made to third persons wherein the debtor admitted his indebtedness is inadmissible.—*Davis v. Strange*, 161 S. W. 217.

## LIMITATION OF LIABILITY.

See Telegraphs and Telephones, § 54.

## LIQUOR SELLING.

See Intoxicating Liquors.

## LIS PENDENS.

See Limitation of Actions, § 105.

## LIVE STOCK.

See Railroads, §§ 407-447.

## LIVE STOCK INSURANCE.

See Insurance, §§ 145, 151.

## LOANS.

See Money Lent.

## LOCAL LAWS.

See Statutes, § 79.

## LOCAL OPTION.

See Intoxicating Liquors, §§ 36, 224-239.

## LOGS AND LOGGING.

See Adverse Possession, § 16; Covenants; Mandamus, § 79; Sequestration, § 20.

§ 3 (Ark.) Under an agreement for the rental and clearing of timber land, held, that the title to the standing timber and the right to remove it remained in the owner, and that the tenant had no right to sell it or to destroy any of it except such as it might be necessary to destroy in clearing the land.—*Conway v. Coursey*, 161 S. W. 1030.

§ 3 (Ky.) Where grant of standing timber gave grantee six years to remove it, and he to have the right to let the trees stand after six years until he should desire to remove them, held that a failure to remove them within six years or a reasonable time thereafter did not divest his title.—*Shepherd v. Bank of Montreal*, 161 S. W. 214.

§ 3 (Tex.Civ.App.) Where it is contemplated by a conveyance of growing trees that the purchaser shall have some beneficial use of the land in connection with the trees, which shall remain on the land and receive their sustenance therefrom, the sale is of an interest in land, and carries the right to the use of the land for the sustenance of the trees and of entering thereon

to enjoy the interest conveyed.—*Davis v. Conn*, 161 S. W. 39.

Where, in conveying growing trees, a severance and taking away from the land is contemplated, the sale is of an interest in chattels only, and the right of removal must be exercised within the time agreed.—*Id.*

A sale of growing trees with the privilege of removing them within five years, or after that time, if an annual rental shall be paid, operates as a sale of chattels rather than of an interest in realty.—*Id.*

A stipulation that the agreed time for removing trees may be extended as long as the buyer "may want" upon payment of a certain rental means that the time may be extended for as long as needed.—*Id.*

Under a conveyance of growing trees with the right of removing them within five years, or thereafter if an annual rental should be paid, the buyer had the right to turpentine the trees while standing, where he proceeded, with diligence, to remove them in accordance with the contract, and no damage was done the soil beyond that necessarily incident to turpentin- ing the trees.—*Id.*

Where the buyer of all trees of 12 inches or greater diameter growing on certain land sold the right of turpentin- ing, he was not liable in damages because those turpentin- ing the trees destroyed trees under 12 inches in diameter.—*Id.*

## LOSS OF SERVICE.

See Master and Servant, § 340.

## LOTTERIES.

### II. LOTTERY FRANCHISES, CON-TRACTS, AND TRANS-ACTIONS.

§ 12 (Ark.) Where there was a contract of sale of an automobile completely executed by delivery to the winner in the contest for news- paper subscriptions, it was wholly immaterial whether the contest was a lottery.—*Jones v. Burks*, 161 S. W. 177.

## LUMBER.

See Logs and Logging.

## LUNATICS.

See Insane Persons.

## MACHINERY.

See Master and Servant, §§ 101-129; Negli- gence, § 23.

## MAIL CLERKS.

See Carriers, §§ 241, 280, 320.

## MAIMING.

See Mayhem.

## MAINTENANCE.

See Husband and Wife, §§ 283, 297.

## MALICIOUS PROSECUTION.

See Abatement and Revival, § 39.

## V. ACTIONS.

§ 52 (Tex.Civ.App.) Where, in an action for wrongful garnishment, the petition alleged that the garnishment writ, as well as the attach- ment, was sued out wrongfully and maliciously and without probable cause, and actual damag- es were claimed, exceptions to the claim for ex- emplary damages on the ground that actual damages were not sufficiently pleaded were properly overruled.—*Bennett v. Foster*, 161 S. W. 1078.

§ 55 (Tex.Civ.App.) In an action begun by at- tachment, where defendant's plea in reconven- tion did not in terms allege that the attachment was sued out without probable cause but al- leged facts showing that it was, such plea was sufficient to support a recovery of exemplary damages.—*Johnson v. Tindall*, 161 S. W. 401.

§ 58 (Tex.Civ.App.) In an action for wrong- ful garnishment arising out of plaintiff's liabil- ity as surety on notes executed by A., evidence that plaintiff was induced to sign the notes by false representations of L. that A.'s father would pay the notes as soon as the transaction was completed held inadmissible as a mere opinion on which plaintiff was not entitled to rely.—*Bennett v. Foster*, 161 S. W. 1078.

In an action for wrongful garnishment aris- ing out of plaintiff's signing certain notes of A. executed in a deal for the purchase of corpo- rate stock, evidence held admissible as tending to show knowledge on the part of the defendant that L. was acting as their agent in the sale of the stock.—*Id.*

In an action for wrongful garnishment, it was not error for the court to permit an allegation in plaintiff's petition that he made an effort to compromise the debt before the garnishment was issued to remain, and to permit proof there- of.—*Id.*

§ 64 (Tex.Civ.App.) In an action for wrongful garnishment, evidence held insufficient to justify a recovery for profits lost in terminating plain- tiff's business which he would otherwise have made in succeeding years.—*Bennett v. Foster*, 161 S. W. 1078.

§ 67 (Tex.Civ.App.) Where plaintiff claimed that the wrongful garnishment of certain cor- porate stock resulted in his inability to exchange the stock for certain vendor's lien notes, his claim for the value of such notes and interest was a proper element of damage.—*Bennett v. Foster*, 161 S. W. 1078.

Loss of prospective profits in plaintiff's busi- ness as the alleged result of the wrongful insu- rance and service of a garnishment cannot be recovered as actual damages, but may be con- sidered in determining punitive damages.—*Id.*

§ 71 (Tex.Civ.App.) In an action for compen- sation for medical services begun by attachment, where defendant claimed damages for malicious attachment, the evidence held to raise the issue of punitive damages.—*Johnson v. Tindall*, 161 S. W. 401.

## MALPRACTICE.

See Physicians and Surgeons.

## MANDAMUS.

See Appeal and Error, § 934; Exceptions, Bill of, § 53.

### II. SUBJECTS AND PURPOSES OF RELIEF.

(A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 57 (Tex.Cr.App.) Where mayor or other of- ficer refuses to approve sufficient bond of per- son appealing from mayor's court, mandamus held to be the proper remedy.—*Ex parte Hunt*, 161 S. W. 457.

(B) Acts and Proceedings of Public Of- ficers and Boards and Municipalities.

§ 79 (Ky.) Under St. 1903, § 4425, before amendment of March 16, 1905 (Laws 1906, c. 29), relating to the examination of and the granting of certificates to teachers, and Const. § 2, prohibiting arbitrary power to any state officer, held, that, where the board of county examiners arbitrarily refused a certificate, man- damus would compel the granting of a certi- ficate as a ministerial act.—*Flynn v. Barnes*, 161 S. W. 523.

Under St. 1903, § 4425, before amendment of March 16, 1905 (Laws 1906, c. 29), relating to

the examination of and the granting of certificates to teachers, and Const. § 2, prohibiting arbitrary power to any officer of the state, *held*, that, where the board had reasonable grounds for refusing a certificate, its discretion would not be controlled.—*Id.*

§ 98 (Ky.) Where a telephone company desires to construct its line along the highways of a county under Ky. St. § 4879b, and the fiscal court arbitrarily refuses to offer a franchise for sale, the telephone company may compel such action by mandamus under Civ. Code Proc. § 474.—*Christian-Todd Telephone Co. v. Commonwealth*, 161 S. W. 543.

## MANDATE.

See Mandamus.

## MANSLAUGHTER.

See Homicide, §§ 86-63, 309.

## MAPS.

See Appeal and Error, § 543.

## MARRIAGE.

See Appeal and Error, § 487; Bigamy; Criminal Law, § 400; Divorce; Executors and Administrators, § 84; Husband and Wife.

§ 40 (Tex.Civ.App.) While persons seeking to trace their title to land through a marriage of the former owner have the burden of proving a marriage, it is presumed that the marriage was valid, and the burden of proof is upon those contesting its validity.—*Adams v. Wm. Cameron & Co.*, 161 S. W. 417.

§ 47 (Tex.Civ.App.) Declarations *held* incompetent to show invalidity or nonexistence of a marriage.—*Adams v. Wm. Cameron & Co.*, 161 S. W. 417.

§ 52 (Tex.Civ.App.) Where there is testimony tending to rebut the presumption of validity of a marriage, an instruction on the presumption is properly refused; the whole matter being for the jury.—*Adams v. Wm. Cameron & Co.*, 161 S. W. 417.

## MARSHALING ASSETS AND SECURITIES.

§ 3 (Tex.Civ.App.) As a rule the doctrine of marshaling securities will not be applied so as to deprive a debtor, who has not waived his rights thereto, of his homestead or exempt property.—*Pugh v. Whitsitt & Guerry*, 161 S. W. 953.

The doctrine of marshaling assets will not be enforced so as to require a creditor, whose mortgage covers exempt and nonexempt property, to first resort to the exempt property, that other creditors not secured by such property may satisfy their claims out of the nonexempt residue.—*Id.*

## MASCULINE GENDER.

See Statutes, § 188.

## MASTER AND SERVANT.

See Appeal and Error, §§ 1033, 1039, 1050, 1068; Commerce, § 27; Corporations, § 308; Evidence, §§ 126, 474; Garnishment, § 131; Pleading, §§ 34, 369; Statutes, § 221; Trial, §§ 244, 252, 258; Work and Labor.

### I. THE RELATION.

#### (C) Termination and Discharge.

§ 20 (Ark.) Where an offer of employment did not specify any length of time of service, an acceptance would create a contract terminable at will.—*Fulkerson v. Western Union Telegraph Co.*, 161 S. W. 168.

§ 30 (Mo.App.) Where a contract to pay plaintiff commissions upon oil sold by him for defendant provided that plaintiff should get the market prices for the oil, sales by plaintiff under an agreement to refund to his customers 5 per cent. of his commissions would be a breach justifying discharge.—*Goller v. Henseler Mercantile Oil & Supply Co.*, 161 S. W. 584.

§ 41 (Tex.Civ.App.) Damages for breach of a contract of employment for a year at a certain amount per month *held* to include expense of moving and such other damages and loss sustained, not to exceed the amount to which he would have been entitled had the contract been performed.—*Louisiana Rio Grande Canal Co. v. Quinn*, 161 S. W. 375.

A servant employed for a year, at a certain amount per month, on his discharge without cause had an immediate right of action for the damages accruing from the breach, though only those damages accrued at the time of the trial are recoverable.—*Id.*

### III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

#### (A) Nature and Extent in General.

§ 86 (Ky.) Where a carrier is engaged in interstate commerce and an employé is injured while employed in such commerce, the federal Employer's Liability Act supersedes all state laws and furnishes the only basis for recovery.—*Louisville & N. R. Co. v. Strange's Adm'x*, 161 S. W. 239.

Whether an action for injuries to or death of a railroad employé depends on the federal Employer's Liability Act or the state law depends on whether the injuries were sustained while the carrier was engaged and the employé was employed in interstate commerce.—*Id.*

§ 95 (Ky.) A servant under the age of 16 years, employed in a mine without the consent of his father, may recover for injuries received in the course of his employment, regardless of the negligence of the master, where it knew that the servant was under age, and was warned not to employ him.—*Stearns Coal & Lumber Co. v. Tuggle*, 161 S. W. 1112.

§ 96 (Ky.) To recover for the master's negligence it is necessary that the injury was the natural and proximate result of the negligence.—*Cooke-Jellico Coal Co. v. Richardson's Adm'x*, 161 S. W. 537.

#### (B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Ky.) In an action for death of a railroad employé, plaintiff may recover for ordinary negligence.—*Louisville & N. R. Co. v. Strange's Adm'x*, 161 S. W. 239.

§§ 101, 102 (Mo.App.) An employer is not bound to furnish an absolutely safe place of work but only one free from the dangers not ordinarily incident to the work.—*Braden v. Chicago, B. & Q. R. Co.*, 161 S. W. 279.

§§ 101, 102 (Mo.App.) A master must exercise ordinary care in furnishing a reasonably safe appliance.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

§§ 101, 102 (Mo.App.) The term "reasonably safe," within the rule requiring an employer to adopt a reasonably safe mode for the performance of the work, means safe according to the usages, and habits, and ordinary risks of the business.—*Marquez v. Koch*, 161 S. W. 648.

§ 103 (Tenn.) A master may impose upon a servant the duty of giving signals prescribed for his own safety, and where such signals are not given as his duty requires he cannot recover for injury resulting therefrom.—*American Zinc Co. v. Smith*, 161 S. W. 494.

§ 103 (Tex.Civ.App.) Where plaintiff, whose duty it was to keep the machines adjusted and repaired, knew that a jam nut was defective

and a wrench slipped from it, whereby he was injured, defendant's liability could not be predicated on the defect in the nut.—*Pruitt v. Frost-Johnson Lumber Co. of Texas*, 161 S. W. 421.

§ 107 (Mo.App.) A railroad company which employed plaintiff to mow its right of way with a machine and by hand was not required to furnish him with a level surface to mow in order to discharge its duty.—*Braden v. Chicago, B. & Q. R. Co.*, 161 S. W. 279.

§ 107 (Mo.App.) When defendant overhauled an automobile for plaintiff's use in demonstrating, it was defendant's duty to exercise ordinary care in reconstructing all parts of it, including the steering gear.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

§ 110 (Tex.Civ.App.) In view of Rev. Civ. St. 1911, art. 6713, requiring railroads to equip their engines and tenders with foot stirrups, and in view of defendant's nonperformance of such duty, its requested instruction that it was not required to maintain foot stirrups upon its engines or tenders *held* properly refused.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 125 (Mo.App.) A master who has exercised ordinary care to furnish a reasonably safe appliance is not liable for injuries resulting from it becoming defective while in use, unless he should have known of the defect by exercising ordinary care for a sufficient time to have enabled him to remove it.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

An employer who undertakes to construct and furnish an appliance need not, as a condition to liability for defects therein, be given notice of a defect which he could have discovered by exercising ordinary care in constructing the appliance.—*Id.*

§ 125 (Tex.Civ.App.) Where defendant's switching foreman, directing the running of cars in the nighttime at the rate of 10 miles an hour, failed to know the condition of the track on which they were run, whereby there was a collision injuring a switchman, the defendant was liable, irrespective of whether the foreman actually gave the signal to go at that rate or not.—*Missouri, K. & T. Ry. Co. of Texas v. Leabo*, 161 S. W. 382.

§ 129 (Tex.Civ.App.) That a brakeman, on the breaking loose of cars, exposed himself to danger in an attempt to catch them to use the brakes, and was thrown therefrom when they struck a stationary one, did not break the causal connection between the negligence of the railroad company, in furnishing insufficient couplers and defective tracks, and the injury.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

#### (C) Methods of Work, Rules, and Orders.

§ 137 (Ky.) While a railroad brakeman assumes the risks and hazards arising from usual and ordinary jerks incident to the operation of the train, yet, if he is killed or injured as the result of an unusual and unnecessary jerk so violent as to show want of ordinary care, a recovery may be had.—*Louisville & N. R. Co. v. Strange's Adm'r*, 161 S. W. 239.

#### (D) Warning and Instructing Servant.

§ 150 (Mo.App.) If a danger is one not ordinarily incident to the service, and the employer knows it, he is negligent for failing to warn the employe; otherwise in case of nonobvious dangers.—*Braden v. Chicago, B. & Q. R. Co.*, 161 S. W. 279.

§ 155 (Mo.App.) If a danger is obvious to one of ordinary intelligence and can be appreciated by him, the employer is not bound to warn a servant thereof.—*Braden v. Chicago, B. & Q. R. Co.*, 161 S. W. 279.

#### (E) Fellow Servants.

§ 198 (Ky.) Servants placing running boards on a railroad car are not fellow servants with

a carpenter engaged in repairing the floor, where the two acted entirely independently.—*Louisville & N. R. Co. v. Moore*, 161 S. W. 1129.

§ 199 (Ky.) Servants in charge of different coal cars in a mine are not fellow servants.—*Stearns Coal & Lumber Co. v. Tuggle*, 161 S. W. 1112.

#### (F) Risks Assumed by Servant.

§ 203 (Ky.) The defenses of contributory negligence and assumed risk are distinct, the doctrine of assumed risk resting upon an agreement by the servant that the master shall not be liable for an injury ordinarily incident to the service, or arising from a known and obvious danger.—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

§ 206 (Ky.) An employe assumes all of the ordinary risks incident to his employment.—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

§ 206 (Mo.App.) One employed by a railroad company to mow, with a machine and by hand, a part of its right of way assumed the risk of injury to his team by one of the horses falling into a ditch on the right of way.—*Braden v. Chicago, B. & Q. R. Co.*, 161 S. W. 279.

§ 209 (Tex.) An experienced engineer *held* to have assumed risk of injury where base on which engine rested was too high, the space between the base and the wheel pit too narrow, the pit was insufficiently guarded, and the floor was slippery, caused by oil dropped by himself.—*Snipes v. Bomar Cotton Oil Co.*, 161 S. W. 1.

§ 217 (Ky.) An employe assumes all risks of which he may know in the exercise of ordinary care, but he does not assume latent risks.—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

§ 217 (Ky.) If the miner's own work made the room dangerous and, knowing of the danger, he remained therein, he assumed the risk.—*Cooke-Jellico Coal Co. v. Richardson's Adm'r*, 161 S. W. 537.

§ 217 (Tex.Civ.App.) A servant, who knew and fully appreciated the danger involved in the use of a wrench so defective as to slip, while he was endeavoring to loosen a nut, yet, who chose such a wrench when he might have chosen one without defect and which would not have slipped, assumed the risk of injury from the defect.—*Pruitt v. Frost-Johnson Lumber Co. of Texas*, 161 S. W. 421.

§ 226 (Ky.) An employe does not assume risks created by the master's negligence.—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

#### (G) Contributory Negligence of Servant.

§ 233 (Tex.Civ.App.) Where a master furnished a servant wrenches free of defects and reasonably safe for use, and the servant, instead of using one of them, chose and used a defective wrench, the master discharged his duty.—*Pruitt v. Frost-Johnson Lumber Co. of Texas*, 161 S. W. 421.

§ 243 (Tenn.) Servant's noncompliance with the master's rule forbidding any one to come into a mining shaft without giving notice thereof by signal *held* negligence, defeating any recovery for his death from a block falling in the shaft.—*American Zinc Co. v. Smith*, 161 S. W. 494.

§ 247 (Mo.App.) That an employe when injured was running an automobile in excess of the statutory speed limit will not bar recovery, unless such negligence proximately contributed to his injury.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

§ 248 (Tex.Civ.App.) In a car repairer's action for injuries after he had jumped from cars on a side track and ran in front of an engine on a parallel track, *held*, on the facts, that those in charge of the engine could not antici-



pate injury to plaintiff as probable until it appeared that he was nearing the track without knowing of the engine's approach.—*International & G. N. R. Co. v. Walters*, 161 S. W. 916.

#### (H) Actions.

§ 250¼ [New, vol. 15 Key-No. Series] (Ky.) Where a general allegation of negligence is sufficient in the courts of a state, such allegation is good in an action under the federal Employers' Liability Act.—*Louisville & N. R. Co. v. Stewart's Adm'x*, 161 S. W. 557.

§ 256 (Tex.) Petition *held* insufficient as failing to show upon what ground recovery was sought.—*Snipes v. Bomar Cotton Oil Co.*, 161 S. W. 1.

§ 258 (Mo.App.) Allegations, in an action for injuries by the steering gear of an automobile coming apart and causing a collision while plaintiff was demonstrating for defendant, that the injuries were the direct result of defendant's negligence in furnishing a car with defective steering apparatus, grounded the action on negligence in not originally furnishing a reasonably safe appliance, and hence need not allege that defendant should have known of the defect.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

§ 265 (Ky.) An employé, suing under the federal Employer's Liability Act for personal injuries, has the burden of showing that defendant's employes were guilty of negligence causing his injury.—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

§ 265 (Mo.App.) The presumption that an employer did his duty with respect to furnishing a reasonably safe appliance is not conclusive.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

§ 265 (Tex.Civ.App.) Acts 31st Leg. (1st Extra Sess.) c. 10 (Rev. Civ. St. 1911, art. 6049), providing that the damages shall be diminished in proportion to the amount of negligence attributable to a plaintiff, did not abrogate the rule placing the burden of proving contributory negligence upon defendant.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

§ 274 (Tex.Civ.App.) Where the railroad company claimed that a brakeman's failure to jump from wild cars was contributory negligence, evidence that it would have been dangerous to have jumped, under the circumstances, was admissible.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 276 (Ky.) Evidence *held* insufficient to show that the master's negligence in failing to properly support the roof of a mine and in allowing one of the props to be taken from near the place of the accident was the proximate cause of the injury.—*Cooke-Jellico Coal Co. v. Richardson's Adm'x*, 161 S. W. 537.

§ 276 (Ky.) In an action under the federal Employers' Liability Act for the death of an engineer, evidence *held* not to show the negligence of the rear flagman in applying the emergency air brake.—*Louisville & N. R. Co. v. Stewart's Adm'x*, 161 S. W. 557.

§ 276 (Tex.Civ.App.) Evidence in an action for injuries to an engineer in a collision of his train with another standing on the main track *held* to sustain a finding that negligence in not having the other train on siding, or in not warning plaintiff that the main track was obstructed and turning the switch for the siding, was the proximate cause of plaintiff's injury.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

§ 278 (Ky.) In an action under the federal Employers' Liability Act for the death of an engineer, evidence *held* to show that the conductor was negligent in giving signals to the engineer.—*Louisville & N. R. Co. v. Stewart's Adm'x*, 161 S. W. 557.

§ 278 (Tex.Civ.App.) Evidence in an engineer's action for injuries in a collision of his train with another standing on the main track

at a station *held* to sustain a finding of defendant's negligence in failing to have the other train on the side track, or if not, in failing to warn plaintiff that the main track was obstructed, and in not turning the switch for the side track.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

§ 278 (Tex.Civ.App.) In a brakeman's action for injuries, evidence *held* sufficient to show that by use the outer top edge of a step on a tender had worn off, so that instead of presenting a square edge on top it slanted downward.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

In a brakeman's action for injuries by slipping a worn step on the tender while attempting to board after opening a gate, evidence *held* sufficient to show that at the time of his injury he was in the discharge of his duty.—*Id.*

Evidence *held* sufficient to show that such step was provided for the use of employes in going upon the tender and train.—*Id.*

§ 281 (Ky.) Evidence, in an experienced miner's action for injuries from the falling of slate, *held* to sustain a finding that at the time of the accident plaintiff was digging coal from the entry stump, contrary to the rules of the mine, and that his own negligence was the proximate cause of his injury.—*Sams v. Gray*, 161 S. W. 553.

§ 285 (Mo.App.) In an action for injuries by the steering gear of an automobile which plaintiff was demonstrating for defendant coming apart and causing a collision with a tree, whether the injury was caused by the defective steering gear or by the explosion of a tire *held* a jury question.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

§ 285 (Tex.Civ.App.) In a personal injury action by a railroad brakeman, the question whether the employer's negligence was the proximate cause of the injury *held* under the evidence for the jury.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 286 (Ky.) Whether a jerk by which plaintiff's decedent was thrown from his train and received injuries from which he died was an unusual and unnecessary one showing negligence *held* for the jury.—*Louisville & N. R. Co. v. Strange's Adm'x*, 161 S. W. 239.

§ 286 (Tex.Civ.App.) Whether the outer step on a tender which was worn so as to slant downward, instead of presenting a square edge on top, made it more likely that one's foot would slip therefrom, and whether its maintenance in such condition was negligence, *held* questions for the jury.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 286 (Tex.Civ.App.) In a car repairer's action for injuries by being struck by an engine, *held*, on the evidence, that the question whether the engineer saw plaintiff on the side of the car from which he jumped and ran in front of the engine was for the jury.—*International & G. N. R. Co. v. Walters*, 161 S. W. 916.

§ 286 (Tex.Civ.App.) On injury to a brakeman, thrown from wild cars which had come uncoupled, the question of the master's negligence in furnishing insufficient couplers and in maintaining defective tracks *held* for the jury.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 288 (Ky.) Evidence *held* to make it a jury question whether the jerking of a train was only the ordinary movement of the train, the risk of which plaintiff assumed.—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

§ 289 (Mo.App.) In an action for injuries by the steering gear of an automobile furnished to plaintiff for demonstrating coming apart and causing a collision with a tree, whether plaintiff was guilty of contributory negligence in

exceeding the speed limit *held* a jury question.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

Whether plaintiff's negligence in running the automobile above the statutory speed limit proximately contributed to his injury *held* a jury question.—*Id.*

§ 289 (Tex.Civ.App.) Evidence in an action by a railroad engineer for injuries in a collision of his train with train on the main track at a station *held* not to show plaintiff's contributory negligence as a matter of law in assuming the track was clear because the switch target was white.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

§ 289 (Tex.Civ.App.) On evidence, in a car repairer's action for personal injuries, *held*, that it was for the jury to say whether defendant's employes on the engine which struck plaintiff exercised ordinary care to prevent the injury, and, if they did not, whether their exercise of such care could have averted the injury.—*International & G. N. R. Co. v. Walters*, 161 S. W. 916.

§ 291 (Ky.) Where the negligence in issue in a conductor's action for injuries was defective step of a caboose and sudden jerk of the train, an instruction, which coupled with the latter negligent act, negligence of the engineer in starting before receiving a signal, was erroneous.—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

§ 293 (Ky.) Instructions in an action for injuries from the sudden jerking of the train should have used the terms "violent, unusual, and unnecessary," in characterizing the jerk, instead of "quick, violent, sudden, and unusual."—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

The court having submitted in one instruction the issue of the sudden jerk of the train, it was confusing to submit the same question in a second instruction also submitting the question of a defective step.—*Id.*

§ 293 (Mo.App.) An instruction, in an action for the death of an employe, *held* to contain inconsistent statements as to the duty of the employer to provide a reasonably safe place to work.—*Marquez v. Koch*, 161 S. W. 648.

An instruction, in an action for the death of an employe, *held* to erroneously submit the issue of the employer's reasonable care in view of the evidence of the usual way adopted by others engaged in a similar business.—*Id.*

§ 293 (Tex.Civ.App.) In a brakeman's action for injuries from a defective step on the tender, instruction *held* not objectionable as authorizing a verdict for plaintiff, even though defendant had exercised ordinary care to furnish a proper step and keep it in repair.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 295 (Ky.) Where there was more evidence that the jerk of a train was only an ordinary movement than that it was violent and unnecessary, the court should have instructed upon the question of assumed risk.—*Cincinnati, N. O. & T. P. Ry. Co. v. Goldston*, 161 S. W. 246.

§ 295 (Tex.Civ.App.) When plaintiff seeks a recovery upon the issue of discovered peril as well as upon other theories, charges on assumed risk should be limited to be considered only upon the other theories, as such defense cannot be urged to defeat liability arising by reason of discovered peril.—*International & G. N. R. Co. v. Walters*, 161 S. W. 916.

§ 296 (Ky.) An instruction submitting the issue of contributory negligence must charge that it was the duty of the brakeman to perform his duties in a reasonably safe way and exercise the care of an ordinarily prudent person under like circumstances.—*Nashville, C. & St. L. R. Co. v. Banks*, 161 S. W. 554.

§ 296 (Tex.Civ.App.) In car repairer's action for personal injuries, instruction as to duty of defendant's employes after discovering his peril *held* not without support in the evidence.—*International & G. N. R. Co. v. Walters*, 161 S. W. 916.

When plaintiff seeks a recovery upon the issue of discovered peril as well as upon other theories, charges on contributory negligence should be limited to be considered only upon the other theories, as such defense cannot be urged to defeat liability arising by reason of discovered peril.—*Id.*

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (B) Work of Independent Contractor.

§ 315 (Ky.) If one making a railroad cut was an independent contractor, over whom the company had no control, he alone, and not the company, was responsible for a trespass committed by him in dumping earth on plaintiff's land.—*Louisville Ry. Co. v. Wigginton*, 161 S. W. 209.

§ 319 (Ky.) Where blasting operations on a railroad right of way casting material on plaintiff's adjoining property were necessary in the execution of a contract for the improvement and such as would naturally result in injury to plaintiff's property, even if done with ordinary care, the railroad company could not escape liability because the work was performed by independent contractors.—*Lexington & E. Ry. Co. v. Baker*, 161 S. W. 228.

#### V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

##### (A) Civil Liability.

§ 340 (Ark.) In an action by one insurance company against another, allegations charging interference with plaintiff's employes *held* not to state a cause of action.—*Arkansas Life Ins. Co. v. American Nat. Life Ins. Co.*, 161 S. W. 136.

#### MATERIALITY.

See Alteration of Instruments, §§ 4, 8.

#### MAYHEM.

§ 1 (Tex.Cr.App.) Under the statute providing that to maim is to willfully and maliciously deprive of an ear, etc., the injury must be done willfully and maliciously, and, if it arises from a sudden attack without premeditated design, the offense is not maiming.—*Key v. State*, 161 S. W. 121.

Where the statute prohibits an injury to a member, such as an ear, etc., which disfigures the person, the whole member need not be detached to constitute the offense, but a severance of only a small part, which does not disfigure the person and could only be discovered by close examination, is not an offense.—*Id.*

An act is "willful" within the statute if it is committed with evil intent, with legal malice, and without reasonable ground for believing the act to be lawful or legal justification, and is "malicious" if committed in a state of mind showing a heart fatally bent on mischief.—*Id.*

If a maiming occurred under the immediate influence of sudden passion aroused by adequate cause, such as an assault, the issue of simple assault by accused would not be in the case, though accused only intended to commit a simple assault; Pen. Code 1911, art. 50, providing that if one intending to commit a misdemeanor shall, through mistake, commit a felony he shall receive the lowest punishment for the felony.—*Id.*

§ 2 (Mo.) Self-defense may be available to a charge of mayhem.—*State v. Bunyard*, 161 S. W. 756.

§ 4 (Mo.) An information which alleged that accused feloniously assaulted prosecutor with a knife, and of his malice aforethought cut and slit the nose of prosecutor, with intent to maim and disfigure him, sufficiently charges the offense of mayhem, under Rev. St. 1909, § 4480.—*State v. Bunyard*, 161 S. W. 756.

§ 6 (Mo.) Where the evidence raises the issue of self-defense, the court must as required by Rev. St. 1909, § 5231, submit it to the jury.—*State v. Bunyard*, 161 S. W. 756.

An instruction that, if accused sought or brought on the difficulty or voluntarily entered into it, he could not justify himself under the law of self-defense is erroneous, for not stating the intention with which accused entered into the difficulty.—*Id.*

On a trial for mayhem, an instruction on self-defense held unauthorized under the evidence.—*Id.*

On prosecution for mayhem, in an assault on a school-teacher who was conducting an entertainment in the schoolhouse, the court must presume, in the absence of a contrary showing, that Rev. St. 1909, § 10,784, had been complied with, and that the teacher had the right to eject disturbers.—*Id.*

## MAYOR.

See Contempt, § 86.

## MEASURE OF DAMAGES.

See Damages, §§ 105-124.

## MECHANICS' LIENS.

See Bankruptcy, § 192; Subrogation, § 24.

## II. RIGHT TO LIEN.

(B) Services Rendered and Materials Furnished.

§ 47 (Ky.) One who rented a hoisting engine to contractors was not entitled to a lien for such rent, under Ky. St. § 2463, giving one who furnishes "materials" a lien.—*Henry Bickel Co. v. National Surety Co.*, 161 S. W. 1113.

## III. PROCEEDINGS TO PERFECT.

§ 132 (Tenn.) Under a building contract, including the installing of a sprinkler system, to be approved by the State Inspection Bureau, the building is not completed, as regards the time for filing notice of lien, till the work required by the bureau on its inspection is done.—*Harrison v. Knaff*, 161 S. W. 1003.

Within the statute giving materialmen 30 days from completion of the work provided by the contract within which to file notices of liens, they have 30 days from completion of the work as enlarged by amendment of the contract between the owner and contractor, though part of their material was furnished before such amendment and all of it was for the work previously provided for by the contract.—*Id.*

## MEETINGS.

See Schools and School Districts, § 56.

## MEMORANDA.

See Witnesses, § 257.

## MENTAL CAPACITY.

See Wills, §§ 47-53, 329.

## MENTAL SUFFERING.

See Telegraphs and Telephones, §§ 68, 71, 74.

## MINES AND MINERALS.

See Master and Servant, §§ 95, 199, 217, 243, 276, 281; Partition, § 114; Vendor and Purchaser, § 175.

## II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

§ 64 (Ark.) Where mining lessee leased the property for a term extending beyond his term,

held, that his lessee was an assignee of the original lease and not a sublessee.—*Pennsylvania Mining Co. v. Bailey*, 161 S. W. 200.

An assignee of a mining lease was liable to the original lessor for the stipulated royalty.—*Id.*

§ 83 (Mo.App.) Mining licensees, though having no estate or interest in the land, mines, or minerals, held to have substantial rights which the law would protect, and of which they could not be deprived at will or arbitrarily, in the absence of any substantial violation by them of the license.—*Gates v. Steckel*, 161 S. W. 1185.

§ 84 (Mo.App.) Under a license to mine on certain lands, held that there had been no such substantial violations of the terms and conditions thereof by the licensees as justified the licensors in declaring a forfeiture, and a court of equity would therefore set the forfeiture aside.—*Gates v. Steckel*, 161 S. W. 1185.

Where mining licensors, although aware that licensees were not doing continuous mining, made no complaint until at least a week after the resumption of active mining operations, held that they could not then declare a forfeiture for the past default.—*Id.*

## MISTAKE.

See Account Stated, § 12; Adverse Possession, § 65; Bills and Notes, § 102; Deeds, § 69; Reformation of Instruments, §§ 19, 36, 45; Sales, § 36.

## MODIFICATION.

See Contracts, §§ 238-245.

## MONEY LENT.

§ 6 (Ky.) A petition held to state a cause of action.—*Gahren, Dodge & Maltby v. Farmers' Bank of Estill County*, 161 S. W. 1127.

## MONEY RECEIVED.

See Payment, §§ 82-89; Pleading, § 367; Sales, § 391; Vendor and Purchaser, § 343.

§ 1 (Mo.App.) An action for money had and received lies for money which in equity and right defendant ought to refund, for money paid by mistake, or got through imposition, express or implied, or an undue advantage taken of plaintiff's situation, contrary to laws made for the protection of persons under the circumstances, and is favored.—*St. Louis Sanitary Co. v. Reed*, 161 S. W. 315.

§ 17 (Mo.App.) The petition in an action for money had and received, which defendant claimed was paid him for services, should have set forth the relation of the parties and the contract or wrong out of which the cause of action arose; it not being one on an account.—*St. Louis Sanitary Co. v. Reed*, 161 S. W. 315.

§ 18 (Mo.App.) In an action for money had and received, which defendant claimed was paid him by plaintiff for his services, it was error to hold that the burden at the outset and by the pleadings was on defendant.—*St. Louis Sanitary Co. v. Reed*, 161 S. W. 315.

## MONOPOLIES.

### I. VALIDITY AND EFFECT OF GRANTS.

§ 2 (Tenn.) Under Const. art. 1, § 22, forbidding perpetuities and monopolies, the Legislature cannot confer upon a municipality the power to grant an exclusive franchise for the conduct of a business which is of common right.—*Noe v. Town of Morristown*, 161 S. W. 485.

### II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§ 12 (Tex.Civ.App.) A contract by which plaintiff, in consideration of the execution of

certain notes in his favor by other moving picture concerns, agreed to discontinue his business and warrant that no showhouse besides those existing should open in the town for a certain period *held* to violate the Anti-Trust Act as stated.—*Crandall v. Scott*, 161 S. W. 925.

A combination in violation of the anti-trust statute is void, irrespective of the common-law distinction between reasonable and unreasonable restrictions on trade.—*Id.*

### MOOT QUESTIONS.

See Appeal and Error, § 781; *Certiorari*, § 64.

### MORTGAGES.

See Chattel Mortgages; Corporations, § 482; Costs, § 32; Homestead, § 146; Husband and Wife, §§ 171, 268; Pleading, § 423.

#### I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 32 (Ark.) A deed absolute in form will be construed as a mortgage if the proof of such intent is clear and convincing.—*Prickett v. Williams*, 161 S. W. 1023.

### III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 105 (Tex.Civ.App.) A deed and a bill of sale with a mortgage and notes simultaneously executed by the grantee as security for the purchase price referring to the same subject-matter *held* but one act and to be construed as one and the same agreement.—*Vinson v. W. T. Carter & Bro.*, 161 S. W. 49.

### IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 199 (Ark.) Where a senior mortgagee was in possession as tenant of the administrator and heir of the deceased mortgagor, and not as mortgagee, he could not be required to account for rents and profits for the benefit of a junior mortgagee.—*Armistead v. Bishop*, 161 S. W. 182.

### VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 280 (Mo.App.) Though a deed did not state directly that the grantee assumed a mortgage yet, as the deed mentioned it and provided that the grantor should be released from liability for it, it amounted to an assumption by the grantee.—*Greer v. Orchard*, 161 S. W. 875.

§ 281 (Ark.) Where a deed recited that the consideration was a certain sum in cash, and the assumption of a \$400 mortgage by the grantee, the grantee by accepting the deed impliedly promised to discharge the mortgage.—*Felker v. Rice*, 161 S. W. 162.

§ 283 (Ark.) A grantee assuming a mortgage on the premises as a part of the consideration was a surety for the debt.—*Felker v. Rice*, 161 S. W. 162.

§ 283 (Mo.App.) Where a grantee assumes a mortgage, not only does he become the principal debtor between the parties, but the mortgagee, after notice of the assumption, must treat the grantee as the principal and the grantor as surety.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

§ 283 (Mo.App.) Where mortgaged property is conveyed to one who assumes the mortgage debt, the grantee becomes the principal and the mortgagor and grantor his surety.—*Greer v. Orchard*, 161 S. W. 875.

§ 292 (Ark.) Evidence *held* to sustain a finding that a defendant assumed in a deed to himself to discharge a mortgage which covered part of the land.—*Felker v. Rice*, 161 S. W. 162.

### X. FORECLOSURE BY ACTION.

(F) Pleading and Evidence.

§ 463 (Ark.) Evidence, in an action to foreclose a mortgage, *held* to show that, at the time the mortgagee's deed to the mortgagor releasing a condition in a prior deed was executed and deposited in a bank for delivery when the mortgage was paid, there was no time fixed within which payment should be made.—*Brown v. Albright*, 161 S. W. 1036.

### MOTION PICTURES.

See Injunction, § 59.

### MOTIONS.

See Continuance, § 33; Criminal Law, § 1088; New Trial, §§ 108, 124, 167; Pleading, §§ 345-369; Trial, § 178; Venue, §§ 36-72.

### MULTIFARIOUSNESS.

See Appeal and Error, § 736.

### MUNICIPAL CORPORATIONS.

See Appeal and Error, §§ 172, 781; Cemeteries, § 3; Constitutional Law, § 115; Contempt, § 36; Counties; Courts, § 231; Dedication; Elections, § 65; Electricity, § 1; Eminent Domain, §§ 2, 119, 296; Evidence, §§ 83, 242; Injunction, § 128; Licenses, § 6; Monopolies, § 2; Railroads, §§ 76, 99, 236, 398; Schools and School Districts; Street Railroads; Waters and Water Courses, § 183.

### I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(A) Incorporation and Incidents of Existence.

§ 14 (Tex.Civ.App.) Under *Sayles' Ann. Civ. St. 1897*, art. 386a, a city with less than 2,000 inhabitants could not be lawfully incorporated so as to include more than two square miles of territory, and, an attempt having been made to do it, the defect could not be cured by eliminating the excess.—*Wilson v. Carter*, 161 S. W. 411.

§ 15 (Tex.Civ.App.) *Sayles' Ann. Civ. St. 1897*, art. 386b, enacted in 1895, providing for the relinquishment of excess territory by cities, *held* only to apply to those incorporated prior to 1895.—*Wilson v. Carter*, 161 S. W. 411.

*Sayles' Ann. Civ. St. 1897*, art. 386c, enacted in 1897, and validating incorporation of cities which had included more than two square miles of territory and whose city councils had restricted the limits to prescribed bounds, *held* not applicable to a city so incorporated in 1911.—*Id.*

*Rev. Civ. St. 1911*, art. 776, validating incorporation of cities which had included more than two square miles of territory, *held* not to apply to city incorporation proceedings which were subject to such defect but which had been dissolved by an election prior to the taking effect of the act.—*Id.*

§ 17 (Tex.Civ.App.) Where a municipal corporation was illegally incorporated so as to contain more than two square miles of territory but with less than 2,000 inhabitants in violation of *Sayles' Ann. Civ. St. 1897*, art. 386a, but officers were elected and debts incurred, it was a corporation de facto.—*Wilson v. Carter*, 161 S. W. 411.

### II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

§ 63 (Mo.) The courts may inquire into the reasonableness of municipal ordinances.—*Union Cemetery Ass'n v. Kansas City*, 161 S. W. 261.

### III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 64 (Ky.) The extent of legislative control over municipalities extends as far as is essential

to accomplish a result in which the state has an interest in its governmental capacity but not so as to deprive the municipality of discretion in the means of accomplishing the result.—*Kenton Water Co. v. City of Covington*, 161 S. W. 988.

§ 70 (Ky.) The establishment of a water system in a city is not a governmental function in which the state can have such an interest as would give it power to compel its maintenance therein.—*Kenton Water Co. v. City of Covington*, 161 S. W. 988.

§ 73 (Ky.) Laws 1910, c. 83, requiring any city, before establishing its own waterworks in any neighboring town annexed, to purchase the property of the water company then supplying such town, violates Const. § 181.—*Kenton Water Co. v. City of Covington*, 161 S. W. 988.

#### IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

##### (B) Ordinances and By-Laws in General.

§ 110 (Ky.) The publication of an ordinance of the city of the fourth class by typewritten handbills was a sufficient compliance with Ky. St. § 3487.—*Gesser v. McLane*, 161 S. W. 1118.

#### V. OFFICERS, AGENTS, AND EMPLOYEES.

##### (B) Municipal Departments and Officers Thereof.

§ 180 (Tex.Cr.App.) A policeman of a city is a public officer holding his office as a trust from the state, and not as a matter of contract between himself and the city; the word applying equally to every member of the police force.—*Ex parte Preston*, 161 S. W. 115.

#### IX. PUBLIC IMPROVEMENTS.

##### (A) Power to Make Improvements or Grant Aid Therefor.

§ 266 (Ky.) The authority of the city of Covington to construct and maintain a water system, granted by Ky. St. § 3058, subsec. 4, held not repealed by Laws 1910, c. 83.—*Kenton Water Co. v. City of Covington*, 161 S. W. 988.

##### (B) Preliminary Proceedings and Ordinances or Resolutions.

§ 292 (Mo.App.) As the statute requires no particular form of signature to a petition, the signature of a corporate officer is binding if he had authority to bind it in ordinary corporate contracts.—*Pasche v. South St. Joseph Town Co.*, 161 S. W. 322.

Where the board of directors placed the active management of a corporation in the hands of its secretary and president, the signing by the secretary of a petition for street paving held binding.—*Id.*

A general resolution of the board of directors at the end of the year, ratifying all of his acts, validates his signature as of the time of signing.—*Id.*

Though the statute requires a petition for a street improvement to be in writing, the authority of an officer of the corporation to sign such petition need not be written.—*Id.*

§ 325 (Mo.App.) A finding by the board of public works that a petition for paving had been signed by the owners of a majority of the abutting property establishes prima facie the validity of such signatures.—*Pasche v. South St. Joseph Town Co.*, 161 S. W. 322.

##### (E) Assessments for Benefits, and Special Taxes.

§ 408 (Ky.) The provision of Acts 1912, c. 113, that a city may assess the cost of street improvements against the property owners, etc.,

does not repeal Ky. St. § 3456, providing that the cost of improvements at street intersections shall be paid by the city.—*City of Henderson v. Connell*, 161 S. W. 1121.

§ 417 (Ky.) That a drain had been constructed along a portion of the route of the sewer in question held not to preclude the sewer from being an original improvement the cost of which was assessable against the abutting property, under Ky. St. § 3490.—*Gesser v. McLane*, 161 S. W. 1118.

§ 434 (Ky.) Under Ky. St. § 1336, making the disturbance of cemetery property a misdemeanor, such property cannot be sold under execution to pay an assessment for the public improvement made by the municipality in which the property is located.—*Cave Hill Cemetery Co. v. Gosnell*, 161 S. W. 980.

§ 459 (Ky.) Ky. St. § 3490, subd. 9, relative to apportionment of the cost of the construction of sewers in cities of the fourth class, not being mandatory, the council has power to assess the cost of a sewer, to the extent of \$1 per front foot, on the abutting property and provide for the payment of the cost in excess thereof out of the general fund.—*Gesser v. McLane*, 161 S. W. 1118.

§ 469 (Ky.) Where a sewer was constructed by a city of the fourth class on its side of a street forming the line between two cities, the fact that the assessment therefor was not levied on the property abutting the street on the opposite side over which it had no control did not invalidate the assessment.—*Gesser v. McLane*, 161 S. W. 1118.

§ 470 (Ky.) A corner lot which has been assessed \$1 per front foot for the construction of a sewer on one street may be assessed for a sewer constructed on the other street.—*Gesser v. McLane*, 161 S. W. 1118.

§ 487 (Ky.) A purchaser who knew of a street improvement on which the assessment had been paid held presumed to have knowledge of Ky. St. § 2834, part of the city charter permitting a lien for improvements and permitting corrections, so that he was not a purchaser without notice, but was liable for a correcting additional assessment.—*Richards v. Barber Asphalt Paving Co.*, 161 S. W. 1105.

The fact that the original assessment for a street improvement paid by defendant's vendor was erroneous, and that such error misled defendant and required him to pay an additional assessment held not sufficient ground for estoppel, in view of his presumed knowledge of Ky. St. § 2834, expressly authorizing a city to correct an erroneous assessment.—*Id.*

##### (F) Enforcement of Assessments and Special Taxes.

§ 558 (Mo. App.) An action to enforce the lien of a special tax bill issued under Kansas City charter, permitting such suits against owners of the land charged, but providing that only the title and interest of the defendants shall be affected by the proceedings, is not one in rem until jurisdiction of the subject-matter is acquired.—*Barber Asphalt Paving Co. v. Field*, 161 S. W. 364.

§ 565 (Mo. App.) An action to enforce a special tax bill, brought under Kansas City charter, providing that the owners of any interest in the land charged may be made defendants, but only their right or interest in the land shall be affected, can only be maintained against one owning some interest in the land when action is brought.—*Barber Asphalt Paving Co. v. Field*, 161 S. W. 364.

§ 586 (Ky.) As cemetery property is free from the lien of public improvements, the court cannot, by indirection, cast such burden on a cemetery corporation by making it personally lia-

ble for the assessment.—Cave Hill Cemetery Co. v. Gosnell, 161 S. W. 980.

A landowner is not personally liable for an assessment for public improvements placed in front of or nearby his land.—Id.

## X. POLICE POWER AND REGULATIONS.

### (A) Delegation, Extent, and Exercise of Power.

§ 591 (Mo.) The city cannot surrender or bargain away its police power.—Union Cemetery Ass'n v. Kansas City, 161 S. W. 261.

§ 591 (Tenn.) The provision of section 16 of the ordinance of Morristown providing for the inspection of slaughterhouses, which confers police powers upon the inspector, is objectionable.—Noe v. Town of Morristown, 161 S. W. 485.

The provision of section 13 of the ordinance of Morristown providing for the inspection of slaughterhouses, which gives the inspector absolute power to dispose of the condemned meat, is objectionable as delegating to him a decision which should be controlled by law.—Id.

The provisions of the ordinance of Morristown regulating the inspection of slaughterhouses and the sale of meat, that certain acts should be "sufficient" evidence that the goods were on sale, are objectionable.—Id.

§ 592 (Mo.) Where a cemetery association was incorporated by a special act, the right of the municipality in which it was located to prohibit the continued use of the burying ground cannot be denied on the ground that the charter of the municipality giving it authority to pass such ordinances prohibited the passage of ordinances inconsistent with the state laws.—Union Cemetery Ass'n v. Kansas City, 161 S. W. 261.

§ 609 (Mo.) Under Kansas City Charter 1909, art. 1, § 1, par. 13, art. 3, § 1, par. 16, or under paragraph 41 alone, the city may prohibit the further use of a public burying ground when it is detrimental to public health and its continued use constitutes a nuisance.—Union Cemetery Ass'n v. Kansas City, 161 S. W. 261.

§ 611 (Tenn.) The ordinances of a town, providing for the selection of places for the inspection of animals to be slaughtered for food and confirming a contract which made the premises of a company the only place where they should be inspected and slaughtered, were void as not being within the powers conferred by the town charter (Acts 1903, c. 103).—Noe v. Town of Morristown, 161 S. W. 485.

An act authorizing the establishment of a municipal slaughterhouse, to be constitutional, must provide that all persons should have a right to resort to that place to do their own slaughtering or to have it done by their own agents.—Id.

The original ordinance of Morristown, providing for the selection of one or more places for the inspection and slaughter of animals intended for food, is in the main valid.—Id.

§ 617 (Tenn.) The power to grant an exclusive franchise, even of the limited class which may be granted within a town, must be expressly conferred by the Legislature.—Noe v. Town of Morristown, 161 S. W. 485.

§ 623 (Tex.Civ.App.) Under Rev. Civ. St. 1911, arts. 844, 856, and 965, a city council by resolution held authorized to require the removal of a dilapidated wooden building located within the fire limits, where it was likely to fall and endanger human life or to burn.—Howell v. City of Sweetwater, 161 S. W. 948.

A city having properly condemned a wooden building within the fire limits, and the owner having refused to remove the same, the city could enjoin the construction of improvements, and compel the removal of the building as a nuisance.—Id.

## XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

### (A) Streets and Other Public Ways.

§ 648 (Mo.) Where a city uses a strip of land for public use for more than ten years under claim of title, and improves the same, the strip becomes a public street by adverse possession.—Quinn v. St. Louis & S. F. R. Co., 161 S. W. 820.

§ 663 (Ky.) The sidewalk belongs to the public, and an abutting owner cannot compel a member of the public to leave the sidewalk, even though he is guilty of a violation of a breach of the peace.—Hixson v. Slocum, 161 S. W. 522.

§ 663 (Tex.Civ.App.) Even though the abutting owner owns the fee of the street, the city is entitled to remove soil or gravel therefrom when necessary to properly grade it, and to use the gravel or soil in improving the streets in another locality.—City of La Grange v. Brown, 161 S. W. 8.

As Rev. Civ. St. 1911, art. 769, expressly authorized cities owning waterworks to improve a highway to their plants even though they be without the corporate limits, a city may use gravel and soil removed from a street within its corporate limits for the purpose of improving the highway to its water plant.—Id.

## XII. TORTS.

### (B) Acts or Omissions of Officers or Agents.

§ 745 (Tex.Civ.App.) A municipal corporation is not liable for the wrongful assault and imprisonment of the plaintiff by its officers without a showing of some wrongful act by the corporation itself.—Swanson v. Nacogdoches, 161 S. W. 83.

### (C) Defects or Obstructions in Streets and Other Public Ways.

§ 766 (Mo. App.) Where an injury results from a danger inherent in the plan adopted by a city for the improvement of a street, it is not liable, but if the danger has arisen from negligent construction or maintenance liability accrues.—Trippensee v. City of Jefferson, 161 S. W. 303.

§ 766 (Tenn.) A city was responsible for the death of children 11 and 9 years of age by drowning in a pond, which occupied the whole width of a public street, about 120 feet from a public park.—Doyle v. City of Chattanooga, 161 S. W. 997.

§ 768 (Ky.) In an action for injuries to a pedestrian by the tilting of a stone in steps leading from one street to another, it was immaterial whether the city's negligence consisted of a defect in the construction or a failure to keep the steps in proper repair.—Board of Council of City of Frankfort v. Kirby, 161 S. W. 1115.

§ 768 (Mo.App.) Where walks are not negligently constructed nor allowed to become or remain unsafe, an injury caused by mere slant is not actionable.—Price v. City of Maryville, 161 S. W. 295.

A city is not liable for a step-off rendered necessary in the construction of a sidewalk, where it is not negligently maintained and the plan is not manifestly unsafe.—Id.

A city held liable for injuries to a pedestrian at night by stepping on a "low place" in the sidewalk, which resulted from a defect in the walk, and was not a mere step-off arising from the topographical conditions, of which defect the city had had notice.—Id.

§ 772 (Mo.App.) Where a city allowed water from one of its hydrants to run over the sidewalk so that it formed slush with newly fallen snow, it cannot escape liability for injuries to one who fell upon the unevenly frozen slush, on the ground that the snow was a gen-

eral condition.—*Livingston v. City of St. Joseph*, 161 S. W. 304.

§ 784 (Mo.App.) Act of a city engineer in allowing hooks attached to a sewer cover to be so placed that they could be easily moved, so that the cover would not remain in place, was not a part of the general plan of construction adopted by the city, and rendered the city liable for injuries suffered by a pedestrian by reason thereof.—*Trippensee v. City of Jefferson*, 161 S. W. 303.

§ 791 (Mo.App.) Where the displacement of a sewer cover by which a pedestrian was injured was not the result of the act of a third person, but rather the negligence of the city in the original construction, the city was charged with notice of the defect from the beginning.—*Trippensee v. City of Jefferson*, 161 S. W. 303.

§ 794 (Ky.) Where a contractor, under a permit from the city, obstructed the side of a street with his engines and materials and laid a temporary board sidewalk around the obstruction for public use, it was the duty of the city to use ordinary care that such walk should be safe for the use which the public were invited to make of it.—*Brentlinger v. Louisville Ry. Co.*, 161 S. W. 1107.

§ 803 (Ky.) A pedestrian using a temporary walk around the engines and material of a contractor obstructing one side of a street was bound to exercise such care for his own safety as might be reasonably expected of a person of ordinary prudence in that situation.—*Brentlinger v. Louisville Ry. Co.*, 161 S. W. 1107.

§ 806 (Ky.) Plaintiff, walking on a temporary sidewalk built by a contractor around his machinery and material on one side of a street and held out to the public for use, had a right to assume that the walk was safe.—*Brentlinger v. Louisville Ry. Co.*, 161 S. W. 1107.

§ 809 (Ky.) Where a contractor, under a permit from the city, obstructed the side of a street with his engines and materials and laid a temporary walk around the obstruction for the public use, it was his duty to use ordinary care that the walk should be safe.—*Brentlinger v. Louisville Ry. Co.*, 161 S. W. 1107.

§ 816 (Ky.) Petition, in an action for injury from the projecting end of a street car as it turned across a temporary board sidewalk built outside a contractor's machinery and materials, *held* good as against demurrers by the city permitting the walk and by the contractor.—*Brentlinger v. Louisville Ry. Co.*, 161 S. W. 1107.

§ 816 (Mo.App.) Evidence *held* not a variance as showing that plaintiff walked into a ditch instead of into a low place in the walk.—*Price v. City of Maryville*, 161 S. W. 295.

§ 819 (Tenn.) If a strip offered to be dedicated as a street contains thereon a nuisance, such as a dangerous pond, slight evidence of acceptance by the municipality would be sufficient to make it liable for injuries arising from the pond.—*Doyle v. City of Chattanooga*, 161 S. W. 997.

§ 821 (Mo.App.) Whether the city was negligent in permitting a defect to remain *held* for the jury.—*Price v. City of Maryville*, 161 S. W. 295.

§ 821 (Mo.App.) The question of the city's negligence in permitting water to run onto the sidewalk from a hydrant forming slush with the snow *held* for the jury.—*Livingston v. City of St. Joseph*, 161 S. W. 304.

§ 821 (Tenn.) Evidence *held* to make it a jury question whether a tract containing a dangerous pond was accepted by a municipality as a street.—*Doyle v. City of Chattanooga*, 161 S. W. 997.

### XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

#### (A) Power to Incur Indebtedness and Expenditures.

§ 863 (Ky.) An obligation of a city in excess of the income and revenue provided for the year is a violation of the Constitution, though it is made payable in future years.—*Southern Bitulithic Co. v. Detreville*, 161 S. W. 560.

Where a city has created a debt which is not in excess of the amount it can constitutionally raise by taxation, it cannot defeat the debt by failing to make the necessary levy.—*Id.*

§ 867 (Ky.) Under Const. §§ 157, 158, a municipality, without a vote of the people, cannot create in one year a debt to be thereafter paid out of the income and revenue of subsequent years and for the payment of which no provision can be made out of the income and revenue for the year in which the indebtedness is created.—*Southern Bitulithic Co. v. Detreville*, 161 S. W. 560.

### MURDER.

See Homicide, §§ 8-18.

### MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 723-825.

### NATIONAL BANKS.

See Banks and Banking, §§ 246, 253.

### NAVIGABLE WATERS.

See Damages, § 106; Ferries; Waters and Water Courses.

#### I. RIGHTS OF PUBLIC.

§ 1 (Mo.App.) Under Const. art. 1, § 1, reserving to the people the free use of all navigable streams leading to the Mississippi as a common highway a stream capable of transporting commerce in any manner in which commerce is ordinarily conducted is a public highway.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

§ 19 (Mo.App.) The obstruction of a navigable stream is a public nuisance.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

§ 21 (Mo.App.) Where defendant maintained a boom above plaintiff's sawmill, preventing him from rafting logs down the branch of a navigable stream upon which the sawmill was located, it is no defense that such channel came back to the main stream below the boom, and the logs might, by artificial means, have been forced upstream.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

§ 26 (Mo.App.) A petition *held* to state a cause of action for the maintenance of an obstruction in a navigable river constituting a public nuisance.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

In an action for damages for maintaining an obstruction in a navigable stream, evidence of damages not alleged by the petition is inadmissible.—*Id.*

The question whether a stream is navigable is one of fact for the jury.—*Id.*

In an action for damages for obstructing a navigable stream, it is no defense that defendant and its predecessors had deepened the channel and made it more suitable for the purpose used.—*Id.*

### NAVIGATION.

See Navigable Waters.

### NEGATIVE PREGNANT.

See Pleading, § 126.



## NEGLIGENCE.

See Adjoining Landowners, § 8; Appeal and Error, § 882; Bailment; Banks and Banking, § 54; Carriers, §§ 69, 280-347; Constitutional Law, § 301; Death, § 58; Drains, §§ 17, 57; Electricity, § 16; Estoppel, § 56; Landlord and Tenant, §§ 162-169; Master and Servant, §§ 86-296; Municipal Corporations, §§ 745-821; Physicians and Surgeons, § 24; Pleading, §§ 8, 34, 369; Railroads, §§ 108, 113, 114, 236-481; Statutes, § 253; Street Railroads, §§ 81-118; Telegraphs and Telephones, §§ 28-79; Trial, §§ 84, 191, 194, 203, 229, 242, 252, 260, 296.

### I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

#### (A) Personal Conduct in General.

§ 2 (Mo.App.) An injury is not caused by negligence when the party charged with the negligence owed no duty to the injured party.—*Featherstone v. Kansas City Terminal Ry. Co.*, 161 S. W. 284..

§ 8 (Tex.Civ.App.) The care due to a person intoxicated to the extent of being unable to take care of himself is that of reasonable care to avoid injuring him.—*Texas Cent. Ry. Co. v. Rose*, 161 S. W. 387.

#### (B) Dangerous Substances, Machinery, and Other Instrumentalities.

§ 23 (Tenn.) The owner of dangerous machinery naturally attractive to a child is liable for injuries to one attracted thereto, while the machinery is on the owner's premises.—*Doyle v. City of Chattanooga*, 161 S. W. 997.

#### (C) Condition and Use of Land, Buildings, and Other Structures.

§ 29 (Mo.App.) The owner of uninclosed land need not make it safe for pasturage and is not liable for injuries to stray cattle by falling into excavations thereon.—*Wilt v. Coughlin*, 161 S. W. 888.

### II. PROXIMATE CAUSE OF INJURY.

§ 58 (Mo.App.) Plaintiff must show that the injuries would naturally and probably result from the negligent act and should have been foreseen by defendant as likely to result therefrom.—*Wilt v. Coughlin*, 161 S. W. 888.

§ 59 (Tex.Civ.App.) An injury which could not have been foreseen or reasonably anticipated as the natural and probable result of a negligent act is not proximately caused by such act.—*International & G. N. R. Co. v. Walters*, 161 S. W. 916.

§ 59 (Tex.Civ.App.) If an injury follows an act of negligence in natural sequence, and there is no intervening agency, the wrongdoer is, as a matter of law, held to have had the result in contemplation.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

### III. CONTRIBUTORY NEGLIGENCE.

#### (B) Children and Others Under Disability.

§ 85 (Mo.App.) A child of tender years may comprehend certain dangers so as to be guilty of negligence as a matter of law, and will be held negligent if he does so, or if the danger is obvious to one of his age.—*Battles v. United Rys. Co., of St. Louis*, 161 S. W. 614.

§ 85 (Tenn.) A young boy would not be guilty of contributory negligence in jumping into a pond to save his young brother from drowning, having acted in an emergency.—*Doyle v. City of Chattanooga*, 161 S. W. 997.

#### (C) Imputed Negligence.

§ 93 (Mo.App.) Where plaintiff was not driving or directing the wagon on which she was riding with her husband, and he was not her agent in so doing, his negligence in driving, if any, was not imputable to her, where she did

not concur in or expressly sanction it, or knowing the danger fail to protect herself.—*Johnson v. Springfield Traction Co.*, 161 S. W. 1193.

#### (D) Comparative Negligence.

§ 101 (Ky.) The federal Employer's Liability Act only means that the employe can recover a proportional amount bearing the same relation to the full amount as the negligence attributable to the railroad company bears to the entire negligence attributable to both.—*Nashville, C. & St. L. R. Co. v. Banks*, 161 S. W. 554.

§ 101 (Tex.Civ.App.) Acts 31st Leg. (1st Extra Sess.) c. 10 (Rev. Civ. St. 1911, art. 6649), only denies recovery because of contributory negligence to the extent that the jury determines is attributable to his negligence.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

Even where plaintiff's proof shows that he is guilty of contributory negligence as a matter of law, under Acts 31st Leg. (1st Extra Sess.) c. 10 (Rev. Civ. St. 1911, art. 6649), the court can only direct the jury to diminish the damages in proportion to plaintiff's negligence.—*Id.*

§ 101 (Tex.Civ.App.) In view of Rev. Civ. St. 1911, art. 6649, providing that plaintiff's contributory negligence shall merely diminish his damages proportionately to his negligence, a requested charge that if plaintiff was guilty of contributory negligence he could not recover held properly refused.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

### IV. ACTIONS.

#### (A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

§ 119 (Mo.App.) The last clear chance doctrine is an exception to the rule that contributory negligence is a complete defense, so that, where the facts found call for the application of the doctrine, the fact that plaintiff's negligence is not pleaded or admitted is unimportant.—*Johnson v. Springfield Traction Co.*, 161 S. W. 1193.

#### (B) Evidence.

§ 121 (Tex.Civ.App.) Neither negligence nor causal connection between it and the injury will be presumed from the fact of injury alone.—*Stone & Webster Engineering Corporation v. Brewer*, 161 S. W. 38.

§ 124 (Mo.App.) In an action for negligence, the general reputation of the party charged with the negligence in respect to his being careful or negligent is generally inadmissible.—*Hodges v. Hill*, 161 S. W. 633.

§ 125 (Mo.App.) Proof of specific acts similar to those on which the action was grounded, as distinguished from a custom or habit, to do such acts, is inadmissible.—*Hodges v. Hill*, 161 S. W. 633.

Evidence as to specific acts of carelessness or to general traits of negligence of the party charged therewith, without reference to the particular act in issue, was inadmissible.—*Id.*

§ 134 (Mo.App.) Running an automobile at a speed above that permitted by statute is prima facie negligence.—*Cabanne v. St. Louis Car Co.*, 161 S. W. 597.

§ 134 (Mo.App.) A causal connection between the alleged negligence and the injury need not be shown by direct evidence, but may appear by a fair inference from the circumstances proved.—*Battles v. United Rys. Co., of St. Louis*, 161 S. W. 614.

Plaintiff must prove that the alleged negligence proximately caused the injury, by evidence which amounts to more than mere conjecture.—*Id.*

§ 134 (Tex.Civ.App.) Not only must negligence upon defendant's part be shown, but the causal connection between it and the injury must be shown.—*Stone & Webster Engineering Corporation v. Brewer*, 161 S. W. 38.



**(C) Trial, Judgment, and Review.**

§ 136 (Mo.App.) An act which all reasonable minds would pronounce a culpable breach of duty is negligence in law, but, if there is any doubt as to the facts and inferences to be drawn therefrom, negligence is for the jury.—*Pontius v. Chicago, R. I. & P. Ry. Co.*, 161 S. W. 292.

§ 136 (Tex.Civ.App.) Ordinarily, the question whether an injury should have been foreseen and was the proximate result of the negligence complained of is for the jury.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 141 (Tex.Civ.App.) An instruction, if plaintiff's negligence and defendant's negligence were concurrent proximate causes of the injuries, plaintiff's damages should be diminished proportionately to the amount of negligence attributable to him *held* not affirmatively erroneous or misleading.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

**NEGOTIABLE INSTRUMENTS.**

See Bills and Notes.

**NEWLY DISCOVERED EVIDENCE.**

See Criminal Law, §§ 938-958; New Trial, §§ 102-124.

**NEW MATTER.**

See Justices of the Peace, § 174.

**NEW PROMISE.**

See Limitation of Actions, § 141.

**NEWSPAPERS.**

See Estoppel, § 119; Exemptions, § 45.

**NEW TRIAL.**

See Appeal and Error, §§ 281-302, 533, 706, 724, 732, 742, 743, 854, 867, 933, 977, 979, 1133, 1170; Criminal Law, §§ 938-958, 1064, 1124, 1134.

**II. GROUNDS.****(B) Misconduct of Parties, Counsel, or Witnesses.**

§ 32 (Ky.) Alleged violation by plaintiff's attorney of his agreement that, if defendant would file no answer, he would take no action in the case without notice to defendant, was not ground for new trial, where the answer tendered was insufficient because not properly verified.—*Gahren, Dodge & Maltby v. Farmers' Bank of Estill County*, 161 S. W. 1127.

**(F) Verdict or Findings Contrary to Law or Evidence.**

§ 72 (Mo.App.) It is proper to grant a new trial on the ground that the verdict is against the weight of the evidence.—*Clarkson v. Garvey*, 161 S. W. 664.

The award of new trial will not be disturbed where there is substantial evidence in favor of or such as will sustain a verdict for the party to whom the new trial is granted.—*Id.*

In an action against the business agent of a local union for conspiracy by threatening plaintiff's employer with a strike, whereby plaintiff lost his job and also a subcontract, *held*, that the court did not abuse its discretion in granting defendant a new trial.—*Id.*

§ 78 (Mo.App.) Under Rev. St. 1909, § 2023, *held*, that, if the court has set aside one verdict on the ground of insufficiency of the evidence, a second verdict cannot be set aside for the same cause.—*Clarkson v. Garvey*, 161 S. W. 664.

Under Rev. St. 1909, § 2023, *held*, that the court may grant one new trial to either party for insufficiency of the evidence, regardless of the number of new trials theretofore granted to the same party upon other grounds.—*Id.*

**(H) Newly Discovered Evidence.**

§ 102 (Ky.) Plaintiff was not wanting in diligence barring a new trial for newly discovered evidence, in that he failed to ask one of defendant's witnesses whether he heard defendant state his contract with plaintiff.—*Nantz v. Sizemore*, 161 S. W. 552.

§ 108 (Mo.) Alleged newly discovered evidence *held* of such slight probative force as to justify the denial of the motion for a new trial on the ground that it would not change the result.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

**III. PROCEEDINGS TO PROCURE NEW TRIAL.**

§ 124 (Mo.) A motion for a new trial for newly discovered evidence, which neither stated the evidence, gave the names of any witnesses, nor stated the diligence used before the trial, was insufficient.—*Lyons v. Metropolitan St. Ry. Co.*, 161 S. W. 726.

§ 167 (Ky.) An action for a new trial was properly dismissed where it appeared that plaintiffs had no defense to the original action.—*Burks v. Douglass*, 161 S. W. 225.

**NON OBSTANTE VEREDICTO.**

See Judgment, § 199.

**NONRESIDENCE.**

See Constitutional Law, §§ 205, 312; Fish, § 9; Game, § 4; Judgment, § 17.

**NOTES.**

See Bills and Notes.

**NOTICE.**

See Appeal and Error, § 509; Brokers, § 49; Chattel Mortgages, §§ 48, 204; Corporations, § 18; Criminal Law, § 1081; Execution, § 272; Executors and Administrators, § 362; Highways, §§ 30, 38, 41; Injunction, § 115; Insane Persons, § 13; Insurance, §§ 751, 756; Intoxicating Liquors, § 36; Landlord and Tenant, § 120; Malicious Prosecution, § 58; Master and Servant, §§ 95, 125, 150, 155; Mechanics' Liens, § 132; Municipal Corporations, §§ 110, 487, 791; Pleading, § 330; Process, § 66; Railroads, §§ 275, 282, 356; Sales, § 36; Schools and School Districts, §§ 97-107, 135; Searches and Seizures, § 2; Sheriffs and Constables, § 153; Street Railroads, § 81; Telegraphs and Telephones, §§ 68, 73; Tenancy in Common, § 15; Trespass to Try Title, § 41; Trial, § 252; Vendor and Purchaser, §§ 229-243.

**NOVATION.**

§ 5 (Mo.App.) Where a bank agreed to an arrangement whereby third persons were to pay defendants' note, *held* that, as defendants were not released, there was no novation.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

**NUISANCE.**

See Cemeteries, § 3; Municipal Corporations, §§ 609, 623, 819, 821; Navigable Waters, §§ 19, 26.

**II. PUBLIC NUISANCES.****(B) Rights and Remedies of Private Persons.**

§ 72 (Mo.App.) In an action for damages for the maintenance of a public nuisance, the plaintiff must show special damages different from those incurred by the public generally.—*Weller v. Missouri Lumber & Mining Co.*, 161 S. W. 853.

That the injury to plaintiff by a public nuisance is greater in degree than that suffered by

the public generally will not authorize the maintenance of an action where it is of the same kind.—*Id.*

## OBJECTIONS.

See Appeal and Error, §§ 193-232, 835; Criminal Law, § 1054.

## OBLIGATION OF CONTRACTS.

See Constitutional Law, §§ 42, 115-129.

## OBSCENITY.

See Telegraphs and Telephones, § 79.

## OBSTRUCTIONS.

See Highways, § 161; Navigable Waters, §§ 19-26; Waters and Water Courses, §§ 118, 126.

## OCCUPATION.

See Injunction, § 99.

## OFFICERS.

See Counties, § 64; District and Prosecuting Attorneys; False Personation, § 2; Justices of the Peace; Mandamus, §§ 57, 79, 98; Municipal Corporations, §§ 180, 292, 745; Schools and School Districts, § 56; Seduction, § 46; Sheriffs and Constables; States, §§ 66, 137.

## III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 110 (Tex.Cr.App.) It is the purpose and theory of the law that peace officers especially shall do everything necessary to prevent, suppress, and punish crime.—*Ex parte Preston*, 161 S. W. 115.

## OPINION EVIDENCE.

See Criminal Law, §§ 448-459; Evidence, §§ 471-548.

## OPINIONS.

See Appeal and Error, § 533; Courts, §§ 106, 107.

## ORDINANCES.

See Municipal Corporations, §§ 63, 110, 591-623.

## PANDERING.

See Prostitution.

## PARENT AND CHILD.

See Death, § 32; Habeas Corpus, §§ 85, 99, 113; Railroads, § 804; Specific Performance, § 121; Wills, § 163; Work and Labor, § 7.

§ 9 (Tex.Civ.App.) A father may make a valid gift to his minor son in the absence of complaint by an existing creditor, without reference to whether the son has been emancipated.—*Burns & Bell v. Lowe*, 161 S. W. 942.

## PAROL EVIDENCE.

See Evidence, §§ 419-448.

## PARTIES.

See Appeal and Error, §§ 834, 877, 879; Bailment, § 29; Contracts, § 187; Highways, § 161; Husband and Wife, §§ 221, 270; Indictment and Information, § 124; Judgment, § 237; Partnership, § 197; Process, § 81; Remainders, § 16; Wills, § 229.

## I. PLAINTIFFS.

### (B) Joinder.

§ 14 (Mo.) All persons having an interest in the subject-matter of a private civil action may be joined as plaintiffs.—*Norton v. Reed*, 161 S. W. 842.

## V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 75 (Mo.) In case a petition shows on its face a defect of parties, the defect may be reached by demurrer, but if it does not show such defect on its face, the fault may be attacked by answer.—*Norton v. Reed*, 161 S. W. 842.

Where a defect in parties or a misjoinder of causes of action are not taken advantage of either by demurrer or answer, it is waived.—*Id.*

§ 75 (Mo.App.) Where a defect of parties appears on the face of the petition, it must, under Rev. St. 1909, § 1800, be taken advantage of by demurrer; but, if not so appearing, it must, under section 1804, be taken advantage of by answer, or the defect is waived.—*Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 161 S. W. 320.

§ 75 (Mo.App.) Under Rev. St. 1909, §§ 1800, 1804, where defect of parties was raised neither by demurrer nor answer, court held not to have erred in refusing to permit amendment so as to allege such defect at the close of plaintiff's evidence.—*Sails v. Funk*, 161 S. W. 1175.

## PARTITION.

See Adverse Possession, §§ 31, 79, 85; Appeal and Error, § 882; Evidence, § 208; Quieting Title, § 50; Remainders, § 17; Tenancy in Common, § 15.

### I. BY ACT OF PARTIES.

§ 9 (Mo.App.) Where land belonged to a married woman and her brother as tenants in common, a partition deed from the brother to her and her husband was not a conveyance of title to her husband, nor even to her, but was a mere setting off of the boundaries to the land she owned.—*Shull v. Cummings*, 161 S. W. 300.

### II. ACTIONS FOR PARTITION.

#### (A) Right of Action and Defenses.

§ 12 (Mo.) Partition will not lie while the homestead exists.—*Armor v. Lewis*, 161 S. W. 251.

§ 13 (Mo.) A disseizure on actual adverse possession destroys the unity of possession among tenants in common and takes away the right of partition until the title is determined by appropriate action.—*Armor v. Frey*, 161 S. W. 829.

§ 22 (Mo.) An unperformed agreement to arbitrate the partition of certain real property held no defense to a suit for partition.—*Ferrell v. Ferrell*, 161 S. W. 719.

#### (B) Proceedings and Relief.

§ 34 (Tex.Civ.App.) Rev. Civ. St. 1911, art. 6097, providing a statutory mode of partition, is not exclusive, and does not deprive the courts of their equitable power of partition.—*Guthridge v. Guthridge*, 161 S. W. 892.

§ 44 (Mo.) The right to partition being a right common to both tenants, neither are barred from asking that relief by reason of lapse of time.—*Armor v. Frey*, 161 S. W. 829.

§ 55 (Tex.Civ.App.) Under the direct provisions of Rev. Civ. St. 1911, art. 6097, subd. 3, a petition for statutory partition is insufficient when not giving an estimate of the value of the premises.—*Guthridge v. Guthridge*, 161 S. W. 892.

A petition for equitable partition need not state the estimated value of the property.—*Id.*

§ 63 (Tex.Civ.App.) In a proceeding for the partition of real estate, the question of value should govern more than the item of quantity, and a judgment rendered without any evidence of value cannot be supported.—*Guthridge v. Guthridge*, 161 S. W. 892.

§ 85 (Mo.) A tenant in common who makes improvements on the property in good faith, not for the purpose of embarrassing his cotenants,

or encumbering their estate, or hindering partition, is, upon partition, entitled to compensation for such improvements.—*Armor v. Frey*, 161 S. W. 829.

§ 85 (Mo.) Where a tenant in common in possession places improvements on the land in good faith, he is entitled to an allowance upon partition for such sum as may be equal to the increase in the value of the land by reason of the improvements.—*Armor v. Jester*, 161 S. W. 839; *Same v. Kearney*, Id. 840; *Same v. Cooper*, Id. 841.

§ 114 (Mo.App.) Under Rev. St. 1909, §§ 2275, 2279, 2609, relating to costs in partition suits, *held*, that the fee of the attorney for plaintiff need not be fixed by contract to authorize the trial judge to allow him a fee, and that such rule applied where the parties formed a corporation and received stock therein in proportion to their interest in the land.—*Connor Realty Co. v. St. Louis Union Trust Co.*, 161 S. W. 885.

In partition involving mineral lands worth \$24,000, where the desired result was accomplished by the formation of a corporation and the issuance of stock therein to the parties interested in the land, and where attorneys testified that 1,200 was a reasonable fee, the trial court was justified in awarding a fee of \$720 to plaintiff's attorney.—*Id.*

## PARTNERSHIP.

See Replevin, § 8; Set-Off and Counterclaim, §§ 28, 33, 44.

### I. THE RELATION.

#### (A) Creation and Requisites.

§ 20 (Tex.Civ.App.) An agreement that one of the parties thereto would furnish the money to purchase horses would not of itself constitute a partnership between the parties.—*Coody v. Shawver*, 161 S. W. 935.

### III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

#### (C) Actions Between Partners.

§ 108 (Tex.Civ.App.) The rule that one partner cannot sue another, except for dissolution of the partnership and for a general accounting *held* to have no application to a suit between former partners after dissolution by consent.—*Reeves v. White*, 161 S. W. 43.

### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

#### (A) Representation of Firm by Partner.

§ 141 (Tex.Civ.App.) A deed signed by partners, reciting that it conveyed all of the property and assets of the company, includes only the partnership property and not the partners' individual estate.—*Dye v. Livingston Lumber Co.*, 161 S. W. 53.

#### (D) Actions by or Against Firms or Partners.

§ 197 (Mo.App.) Actions by a partnership should be brought in the names of the individual partners, and if brought in the firm name there is a defect of parties.—*Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 161 S. W. 320.

§ 213 (Tex.Civ.App.) The mere allegation in the petition of joint ownership of the mules sought to be recovered was not equivalent to an allegation of partnership as to the mules.—*Coody v. Shawver*, 161 S. W. 935.

§ 218 (Ark.) In replevin for the automobile claimed by plaintiff as the prize in the contest for newspaper subscriptions, *held* on the evidence that whether one interested with defendant in the sale of the car to the newspaper company on commission had authority to deliver it was for the jury.—*Jones v. Burks*, 161 S. W. 177.

§ 218 (Tex.Civ.App.) In an action to recover possession of mules claimed to have been converted by the defendant, whether defendant was a partner of plaintiff need not be submitted; the evidence not showing a partnership.—*Coody v. Shawver*, 161 S. W. 935.

A requested instruction submitting the issue of partnership was defective for not stating to the jury what would constitute a partnership.—*Id.*

An instruction that if the purchase of horses by plaintiff was under an agreement by which defendant was to have a third interest upon paying plaintiff a third of the price, unless he paid within a reasonable time, he would not be a partner, was not erroneous as authorizing a finding that failure to so pay would dissolve the partnership.—*Id.*

§ 220 (Tex.Civ.App.) Under Rev. St. 1911, art. 3743, providing for levy of execution on the interest of a partner, a partnership cannot enjoin such levy, though it would result in suspending the partnership business.—*J. M. Radford Grocery Co. v. Owens*, 161 S. W. 911.

### VI. DEATH OF PARTNER, AND SURVIVING PARTNERS.

§ 246 (Mo.) While a partnership cannot hold the legal title to land, yet equity recognizes the right of a firm in partnership land, and a surviving partner has an equitable estate in the land and the right to treat it as personalty in order to wind up the affairs of the firm, though after the partnership demands are satisfied the surplus is treated as real estate.—*Armor v. Frey*, 161 S. W. 829.

Where no creditors of a firm made any claim to wild lands owned by the partners, and the surviving partner before conveying the property obtained deeds from the executor and heirs of the deceased partner, the surviving partner's conveyance of the property will not be upheld as a conveyance to wind up the partnership affairs; it appearing that the conveyance of the executor of the deceased partner was insufficient to pass title.—*Id.*

### PASSENGERS.

See Carriers, §§ 239-366.

### PASSES.

See Carriers, § 307.

### PASTURAGE.

See Adverse Possession, § 22.

### PAYMENT.

See Account, Action on, § 4; Bills and Notes, §§ 429, 434, 499; Justices of the Peace, § 158; Mortgages, § 463; Subrogation; Vendor and Purchaser, §§ 175, 267, 315.

### V. RECOVERY OF PAYMENTS.

§ 82 (Ark.) Although an exaction is illegal, yet, if voluntarily paid without any compulsion, it cannot be recovered.—*Williford v. Eason*, 161 S. W. 498.

§ 86 (Ky.) A vendor repaying \$1,500 to vendee to enable him to perfect the title *held* entitled to recover \$500 of such amount paid by vendee to an attorney without vendor's knowledge.—*Marrowbone Coal & Coke Co. v. Coleman*, 161 S. W. 238.

§ 87 (Ark.) A payment of the fee claimed by a deputy prosecuting officer not entitled thereto, made while plaintiff was in the custody of an arresting officer, and upon the assurance of a justice of the peace that it was legal and could be enforced against him, *held* a payment under duress and hence recoverable.—*Williford v. Eason*, 161 S. W. 498.

§ 89 (Ark.) In an action to recover a fee paid to a de facto prosecuting attorney not entitled thereto, submission of the case on the sole issue whether plaintiff knew when he made the payment that the fee demanded was illegal was more favorable than defendant was entitled to.—Williford v. Eason, 161 S. W. 498.

## PENALTIES.

See Agriculture, § 8; Jury, § 107; Robbery, § 30; Statutes, § 241; Telegraphs and Telephones, § 34.

## PENDENCY OF ACTION.

See Limitation of Actions, § 105.

## PERJURY.

See Libel and Slander, §§ 7, 156; Witnesses, § 286.

## I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 11 (Mo.) Evidence of false testimony before the grand jury as to whether a hotel proprietor was running a bawdyhouse *held* material, within Rev. St. 1909, § 4344.—State v. Burnett, 161 S. W. 680.

## II. PROSECUTION AND PUNISHMENT.

§ 32 (Tex.Cr.App.) In a prosecution for perjury in falsely testifying that accused had never been injured while working for another railroad, parts of the transcript in such action, which showed that accused's counsel therein withdrew from the case upon it appearing that accused had testified falsely, were not admissible.—Key v. State, 161 S. W. 130.

§ 32 (Tex.Cr.App.) In a prosecution for testifying falsely before the grand jury as to his brother's age, evidence that an action was pending against the brother in the justice court, in which he had entered a plea of minority and swore that he was only 19 years of age, was admissible, but the result of that trial was inadmissible.—Poulter v. State, 161 S. W. 475.

Testimony of grand jury men was admissible to show that defendant acted deliberately and willfully and did not testify through misapprehension or agitation.—Id.

## PERSONAL INJURIES.

See Abatement and Revival, § 54; Carriers, §§ 246, 280-347; Damages, §§ 130, 132, 166-221; Death; Electricity, § 16; Evidence, §§ 471, 548; Master and Servant, §§ 86-296; Municipal Corporations, §§ 766-821; Negligence; Pleading, §§ 34, 369; Railroads, §§ 275-400; Release; Street Railroads, §§ 81-118; Trial, §§ 84, 191, 194, 217, 226, 242, 243, 250, 252, 260, 296.

## PETITION.

See Pleading.

## PETIT LARCENY.

See Larceny, § 65.

## PHYSICIANS AND SURGEONS.

See Evidence, §§ 317, 528, 548; Malicious Prosecution, § 71; Witnesses, § 410.

§ 11 (Mo.) The right of a licensed physician to practice is a valuable privilege which is protected by such safeguards as the Legislature has thrown around it.—State ex rel. Spriggs v. Robinson, 161 S. W. 1169.

Rev. St. 1909, § 8317, so far as it authorizes the revocation of licenses to practice medicine and surgery, is highly penal and must be so construed.—Id.

Evidence *held* insufficient to sustain suspension of physician by State Board of Health

under Rev. St. 1909, § 8317, for producing an abortion.—Id.

Under Rev. St. 1909, § 8317, a physician's right to practice cannot be suspended because of a willingness or offer to produce an abortion.—Id.

Rev. St. 1909, § 8317, relative to revocation of licenses to practice medicine and surgery, *held* not to authorize the State Board of Health to determine what shall constitute dishonorable conduct on the part of a physician and surgeon, in view of Const. art. 4, § 1, and article 3.—Id.

Assuming that the State Board of Health, under Rev. St. 1909, § 8317, may determine what shall constitute unprofessional conduct, it could not suspend a physician for offering to commit an abortion, where it had not prohibited such offers, in view of Const. art. 2, § 15, prohibiting retrospective legislation.—Id.

§ 24 (Mo.App.) In an action against a surgeon for damages for negligence in an operation, evidence *held* insufficient to go to the jury.—Boner v. Nicholson, 161 S. W. 309.

## PLEADING.

See Abatement and Revival, § 54; Appeal and Error, §§ 172, 173, 193, 194, 197, 254, 518, 544, 837, 882, 916, 1042; Attachment, § 211; Bills and Notes, §§ 462, 485, 489; Contracts, §§ 328, 335, 342; Corporations, §§ 514, 518; Costs, § 71; Damages, §§ 141, 158; Death, § 47; Dismissal and Nonsuit, § 60; Divorce, §§ 104, 105; Drains, § 57; Ejectment, §§ 65, 66, 69; Equity, § 241; Estoppel, §§ 107, 112; Exceptions, Bill of, § 39; Fraud, § 49; Frauds, Statute of, § 150; Fraudulent Conveyances, § 269; Guaranty, § 87; Highways, § 161; Injunction, §§ 118, 122; Judgment, § 948; Justices of the Peace, §§ 44, 90-101, 141, 174; Landlord and Tenant, § 306; Libel and Slander, §§ 80-100; Limitation of Actions, § 123; Malicious Prosecution, §§ 52, 55, 58; Master and Servant, §§ 256, 340; Money Lent, § 6; Money Received, § 17; Municipal Corporations, § 816; Navigable Waters, § 26; Negligence, § 119; Parties, § 75; Partition, § 55; Partnership, § 213; Process, § 66; Quietening Title, §§ 34-50; Railroads, §§ 114, 439, 441; Rape, § 66; Reformation of Instruments, § 36; Sales, § 446; Specific Performance, § 114; Street Railroads, § 117; Telegraphs and Telephones, § 65; Trespass to Try Title, § 32; Trial, §§ 139, 194, 250-253, 397.

## I. FORM AND ALLEGATIONS IN GENERAL.

§ 8 (Ark.) Mere abstract conclusions of law may not be pleaded.—Wood v. Drainage Dist. No. 2 of Conway County, 161 S. W. 1057.

The allegation that the delay in completing work under a contract was negligent *held* a mere conclusion of law.—Id.

§ 8 (Mo.) An allegation that a certain deed was ineffective is a conclusion of law and not an allegation of fact.—Boothe v. Cheek, 161 S. W. 791.

§ 8 (Mo.App.) Averments in a petition, that by obstruction of a stream plaintiff's sawmill was rendered wholly worthless, and he was caused to move it, *held* conclusions of the pleader.—Weller v. Missouri Lumber & Mining Co., 161 S. W. 853.

§ 8 (Mo.App.) The statement of a conclusion that, if defendant was negligent, the plaintiff was also guilty of negligence contributing thereto, *held* bad.—Johnson v. Springfield Traction Co., 161 S. W. 1193.

§ 8 (Tex.Civ.App.) An allegation that defendant became bound to pay plaintiff *held* a conclusion.—Baker v. Hahn, 161 S. W. 443.

§ 34 (Mo.App.) The word "disease" as used in an allegation of the answer, in an action for the price of a jack, that the jack was not a good

breeder and sure foal-getter because of the disease, meant any derangement of the functions or alteration of the structure of the animal organs.—Perry v. Van Matre, 161 S. W. 643.

§ 34 (Tex.) In action for death of an employé, where petition alleged that the floor was greasy and slippery, but failed to show that any other person was responsible for such condition, *held*, that it would be presumed that the employé caused such condition.—Snipes v. Bomar Cotton Oil Co., 161 S. W. 1.

§ 35 (Mo.App.) The words "a corporation," appearing in the caption of a complaint after the name of the plaintiff, may be disregarded as surplusage.—Iroquois Mfg. Co. v. Annan-Burg Milling Co., 161 S. W. 320.

## II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 48 (Ark.) Every essential element of the cause of action must be stated in the complaint.—Wood v. Drainage Dist. No. 2 of Conway County, 161 S. W. 1067.

§ 67 (Ky.) Plaintiff is only required to state in his petition facts making out a prima facie case in his favor, and is not bound to anticipate the answers or objections which defendant may intend to rely upon.—Flynn v. Barnes, 161 S. W. 523.

## III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

### (C) Traverses or Denials and Admissions.

§ 126 (Ky.) An answer, denying that plaintiff "on October 22, 1912, loaned defendants \$5,000, which amount both jointly and severally promise to pay," *held* to admit a loan on some other day, for a different amount, and a promise either joint or several.—Gahren, Dodge & Maltby v. Farmers' Bank of Estill County, 161 S. W. 1127.

§ 127 (Ky.) An answer denying that on October 22d plaintiff loaned defendant \$5,000, being an admission of a loan on some other day, or for a less sum, the consideration for the loan was admitted, so that the further answer that the debt was without consideration presented no defense.—Gahren, Dodge & Maltby v. Farmers' Bank of Estill County, 161 S. W. 1127.

§ 129 (Ky.) Where defendant's allegations of ownership of land and that a part of his boundary was within a boundary claimed by plaintiff were not denied, no issue was raised as to whether the lap was within defendant's deed.—Bassett v. Lush, 161 S. W. 227.

### V. DEMURRER OR EXCEPTION.

§ 192 (Ark.) Where mere abstract conclusions of law are pleaded, the defect may be reached by demurrer.—Wood v. Drainage Dist. No. 2 of Conway County, 161 S. W. 1057.

§ 193 (Ark.) Failure to state every essential element of the cause of action may be reached by demurrer.—Wood v. Drainage Dist. No. 2 of Conway County, 161 S. W. 1057.

§ 193 (Mo.) In case a petition shows on its face a misjoinder of action, the defect may be reached by demurrer, but if it does not show such defect on its face, the fault may be attacked by answer.—Norton v. Reed, 161 S. W. 842.

§ 193 (Mo.App.) It is no ground for demurrer in actions at law that the prayer for relief is not warranted by the averments of the petition.—Weller v. Missouri Lumber & Mining Co., 161 S. W. 853.

§ 214 (Mo.) A demurrer to the petition admits the truth of the allegations therein.—Meehan v. Union Electric Light & Power Co., 161 S. W. 825.

§ 214 (Mo.App.) A demurrer admits all facts well pleaded and the inferences of fact which may be reasonably drawn therefrom, but not conclusions of law nor the conclusions of the pleader.—Weller v. Missouri Lumber & Mining Co., 161 S. W. 853.

§ 214 (Tex.Civ.App.) On demurrer the averments of the petition must be taken as true.—Dye v. Livingston Lumber Co., 161 S. W. 53.

§ 228 (Tex.Civ.App.) An exception to five counts in a petition of reconvention was properly overruled where one of the counts stated a proper counterclaim.—Gillisple v. Ambrose, 161 S. W. 937.

Exception to five counts in plea of reconvention for misjoinder by which it was proposed to strike them out and permit other counts to remain, *held* properly overruled, as the entire pleading is to be stricken, leaving it to the pleader to select such portions of the plea as he may see fit.—Id.

## VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 237 (Mo.) In an action against a railroad company by the former owner of the land of a street, which the company had appropriated with the city's consent, *held* not error to permit defendant to amend its answer to conform to the evidence, after the instructions were given.—Quinn v. St. Louis & S. F. R. Co., 161 S. W. 820.

§ 243 (Ark.) Where no cause of action was stated in a complaint as distinguished from a cause of action defectively stated, it could not be amended.—Arkansas Life Ins. Co. v. American Nat. Life Ins. Co., 161 S. W. 136.

§ 257 (Ky.) In action on notes, every fact provable under an amended answer stricken by the court, alleging that, under contract by which defendant, as plaintiff's agent, was to receive \$2.50 on each wagon shipped by plaintiff, 650 wagons were so shipped, *held* provable under the original answer, alleging that a large number, the exact number of which defendant could not tell, were shipped.—Taulbee v. Lewis & Chambers, 161 S. W. 1100.

## VII. SIGNATURE AND VERIFICATION.

§ 301 (Tex.Civ.App.) That a pleading was verified by a party before one of his attorneys in the case was not ground for sustaining a special exception thereto.—Coody v. Shawver, 161 S. W. 935.

## IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

§ 330 (Tex.Civ.App.) That plaintiff was in possession of the account books and would not permit defendant, his former partner, to inspect them was a sufficient excuse for not particularly itemizing the amount alleged by counterclaim to be due to defendant.—Reeves v. White, 161 S. W. 43.

## XI. MOTIONS.

§ 345 (Ky.) Judgment was properly directed for defendant on the pleadings, where the petition did not aver that the death was accidental, and the answer did not cure the error; the evidence not disclosing the manner of death other than that it was by drowning.—Farnsley's Adm'r v. Philadelphia Life Ins. Co., 161 S. W. 1111.

§ 355 (Ky.) In an action on notes, *held*, that the court properly struck an unverified answer setting up counterclaim for defendant's failure to comply with an order requiring him to verify it.—Taulbee v. Lewis & Chambers, 161 S. W. 1100.

§ 356 (Mo.) The question whether an amendment of the answer, intended to make it agree with the proof, was in fact warranted by the

evidence, cannot be decided on motion to strike the amendment.—Hynds v. Hynds, 161 S. W. 812.

§ 367 (Ark.) A motion to make the complaint more specific *held* properly denied.—Loewer v. Lonoke Rice Milling Co., 161 S. W. 1042.

§ 367 (Ark.) Where the substantial facts constituting a cause of action are stated in the complaint, though imperfectly alleged, the proper mode of correcting the defect is by motion to make more definite and certain.—Wood v. Drainage Dist. No. 2 of Conway County, 161 S. W. 1057.

§ 367 (Mo.App.) The failure of the petition in an action for money had and received to set forth the relation of the parties, the contract, or the wrong out of which the cause of action arose, could have been reached by motion to make it more definite and certain, if not by demurrer.—St. Louis Sanitary Co. v. Reed, 161 S. W. 315.

§ 369 (Ky.) Where a petition, in an action for death of a railroad employé charged that he was engaged either in interstate or intrastate commerce at the time of the accident, it was not sustainable under Civ. Code Prac. § 113, subd. 4, authorizing alternative allegations, and defendant was entitled to compel plaintiff to elect on which she would proceed.—Louisville & N. R. Co. v. Strange's Adm'x, 161 S. W. 239.

In negligence cases, a cause of action for physical pain and mental anguish during the period between the accident and death of the person injured cannot be joined with a cause of action for death, but the plaintiff must elect between them.—Id.

A motion to compel plaintiff to elect whether she would proceed under the state law or under the federal Employers' Liability Act to recover for the death of her intestate, made before proceeding to trial, was in time.—Id.

§ 369 (Ky.) Where an injured servant attempted to rely on both the common law and the federal Employers' Liability Act, the defendant's motion to require an election must be sustained.—Louisville & N. R. Co. v. Moore, 161 S. W. 1129.

§ 369 (Mo.) Where the same cause of action was set out in separate counts to meet possible variations in the proof, plaintiff was not required to elect on which he would proceed.—Schroeder v. Turpin, 161 S. W. 716.

### XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 403 (Mo.) Failure of plaintiff's petition to allege defendant's incorporation was cured by an answer expressly admitting that defendant was a corporation.—Davidson v. Laclede Land & Improvement Co., 161 S. W. 686.

§ 403 (Tex.Civ.App.) The defects in the pleadings of one party may be cured by averments in the pleadings of the other.—Childress v. Robinson, 161 S. W. 78.

The failure of defendant's answer to show that plaintiff, the wife of the possessor of land against whom a judgment had been recovered, was a party to that action so as to be bound by the judgment, is cured where plaintiff's petition showed that the property was the community estate of herself and her husband.—Id.

§ 406 (Mo.) Where a defect in parties or a misjoinder of causes of action are not taken advantage of either by demurrer or answer, it is waived.—Norton v. Reed, 161 S. W. 842.

§ 418 (Mo.) Under Rev. St. 1909, §§ 1800, 1804, a defendant who pleads over by taking issue on the facts after the overruling of a demurrer to the petition on the grounds of multifariousness and misjoinder of parties thereby waives the objection.—Wolz v. Venard, 161 S. W. 760.

§ 423 (Ark.) The failure to make a note an exhibit to the complaint, in an action to fore-

close a mortgage and recover the debt, was waived by defendant by not objecting on that ground, the mortgage having been made an exhibit and read in evidence and considered with the complaint.—Felker v. Rice, 161 S. W. 162.

§ 424 (Mo.App.) A defendant may waive his right to insist upon the filing of an account, in accordance with Rev. St. 1909, § 1852, in an action begun in the circuit court.—Barton Lumber Co. v. Gibson, 161 S. W. 357.

§ 428 (Mo.App.) An objection to the petition, first made by an objection to evidence, can prevail only when the petition wholly fails to state any cause of action, construed most favorably to plaintiff.—Price v. City of Maryville, 161 S. W. 295.

§ 433 (Mo.App.) The omission of an essential averment from a petition is not wholly waived by answer to the merits; but a failure to demur brings into play the rule of liberal construction, and, if the omitted fact can be found to be alleged by inference, the petition will not be held bad after verdict.—Coulter v. Coulter, 161 S. W. 281.

A petition, in an action by a wife for separate maintenance, under Rev. St. 1909, § 8295, *held* good, though not in terms alleging that the husband's abandonment was without just cause, when not challenged until after verdict.—Id.

### PLEDGES.

See Insurance, § 240.

§ 29 (Mo.App.) A cold storage company, to which produce stored with it was pledged for advances, refusing arbitrarily to sell to customers produced by the pledgor at prices sufficient to pay it, and afterwards selling it for an insufficient amount, is liable for loss.—Union Cold Storage & Warehouse Co. v. Pitts, 161 S. W. 1182.

### PLURAL

See Statutes, § 188.

### POLICE.

See False Personation, § 2; Municipal Corporations, § 180.

### POLICE POWER.

See Constitutional Law, § 60; Municipal Corporations, §§ 591-623; Railroads, § 99.

### POSSESSION.

See Adverse Possession; Ejectment, § 16; forcible Entry and Detainer, § 9; Larceny, § 64; Replevin, § 8; Trover and Conversion, § 11.

### POST OFFICE.

See Carriers, §§ 241, 280, 320.

### POWERS.

See Wills, § 693.

### II. CONSTRUCTION AND EXECUTION.

§ 34 (Mo.) Whenever there is a conveyance by the donee of a power and the conveyance cannot be given full effect without its being construed as an execution of the power, it will be held to be such execution, even though there is no reference to the power.—Armor v. Frey, 161 S. W. 829.

§ 41 (Mo.) Where an owner of land devised it to his children for life with the power of appointment by will in favor of their children, the execution by a child of the power in favor of his son is not a devise of property, rendering the son liable on the father's covenant of warranty made in the conveyance of land; the son taking from the original owner.—Armor v. Frey, 161 S. W. 829.

**PRACTICE.**

For practice in particular actions and proceedings, see the various specific topics.

**PRAYER.**

See Pleading, § 193.

**PRECEDENTS.**

See Courts, §§ 89-96.

**PREMIUMS.**

See Insurance, §§ 755, 818.

**PRESCRIPTION.**

See Adverse Possession; Limitation of Actions.

**PRESENTMENT.**

See Bills and Notes, § 397.

**PRESUMPTIONS.**

See Appeal and Error, §§ 901-934; Criminal Law, §§ 308, 1144, 1163; Evidence, §§ 65-83.

**PRINCIPAL AND ACCESSORY.**

See Criminal Law, §§ 81, 792.

**PRINCIPAL AND AGENT.**

See Appeal and Error, § 1027; Attorney and Client; Banks and Banking, §§ 54, 106-116, 253; Brokers; Carriers, § 194; Corporations, §§ 308-361, 413, 432; Drains, § 17; Evidence, §§ 242, 243, 441; Husband and Wife, §§ 25, 138; Injunction, § 114; Intoxicating Liquors, § 169; Municipal Corporations, § 292; Witnesses, § 144.

**III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.****(A) Powers of Agent.**

§ 103 (Ark.) A traveling salesman, in the absence of proof of special authority, had no power to accept an order for goods taken by him on behalf of his principal, so as to effectuate a binding contract between the buyer and seller.—*Outcault Advertising Co. v. Young Hardware Co.*, 161 S. W. 142.

§ 123 (Tex.Civ.App.) In an action for broker's commissions, evidence held to warrant a finding that defendants' agent, with whom plaintiff conducted the transactions in question, had authority to act.—*E. R. & D. C. Kolp v. Brazer*, 161 S. W. 899.

§ 136 (Tex.Civ.App.) An agent is not personally responsible upon a contract made for a known principal.—*Chicago, R. I. & G. Ry. Co. v. Floyd*, 161 S. W. 954.

**PRINCIPAL AND SURETY.**

See Appeal and Error, § 467; Bills and Notes, §§ 237, 484; Guaranty; Injunction, § 241; Judgment, § 910; Malicious Prosecution, § 58; Mortgages, § 283.

**I. CREATION AND EXISTENCE OF RELATION.****(A) Between Individuals.**

§ 14 (Mo.App.) Where third persons agreed with defendants, for a valuable consideration, to assume a debt defendants owed a bank, the relation of principal and surety was created between the parties, even though the bank was not a party to the agreement.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

Where a creditor accepts a promise of third parties made to the debtor to discharge the latter's obligation, the creditor is bound to respect the contract of suretyship between them.—*Id.*

Where third persons agreed with defendants to pay their note due a bank, and the bank not only accepted the promise of the third persons, but induced them to assume payment of the debt, granting an extension of time without notifying defendants, the bank must be held to have elected to accept the third persons as principals, and can look to defendants merely as sureties.—*Id.*

Where defendants, primarily liable on a note, became sureties owing to a subsequent agreement by third persons to pay it, their liability was unaffected by the Negotiable Instruments Law.—*Id.*

§ 46 (Mo.App.) The extension of time of payment of a note by a bank, where defendants, the makers, had already agreed with others that they should discharge it, held not to work an estoppel on the bank to hold the makers; there having been no change of position by them.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

**III. DISCHARGE OF SURETY.**

§ 104 (Mo.App.) The extension of the time of payment of a note due a bank held, to relieve the makers of liability; their liability having become that of sureties by reason of a subsequent agreement with third parties for the payment of the note.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

§ 108 (Mo.App.) For an extension of time of payment to discharge a surety on a note, such extension must be supported by a valid consideration and be binding upon the creditor, this also being the rule of Negotiable Instruments Law.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

**IV. REMEDIES OF CREDITORS.**

§ 160 (Tex.Civ.App.) In an action on a bond to indemnify against the default of a contractor and to indemnify plaintiff, who made a deposit to assist the contractor, evidence that plaintiff was not an owner of the house, but merely advanced the money, was admissible to establish plaintiff's interest.—*Fidelity & Deposit Co. v. Bankers' Trust Co.*, 161 S. W. 45.

§ 162 (Mo.App.) Where defendants, who had executed a note, but who were liable only as sureties, owing to a subsequent agreement by third persons to pay it, claimed that they had been discharged by the principal's extension of time, the question was for the jury, where the evidence was conflicting.—*Citizens' Bank of Senath v. Douglass*, 161 S. W. 601.

§ 163 (Tex.Civ.App.) Where in an action on a bond, judgment was rendered against both the surety and contractor with execution first against the contractor and judgment for the surety over against him, it was immaterial whether the contractor was solvent as to the surety's liability to reimburse plaintiff.—*Fidelity & Deposit Co. v. Bankers' Trust Co.*, 161 S. W. 45.

**PRIVILEGED COMMUNICATIONS.**

See Witnesses, § 193.

**PROBATE.**

See Wills, §§ 229-329.

**PROBATE COURTS.**

See Courts, § 200½.

**PROCESS.**

See Appeal and Error, § 880; Attachment; Corporations, § 668; Limitation of Actions, § 119; Mandamus; Searches and Seizures; Sequestration.

**I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.**

§ 31 (Ky.) Under Ky. St. § 2524, and Civ. Code Prac. § 39, declaring an action to be begun by summons, filing a petition, etc., the summons to be valid must name the defendants to be summoned.—Casey v. Newport Rolling Mill Co., 161 S. W. 528.

**II. SERVICE.****(A) Personal Service in General.**

§ 66 (Tex.Civ.App.) Under Rev. Civ. St. 1911, art. 1869, referring to service upon nonresidents, held, that the service of an amended petition is not authorized where the notice does not mention the amendment.—Baker v. Hahn, 161 S. W. 443.

**(B) Return and Proof of Service.**

§ 142 (Ky.) In a collateral attack on a judgment, the sheriff's return is, under Ky. St. § 3760, conclusive, unless attacked on the ground of fraud or mistake.—S. B. Reese Lumber Co. v. Licking Coal & Lumber Co., 161 S. W. 1124.

**PROFITS.**

See Mortgages, § 199.

**PROMISSORY NOTES.**

See Bills and Notes.

**PROPERTY.**

See Logs and Logging; Mines and Minerals; Partnership, § 246.

**PROPERTY TAX.**

See Taxation, § 117.

**PROPOSITIONS.**

See Appeal and Error, § 742.

**PROSTITUTION.**

See Criminal Law, § 371.

§ 1 (Ark.) The statute prohibiting pandering punishes one procuring any female, whether virtuous or not, to enter a place for prostitution.—Boyle v. State, 161 S. W. 1049.

To warrant a conviction of pandering, the proof must show that men and women resorted to the house to which prosecutrix was brought for immoral purposes, and was a place in which prostitution was allowed, and that she was taken there for that purpose.—Id.

§ 1 (Tex.Cr.App.) Acts 32d Leg. c. 23, held intended to cover all acts, conduct, devices, etc., to induce any female to submit her body to other men for the purpose of prostitution, whether they succeeded in inducing her to do so or not, and that whether she was virtuous or not prior thereto was immaterial.—Currington v. State, 161 S. W. 478.

§ 4 (Ark.) Evidence held to justify a conviction of pandering, punishable by the act of 1913.—Boyle v. State, 161 S. W. 1049.

On a trial for pandering, the testimony of witnesses living at the house that up to the time prosecutrix was taken to it it was not used as a disorderly house held relevant to contradict testimony that the house had been and was then used as a disorderly house.—Id.

Where the state proved that accused was engaged only in the business of maintaining a disorderly house, to which prosecutrix was brought, evidence that accused, at the time of the alleged offense, was engaged in the business of securing patents was admissible.—Id.

Evidence of defendant's manner toward females on the street corners was admissible on the issue whether he was in the practice of procuring females to enter a disorderly house.—Id.

§ 4 (Tex.Cr.App.) In a prosecution under Acts 32d Leg. c. 23, offense must be shown be-

yond a reasonable doubt.—Currington v. State, 161 S. W. 478.

In a prosecution under Acts 32d Leg. c. 23, the burden of proof was on the state.—Id.

**PROVINCE OF COURT AND JURY.**

See Criminal Law, §§ 736-764; Trial, §§ 191, 194.

**PROVOCATION.**

See Homicide, § 295.

**PROXIMATE CAUSE.**

See Negligence, §§ 58, 59.

**PUBLICATION.**

See Municipal Corporations, § 110.

**PUBLIC DEBT.**

See Municipal Corporations, §§ 863, 867; Schools and School Districts, §§ 97-107; States, § 137.

**PUBLIC IMPROVEMENTS.**

See Municipal Corporations, §§ 266-586.

**PUBLIC LANDS.**

See Adverse Possession, § 73.

**III. DISPOSAL OF LANDS OF THE STATES.**

§ 176 (Tex.Civ.App.) Where the state of Texas placed grants made by a former sovereign on the same footing as those made by the state, any grant by the state of a part of lands embraced in a grant of a former sovereign was void.—Campbell v. Gibbs, 161 S. W. 430.

**PUBLIC NUISANCE.**

See Nuisance, § 72.

**PUBLIC POLICY.**

See Cemeteries, § 3.

**PUBLIC PURPOSE.**

See Taxation, § 38.

**PUBLIC SCHOOLS.**

See Schools and School Districts.

**PUBLIC SERVICE COMMISSION.**

See Electricity, § 1.

**PUBLIC SERVICE CORPORATIONS.**

See Carriers; Electricity; Railroads; Street Railroads; Telegraphs and Telephones.

**PUBLIC WATER SUPPLY.**

See Waters and Water Courses, § 183.

**PUPILS.**

See Schools and School Districts, § 169.

**QUANTUM MERUIT.**

See Work and Labor.

**QUASHING.**

See Execution, § 161.

**QUESTIONS OF LAW AND FACT.**

See Criminal Law, §§ 736-742; Trial, §§ 136-141, 370.

**QUIETING TITLE.**

See Judgment, §§ 251, 490; Remainders, § 17.



## I. RIGHT OF ACTION AND DEFENSES.

§ 19 (Mo.) Statutes for quieting title are enabling acts and not penal or restrictive.—*Armor v. Frey*, 161 S. W. 829.

A suit to quiet title brought under the statute is a proceeding by one claimant of an interest in property against another claimant asking the court to ascertain and determine the title, but a recovery of the possession of the real estate is not essential; this being so even though the amendment of 1909 was intended to give full affirmative relief in case the suit was changed from one of quiet title to one to quiet title and give possession.—*Id.*

## II. PROCEEDINGS AND RELIEF.

§ 34 (Mo.) Where, in a suit to quiet title, the petition did not disclose that defendant claimed alone through a fatally defective tax record, the suit will not be dismissed on the ground that, the tax deed being void, there was no cause of action.—*Davidson v. Leclade Land & Improvement Co.*, 161 S. W. 686.

§ 39 (Mo.) A cross-bill undertaking to state a cause of action to quiet title under Rev. St. 1909, § 2535, *held* sufficient.—*Hynds v. Hynds*, 161 S. W. 812.

§ 43 (Mo.) Where, in an action to quiet title, the petition alleged title generally in plaintiff and asked that the title of the parties be defined and adjudicated, and the answer was a general denial and special plea asserting title and praying that title be adjudged in defendant, the whole title was in issue.—*Mahaffey v. Lebanon Cemetery Ass'n*, 161 S. W. 701.

§ 50 (Mo.) Where a party brings a suit to establish an equitable interest in land, he may in the same suit have partition, but the rule is otherwise where the plaintiff counts solely on his legal title.—*Armor v. Frey*, 161 S. W. 829.

## RAILROADS.

See Agriculture, § 8; Appeal and Error, §§ 882, 1048, 1060, 1060, 1064; Commerce; Constitutional Law, § 115; Eminent Domain; Justices of the Peace, §§ 91, 100; Limitation of Actions, § 55; Master and Servant; Pleading, §§ 237, 369; Statutes, § 253; Street Railroads; Trial, §§ 84, 191, 194, 234, 242, 250, 252, 296.

## V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 72 (Ky.) A railway company which accepted a right of way deed containing covenants to maintain a sufficient right of way fence could not exempt itself from such obligation by conveying the property to another company.—*Louisville Ry. Co. v. Wigginton*, 161 S. W. 209.

§ 76 (Mo.) When a railroad company is permitted by a municipality to use a public street, the extent of its right in the street is measured by the permission, together with such ordinances as define and regulate its use.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

## VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 99 (Tenn.) Acts 1907, c. 149, § 25, empowering a city to require, by ordinance, a railroad company to build and maintain bridges over its tracks at street crossings, is within the police power.—*City of Chattanooga v. Southern Ry. Co.*, 161 S. W. 1000.

Under the common law a city could require a railroad to construct and maintain at its expense a proper bridge at a street crossing over its tracks.—*Id.*

§ 108 (Mo.App.) Under Rev. St. 1909, § 3150, a railroad company *held* not liable because ditch through roadbed overflowed the land on

the north side of the right of way, where the lateral ditch on the south side of the roadbed was proper and properly constructed.—*Poncot v. St. Louis, I. M. & S. Ry. Co.*, 161 S. W. 1190.

§ 113 (Ky.) That the L. & I. Ry. Co. had the same general offices and was under the same control as the L. Ry. Co. would not make the one liable for the wrong of the other.—*Louisville Ry. Co. v. Wigginton*, 161 S. W. 209.

A former owner of a railroad right of way would not be responsible for injury to adjacent land in grading the right of way by its grantee by dumping earth on such land; the grantee, who committed the wrong, only being responsible therefor.—*Id.*

§ 114 (Ky.) Complaint *held* not to allege that defendant railroad company wrongfully throwing dirt on plaintiff's land cast more water upon plaintiff's land than the natural flow.—*Louisville Ry. Co. v. Wigginton*, 161 S. W. 209.

## X. OPERATION.

### (B) Statutory, Municipal, and Official Regulations.

§ 236 (Mo.) A municipality granting to a railroad company the right to lay its tracks in a public street, may afterwards pass a speed ordinance and make other regulations as to the use.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

§ 255 (Ark.) An indictment for violating Acts 1907, p. 353, §§ 1, 2, requiring railroad companies at junctions where trains connect to have a crier on duty, *held* defective for not alleging that the station was a junction where trains connect.—*State v. Chicago, R. I. & P. Ry. Co.*, 161 S. W. 1066.

### (D) Injuries to Licensees or Trespassers in General.

§ 275 (Ky.) A railroad *held* bound to give warning of the approach of a train, in anticipation of the presence of persons working on the track.—*Cincinnati, N. O. & T. P. Ry. Co. v. Winningham's Adm'r*, 161 S. W. 506.

If a railroad company was charged with notice that a coal tippie was being constructed at a certain point near the track, so that it was bound to anticipate the presence of workmen on the track, it was not excused for failure to give warning of a train's approach because the engineer did not in fact know the tippie was being constructed.—*Id.*

§ 282 (Ky.) If a railroad company was bound to warn of the approach of a train to a point at which a coal tippie was being constructed over the track, one engaged in the work could assume that a warning would be given, and was not conclusively negligent in not looking in crossing the track in his work.—*Cincinnati, N. O. & T. P. Ry. Co. v. Winningham's Adm'r*, 161 S. W. 506.

In an action for the death of one engaged in constructing a coal tippie near a railroad track by being struck by a train whether decedent was guilty of contributory negligence in not looking on crossing the track in his work *held* a jury question.—*Id.*

Where all of the facts were admitted, the question of whether a railroad company was bound to give warning on approaching a point where a coal tippie was being constructed over the track was one for the court.—*Id.*

### (F) Accidents at Crossings.

§ 304 (Mo.App.) While under Laws 1911, p. 153, the obstruction of a road crossing for longer than five minutes is negligence per se, the statute allows trainmen a reasonable exercise of the obstruction privilege, but does not affect the common-law duty of train operatives to exercise reasonable care at crossings.—*Five v. Chicago & A. R. Co.*, 161 S. W. 300.

Operatives of a freight train *held* not negli-

gent in closing the train at a crossing prior to the passing of a passenger train on an adjoining track, by reason of which plaintiff's horse was killed after passing on the crossing and being unable to proceed.—Id.

§ 307 (Tex.Civ.App.) Where an ordinarily prudent person would have maintained a flagman or watchman at the railroad crossing where an injury occurred, a failure to keep such flagman or watchman was negligence.—Texas Midland R. R. v. Wiggins, 161 S. W. 445.

§ 310 (Mo.App.) The degree of care required of railroads at public crossings depends on the circumstances of each particular case, and that a statute prescribes one precaution will not relieve the railroad company from adopting others dictated by common prudence.—Fife v. Chicago & A. R. Co., 161 S. W. 300.

§ 316 (Mo.App.) It is not negligence to run passenger trains at a high rate of speed over road crossings in the country.—Fife v. Chicago & A. R. Co., 161 S. W. 300.

§ 327 (Ark.) Traveler struck by a train which he could have seen except for a failure to look held negligent, even conceding that he had a right to pay greater attention to a freight train on another track.—St. Louis, I. M. & S. R. Co. v. Roddy, 161 S. W. 156.

§ 327 (Tex.Civ.App.) Persons about to cross a railroad track must look and listen for approaching trains, and a failure to do so bars recovery.—Texas Midland R. R. v. Wiggins, 161 S. W. 445.

§ 330 (Ark.) Failure of train approaching crossing to give signals and warning held to be considered on the question of contributory negligence only when there are circumstances excusing a traveler from performing the duty to look and listen.—St. Louis, I. M. & S. R. Co. v. Roddy, 161 S. W. 156.

§ 330 (Mo.App.) While a traveler approaching a railroad crossing in a city may assume that a train will not cross at an unlawful speed, he must nevertheless use his senses for his own protection, and be careful until out of danger.—Coby v. Quincy, O. & K. C. R. Co., 161 S. W. 290.

§ 333 (Mo.App.) Where plaintiff and the driver of an automobile, when they were only 60 or 70 feet from a railroad crossing, saw and heard a freight train about 400 feet away, which was obviously running at an excessive speed, but did not check the speed of the automobile, and attempted to cross ahead of the train, they were guilty of negligence.—Coby v. Quincy, O. & K. C. R. Co., 161 S. W. 290.

§ 337 (Ky.) In an action for killing a team at a crossing, it was not error to refuse to charge that defendant would not be liable if the proximate cause was the breaking of the lock chain on the wagon, where the evidence showed that, though the chain broke, the driver had the team under control before he attempted to cross.—Louisville, H. & St. L. Ry. Co. v. Wilson's Ex'r, 161 S. W. 513.

§ 338 (Ark.) In action for death in crossing accident prior to taking effect of Acts 1911, p. 275, instruction making defendant liable, notwithstanding contributory negligence, if its employees discovered plaintiff's peril, or by ordinary care could have discovered it in time to have avoided injuring him held erroneous.—St. Louis, I. M. & S. R. Co. v. Roddy, 161 S. W. 156.

§ 338 (Mo.App.) To make the last clear chance doctrine applicable to injuries at a railroad crossing, the traveler's peril must be apparent to the trainmen.—Coby v. Quincy, O. & K. C. R. Co., 161 S. W. 290.

§ 348 (Mo.App.) Evidence, in an action for injuries in a collision between an automobile in which plaintiff was riding and a freight train, held to show that the train was within sight and hearing when the automobile ap-

proached the crossing and attempted to cross.—Coby v. Quincy, O. & K. C. R. Co., 161 S. W. 290.

Evidence held not to show that plaintiff's peril was known and apparent to the engineer in time to stop so as to avoid the collision.—Id.

§ 348 (Tex.Civ.App.) Evidence held sufficient to support a judgment for plaintiff.—International & G. N. Ry. Co. v. Walker, 161 S. W. 961.

§ 350 (Ark.) Evidence held to make a question for the jury as to whether engineer of train who saw a person on track should have slackened the speed of the train or given warning of its approach.—St. Louis, I. M. & S. R. Co. v. Roddy, 161 S. W. 156.

§ 350 (Ky.) In view of the evidence as to obstructions at a crossing, court held to have properly permitted the jury to determine whether the statutory crossing signals were sufficient, or whether the company should have used other reasonably effective means.—Southern Ry. Co. in Kentucky v. Thacker's Adm'r, 161 S. W. 236.

§ 350 (Ky.) Evidence held sufficient to take to the jury the question of defendant's negligence in failing to give the alarm for the crossing.—Louisville, H. & St. L. Ry. Co. v. Wilson's Ex'r, 161 S. W. 513.

§ 350 (Tex.Civ.App.) The question whether plaintiff looked and listened is one for the jury, whenever the evidence is conflicting.—Texas Midland R. R. v. Wiggins, 161 S. W. 445.

The question of the railroad company's negligence in failing to keep a watchman at the crossing held for the jury.—Id.

§ 350 (Tex.Civ.App.) Failure of one to stop, look, and listen before going upon a crossing will not render him guilty of negligence as a matter of law.—International & G. N. Ry. Co. v. Walker, 161 S. W. 961.

§ 351 (Ark.) Where there were no circumstances justifying deceased's total failure to look, instructions as to duty to ring bell or sound whistle erroneous because the jury might have understood that they could consider this on the question of contributory negligence.—St. Louis, I. M. & S. R. Co. v. Roddy, 161 S. W. 156.

In action for death in crossing accident, instruction as to obstruction of crossing by freight train held erroneous because the jury might have understood that a partial obstruction of the crossing rendered the company liable, whereas such obstruction was not the proximate cause of the injury.—Id.

§ 351 (Tex.Civ.App.) Instruction to find railroad company not liable if the engineer was not negligent held properly refused where there was evidence that driver's view of crossing was obstructed by the company's cars on a siding.—Texas Midland R. R. v. Nelson, 161 S. W. 1088.

#### (G) Injuries to Persons on or near Tracks.

§ 356 (Mo.App.) Railroad company, permitting public to use its property for travel or recreation, with knowledge thereof, held bound to exercise reasonable care to avoid injuring such users.—Featherstone v. Kansas City Terminal Ry. Co., 161 S. W. 284.

§ 358 (Mo.App.) Child playing upon side track held not to lose status of licensee by going under a car to procure coal for a woman picking up coal.—Featherstone v. Kansas City Terminal Ry. Co., 161 S. W. 284.

Railroad company held to owe to children accustomed to play on side track the duty of warning them before backing other cars thereon.—Id.

§ 359 (Mo.App.) Where a child is a trespasser on railroad property, and is injured in a place where the company has no reason to anticipate its presence, the company is not liable.—Featherstone v. Kansas City Terminal Ry. Co., 161 S. W. 284.

§ 384 (Tex.Civ.App.) A railroad company was bound to operate its train so as not to interfere with plaintiff's enjoyment of his premises near the right of way by casting missiles from the train and injuring plaintiff.—*Trinity & B. V. Ry. Co. v. Blackshear*, 161 S. W. 395.

§ 381 (Mo.) A person walking along a railroad track in a public street along which the tracks extended was bound, after he saw a train approaching, to use the care that an ordinarily prudent person would have, under the circumstances, used to get off the track.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

§ 383 (Ky.) The doctrine of "stop, look, and listen" on approaching and crossing a railroad track has not been adopted in Kentucky.—*Cincinnati, N. O. & T. P. Ry. Co. v. Winningham's Adm'r*, 161 S. W. 506.

§ 385 (Mo.) A traveler in a public street along which a railroad extended had the right to rely upon the observance by the railroad of an ordinance limiting its speed to five miles per hour.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

§ 396 (Tex.Civ.App.) The *res ipsa loquitur* doctrine will raise a presumption of negligence by defendant railroad company, where plaintiff while plowing in his field about 50 feet from the track was struck by a spike "picked up" by a passing freight train and thrown with great force into plaintiff's field.—*Trinity & B. V. Ry. Co. v. Blackshear*, 161 S. W. 395.

§ 398 (Mo.) Evidence, in an action for the death of plaintiff's intestate run over by a train in a public street along which tracks extended, *held* to justify a finding that the speed of the train was excessive in view of an ordinance limiting the speed to five miles per hour, and that the excessive speed was the proximate cause of the accident.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

§ 400 (Mo.) The question whether plaintiff's intestate, after he saw the train, used reasonable efforts to get off the track, was properly submitted to the jury.—*Lueders v. St. Louis & S. F. R. Co.*, 161 S. W. 1159.

#### (H) Injuries to Animals on or near Tracks.

§ 407 (Mo.App.) Engineer of train standing near overhead crossing while waiting for clear track *held* not negligent in blowing the customary blasts of the whistle as a signal to the rear brakeman who had gone back to warn other trains, though the horse of a person waiting for the train to move before crossing the bridge was thereby frightened.—*Pontius v. Chicago, R. I. & P. Ry. Co.*, 161 S. W. 292.

§ 411 (Mo.App.) Under Rev. St. 1909, §§ 3145, 3146, statutory remedy for failure to fence railroad *held* not available, where horse went on track and fell into trestle bridge without being injured, frightened, or run by a locomotive or train.—*McClaskey v. Quincy, O. & K. C. R. Co.*, 161 S. W. 277.

Under Rev. St. 1909, §§ 3145, 3146, owner of horse which went on railroad track because of absence of fence and cattle guards, though not injured, frightened, or run by a locomotive or train, *held* entitled to recover for injuries caused by falling into a bridge; the statutory remedies not being exclusive.—*Id.*

Under Rev. St. 1909, § 3145, proprietor of railroad crossed by private road *held* to owe to the owner of a horse living at some distance the duty of providing a lawful barrier to prevent the horse straying from a public road to the railroad by the way of the private road.—*Id.*

§ 411 (Tex.Civ.App.) Railroad company *held* not bound to maintain a fence extending from its track to the right of way fence after moving the right of way fence closer to the track, and not liable to the owner of a cow which

escaped from its pasture through such fence and fell into a hole.—*Missouri, K. & T. Ry. Co. of Texas v. Meyer*, 161 S. W. 12.

Railroad company, which made excavation on its right of way into which surface water flowed and washed a deep hole, *held* not bound to guard such hole to prevent persons or animals falling therein.—*Id.*

§ 414 (Tex.Civ.App.) Railroad company *held* under no duty to keep a deep hole on its right of way inclosed to prevent live stock falling therein, and not liable for the death of a cow which fell therein after it had moved its right of way fence so as not to inclose such hole.—*Missouri, K. & T. Ry. Co. of Texas v. Meyer*, 161 S. W. 12.

§ 415 (Mo.App.) Where an animal killed was on a public railroad crossing, the statutory duty to ring the bell of an approaching engine was mandatory, regardless whether the trainmen saw or could have seen the animal, while if the animal was not at a public crossing the liability for killing it rested on the common-law duty of the company to avoid injury, if reasonably possible after discovering the danger.—*Martin v. Butler County R. Co.*, 161 S. W. 631.

§ 419 (Mo.App.) Where the engineer or fireman saw or could have seen an animal on the track or coming onto it in time to have avoided killing the animal by either scaring it from the track by an alarm, or by stopping the train, the railroad company was liable for killing it.—*Martin v. Butler County R. Co.*, 161 S. W. 631.

§ 425 (Tex.Civ.App.) The negligence of a railroad company in obstructing a private crossing does not render it liable for the death of a horse without any showing connecting the negligence with the death.—*San Antonio & A. P. Ry. Co. v. Schendel*, 161 S. W. 376.

§ 439 (Mo.App.) Plaintiff's right to recover for injuries to a horse under an allegation that railroad company failed to maintain a lawful fence *held* not affected by the inclusion of another allegation of negligence of the company's servants not sustained by the evidence.—*McClaskey v. Quincy, O. & K. C. R. Co.*, 161 S. W. 277.

§ 441 (Mo.App.) In an action for negligently blowing locomotive whistle, frightening horse, burden of pleading and proving a negligent breach of duty *held* to be with plaintiff to the end of the case.—*Pontius v. Chicago, R. I. & P. Ry. Co.*, 161 S. W. 292.

§ 443 (Tex.Civ.App.) Evidence *held* to sustain a finding that the horse killed entered on the track at a point where railroad employees putting in a new crossing negligently left an opening in the fence.—*Texas & N. O. R. Co. v. Cuniff*, 161 S. W. 396.

§ 446 (Ky.) In an action for value of a horse struck by a train, a peremptory instruction for defendant *held* properly refused, though those in charge of the train testified that they used care to avoid the accident; the burden placed upon defendant by Ky. St. § 809, to disprove negligence not being overcome.—*Chesapeake & O. Ry. Co. v. Burton*, 161 S. W. 1116.

§ 447 (Mo.App.) An instruction, in an action against a railroad company for the killing of an animal, *held* defective for failing to state what facts, if found, constituted actionable negligence.—*Martin v. Butler County R. Co.*, 161 S. W. 631.

#### (I) Fires.

§ 481 (Tex.Civ.App.) In an action for burning plaintiff's goods, where its witnesses testified that the engines were equipped with the best spark arresters, plaintiff can show that the engines threw sparks and started fires.—*St. Louis Southwestern Ry. Co. of Texas v. Benjamin*, 161 S. W. 379.

**RAPE.**

See Criminal Law, § 1186; Evidence, § 116; Indictment and Information, § 125.

**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 14 (Ark.) Failure to resist or make outcry because of fear held not to prevent crime constituting rape, and instruction requiring prosecutrix to use only such means to prevent accused accomplishing his purpose as was consistent with her safety was proper.—Threet v. State, 161 S. W. 139.

**II. PROSECUTION AND PUNISHMENT.****(C) Trial and Review.**

§ 59 (Ark.) Where prosecutrix made no disclosure for about 60 days, and, in the meantime, voluntarily had sexual intercourse with accused and others, refusal of instructions that this might be considered in determining whether the act charged was against her will held error.—Threet v. State, 161 S. W. 139.

**III. CIVIL LIABILITY.**

§ 66 (Mo.App.) Where the petition stated a cause of action for damages for an assault with intent to rape, and the evidence merely tended to establish a simple assault, the variance was immaterial.—Marts v. Powell, 161 S. W. 871.

**RATE.**

See Electricity, § 1; Ferries, § 31; Interest, § 31; Telegraphs and Telephones, § 26.

**REAL ACTIONS.**

See Ejectment; Forcible Entry and Detainer; Partition; Quieting Title; Trespass to Try Title.

**REASONABLE DOUBT.**

See Criminal Law, § 789.

**RECEPTION OF EVIDENCE.**

See Criminal Law, §§ 676, 678.

**RECOGNIZANCES.**

See Ball.

**RECORDS.**

See Adverse Possession, § 79; Appeal and Error, §§ 173, 499-714, 760, 901, 1133; Certiorari, § 64; Chattel Mortgages, § 204; Criminal Law, §§ 1081, 1086-1124; Deeds, § 59.

**REDIRECT EXAMINATION.**

See Witnesses, § 286.

**REFERENCE.****I. NATURE, GROUNDS, AND ORDER OF REFERENCE.**

§ 8 (Ky.) An account was peculiarly one for reference to a commissioner where there were 433 issues of fact involving charges for services and countercharges.—Garvey v. Garvey, 161 S. W. 526.

**REFORMATION OF INSTRUMENTS.****I. RIGHT OF ACTION AND DEFENSES.**

§ 19 (Mo.) The mistake which constitutes a ground for the reformation of an instrument must be mutual, and, where the parties agree to accomplish a particular object by an instrument to be executed, and the instrument does not do so, a court of equity may reform the instrument.—Wolz v. Venard, 161 S. W. 730.

Where the parties to a deed of trust admitted

that by inadvertence there was a misdescription in the real estate intended to be conveyed by the grantors and received by the beneficiary, there was a mutual mistake of the parties justifying reformation.—Id.

§ 23 (Ark.) Where defendants purchased land from a railroad company and relied upon the railroad company's agent to insert the description in their application for the purchase, defendants are not estopped from securing a reformation of their deed because they did not examine the description and ascertain that it failed to include the land they sought to buy.—St. Louis, I. M. & S. Ry. Co. v. McConnell, 161 S. W. 496.

§ 25 (Ark.) Where defendants purchased land from plaintiff and went into possession, erecting structures thereon, they will not be denied a reformation of their deed to include the land purchased, on the ground that the parties cannot be placed in statu quo.—St. Louis, I. M. & S. Ry. Co. v. McConnell, 161 S. W. 496.

**II. PROCEEDINGS AND RELIEF.**

§ 36 (Mo.) A petition for the reformation of an instrument on the ground of mutual mistake need only set forth the substantive facts necessarily showing mutuality of mistake.—Wolz v. Venard, 161 S. W. 760.

A petition for the reformation of a deed of trust by correcting the misdescription of land, which alleges that the grantor agreed to convey by deed of trust two tracts, that pursuant to the agreement a deed was executed, wherein the land was misdescribed, because the draftsman inserted the wrong description, states, when liberally construed, as required by Rev. St. 1909, § 1831, a cause of action based on mutual mistake.—Id.

§ 45 (Ark.) Before a written instrument will be reformed for mutual mistake, the evidence of the mistake must be clear and convincing.—St. Louis, I. M. & S. Ry. Co. v. McConnell, 161 S. W. 496.

Where defendants filed a cross-complaint seeking a reformation of their deed, evidence held sufficient to support a decree of reformation.—Id.

**REFRESHING MEMORY.**

See Witnesses, § 257.

**REHEARING.**

See Appeal and Error, § 835; New Trial.

**REINSTATEMENT.**

See Insurance, § 761.

**RELEASE.**

See Payment.

**I. REQUISITES AND VALIDITY.**

§ 17 (Ark.) One who signed a release of a claim for personal injuries, in reliance on false statements by the agent of the wrongdoer, without reading the release, was not bound thereby.—St. Louis, I. M. & S. Ry. Co. v. Reilly, 161 S. W. 1052.

§ 17 (Tex.Civ.App.) Where the release of a claim for a personal injury was obtained on the representation that only a railroad company was released, a telegraph company could not rely on the release which in fact discharged all companies because of the failure of the person injured and her husband to read the release before signing.—Western Union Telegraph Co. v. Walck, 161 S. W. 902.

**III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.**

§ 57 (Ark.) Evidence, in a passenger's action against a railroad company for personal injuries, held to sustain a finding that plaintiff's signature to a release of her claim against de-

fendant was obtained by fraud.—*St. Louis, I. M. & S. Ry. Co. v. Reilly*, 161 S. W. 1052.

§ 58 (Tex.Civ.App.) Evidence held to require submission of the issue whether a release including the company was procured by fraud.—*Western Union Telegraph Co. v. Walck*, 161 S. W. 902.

## RELEVANCY.

See Evidence, §§ 106-117.

## RELIGIOUS SOCIETIES.

See Constitutional Law, § 205; Escrows, § 8.

§ 2 (Ky.) Ky. St. § 319, prohibiting any church or society of Christians from taking more than 50 acres of land, applies to all religious organizations of whatever faith, and not to societies of Christians only, and hence is not discriminatory against Christians.—*Compton v. Moore*, 161 S. W. 540.

## REMAINDERS.

See Husband and Wife, § 15; Life Estates; Wills, §§ 229, 634.

§ 16 (Ky.) In a proceeding to sell real property for reinvestment, under Civ. Code Prac. § 491, contingent remaindermen held bound by the proceedings by representation, and were not necessary parties.—*Goff v. Renick*, 161 S. W. 983.

Where contingent remaindermen are necessary parties to a proceeding to sell land for reinvestment and join as plaintiffs, it is not necessary to make them defendants.—*Id.*

Under Civ. Code Prac. §§ 543-547, the court properly permitted the taking of proof by affidavit in a proceeding to sell property devised for life, subject to contingent remainders for reinvestment for the benefit of all parties in interest, who were plaintiffs in the proceeding.—*Id.*

§ 17 (Mo.) The statute of limitations does not run against remaindermen who take after a life tenant until the determination of the life estate.—*Armor v. Frey*, 161 S. W. 829.

In view of the analogy between suits to quiet title and those for partition under Rev. St. 1909, §§ 2572, 2575, the failure of a remainderman, entitled to take after the determination of a life estate, to institute a suit to quiet title before the termination of the preceding estate, will not start the running of limitations against him, though the life tenant asserted he owned the fee.—*Id.*

## REMOVAL OF CAUSES.

See Venue, §§ 36-72.

## REMOVAL OF CLOUD.

See Quieting Title.

## RENT.

See Ejectment, § 135; Landlord and Tenant, §§ 209-246; Limitation of Actions, § 28; Mortgages, § 199.

## REPAIRS.

See Landlord and Tenant, §§ 125, 150.

## REPEAL.

See Statutes, § 159.

## REPLEVIN.

See Carriers, § 57; Partnership, § 218; Trial, § 252.

## I. RIGHT OF ACTION AND DEFENSES.

§ 8 (Ark.) Where the automobile which plaintiff won in a contest for newspaper subscrip-

tions was not delivered to him, he could not maintain replevin; but, where it was delivered with the consent of the party selling it to the newspaper and participating in the scheme, he could recover.—*Jones v. Burks*, 161 S. W. 177.

§ 8 (Tex.Civ.App.) In an action by two persons to recover mules, or their value, which were claimed to have been converted by defendant, the question whether plaintiffs were partners and whether one plaintiff had paid the other for his interest therein was immaterial.—*Coody v. Shawyer*, 161 S. W. 935.

## REPORT.

See Highways, § 41.

## REPUTATION.

See Negligence, § 124.

## REQUESTS.

See Trial, §§ 255-267.

## RESALE.

See Sales, §§ 334, 335.

## RESCISSION.

See Exchange of Property, § 8.

## RES GESTÆ.

See Criminal Law, § 364; Evidence, §§ 122-126.

## RESIDENCE.

See Constitutional Law, § 205; Gaming, § 72.

## RES IPSA LOQUITUR.

See Carriers, §§ 316, 320; Railroads, § 396.

## RESTRAINT OF TRADE.

See Contracts, § 117; Monopolies, § 12.

## RESULTING TRUSTS.

See Trusts, § 81.

## RETURN.

See Process, § 142.

## REVENUE.

See Taxation.

## REVERSAL.

See Criminal Law, § 1186.

## REVERSIONS.

See Landlord and Tenant, §§ 55, 61.

## REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1017-1186; Taxation, § 463.

## REVIVAL.

See Judgment, § 866.

## REVOCATION.

See Arbitration and Award.

## RIGHT OF WAY.

See Railroads, §§ 72, 76, 113, 236.

## RIPARIAN RIGHTS.

See Waters and Water Courses, § 38.

**RISK, ASSUMPTION OF.**

See Carriers, § 298; Master and Servant, §§ 203-226, 296.

**ROADS.**

See Highways; Municipal Corporations, §§ 648, 663, 766-821.

**ROBBERY.**

See Indictment and Information, § 171.

§ 17 (Tex.Cr.App.) It is not necessary that the indictment allege the denomination and kind of money stolen.—Bracher v. State, 161 S. W. 124.

§ 20 (Tex.Cr.App.) Where an indictment alleged that C. was robbed of \$10, proof that he was robbed of \$14 was not a variance.—Bracher v. State, 161 S. W. 124.

§ 24 (Mo.) Evidence held to sustain a conviction for robbery.—State v. Sydnor, 161 S. W. 692.

§ 24 (Tex.Cr.App.) Evidence held to justify a conviction, notwithstanding defendant's evidence of alibi.—Bracher v. State, 161 S. W. 124.

§ 27 (Mo.) Robbery in the first degree includes all the elements of larceny, with the added acts of violence and putting in fear, so that, in the absence of proof of violence and putting in fear, accused is entitled to the submission of the offense of larceny.—State v. Weinhardt, 161 S. W. 1151.

In a prosecution for robbery, defendant's evidence held to require a charge on the offense of petit larceny.—Id.

§ 28 (Tex.Cr.App.) A verdict finding accused guilty as charged, and assessing his punishment at the lowest term of imprisonment, is sufficient under an indictment charging robbery by exhibiting deadly weapons, which would have authorized the imposition of the death penalty.—Dosh v. State, 161 S. W. 979.

§ 30 (Tex.Cr.App.) To authorize the jury to assess the death penalty for robbery, the indictment must allege that the robbery was committed by exhibiting firearms or deadly weapons.—Dosh v. State, 161 S. W. 979.

**RULES.**

See Colleges and Universities, § 9.

**RULES OF COURT.**

See Courts, §§ 78, 85.

**SAFE PLACE TO WORK.**

See Master and Servant, §§ 101-129.

**SALES.**

See Alteration of Instruments, § 4; Appeal and Error, § 1066; Carriers, § 57; Chattel Mortgages, §§ 220-222, 225; Corporations, §§ 116, 121; Execution, §§ 272, 275; Husband and Wife, § 267; Logs and Logging, § 3; Lotteries, § 12; Remainders, § 16; Vendor and Purchaser.

**I. REQUISITES AND VALIDITY OF CONTRACT.**

§ 23 (Ark.) Where a written contract was but an order for goods, it was subject to cancellation before acceptance by the seller, though it expressly provided to the contrary.—Outcault Advertising Co. v. Young Hardware Co., 161 S. W. 142.

§ 36 (Tex.Civ.App.) The rule that when a mistake is not mutual courts will not relieve the party making it, does not apply where the party accepting an offer knows of the mistake and seeks to take advantage of it.—Barteldes Seed Co. v. Bennett-Sims Mill & Elevator Co., 161 S. W. 399.

Where by a clerical error the price at which defendants offered to sell seed was a dollar per

hundredweight too low, and plaintiffs accepted the offer knowing that it must have been a mistake, plaintiff could not recover for defendants' failure to perform.—Id.

§ 53 (Ark.) Whether an order for goods obtained by a traveling salesman was accepted by the seller before cancellation by the buyer held for the jury.—Outcault Advertising Co. v. Young Hardware Co., 161 S. W. 142.

**II. CONSTRUCTION OF CONTRACT.**

§ 79 (Tex.Civ.App.) Where a defendant ordered one car of crates complete 6% f. o. b. Magnolia, the expression merely indicated that the price was to be 6% cents, including freight to Magnolia, and not that the goods were to be delivered at that place.—Burton & Beard v. Nacogdoches Crate & Lumber Co., 161 S. W. 25.

§ 82 (Tex.Civ.App.) Where goods are ordered delivered to a third person and charged to defendant, the purchase price cannot be collected until delivery.—Burton & Beard v. Nacogdoches Crate & Lumber Co., 161 S. W. 25.

**IV. PERFORMANCE OF CONTRACT.**

(C) Delivery and Acceptance of Goods.

§ 161 (Tex.Civ.App.) Where defendants ordered a car of crates to be shipped to third persons, the sellers, by delivering the shipment to the carrier in the time stipulated, comply with the contract and are entitled to recover the purchase price, even though the shipment is so delayed that the consignees refuse to receive it.—Burton & Beard v. Nacogdoches Crate & Lumber Co., 161 S. W. 25.

§ 176 (Ark.) Where defendant ordered a car load of cooperage by sample and, with knowledge of defects in quality, paid a part of the price and promised to pay the balance to secure an extension of time of payment, he waived right to object because of such defects.—Menasha Wooden Ware Co. v. Hudgins Produce Co., 161 S. W. 198.

§ 177 (Tex.Civ.App.) Under contract for sale of lumber at a specified price per thousand feet, buyer could accept so much only as complied with the contract, and seller could demand that it do so, and that part of that tendered did not comply with the contract did not justify an entire refusal to accept.—Bland & Fisher Lumber Co. v. Scanlan, 161 S. W. 401.

§ 178 (Tex.Civ.App.) Use of small quantity of lumber by purchaser, who had refused to accept it, by mistake, held not necessarily an acceptance of the lumber.—Continental Lumber & Tie Co. v. Miller, 161 S. W. 927.

§ 181 (Ark.) Evidence held to show that an automobile had been delivered to plaintiff in pursuance of the contract of sale between the seller and a newspaper company offering it as a prize.—Jones v. Burks, 161 S. W. 177.

**VI. WARRANTIES.**

§ 279 (Mo.App.) There is no difference between a warranty that a jack is a "good breeder" and a warranty that he is a "great breeder," except possibly in degree; if there is any difference, a great breeder would be a more than ordinarily good breeder.—Perry v. Van Matre, 161 S. W. 643.

§ 284 (Mo.App.) Where an animal, warranted to be of sound and healthy condition, has within it, on the date of the sale, the seeds of disease, from which a condition of unfitness develops, there is a breach of the warranty.—Perry v. Van Matre, 161 S. W. 643.

**VII. REMEDIES OF SELLER.**

(D) Resale.

§ 334 (Mo.App.) Defendants, to whom onion sets had been shipped, with draft attached to bill of lading, having requested a reduction of 10 per cent., held bound to ascertain from the

bank plaintiffs' action in that regard, and, having failed to do so, plaintiffs' sale of the sets for defendants' account within a reasonable time after plaintiffs' refusal was valid.—*Leesley Bros. v. A. Rebori Fruit Co.*, 161 S. W. 861.

§ 335 (Mo.App.) Where the court was justified in finding that onion sets, on being refused, were resold by the seller at a fair price, the buyer could not object that, because part of the sets were sold to plaintiff's agent, the sale was no criterion for determining defendant's liability.—*Leesley Bros. v. A. Rebori Fruit Co.*, 161 S. W. 861.

(E) Actions for Price or Value.

§ 347 (Ark.) If the purchaser was induced by false and fraudulent statements by the seller to purchase a jack and execute his note therefor, and the purchaser was injured by such false representations in that the jack did not breed, the seller could not recover the price.—*Warden v. Middleton*, 161 S. W. 151.

§ 359 (Ark.) Evidence in an action on a note for the price of a jack purchased from plaintiff held not to show that defendant's wife, who signed the note, was interested in the purchase of the animal.—*Warden v. Middleton*, 161 S. W. 151.

(F) Actions for Damages.

§ 388 (Ark.) On an issue of false representations in the making of a contract of sale, the court properly charged that if plaintiff's agent obtained the contract by material false representations defendant would avoid the contract.—*Outcault Advertising Co. v. Young Hardware Co.*, 161 S. W. 142.

## VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

§ 391 (Ark.) Where the purchaser of a jack, upon discovering the falsity of representations as to it, offered to return it and rescind the contract, he could sue the seller for all damages sustained by such fraudulent misrepresentations.—*Warden v. Middleton*, 161 S. W. 151.

(D) Actions and Counterclaims for Breach of Warranty.

§ 425 (Mo.App.) On a breach of warranty of sale, the buyer may keep the chattel and sue for the difference between the chattel as warranted and its actual value, or he may return the chattel and sue for the full amount paid on the price.—*Excelsior Stove Mfg. Co. v. Million*, 161 S. W. 298.

§ 428 (Mo.App.) Where a buyer did not elect to rescind on acquiring knowledge of a breach of warranty, he became liable for the contract price, and could set up his damages for breach of warranty by way of counterclaim.—*Excelsior Stove Mfg. Co. v. Million*, 161 S. W. 298.

§ 441 (Mo.App.) Evidence, in an action for the price of a jack, wherein the defense was breach of a warranty that the animal was sound and a good breeder, held to sustain a finding that the animal, on the date of sale, was diseased, and thereby rendered unfit for breeding purposes.—*Perry v. Van Matre*, 161 S. W. 643.

§ 446 (Mo.App.) Instructions on warranty, in an action for the price of a jack, held not erroneous, though they failed to assume evidentiary facts which were pleaded in the answer, and were in issue; the evidence thereon being in conflict.—*Perry v. Van Matre*, 161 S. W. 643.

Where defendant testified that plaintiff represented the jack as a great breeder, it was not error to use the term "great breeder" in an instruction on the warranty, though the warranty as pleaded in the answer was that the jack was a "good breeder and a sure foal-getter."—*Id.*

Where the warranty set up in the answer was

double, that the animal was sound and a good breeder, and plaintiff secured an instruction predicated upon only one-half of such warranty, an instruction given for defendant, and covering the entire warranty, was not erroneous as conflicting with plaintiff's instruction.—*Id.*

Where the warranty set up in the answer was double, an instruction which, though purporting to cover the case and directing a finding, covered only one-half of such warranty was erroneous.—*Id.*

An instruction to find for defendant if plaintiff warranted the animal to be sound and a good breeder, and he was not such, was not erroneous for failure to fix any time at or within which the warranty must be found to be operative.—*Id.*

## SATISFACTION.

See Payment; Release.

## SCHOOLS AND SCHOOL DISTRICTS.

See Colleges and Universities; Elections, §§ 60, 65; Statutes, § 141.

## II. PUBLIC SCHOOLS.

(C) Government, Officers, and District Meetings.

§ 56 (Ark.) It is only when the board of school directors convene and act together as a board that they bind the district by their acts.—*School Dist. No. 56 v. Jackson*, 161 S. W. 153.

(E) District Debt, Securities, and Taxation.

§ 97 (Ky.) The board of education in cities of the first class has no authority to issue school bonds or levy a tax for school purposes; such power vesting exclusively in the general council.—*Stuessy v. City of Louisville*, 161 S. W. 564.

An election to authorize a school bond issue by the city of Louisville under Act March 15, 1912 (Laws 1912, c. 90), was not invalid because 10 days' notice of the election required by an ordinance adopted to carry the act into effect was not given; the ordinance having been published nearly three months before the election was held.—*Id.*

Where a statute authorizing an election for the issuance of school bonds did not provide for notice, and such notice as was provided by ordinance was not given, the size of the vote cast could be considered in determining whether the notice actually given was sufficient.—*Id.*

§ 103 (Tex.Civ.App.) Acts 31st Leg. c. 12, § 1 amending Acts 29th Leg. c. 124, § 58, relative to notice of election to vote on school taxes to supplement state school fund, held neither strictly nor substantially complied with by posting two notices within the district and one notice outside the district.—*Cochran v. Kennon*, 161 S. W. 67.

Where one of the notices of an election to vote on a school district tax required by Acts 31st Leg. c. 12, § 1, amending Acts 29th Leg. c. 124, § 58, was posted outside the district, subsequent annexation of territory, including the place where it was posted, to such district, held not to render the notice sufficient.—*Id.*

§ 107 (Tex.Civ.App.) Under Acts 31st Leg. c. 12, § 1, amending Acts 29th Leg. c. 124, § 58, the validity of an election to vote on a school tax to supplement the state school fund may be attacked for failure to give the statutory notice in a suit to enjoin the collection of the tax.—*Cochran v. Kennon*, 161 S. W. 67.

In suit to enjoin collection of school tax for failure to give notice of election, as required by Acts 31st Leg. c. 12, § 1, amending Acts 29th Leg. c. 124, § 58, burden held on defendants to show that all or a substantial majority of the qualified voters had actual knowledge of the election.—*Id.*

**(G) Teachers.**

§ 135 (Ark.) Knowledge and conduct of school directors who had employed plaintiff to teach under an invalid contract *held* a ratification of the contract.—School Dist. No. 56 v. Jackson, 161 S. W. 153.

**(H) Pupils, and Conduct and Discipline of Schools.**

§ 169 (Ky.) Except as to the parental right of control, the power of school authorities over pupils extends to all acts detrimental to the best interest of the school, whether committed in school hours or after the pupil's return home.—Gott v. Berea College, 161 S. W. 204.

**SEARCHES AND SEIZURES.**

§ 2 (Ark.) Kirby's Dig. § 1742 (Rev. St. 1837, c. 44, div. 6, art. 3, § 9), requiring a sheriff on notice of violations of the gaming law to give notice to a judicial officer, *held* not to violate Const. 1874, art. 2, § 15, providing that no search warrant shall issue except on probable cause supported by oath or affirmation.—State v. Williams, 161 S. W. 159.

**SECONDARY EVIDENCE.**

See Criminal Law, §§ 400, 403.

**SEDUCTION.****II. CRIMINAL RESPONSIBILITY.**

§ 44 (Mo.) Evidence that, during the period fixed by prosecutrix as the period during which accused kept company with her, he kept company with other girls was properly limited to the particular dates fixed by prosecutrix as the dates accused was in her company.—State v. Bruton, 161 S. W. 751.

§ 46 (Mo.) Where prosecutrix testified to an engagement in May, 1910, a letter written by accused to her in July following, wherein he asked her if she would marry, did not corroborate promise of marriage, as required by Rev. St. 1909, § 5235.—State v. Bruton, 161 S. W. 751.

The evidence to be corroborative within Rev. St. 1909, § 5235, must be evidence of material circumstances corroborative of the testimony of the prosecuting witness as to the promise of marriage.—*Id.*

§ 46 (Tex. Cr. App.) There must be some fact, independent of the testimony of the prosecutrix, tending to connect accused with the offense, to justify a conviction.—James v. State, 161 S. W. 472.

Letters purporting to have been signed by accused did not corroborate the testimony of prosecutrix, where there was no testimony except hers to show that they came from accused.—*Id.*

§ 50 (Tex. Cr. App.) An instruction as to corroboration *held* erroneous, and that the court should have charged that the jury must find prosecutrix's testimony to be true, and also that there was evidence, independent of her testimony, tending to connect accused with the crime.—James v. State, 161 S. W. 472.

Court *held* to have erred in giving and refusing instructions because the jury were not pointedly told that letters claimed to have been written by accused could not be considered as corroborative evidence, unless there was evidence, other than hers, tending to show that he wrote them.—*Id.*

**SEIZURE.**

See Searches and Seizures.

**SELF-DEFENSE.**

See Homicide, §§ 188, 300; Mayhem, §§ 2, 6.

**SELF-SERVING DECLARATIONS.**

See Criminal Law, § 413.

**SENTENCE.**

See Criminal Law, §§ 992, 1206.

**SEPARATE ESTATE.**

See Husband and Wife, § 138.

**SEQUESTRATION.**

§ 20 (Tex. Civ. App.) In trespass to try title, where plaintiffs after sequestration obtained possession by filing a replevin bond *held* that on judgment for defendant they were liable for unlawfully cutting and removing timber belonging to the defendants.—Adams v. Burrell, 161 S. W. 51.

**SERVICE.**

See Process, §§ 66, 142.

**SERVICES.**

See Work and Labor.

**SET-OFF AND COUNTERCLAIM.**

See Action, § 25; Executors and Administrators, § 434; Fraud, § 49; Justices of the Peace, §§ 45, 174; Landlord and Tenant, § 223; Pleading, §§ 228, 355; Sales, § 428.

**I. NATURE AND GROUNDS OF REMEDY.**

§ 3 (Tex. Civ. App.) Rev. Civ. St. 1911, art. 1325, relating to counterclaims, was enacted to avoid a multiplicity of suits and should be liberally construed.—Reeves v. White, 161 S. W. 43.

**II. SUBJECT-MATTER.**

§ 28 (Tex. Civ. App.) Under Rev. Civ. St. 1911, arts. 1325, 1329, prescribing the claims which may be set off, *held* that, in an action on a note by his former partner, the defendant might set off a debt due from the plaintiff.—Reeves v. White, 161 S. W. 43.

§ 33 (Tex. Civ. App.) Where plaintiff was individually indebted to defendant upon a claim not founded upon a tort or breach of covenant, defendant might set off such debt against his individual debt to the plaintiff, founded on a note, and it was immaterial that defendant's demand arose out of former partnership transactions.—Reeves v. White, 161 S. W. 43.

§ 44 (Tex. Civ. App.) The rule that set-offs or counterclaims must be due in the same right and that a separate debt cannot be set off by a joint debt does not prevent the setting off of a separate individual debt from one of two partners to the other.—Reeves v. White, 161 S. W. 43.

**SETTLEMENT.**

See Arbitration and Award; Payment; Release.

**SEWERS.**

See Eminent Domain, § 2.

**SHERIFFS AND CONSTABLES.**

See Officers, § 110.

**III. POWERS, DUTIES, AND LIABILITIES.**

§ 153 (Ark.) Under Kirby's Dig. § 1742 (Rev. St. 1837, c. 44, div. 6, art. 3, § 9), *held*, that in each case it was for the jury in a prosecution of the sheriff for nonfeasance to determine whether the sheriff had such knowledge or probable cause to give notice.—State v. Williams, 161 S. W. 159.

Although Kirby's Dig. § 1742 (Rev. St. 1837, c. 44, div. 6, art. 3, § 9) requiring the sheriff to give notice to certain judicial officers of violations of the gaming law, does not say how such notice shall be given, a proper practice requires it to be in writing.—*Id.*



**SIDEWALKS.**

See Municipal Corporations, §§ 663, 768, 772, 794-816.

**SIGNALS.**

See Master and Servant, § 103.

**SIGNATURES.**

See Appeal and Error, § 361; Deeds, § 31; Municipal Corporations, §§ 292, 325.

**SLANDER.**

See Libel and Slander.

**SLAUGHTER HOUSES.**

See Municipal Corporations, §§ 591, 611.

**SNOW.**

See Municipal Corporations, § 772.

**SODOMY.**

§ 5 (Mo.) Rev. St. 1909, § 4726, punishing every person committing the crime against nature with the sexual organs or with the mouth enlarges the common-law offense, and the acts by which the crime is committed must be designated at least in a general way.—*State v. Wellman*, 161 S. W. 795.

An information alleging that accused committed the crime against nature by having sexual intercourse with prosecutrix with his mouth does not charge the crime as defined by Rev. St. 1909, § 4726, notwithstanding the statute of jeofails (section 5115).—*Id.*

**SPECIAL LAWS.**

See Statutes, § 79.

**SPECIFICATION OF ERRORS.**

See Appeal and Error, §§ 724, 732.

**SPECIFIC PERFORMANCE.****II. CONTRACTS ENFORCEABLE.**

§ 42 (Mo.) Acts claimed to have been done in part performance of an oral contract to convey must be referable only to the contract, and not explainable on any other theory than that they were done in part performance of the contract.—*Hersman v. Hersman*, 161 S. W. 800.

§ 51 (Mo.) To authorize a decree of specific performance of an oral contract to convey, where there has been part performance, the consideration of the contract must have been fair.—*Hersman v. Hersman*, 161 S. W. 800.

§ 80 (Mo.) A contract between distributees to meet and divide the property, and, if they failed to agree, to select arbitrators to appraise each acre *held* not a proper subject for specific performance.—*Ferrell v. Ferrell*, 161 S. W. 719.

An agreement to name arbitrators cannot be specifically enforced.—*Id.*

**IV. PROCEEDINGS AND RELIEF.**

§ 114 (Tex.Civ.App.) A petition *held* to allege such performance on the part of the vendor as entitles him to specific performance, even if the contract was not in writing.—*Fahey v. Benedetti*, 161 S. W. 896.

§ 121 (Mo.) In an action for the specific performance of an alleged oral contract, evidence *held* to sustain a finding of the making of the contract and of performance of the consideration.—*Merrill v. Thompson*, 161 S. W. 674.

§ 121 (Mo.) To authorize a decree compelling specific performance of an oral contract to convey, upon proof of part performance, the contract to convey must be shown by evidence so

clear and convincing as to leave no reasonable doubt of its existence and terms.—*Hersman v. Hersman*, 161 S. W. 800.

Evidence, in a suit for specific performance of an oral contract to convey, *held* not to show that defendant promised to convey to plaintiff in consideration of services to be rendered by her to her and defendant's parents.—*Id.*

**STARE DECISIS.**

See Courts, §§ 89, 90.

**STATEMENT.**

See Appeal and Error, § 1183; Criminal Law, §§ 1090, 1097-1102; Witnesses, §§ 379-410.

**STATES.**

See Constitutional Law, § 129; Licenses, § 6; Municipal Corporations, §§ 64-73; Physicians and Surgeons, § 11; Public Lands, § 176.

**II. GOVERNMENT AND OFFICERS.**

§ 66 (Tex.Cr.App.) In a popular sense a "state officer" is one whose jurisdiction is co-extensive with the state, while in a more enlarged sense a "state officer" is one who receives his authority under the laws of the state.—*Ex parte Preston*, 161 S. W. 115.

**IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.**

§ 137 (Tenn.) The officers of the state upon whom is imposed the duty of disbursing the public funds can question the validity of an appropriation made by the Legislature.—*State v. Woollen*, 161 S. W. 1006.

**STATUTES.**

For statutes relating to particular subjects, see the various specific topics.

**I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.**

§ 5 (Tenn.) Under Const. art. 3, § 9, authorizing an extraordinary session by proclamation for stated purposes, the Governor could qualify the general subject "appropriations" by "necessary to maintain the state's institutions."—*State v. Woollen*, 161 S. W. 1006.

An appropriation of \$25,000 to the National Conservation Exposition Company, made by the Legislature in extraordinary session called to make appropriations for state institutions, *held* not embraced within the call of the Governor, and void under Const. art. 3, § 9, prohibiting an extraordinary session from entering on any business except that embraced within the call.—*Id.*

**II. GENERAL AND SPECIAL OR LOCAL LAWS.**

§ 79 (Ky.) Act 1910, c. 81, § 7, exempting non-residents from registration of motor vehicles, payment of the license tax, etc., where they have already complied with similar laws of their own state, does not discriminate against the citizens of the state within state Const. § 60.—*City of Newport v. Merkel Bros. Co.*, 161 S. W. 549.

**IV. AMENDMENT, REVISION, AND CODIFICATION.**

§ 141 (Ky.) Under Const. § 51, forbidding the amendment of an act without re-enactment and publication at length, and Act March 10, 1906 (Laws 1906, c. 29), entitled an act to amend St. 1903, § 4425, relating to the examinations and certificates of teachers, *held*, that the amendatory act was not an addition thereto, not having republished any of the former section, but was a substitute for it, so that the former section was no longer in force.—*Flynn v. Barnes*, 161 S. W. 523.

**V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.**

§ 159 (Ky.) A statute will not be construed as repealing a prior statute by implication unless so clearly repugnant thereto as to admit of no other reasonable construction.—*City of Henderson v. Connell*, 161 S. W. 1121.

**VI. CONSTRUCTION AND OPERATION.****(A) General Rules of Construction.**

§§ 174, 175 (Mo.) All laws must receive a rational and not an arbitrary construction.—*State ex rel. Spriggs v. Robinson*, 161 S. W. 1169.

§ 188 (Mo.) Even in construing statutes, the plural is generally included in the singular number, and the masculine gender is construed to include the feminine.—*Garrett v. Wiltse*, 161 S. W. 694.

§ 194 (Mo.) Where a law designates several matters to be governed by its provisions, and by general language includes other acts not specifically named, it must be construed to apply only to things of the same general nature as those set out.—*State ex rel. Spriggs v. Robinson*, 161 S. W. 1169.

§ 220 (Ky.) Where the Legislature has long acquiesced in the construction of a statute, and has framed its legislative policy in accordance

therewith, such construction will be followed.—*Cave Hill Cemetery Co. v. Gosnell*, 161 S. W. 980.

§ 221 (Tex. Civ. App.) It will be presumed that the Legislature knew when it enacted the Employers' Liability Act, that contributory negligence would bar a recovery by employee.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

§ 230 (Mo.) In the interpretation of amended statutes, the state of the old law, the mischiefs arising thereunder, and the remedies provided therefor in the new law, are to be considered.—*Armor v. Lewis*, 161 S. W. 251.

**(B) Particular Classes of Statutes.**

§ 241 (Mo.) Where the penalty is onerous, no one can be held to have violated the provisions of a penal statute unless his acts come within both the letter and the spirit of the law.—*State ex rel. Spriggs v. Robinson*, 161 S. W. 1169.

**(C) Time of Taking Effect.**

§ 253 (Ark.) Acts 1911, p. 275, relative to liability of railroad companies for failure to keep a lookout, though approved May 26, 1911, held not in force until 90 days after adjournment of the legislature, June 2, 1911, and not applicable to an accident on May 29, 1911.—*St. Louis, I. M. & S. R. Co. v. Roddy*, 161 S. W. 156.

**STATUTES CONSTRUED.**

<b>UNITED STATES.</b>	
<b>CONSTITUTION.</b>	
Amend. 14 .....	789
Art. 1, § 10 .....	1000
<b>STATUTES AT LARGE.</b>	
1908, April 22, ch. 149, § 35	
Stat. 65 .....	239, 246
554, 557, 1129	
1908, April 22, ch. 149, § 1,	
35 Stat. 65 .....	1136
1908, April 22, ch. 149, § 9	
added by Act 1910, April	
5, ch. 143, § 2, 36 Stat.	
291) .....	1136
1910, April 5, ch. 143, § 2,	
36 Stat. 291 .....	1136
1911, March 3, ch. 281, §	
245, 36 Stat. 1158 .....	450
<b>REVISED STATUTES.</b>	
§ 5210 .....	512
<b>COMPILED STATUTES</b>	
1901.	
Page 8498 .....	512
<b>COMPILED STATUTES</b>	
SUPP. 1911.	
Page 229 .....	450
Page 1322 .....	239, 246, 554
557, 1129, 1136	
Page 1325 .....	1136
<b>ARKANSAS.</b>	
<b>CONSTITUTION.</b>	
Art. 2, § 15 .....	159
Art. 2, § 18 .....	154
Art. 7, § 34 .....	166
Art. 19, § 16 .....	1019
<b>KIRBY'S DIGEST.</b>	
§§ 113, 114, 119 .....	189
726 .....	173

§ 965 .....	166
1122 .....	1039
1340 .....	166
1742 .....	159
2220 .....	139
2390 .....	145
2742 .....	185
3088 .....	139
3137 .....	195
3157, subsec. 3 .....	195
3998 .....	162
4670 .....	201
5035 .....	183
5586 .....	173
6285 .....	136
6313 .....	134
7947 .....	1025
7948 .....	1060
<b>REVISED STATUTES 1837.</b>	
Ch. 44, div. 6, art. 3, § 9 ..	159
<b>SPECIAL &amp; PRIVATE</b>	
<b>LAWS.</b>	
1911, p. 218, § 2 .....	499
<b>LAWS.</b>	
1897 (Ex. Sess.) p. 22 .....	170
1907, p. 166 .....	170
1907, p. 353, §§ 1, 2 .....	1066
1909, p. 751 .....	1052
1909, pp. 835, 837, 842, §§	
7, 8, 16 .....	1057
1911, p. 275 .....	156
1913, p. 791 .....	170
1913, p. 791, § 1 .....	170
1913, p. 961 .....	195
1913, pp. 962, 963, §§ 2-4 ..	192
1913, p. 1118 .....	154
<b>ILLINOIS.</b>	
<b>HURD'S REVISED STAT-</b>	
<b>UTES 1912.</b>	
Ch. 62, § 14 .....	352

<b>KENTUCKY.</b>	
<b>CONSTITUTION.</b>	
§ 2, 51 .....	523
60 .....	549
155 .....	564
§ 157, 158 .....	560
164 .....	543
181 .....	988
242 .....	1118
<b>CIVIL CODE OF PRAC-</b>	
<b>TICE.</b>	
10, subsec. 4 .....	526
39 .....	528
98 .....	1111
113, subsec. 4 .....	239
315 .....	513
439 .....	516
474 .....	543
491 .....	983
518, subsec. 7 .....	1124
§ 543-547 .....	983
606 .....	217
606, subsec. 7 .....	217
<b>STATUTES 1903.</b>	
4425 .....	523
4425. Amended by Laws	
1906, ch. 29 .....	523
<b>STATUTES 1909.</b>	
319 .....	540
571 .....	570, 1124
§ 654, 655, 671 .....	1102
809 .....	1116
1189 .....	229
1336 .....	980
1840 .....	203, 506
2463 .....	1113
2524 .....	528
2834 .....	1105
3058, subsec. 4 .....	988
3456 .....	1121
§ 3487, 3490 .....	1118
3490, subsec. 9 .....	1118
3720b, subsec. 31 .....	211
3760 .....	1124

3901-4000	1120
4077-4080, 4083	222
4281a	510
4287-4300	508
4306	508, 543
4679b	543

## LAWS.

1906, ch. 29	523
1910, ch. 81	549
1910, ch. 81, § 7	549
1910, ch. 83	988
1912, chs. 47, 90	564
1912, ch. 113	1121

## MISSOURI.

## CONSTITUTION.

Art. 1, § 1	853
Art. 2, § 15	1169
Art. 2, § 22	795
Art. 8	1169
Art. 4, § 1	1169
Art. 10, § 1	1155
Art. 10, § 3	794, 1155
Art. 10, § 11	1155
Art. 11, § 8	789

## REVISED STATUTES 1889.

§ 147	842
-------	-----

## REVISED STATUTES 1899.

§ 3620	251
§§ 7897, 7900	667

## REVISED STATUTES 1909.

332	251
476	341
1112	601
1737	859
1794	714
1800, 1804	320, 760, 1175
1806, 1807	812
1831	760
1832	357
1846	609
1850	643, 868
1882	681
1889, subsec. 5	337
1974	593
1985	320, 335
2023	664
2029	812
2029, Repealed by Laws	
1911, p. 139	770
2081	1190
2082	643
2083	1190
2119, subsecs. 8, 9, 14	714
2125-2132, 2166	760
2263	874
2273	589
2275	865, 874
2279	865
2380	858
2381	850
2382, 2385, 2387, 2388	714
2391	842
2415	852
2535	681, 760, 812
2572, 2575	829
2609	865
2793	593
2810	694
2881, 2887	862
3039, 3040	789
3145, 3146	277
3150	1190
4344	680
4458	723
4480	756
4509	705

4528	736
4726	795
4818	877
5103, 5104	736
5115	795
5231	756
5235	751
5244	848
5245	770
5313	674, 680
5425	1159
6313	791
6354	1187
7180	286
7181	624
7182, 7184	286
7227, 7228	848
7413	357
7568	589
7586	298
7883	360
8295	281
8317	1169
9253	794
9568-9570, Repealed by	
Laws 1913, p. 651, §	
139	1166
9996	875
10023	613
10025, 10029	881
10090	601
10160	875
10161	601
10222	875, 881
10533, 10576-10610	583
10784	756

## CITY CHARTERS.

Kansas City 1909, art. 1, §	
1, par. 13	261
Kansas City 1909, art. 3, §	
1, para. 16, 41	261

## LAWS.

1895, p. 185	251
1911, p. 130, § 8, Amend-	
ed by Laws 1913, p. 143	
et seq.	1155
1911, p. 139	770
1911, p. 153	300
1913, p. 143 et seq.	1155
1913, p. 651, § 139	1166

## TENNESSEE.

## CONSTITUTION.

Art. 1, § 22	485
Art. 2, § 25	994
Art. 3, § 9	1006

## SHANNON'S CODE.

1069	994
§§ 6187, 6103, 6104	1131
§ 6441	1016, 1017

## LAWS.

1877, ch. 31	488, 1131
1891, ch. 122	488, 1131
1895, ch. 31	488, 1131
1903, ch. 103	485
1903, ch. 140, § 1	492
1907, ch. 149, § 25	1000
1911, ch. 32	1016

## TEXAS.

CODE OF CRIMINAL PRO-  
CEDURE 1895.

Art. 723, Amended by	
Laws 1897, ch. 21	101
Art. 904, Amended by	
Laws 1897, ch. 12	459

CODE OF CRIMINAL PRO-  
CEDURE 1911.

Arts. 43, 44	115
Art. 58	478
Art. 238	93
Art. 528 et seq.	458
Art. 750	1098
Arts. 791, 808	101
Art. 810	459
Art. 919	971

## PENAL CODE 1911.

Art. 6	112
Art. 10	478
Art. 15	118
Art. 50	121
Arts. 349, 424	115
Art. 471	971
Arts. 506, 561, 611	115
Art. 1141	101

## REVISED STATUTES 1895.

Art. 1194	19
-----------	----

REVISED CIVIL STAT-  
UTES 1911.

Art. 747	1090
Art. 759	931
Art. 769	8
Arts. 844, 856, 965	948
Arts. 1325, 1329	43
Art. 1330	937
Art. 1612	78
Art. 1612, Amended by	
Laws 1913, ch. 136	73
Art. 1614	70
Art. 1869	443
Art. 1990	960
Art. 2393	1090
Art. 3712	927
Art. 3743	911
Art. 3785, subsec. 5	5
Art. 3965	401
Art. 4694	1077
Art. 5475	939
Art. 5490	5
Arts. 5659, 5661, 5665	921
Art. 5676	907
Art. 5686	1077
Art. 5728	128
Art. 6097	892
Art. 6097, subsec. 3	892
Arts. 6601, 6602	914
Art. 6649	84, 405
Art. 6713	405
Art. 7399	944
Art. 7796	925

SAYLES' ANNOTATED  
CIVIL STATUTES 1897.

Arts. 386a-386c, 776	411
Art. 947	78
Art. 2395, subsec. 5	47

## LAWS.

1897, ch. 12	459
1897, ch. 21	101
1905, ch. 124, § 58, Amend-	
ed by Laws 1909, ch. 12,	
§ 1	67
1909, ch. 12, § 1	67
1909 (1st Ex. Sess.) ch.	
10	84
1909 (1st Ex. Sess.) ch.	
36	54
1911, ch. 23	478
1911, ch. 24	1091
1911, ch. 119	459
1911, ch. 119, § 7	124
1913, ch. 116	118
1913, ch. 132	112, 1098
1913, ch. 136	73

## STIPULATIONS.

See Telegraphs and Telephones, § 54.

§ 14 (Tex.Civ.App.) An agreement of the parties in trespass to try title, which stipulates that it was agreed that the defendants claiming under junior patents have such title as was vested in the junior patentees, relieves defendants of the burden of establishing the consecutive links in their respective chains of title, and satisfies the requirement of the three-year statute of limitations that there shall be color of title from the sovereignty.—Campbell v. Gibbs, 161 S. W. 430.

## STOCK.

See Corporations, §§ 116, 121.

## STOCKHOLDERS.

See Banks and Banking, §§ 47, 246; Corporations, § 279.

## STORAGE.

See Pledges, § 29; Warehousemen.

## STRAYS.

See Negligence, § 29.

## STREET RAILROADS.

See Evidence, §§ 474, 539½; Railroads; Taxation, §§ 47, 463; Trial, §§ 191, 243, 252, 296.

## II. REGULATION AND OPERATION.

§ 81 (Mo.App.) The failure of a street car to give warning on approaching a crossing is negligence per se.—Battles v. United Rys. Co. of St. Louis, 161 S. W. 614.

§ 81 (Mo.App.) The vigilant watch doctrine is in force as part of the common law, without any city ordinance to that effect.—Johnson v. Springfield Traction Co., 161 S. W. 1193.

§ 90 (Mo.) The motorman in charge of a street car, after discovering a vehicle in danger, was bound to use all reasonable effort consistent with the safety of persons on board the car to avoid a collision.—Lyons v. Metropolitan St. Ry. Co., 161 S. W. 726.

§ 90 (Mo.App.) Plaintiff might recover where defendant could have prevented injury either by sounding the gong or stopping the car and failed to do so, and could also recover upon defendant's negligence in not stopping the car even if the gong was being sounded.—Johnson v. Springfield Traction Co., 161 S. W. 1193.

The doctrine of vigilant watch requires that a motorman on the "first appearance of danger" to a vehicle on the track shall stop the car in the shortest time and space possible, which, in a case where he saw or might have seen the danger in time to have avoided injury, was between his first vision and the collision.—Id.

§ 93 (Ky.) Where the presence of persons near a street railway track and danger to them may be reasonably anticipated by those in charge of cars, *held*, that it was their duty to maintain a lookout for such persons and to exercise such care for their safety as might usually be expected of persons of ordinary prudence under the circumstances.—Brentlinger v. Louisville Ry. Co., 161 S. W. 1107.

§ 95 (Mo.App.) Where, when he saw a boy on the track, the motorman had only an instant in which to act, and immediately reversed the car and applied the air brakes, believing he did not have time to do that and also lower the fender, he was not negligent in not lowering the fender.—Battles v. United Rys. Co. of St. Louis, 161 S. W. 614.

§ 99 (Mo.App.) The mere use of a public street, no part of which was set apart for the exclusive use of a street railway, by driving on the part of the street occupied by its car track,

*held*, not negligence.—Johnson v. Springfield Traction Co., 161 S. W. 1193.

§ 102 (Mo.App.) The injury must have proximately resulted from the negligence complained, though such negligence was alleged to be the violation of a speed ordinance.—Battles v. United Rys. Co. of St. Louis, 161 S. W. 614.

§ 112 (Mo.App.) That a street car, which caused the injury, was running at a speed prohibited by ordinance does not raise the presumption that the injury was caused by such excessive speed.—Battles v. United Rys. Co. of St. Louis, 161 S. W. 614.

The burden was on plaintiff to show that the accident was proximately caused by the negligence alleged.—Id.

§ 114 (Mo.App.) Evidence in an action for the death of a boy by being struck by a street car *held* not to show that the excessive speed proximately caused the boy's death.—Battles v. United Rys. Co. of St. Louis, 161 S. W. 614.

Evidence *held* to show that failure to sound a gong was not the proximate cause of his death.—Id.

Evidence *held* not to show that there was such an impact of the body against the front of the fender so as to cause it to automatically drop, and hence not to show that it was defective, though it failed to drop.—Id.

Evidence *held* to show that the boy's death was caused by his own negligence.—Id.

§ 117 (Ky.) In an action against a street railroad for injuries from being struck by the rear end of its car projecting over a temporary sidewalk, *held*, on the evidence, that whether those in charge of the car in the exercise of ordinary care should have anticipated the presence of plaintiff on the sidewalk when the car turned, and should have kept a lookout or taken other precautions for his safety, was a question for the jury.—Brentlinger v. Louisville Ry. Co., 161 S. W. 1107.

§ 117 (Mo.) In action for injuries sustained in collision between street car and buggy, evidence *held* to justify the submission of the case on the humanitarian theory.—Lyons v. Metropolitan St. Ry. Co., 161 S. W. 726.

§ 117 (Mo.App.) In an action for injuries from a collision of defendant's car with a wagon on which plaintiff was riding, *held*, that a demurrer to the evidence was properly overruled.—Johnson v. Springfield Traction Co., 161 S. W. 1193.

It was for the jury to determine when plaintiff's danger first appeared.—Id.

§ 118 (Mo.App.) In an action against a street railway for personal injuries from a collision, an instruction stating generally the duty of defendant, followed with a specific application of the doctrine, *held* proper.—Johnson v. Springfield Traction Co., 161 S. W. 1193.

## STREETS.

See Dedication; Municipal Corporations, §§ 648, 663, 766-821.

## STRIKING OUT.

See Appeal and Error, § 767.

## STUDENTS.

See Colleges and Universities, § 9.

## SUBROGATION.

§ 4 (Mo.) Where an accommodation indorser, after a note was dishonored, paid it, and subsequently the note was again paid by the maker, the indorser was subrogated to the rights of the maker, and could recover from the payee the amount so paid by the maker.—Havlin v. Continental Nat. Bank of St. Louis, 161 S. W. 741.

§ 24 (Ark.) The provision in a construction contract for the retention by the owner of 15 per cent. of the contract price after completion

is for the sole benefit of the owner and furnishes no basis for subrogation by an unpaid materialman.—*Russellville Water & Light Co. v. Sauerman*, 161 S. W. 502.

### SUFFERANCE.

See Landlord and Tenant, § 120.

### SUMMARY PROCEEDINGS.

See Landlord and Tenant, § 306.

### SUMMONS.

See Process.

### SUNDAY.

See Telegraphs and Telephones, § 38.

### SUPERSEDEAS.

See Appeal and Error, §§ 467, 1043.

### SUPPORT.

See Husband and Wife, §§ 283, 297.

### SUPPRESSION.

See Depositions, § 83.

### SUPREME COURTS.

See Courts, § 231.

### SURCHARGING.

See Account Stated, §§ 12, 19.

### SURETYSHIP.

See Principal and Surety.

### SURFACE WATERS.

See Waters and Water Courses, §§ 118, 126.

### SURPLUSAGE.

See Indictment and Information, § 119; Pleading, § 35.

### SURRENDER.

See Insurance, §§ 239, 241.

### SURVIVAL.

See Abatement and Revival, § 89.

### SURVIVING PARTNERS.

See Partnership, § 246.

### TAXATION.

See Abatement and Revival, § 22; Adverse Possession, §§ 31, 79, 95; Appeal and Error, § 1056; Counties, § 190; Levees, § 25; Licenses; Municipal Corporations, §§ 408-586; Schools and School Districts, §§ 97-107.

#### I. NATURE AND EXTENT OF POWER IN GENERAL.

§ 29 (Mo.) Const. art. 10, § 1, *held* a limitation on the sources of the taxing power, precluding the Legislature from conferring such power on a hospital district which could not be regarded as a municipal corporation.—*Board of Com'rs of Tuberculosis Hospital Dist. of Buchanan County v. Peter*, 161 S. W. 1155.

#### II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 38 (Mo.) Laws 1911, p. 130, § 8, as amended by Laws 1913, p. 143 et seq., providing for the levy of a tax to support the tuberculosis

hospital district in B. county, *held* to provide taxation for a "public purpose" within Const. art. 10, § 3.—*Board of Com'rs of Tuberculosis Hospital Dist. of Buchanan County v. Peter*, 161 S. W. 1155.

§ 47 (Ky.) Under Ky. St. §§ 4077-4080, the amount assessed by the state board as a franchise tax against a street railroad *held* in part double taxation, and illegal.—*City of Newport v. South Covington & C. St. Ry. Co.*, 161 S. W. 222.

#### III. LIABILITY OF PERSONS AND PROPERTY.

##### (B) Corporations and Corporate Stock and Property.

§ 117 (Ky.) A franchise tax is not a license or occupation tax, but simply an ad valorem or property tax.—*City of Newport v. South Covington & C. St. Ry. Co.*, 161 S. W. 222.

#### V. LEVY AND ASSESSMENT.

##### (A) Levy and Apportionment.

§ 301 (Tex.Civ.App.) Where the burden of taxation is authorized to be laid upon the property of citizens under certain conditions, a compliance with all such conditions is essential to the validity of the tax.—*Cochran v. Kennon*, 161 S. W. 67.

##### (G) Review, Correction, or Setting Aside of Assessment.

§ 463 (Ky.) Under Ky. St. §§ 4077-4080, and 4083, relating to franchise taxes a railroad claiming an overassessment of its franchise tax in a city was not required to apply within 30 days to the state board for correction, since before the valuation became final it had no means of knowing what the assessment would be.—*City of Newport v. South Covington & C. St. Ry. Co.*, 161 S. W. 222.

#### XI. TAX TITLES.

##### (B) Tax Deeds.

§ 776 (Mo.) Tax deed construed and *held* only to convey a part of the tract assessed and on which the tax lien was imposed.—*Davidson v. Laclede Land & Improvement Co.*, 161 S. W. 686.

#### XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

§ 867 (Ky.) Under Ky. St. § 4281a, *held*, that personalty of a nonresident intestate, situated in this state at the time of her death and descending to her heirs, was subject to an inheritance tax.—*Barclay's Trustee v. Commonwealth*, 161 S. W. 510.

§ 893 (Ky.) An administrator of estate of deceased nonresident *held* not entitled to settle the question of liability of the estate to inheritance tax by proceeding against the sheriff.—*Barclay's Trustee v. Commonwealth*, 161 S. W. 510.

#### TEACHERS.

See Schools and School Districts, § 135; Statutes, § 141.

#### TELEGRAPHS AND TELEPHONES.

See Appeal and Error, §§ 882, 1175; Evidence, § 5; Mandamus, § 98.

#### I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 10 (Ky.) Under Ky. St. §§ 4306, 4679b, a telephone company, without first having acquired a franchise by purchase, as required by Const. § 164, had no right to construct and operate its line along the highways of a county.—*Christian-*

Todd Telephone Co. v. Commonwealth, 161 S. W. 543.

Under Const. § 164, a telephone company cannot occupy the highways of a county for its telephone line without first making compensation therefor by bidding for a franchise.—Id.

## II. REGULATION AND OPERATION.

§ 26 (Ky.) The fiscal court of a county, being authorized to prohibit the use of the highways by a telephone company without a franchise, was authorized not only to regulate the construction and maintenance of the line but to regulate rates and impose restrictions to prevent discrimination.—Christian-Todd Telephone Co. v. Commonwealth, 161 S. W. 543.

§ 34 (Ark.) Kirby's Digest, § 7948, authorizing recovery of penalties from a telephone company for discrimination, is merely declaratory of the common law for the purpose of preventing discrimination, with penalties added.—Montgomery v. Southwest Arkansas Telephone Co., 161 S. W. 1080.

While telephone companies may in good faith determine the limits within which they will carry on their business, they are obligated to give the same service on the same terms to all who apply therefor, without partiality or unreasonable discrimination.—Id.

A telephone company *held* not liable for the penalties prescribed by Kirby's Dig. § 7948, for refusal to continue giving telephone service, under its contract to furnish service to a rural line, to a person who moved from his residence on the rural line to a residence within the city limits, and connected his new residence with the rural line.—Id.

§ 37 (Ark.) A message addressed to two persons jointly may be delivered to either, and a delivery to one is a delivery to the other.—Western Union Telegraph Co. v. Westbrook, 161 S. W. 1062.

§ 37 (Tex.Civ.App.) In the absence of a special contract, a company is not liable for failure to deliver a message beyond the limits of the city of destination or beyond the free delivery limits thereof.—Western Union Telegraph Co. v. Kersten, 161 S. W. 369.

§ 38 (Ark.) Where a telegraph company accepted a death message for transmission on Sunday, it cannot excuse its failure solely on a showing that the lineman refused to repair a defect on that day.—Western Union Telegraph Co. v. Hearn, 161 S. W. 1025.

§ 38 (Ark.) A person living a mile and a half from a town having a population of less than 5,000 is beyond the free delivery limits of a telegraph company establishing free delivery limits within a radius of half a mile from its office, and a delivery of a message by promptly placing it in the post office addressed to the addressee is sufficient.—Western Union Telegraph Co. v. Westbrook, 161 S. W. 1062.

Where the addressee of a message resided beyond free delivery limits, and the messenger looked around the town to find some one by whom he could send the message and, failing to do so, deposited it in the post office and advised the postmaster of the facts and the contents of the message, the company was not guilty of any breach of duty.—Id.

Where the sender of a message was informed of the fact that the addressee resided beyond free delivery limits and expressed satisfaction with the mailing of the message, the company did not breach its duty, notwithstanding its rule for special messenger service on the sender guaranteeing the charges therefor.—Id.

§ 39 (Tex.Civ.App.) The substitution of "Dallas" for "Galveston," Tex., as the sender's address, was negligence entitling the sender to damages, if no answer was received because of such mistake.—Western Union Telegraph Co. v. McFarlane, 161 S. W. 57.

§ 54 (Ark.) A stipulation on a telegraph blank limiting damages for a delay to \$50 *held* inef-

fectual. Kirby's Dig. § 7947.—Western Union Telegraph Co. v. Hearn, 161 S. W. 1025.

§ 54 (Ark.) A limitation of the company's liability, contained in a telegraph blank, to the sum of \$50, *held* not binding on the sender.—Western Union Telegraph Co. v. Alford, 161 S. W. 1027.

§ 55 (Ark.) If the initial company does not operate a telegraph line to destination, a sender has the right to select the route beyond such company's last receiving office.—Western Union Telegraph Co. v. Alford, 161 S. W. 1027.

Where, though the initial telegraph company's lines do not extend to the destination of a message, there is a continuous telegraphic route, the telegraph company is liable for resulting damages if it transmits to final destination by telephone.—Id.

§ 65 (Tex.Civ.App.) A petition, in an action for delaying a message, which alleges that the company accepted the same for delivery and also the sender's guaranty of payment of any special charges for delivery, *held* to set forth a special contract.—Western Union Telegraph Co. v. Kersten, 161 S. W. 369.

§ 66 (Ark.) Where a telegraph company negligently delay the transmission of a message offering plaintiff employment at will, it cannot be presumed that the employment would continue for any given length of time, so as to entitle plaintiff to a recovery for his loss during that period, and hence evidence of the profits he would have made had he obtained the position is inadmissible.—Fulkerson v. Western Union Telegraph Co., 161 S. W. 168.

§ 66 (Ark.) Defendant telegraph company *held* to have the burden of excusing its delay.—Western Union Telegraph Co. v. Hearn, 161 S. W. 1025.

§ 66 (Ark.) In an action for failure to deliver message, which was telephoned to M., the ultimate destination, though it could have been transmitted by telegraph, evidence that many farmers were in M. about that time was admissible to corroborate evidence of the operator at M. that if the message had been received he would have found means of getting the information to sendee.—Western Union Telegraph Co. v. Alford, 161 S. W. 1027.

§ 66 (Tex.Civ.App.) In an action for delay in the delivery of a message announcing the death of the sendee's brother, evidence *held* not to sustain a finding that he would have attended the funeral had the telegram been promptly delivered.—Western Union Telegraph Co. v. Kersten, 161 S. W. 369.

§ 68 (Tex.Civ.App.) A mistake in substituting "Dallas" for "Galveston" as the sender's address, by reason of which no answer was received to a telegram wiring for money and stating that the sender's wife had just died, was the proximate cause of mental anguish to the sender, resulting from inability to properly bury his wife because of lack of money.—Western Union Telegraph Co. v. McFarlane, 161 S. W. 57.

Though a telegraph company was not told, when a message was sent, requesting money immediately and stating that plaintiff's wife had just died, that plaintiff desired the money for embalming his wife, it was sufficiently informed that its failure to properly transmit would probably cause plaintiff mental anguish from inability to properly embalm his wife on the non-receipt of the money.—Id.

§ 71 (Tex.Civ.App.) Evidence, in an action for damages for mental anguish, etc., through failure to deliver a telegram requesting money, *held* not to show that a verdict for plaintiff for \$1,500 was excessive.—Western Union Telegraph Co. v. McFarlane, 161 S. W. 57.

§ 73 (Ark.) Where a telegraph company negligently delayed the transmission of an intelligible business message, disclosing on its face that it was of importance, it is liable at least for nom-

inal damages, and it is improper to direct a verdict in its favor.—*Fulkerson v. Western Union Telegraph Co.*, 161 S. W. 168.

§ 73 (Ark.) In an action for damages for delay in transmitting a death message, evidence of negligence *held* sufficient to go to the jury.—*Western Union Telegraph Co. v. Hearn*, 161 S. W. 1025.

§ 74 (Tex.Civ.App.) An instruction on the question of mental anguish resulting from plaintiff's inability to properly embalm and bury his wife as a result of failing to receive an answer to a telegram *held* not affirmatively erroneous or misleading.—*Western Union Telegraph Co. v. McFarlane*, 161 S. W. 57.

§ 74 (Tex.Civ.App.) An instruction, in an action for delay in the delivery of a message, *held* objectionable as imposing on the company the absolute duty to deliver the message in a reasonable time.—*Western Union Telegraph Co. v. Kersten*, 161 S. W. 369.

§ 79 (Tex.Cr.App.) The expression "son of a bitch" is vulgar, obscene, or indecent language over the telephone, within Penal Code 1911, art. 471.—*Darnell v. State*, 161 S. W. 971.

## TENANCY.

See Landlord and Tenant.

## TENANCY IN COMMON.

See Partition, §§ 9, 13, 85.

## II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

§ 15 (Mo.) The mere possession of land by a cotenant was not sufficient to compel his cotenants to bring ejectment before maintaining a suit in partition.—*Boothe v. Cheek*, 161 S. W. 791.

§ 15 (Mo.) To establish adverse possession in favor of one cotenant as against another there must be such outward acts of exclusive ownership as to impart notice of adverse possession to other cotenants, but actual notice is not necessary.—*Hynds v. Hynds*, 161 S. W. 812.

There is a rebuttable presumption that the possession of one cotenant is the possession of all, and the burden is on a cotenant seeking to rebut it to do so by cogent proof.—*Id.*

§ 28 (Ky.) Each tenant in common is equally entitled to use the common property, and neither is entitled to the exclusive use, enjoyment, and possession thereof.—*Derrington v. Childers*, 161 S. W. 216.

§ 38 (Ky.) One joint owner cannot maintain forcible entry against his cotenant.—*Derrington v. Childers*, 161 S. W. 216.

## TESTAMENTARY CAPACITY.

See Wills, §§ 47-53, 329.

## TESTAMENTARY POWERS.

See Powers; Wills, §§ 6, 693.

## THEATERS AND SHOWS.

See Commerce, § 16; Monopolies, § 12.

## THEFT.

See Larceny.

## TIMBER.

See Covenants; Logs and Logging.

## TIME.

See Account Stated, § 12; Appeal and Error, §§ 197, 395, 653, 1127; Brokers, §§ 54, 60; Carriers, § 287; Contracts, § 216; Divorce, § 181; Executors and Administrators, § 362; Justices of the Peace, § 164; Landlord and

Tenant, § 120; Logs and Logging, § 8; Master and Servant, § 20; Mechanics' Liens, § 132; Mortgages, § 463; Partition, § 44; Principal and Surety, §§ 46, 104, 108; Sales, § 334; Statutes, § 253; Taxation, § 463.

## TITLE.

See Attachment, § 308; Execution, § 275; Landlord and Tenant, §§ 55, 61; Limitation of Actions, § 47; Logs and Logging, § 8; Marriage, § 40; Partition, § 13; Partnership, § 246; Quieting Title; Replevin, § 8; Stipulations, § 14; Taxation, § 776; Trespass to Try Title; Trial, § 397; Trusts, § 31; Vendor and Purchaser, §§ 54, 79, 239, 242.

## TOOLS.

See Master and Servant, §§ 101-129.

## TORTS.

See Assault and Battery, §§ 2-35; Carriers, §§ 132, 134, 280-366; Conspiracy; Electricity, § 18; Executors and Administrators, § 119; Fraud; Libel and Slander; Malicious Prosecution; Master and Servant, §§ 315, 319; Municipal Corporations, §§ 745-821; Negligence; Nuisance; Trover and Conversion.

§ 1 (Ky.) One is not liable for injurious consequences incidental to the performance of a lawful act in a proper manner.—*Gott v. Berea College*, 161 S. W. 204.

§ 10 (Ky.) Even if a college rule prohibiting students from entering eating houses in the town, not controlled by the college, was unreasonable, one who ran a restaurant near the campus, which was largely patronized by students but who had no children in the school, could not recover damages for injury to his business resulting from enforcement of the rule.—*Gott v. Berea College*, 161 S. W. 204.

## TOWNS.

See Municipal Corporations; Schools and School Districts.

## TRADE UNIONS.

See Conspiracy, § 19; Injunction, §§ 101, 114.

## TRANSCRIPTS.

See Appeal and Error, §§ 625, 635.

## TREATIES.

See Adverse Possession, § 7.

## TREES.

See Covenants; Logs and Logging.

## TRESPASS.

See Master and Servant, § 315; Railroads, §§ 358, 359.

## TRESPASS TO TRY TITLE.

See Adverse Possession, §§ 85, 115; Appeal and Error, §§ 877, 1027; Evidence, § 213; Husband and Wife, § 270; Judgment, § 693; Sequestration, § 20; Stipulations, § 14.

## I. RIGHT OF ACTION AND DEFENSES.

§ 6 (Tex.Civ.App.) In an action to enjoin the enforcement of a judgment upon land which plaintiff claimed was her individual estate, a deed not executed in favor of plaintiff until after the institution of the injunction suit, and not referred to in the pleadings, is inadmissible.—*Childress v. Robinson*, 161 S. W. 78.

## II. PROCEEDINGS.

§ 32 (Tex.Civ.App.) A petition in trespass to try title, which averred that defendants based their claim of sole title on a deed executed by plaintiffs as members of a firm, which included only the firm property, and that the land was the individual property of plaintiffs, states a cause of action.—*Dye v. Livingston Lumber Co.*, 161 S. W. 53.

Counts of a petition *held* to state no cause of action.—*Id.*

§ 35 (Tex.Civ.App.) Where defendants stipulated that plaintiffs held whatever title A. had at his death, and he died in 1870, evidence to show acquisition of adverse title thereafter is inadmissible.—*Adams v. Wm. Cameron & Co.*, 161 S. W. 417.

§ 38 (Tex.Civ.App.) In trespass to try title, plaintiff must establish *prima facie* his title and right to recover, before the defendant is required to make any defense.—*Childress v. Robinson*, 161 S. W. 78.

§ 38 (Tex.Civ.App.) A plaintiff has the burden of establishing the location of the ancient grant under which he claims, so as to include the land sued for.—*Campbell v. Gibbs*, 161 S. W. 430.

§ 41 (Tex.Civ.App.) Evidence *held* sufficient to support a conclusion that defendant's grantor by deed or settlement had acquired the title of two of his brothers to their interest in the land.—*Le Blanc v. Jackson*, 161 S. W. 60.

Evidence as to talk in the family that defendant's grantor had acquired the title of his brothers *held* admissible as bearing upon the knowledge of the grantor's claim on the part of the brothers' heirs.—*Id.*

§ 41 (Tex.Civ.App.) In trespass to try title to recover land under ancient grants, evidence *held* to sustain a finding that the land claimed had not been located and surveyed on the ground, so as to embrace the land claimed by plaintiff.—*Campbell v. Gibbs*, 161 S. W. 430.

§ 41 (Tex.Civ.App.) In trespass to try title wherein an intervenor and certain of the defendants claimed under the ten-year statute of limitation by reason of improvements and possession by their ancestor, evidence *held* not to show that their ancestor had conveyed 160 acres to a third person.—*Mixon v. Wallis*, 161 S. W. 907.

## TRIAL

See Adverse Possession, § 115; Appeal and Error, §§ 207, 216, 231, 232, 265, 499, 688, 699, 714, 719, 742, 743, 835, 842, 843, 882, 927, 989-1012, 1031, 1033, 1060, 1064-1070, 1170, 1171; Attachment, § 311; Bills and Notes, § 537; Boundaries, §§ 40, 41; Brokers, § 88; Carriers, §§ 320, 321, 347; Continuance; Contracts, §§ 142, 323; Costs; Criminal Law, §§ 619-885, 1037-1064, 1090, 1097, 1153, 1159, 1163, 1165, 1166½, 1171, 1172; Damages, §§ 208, 216, 221; Death, § 101; Deeds, § 78; Dismissal and Nonsuit; Estoppel, § 119; Homicide, §§ 282-318, 340; Insurance, §§ 668, 825; Intoxicating Liquors, § 239; Jury; Justices of the Peace, §§ 173, 174; Libel and Slander, § 7; Marriage, § 52; Master and Servant, §§ 285-296; Mayhem, § 6; Municipal Corporations, § 821; Navigable Waters, § 26; Negligence, §§ 101, 136, 141; New Trial; Partnership; Physicians and Surgeons, § 24; Principal and Surety, § 162; Railroads, §§ 282, 337, 338, 350, 351, 400, 446, 447; Rape, §§ 14, 59; Reference; Release, § 58; Robbery, §§ 27, 28; Sales, §§ 53, 446; Seduction, § 50; Sheriffs and Constables, § 153; Stipulations; Street Railroads, §§ 117, 118; Telegraphs and Telephones, §§ 73, 74; Trespass to Try Title; Venue, §§ 36-72; Wills, §§ 324, 329; Witnesses, § 317.

## II. DOCKETS, LISTS, AND CALENDARS.

§ 11 (Ky.) Under Civ. Code Prac. § 10, subsec. 4, permitting transfer of a case to the equity docket if it involves complicated accounts, an action for the value of services, etc., was properly transferred where there were more than 400 separate items of charges and countercharges.—*Garvey v. Garvey*, 161 S. W. 526.

A case should be transferred to the equity docket, under Civ. Code Prac. § 10, subsec. 4, in all cases where there is difficulty in adjusting accounts, or the issues are so numerous and complicated as to make a jury trial impracticable.—*Id.*

## IV. RECEPTION OF EVIDENCE

## (C) Objections, Motions to Strike Out, and Exceptions.

§ 75 (Tex.Civ.App.) Plaintiff having, without objection, testified to a matter pertinent to the issue, it was not error to permit another witness for plaintiff to testify to the same matter.—*Lattimore v. Puckett & Wear*, 161 S. W. 951.

§ 82 (Ark.) On objection to evidence, the court's attention should have been called to the particular objection.—*Western Union Telegraph Co. v. Alford*, 161 S. W. 1027.

§ 84 (Ark.) Ordinarily a general objection to evidence is sufficient to raise the question of its competency.—*Western Union Telegraph Co. v. Alford*, 161 S. W. 1027.

§ 84 (Tex.Civ.App.) In a personal injury action by a railroad brakeman, evidence tending to show his freedom from contributory negligence *held* admissible on general objection, as against the contention that it showed negligence of defendant not pleaded.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 89 (Tex.Civ.App.) A collateral oral contract to pay the debt of another being within the statute of frauds (Rev. Civ. St. 1911, art. 3965), testimony by plaintiff that defendant made such an agreement is incompetent to show an indebtedness on defendant's part and should be stricken.—*Johnson v. Tindall*, 161 S. W. 401.

§ 95 (Tex.Civ.App.) Testimony that, after the services were rendered to defendant's married daughter, defendant orally promised to pay if the daughter's husband did not, while objectionable because showing a contract in contravention of the statute of frauds, was properly received over objection that the promise, having been made after the services were rendered and not being in writing, was not binding on defendant.—*Johnson v. Tindall*, 161 S. W. 401.

§ 105 (Ark.) Evidence as to the contents of a recorded deed could be considered though the original deed was in existence, where admitted without objection.—*Felker v. Rice*, 161 S. W. 162.

## V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 106 (Tex.Civ.App.) The scope of the argument of counsel rests largely in the discretion of the trial court.—*Texas Midland R. R. v. Wiggins*, 161 S. W. 445.

## VI. TAKING CASE OR QUESTION FROM JURY.

## (A) Questions of Law or of Fact in General.

§ 136 (Tex.Civ.App.) Where there is no ambiguity in a written contract, it is the duty of the court to construe it and to instruct the jury what its legal effect is.—*Conn v. Rosamond*, 161 S. W. 73.

§ 139 (Mo.App.) In an action against several defendants, where the evidence wholly failed to show the liability of some of them, their demurrer to the evidence should be sustained.—*Livingston v. City of St. Joseph*, 161 S. W. 304.



§ 139 (Tex.Civ.App.) The court should not direct a verdict on an issue of fact unless the evidence shows that reasonable men could not draw a different conclusion.—*Zimmerman v. Baugh*, 161 S. W. 943.

§ 141 (Mo.App.) The court should declare the legal effect of uncontradicted facts.—*Russell v. St. Louis & S. F. R. Co.*, 161 S. W. 638.

#### (D) Direction of Verdict.

§ 178 (Mo.App.) In passing on a motion for a peremptory instruction for defendant, the court will consider the evidence in the light most favorable to plaintiff.—*Marts v. Powell*, 161 S. W. 871.

### VII. INSTRUCTIONS TO JURY.

#### (A) Province of Court and Jury in General.

§ 191 (Mo.App.) Where plaintiff's horse while being driven by S. was killed on defendant's crossing, an instruction that defendant was liable if the property was destroyed on account of the joint or concurrent negligence of both defendant and S. *held* objectionable as assuming that the damage was caused by such concurrent negligence.—*Fife v. Chicago & A. R. Co.*, 161 S. W. 300.

§ 191 (Mo.App.) In an action for services, a request to charge that, though defendant told plaintiff to take charge of certain mules, that statement would not constitute a contract of employment on defendant's part individually *held* properly refused.—*Hatfield v. Swift*, 161 S. W. 359.

§ 191 (Mo.App.) An instruction allowing plaintiff commissions for selling oil for defendant, which was required to be sold at the market price, that, if it was not agreed that plaintiff could allow rebates, defendant could refuse to permit him to give rebates, etc., *held* erroneous as assuming that an agreement relating to rebates, made contemporaneously with the written contract, was valid.—*Goller v. Henseler Mercantile Oil & Supply Co.*, 161 S. W. 584.

§ 191 (Mo.App.) In an action for injuries from a collision, an instruction that if the jury believed that the motorman saw, or by ordinary care could have seen, the plaintiff's wagon in dangerous nearness to the track, *held* not objectionable as assuming that the car was "in dangerous nearness thereto" without the qualification, "If you so find."—*Johnson v. Springfield Traction Co.*, 161 S. W. 1193.

§ 191 (Tex.Civ.App.) In contractor's action for damages from refusal to permit him to perform, instruction on measure of damages as to considering irregularity of the job, distance from the contractor's home, and other expenses, *held* properly refused as assuming that such matters were parts of the expense of performance.—*Waterman Lumber & Supply Co. v. Holmes*, 161 S. W. 70.

§ 191 (Tex.Civ.App.) In action for injuries to property in crossing accident, an instruction *held* properly refused, even if otherwise proper, because it made driver's failure to heed warning negligence per se, whether or not an ordinarily prudent person would have observed the warning.—*Texas Midland R. R. v. Nelson*, 161 S. W. 1088.

§ 194 (Ark.) In an action for injuries while attempting to board a moving train, instruction as to plaintiff's right to rely on the assurance of defendant's agent on the train *held* not objectionable as taking the issue of contributory negligence from the jury.—*St. Louis, I. M. & S. Ry. Co. v. Green*, 161 S. W. 148.

§ 194 (Mo.App.) An instruction that positive evidence of witnesses, that they heard the gong of a street car was entitled to greater weight than negative evidence of witnesses who said that they were in a position to hear it but did

not hear it, *held* properly refused.—*Johnson v. Springfield Traction Co.*, 161 S. W. 1193.

§ 194 (Tex.Civ.App.) In a brakeman's action for injuries by slipping from a step of the tender, instruction as to the dangerous condition of the step and as to defendant's negligence in maintaining it *held* not on the weight of the evidence.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 194 (Tex.Civ.App.) In action for price of lumber which defendant claimed to have rejected, where his pleading and evidence showed the use of a small quantity of the lumber by mistake, instruction that he could not accept in part and reject in part *held* properly refused as on the weight of the evidence.—*Continental Lumber & Tie Co. v. Miller*, 161 S. W. 927.

#### (B) Necessity and Subject-Matter.

§ 203 (Tex.Civ.App.) Where two or more grounds of negligence are alleged as the basis of the plaintiff's action, and the court submits the case only upon one of them, the other ground of negligence is thereby withdrawn from the jury's consideration, and the defendant is not entitled to have any special charge thereon.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 217 (Ark.) A cautionary instruction as to the right to sue in a county for an injury occurring in another county *held* proper, where the court's attention was called to a newspaper article published as to the trial of cases brought in counties other than those where the injuries complained of occurred.—*St. Louis, I. M. & S. R. Co. v. Thurman*, 161 S. W. 1054.

§ 219 (Mo.App.) An instruction, on a trial of an interplea filed by a third person claiming goods levied in attachment, *held* defective for failing to state what character of frauds defeat a sale within Rev. St. 1909, §§ 2381, 2387, making a sale of personalty without delivery void as to creditors.—*Keet-Rountree Dry Goods Co. v. Hodges*, 161 S. W. 862.

§ 219 (Tex.Civ.App.) The court need not define to the jury the meaning of the words "would hold water" in a contract for construction of a dam; they being of common use and easily understood.—*Lattimore v. Puckett & Wear*, 161 S. W. 951.

#### (C) Form, Requisites, and Sufficiency.

§ 228 (Tex.Civ.App.) An instruction, in an action for damages to a piano in transit, that if it was injured by defendant's negligence the jury should find for plaintiff the difference in its cash market value in the condition in which it was delivered to it if delivered in good condition, and "said piano should have arrived in at Dallas, the difference in" its cash market value in the condition in which it did arrive at Dallas, *held* not erroneous because of the quoted part.—*Missouri, K. & T. Ry. Co. of Texas v. Western Automatic Music Co.*, 161 S. W. 380.

§ 229 (Ky.) In a personal injury action, where one instruction correctly stated the rule as to damages, it was not necessary in another instruction, on the question of defendant's liability, to restate the rule.—*Stearns Coal & Lumber Co. v. Tuggle*, 161 S. W. 1112.

§ 229 (Tex.Civ.App.) Where the evidence is so conflicting as to authorize the jury to find for either party, instructions so emphasizing and repeating the theory of plaintiff's cause that they amount to a peremptory instruction for him are erroneous.—*Risinger v. Sullivan*, 161 S. W. 397.

§ 233 (Ky.) The instructions must be sufficiently concrete to bring before the jury the law of the case, and instructions which do not present a party's theory of the case are insufficient.—*Nashville, C. & St. L. R. Co. v. Banks*, 161 S. W. 554.

§ 234 (Mo.App.) In an action for killing plaintiff's horse at a crossing, it being established that the statutory crossing signals had been given, the court properly charged that there was no evidence that the signals were not given, and restricted the jury to the evidentiary issues.—Fife v. Chicago & A. R. Co., 161 S. W. 800.

§ 236 (Mo.) An instruction that the jury will consider the character of the witnesses and their conduct on the stand, etc., is proper.—Wendling v. Bowden, 161 S. W. 774.

§ 242 (Tex.Civ.App.) Charge, in brakeman's action for injury, that unless the jury should find the existence of all the facts enumerated in a previous paragraph of the charge they should return a verdict for defendant, *held* not confusing.—St. Louis Southwestern Ry. Co. of Texas v. Martin, 161 S. W. 405.

§ 242 (Tex.Civ.App.) An instruction on contributory negligence *held* not misleading.—Texas Midland R. R. v. Wiggins, 161 S. W. 445.

§ 243 (Ark.) Where the court properly charged on agreed boundary, a further instruction, making plaintiff's right to recover depend entirely on whether he had adverse possession of the land in controversy, was conflicting and erroneous.—Turquett v. McMurray, 161 S. W. 175.

§ 243 (Mo.App.) In an action for injury from a street car's collision with plaintiff's wagon, instruction, permitting a recovery if defendant could have prevented the accident by either sounding a gong or stopping the car and failed to do so, *held* not in conflict with instruction permitting recovery for the negligent failure to stop the car, even if the gong was being sounded.—Johnson v. Springfield Traction Co., 161 S. W. 1193.

§ 244 (Mo.App.) A request to charge that a certain statement made by defendant to plaintiff would not constitute a contract of employment on defendant's part individually was improper as commenting on or particularizing certain evidence.—Hatfield v. Swift, 161 S. W. 359.

#### (D) Applicability to Pleadings and Evidence.

§ 250 (Ark.) An instruction, in an action for injuries to a passenger by the derailment of a car, *held* erroneous because submitting an issue not raised by the pleadings and the evidence.—St. Louis, I. M. & S. R. Co. v. Thurman, 161 S. W. 1054.

§ 250 (Mo.App.) Instructions inapplicable to the issues and evidence are improper.—Citizens' Bank of Senath v. Douglass, 161 S. W. 601.

§ 250 (Tex.Civ.App.) Where plea of reconvention alleging that plaintiff had circulated false reports concerning defendant preventing him from marketing a crop of cotton and causing him humiliation, etc., failed to allege and there was no evidence of the amount of his pecuniary loss from his inability to market the cotton, *held*, that this claim should not have been submitted to the jury.—Gillispie v. Ambrose, 161 S. W. 937.

§ 251 (Mo.App.) An instruction which permits the jury to find for more damages than asked by the pleader is erroneous.—Weller v. Missouri Lumber & Mining Co., 161 S. W. 853.

§ 251 (Tex.Civ.App.) An instruction which submits an issue not raised by the pleadings or evidence is erroneous.—Western Union Telegraph Co. v. Kersten, 161 S. W. 369.

§ 251 (Tex.Civ.App.) Where no actual damages were claimed for the levy of a garnishment, the court properly refused a request to charge that the jury should measure the actual damages by the reasonable market value of the property taken, with legal interest thereon from the time of taking to the time of the trial.—Bennett v. Foster, 161 S. W. 1078.

§ 252 (Ark.) In replevin for logs, instructions *held* erroneous because not warranted by the evidence.—Conway v. Coursey, 161 S. W. 1030.

§ 252 (Mo.) An instruction that the jury will consider the character of the witnesses and their conduct on the stand, etc., is not objectionable as not based on evidence, where there was evidence contradicting the testimony of a witness.—Wendling v. Bowden, 161 S. W. 774.

§ 252 (Mo.App.) An instruction, in an action for the death of an employé, *held* abstract for failing to point out one or more safe systems of rules, if any, which the evidence tended to show were safe, and which might have been adopted by the employer.—Marquez v. Koch, 161 S. W. 648.

§ 252 (Mo.App.) Where, in an action on a note by an indorsee, there was no evidence that plaintiff acted in conjunction with the payee or had anything to do with the transaction in which the note was given, an instruction that if he had notice of the fraud before the transfer of the note to him, or if he acted in conjunction with the payee and others in inducing defendant to execute the note, they should find for defendants was erroneous.—Hill v. Dillon, 161 S. W. 881.

An instruction not justified by any evidence in the case should be refused.—Id.

§ 252 (Mo.App.) In an action against a street railway for personal injuries from a collision, where there was no proof of plaintiff's expectancy of life at her age, it was not error to refuse an instruction that in determining the amount of damages her age and expectancy should be considered.—Johnson v. Springfield Traction Co., 161 S. W. 1193.

§ 252 (Tex.Civ.App.) An instruction that, if inspection would not have disclosed the defect, the railroad company would not be liable, to one injured thereby, *held* erroneous, in the absence of evidence of any inspection.—St. Louis Southwestern Ry. Co. v. Moore, 161 S. W. 378.

§ 252 (Tex.Civ.App.) In a brakeman's action for injuries, instruction permitting the consideration of the reasonable value of the time lost in consequence of the injury *held* applicable to the evidence.—St. Louis Southwestern Ry. Co. of Texas v. Martin, 161 S. W. 405.

§ 252 (Tex.Civ.App.) A requested charge having no basis in the evidence should be refused.—Adams v. Wm. Cameron & Co., 161 S. W. 417.

§ 253 (Ark.) In an action involving a disputed boundary line, a modification of a requested charge *held* erroneous, as in effect withdrawing plaintiff's testimony, on the issue involved, from the jury.—Turquett v. McMurray, 161 S. W. 175.

#### (E) Requests or Prayers.

§ 255 (Tex.Civ.App.) The failure of the court to define phrases in its instructions is not error, in the absence of a requested definition.—Ellerd v. Campfield, 161 S. W. 392.

§ 255 (Tex.Civ.App.) An error of omission in the court's general charge should be supplied by a request for a correct special charge.—St. Louis Southwestern Ry. Co. of Texas v. Martin, 161 S. W. 405.

§ 256 (Ark.) Instructions as to the validity of a gift, which in themselves were correct, *held* not objectionable because they did not include delivery as an essential element, in the absence of request so to charge.—Fancher v. Kenner, 161 S. W. 166.

§ 256 (Tex.Civ.App.) In an action for wrongful garnishment, an instruction, authorizing the jury to allow damages for such actual loss as was the natural, direct, and proximate result of the service of the writs, *held* not objectionable as failing to give to the jury any rule for measuring the actual damages; it being incumbent on defendants to request fur-

ther instruction if they desired it.—*Bennett v. Foster*, 161 S. W. 1078.

§ 258 (Mo.App.) Where the court gave ten instructions requested by an employer when sued for the negligent death of an employe, the refusal to give seven other requested instructions was not erroneous.—*Marquez v. Koch*, 161 S. W. 648.

§ 260 (Ark.) The refusal of requested instructions was not prejudicial error, where other instructions were given correctly covering the same subject.—*St. Louis, I. M. & S. Ry. Co. v. Reilly*, 161 S. W. 1052.

§ 260 (Mo.App.) Where the court fully charged that plaintiff could recover only in case she exercised reasonable care at the time she was injured on the defective walk in question, it was not error to refuse an instruction prescribing the care required of a person passing over such walk.—*Price v. City of Maryville*, 161 S. W. 295.

§ 260 (Mo.App.) Defendant was not prejudiced by refusal of a request to charge, the subject of which was covered by another instruction.—*Hatfield v. Swift*, 161 S. W. 359.

§ 260 (Mo.App.) Having given an instruction fairly and clearly presenting an issue, further instructions, differently worded but covering the same point or making nice legal distinctions, are properly refused.—*Johnson v. Springfield Traction Co.*, 161 S. W. 1193.

§ 260 (Tex.Civ.App.) Where defendant requested two special charges on the issue as to whether plaintiff's grantor had ever claimed a definite tract, the giving of one of the special charges was sufficient, and defendant cannot complain of the refusal of the other.—*Houston Oil Co. of Texas v. Lambert*, 161 S. W. 6.

§ 260 (Tex.Civ.App.) Requested charges were properly refused where those which were correct were sufficiently covered by charges given.—*St. Louis, B. & M. Ry. Co. v. Vernon*, 161 S. W. 84.

§ 260 (Tex.Civ.App.) A requested charge is properly refused where covered by other charges given.—*Missouri, K. & T. Ry. Co. of Texas v. Leabo*, 161 S. W. 382.

§ 260 (Tex.Civ.App.) Special charges requested by defendant held properly refused, where the subject-matter thereof had been sufficiently charged in the general charge.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

§ 260 (Tex.Civ.App.) The refusal of a requested charge covered by the charges given is not error.—*Adams v. Wm. Cameron & Co.*, 161 S. W. 417.

§ 260 (Tex.Civ.App.) Refusal of a requested instruction may not be complained of; the matter being substantially covered, both in affirmative and negative form, by another requested instruction, which was given, and by the general charge.—*Lattimore v. Puckett & Wear*, 161 S. W. 951.

§ 260 (Tex.Civ.App.) In a personal injury action, where the court fully charged on proximate cause, the refusal of a special charge on that issue, which also defined remote cause, was not error.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 261 (Tex.Civ.App.) Where an instruction is partially bad, it may be entirely refused.—*Bennett v. Foster*, 161 S. W. 1078.

§ 267 (Mo.) Where the court modified an instruction as requested by defendant, and gave it as modified, it was error if the instruction was a proper one, as requested.—*Turner v. Butler*, 161 S. W. 745.

#### (G) Construction and Operation.

§ 295 (Mo.App.) Error in a general instruction omitting any reference to contributory negligence held harmless, where it and the in-

struction thereon for defendant as a whole covered such matter.—*Johnson v. Springfield Traction Co.*, 161 S. W. 1193.

§ 296 (Mo.App.) In an action against a railroad company, an erroneous instruction held cured by others.—*Farmer v. St. Louis, I. M. & S. Ry. Co.*, 161 S. W. 327.

§ 296 (Mo.App.) In an action against a street railway for personal injuries from a collision, a defense like contributory negligence, which must be pleaded and proved by defendant, may properly be left to a separate instruction, so that a general instruction for plaintiff omitting any reference to such defense was not erroneous.—*Johnson v. Springfield Traction Co.*, 161 S. W. 1193.

§ 296 (Tex.Civ.App.) In a brakeman's action for injuries from slipping from a step on the tender, a charge on the assumption of risk, if objectionable as stating an abstract proposition of law, held, when considered with a special charge, to correctly submit that issue.—*St. Louis Southwestern Ry. Co. of Texas v. Martin*, 161 S. W. 405.

### IX. VERDICT.

#### (B) Special Interrogatories and Findings.

§ 349 (Tex.Civ.App.) The rule of the Supreme Court for the district and county courts governing the submission of special issues is not a limitation of the power of the court, and the court may under the statute, at the request of either party or on its own motion, submit a case on special issues.—*Ellerd v. Campfield*, 161 S. W. 392.

### X. TRIAL BY COURT.

#### (A) Hearing and Determination of Cause.

§ 370 (Ky.) Where, in an action for the value of services, etc., the case was properly transferred to the equity docket, under Civ. Code Prac. § 10, subsec. 4, because of the large number of accounts involved, the court also properly refused to submit certain questions to the jury as to whether defendant promised to pay for the work, etc.—*Garvey v. Garvey*, 161 S. W. 526.

#### (B) Findings of Fact and Conclusions of Law.

§ 397 (Tex.Civ.App.) An adverse judgment having been rendered against plaintiff, he cannot contend that it was improper because the court did not sustain his claims of title upon matters not pleaded or placed in issue.—*Ratcliffe v. Ratcliffe*, 161 S. W. 30.

§ 397 (Tex.Civ.App.) In suit against debtor's fraudulent grantee, finding against his claim of equitable ownership, based on his claim that he furnished the consideration for the debtor's purchase, held to be implied from the judgment against him.—*Landers v. McCutchan*, 161 S. W. 960.

### XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 418 (Mo.App.) Defendant by itself putting in evidence, after demurring to plaintiff's evidence, thereby waived its demurrer.—*Battles v. United Rys. Co. of St. Louis*, 161 S. W. 614.

### TROVER AND CONVERSION.

See Chattel Mortgages, §§ 170, 220-222, 225, 229; Warehousemen, § 28.

### I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 11 (Tex.Civ.App.) One who buys personality must ascertain the ownership thereof at his peril, and his possession in denial of the real owner's right if the seller had authority to sell

constitutes a conversion of the property.—*Nunn v. Padgett Bros.*, 161 S. W. 921.

## TRUST DEEDS.

See Mortgages.

## TRUSTS.

See Adverse Possession, § 43; Appeal and Error, § 877; Banks and Banking, § 253; Corporations, § 310; Evidence, § 271; Monopolies, § 12; Reformation of Instruments, §§ 19, 36; Wills, §§ 6, 693.

### I. CREATION, EXISTENCE, AND VALIDITY.

#### (A) Express Trusts.

§ 31 (Tex.Civ.App.) A showing of accident, fraud, or mistake is not necessary to ingraft a trust upon a deed conveying the legal title on its face.—*Ratcliff v. Ratcliff*, 161 S. W. 30.

#### (B) Resulting Trusts.

§ 81 (Mo.) Where a widow with minor children assumed to deal with the personal estate of her deceased husband as her own, and invested it in real estate in her own name, there was a resulting trust in the property so purchased in favor of the children, whose money was so used, and in such ratable proportion to each as each contributed to the purchase money.—*Hynds v. Hynds*, 161 S. W. 812.

### II. CONSTRUCTION AND OPERATION.

#### (B) Estate or Interest of Trustee and of Cestui Que Trust.

§ 147 (Mo.) A cestui que trust who is entitled to a conveyance may direct that it be made to another so as to pass his whole interest in the property.—*Boothe v. Cheek*, 161 S. W. 791.

## TUBERCULOSIS.

See Taxation, § 38.

## ULTRA VIRES.

See Corporations, § 309.

## UNDUE INFLUENCE.

See Contracts, §§ 96, 99; Deeds, § 72; Wills, §§ 156-166, 324.

## UNIONS.

See Conspiracy, § 19; Injunction, §§ 101, 114.

## UNITED STATES.

See Courts, § 96.

## USURY.

### I. USURIOUS CONTRACTS AND TRANSACTIONS.

#### (A) Nature and Validity.

§ 2 (Mo.App.) Notes secured by a chattel mortgage, payable in Missouri though executed in Kansas, held Missouri contracts, and, being void for usury under the law of that state, were unenforceable.—*J. I. Case Threshing Mach. Co. v. Tomlin*, 161 S. W. 286.

§ 48 (Mo.App.) Under Rev. St. 1909, § 7182, a note bearing a lawful rate of interest before maturity and an unlawful rate after that time is usurious, if forbearance is exercised and the unlawful rate is exacted.—*J. I. Case Threshing Mach. Co. v. Tomlin*, 161 S. W. 286.

§ 80 (Mo.App.) Under the express provisions of Rev. St. 1909, §§ 7180, 7182, 7184, a chattel mortgage securing a note bearing more than 8 per cent. interest is void for usury.—*J. I. Case Threshing Mach. Co. v. Tomlin*, 161 S. W. 286.

### (B) Rights and Remedies of Parties.

§ 115 (Ark.) Parol evidence is admissible to show that a contract for the purchase and resale of land is a mere cloak for usury.—*Prickett v. Williams*, 161 S. W. 1023.

## VACATION.

See Divorce, § 167.

## VALUE.

See Partition, §§ 55, 63.

## VARIANCE.

See Indictment and Information, § 171; Rape, § 66; Robbery, § 20.

## VEHICLES.

See Constitutional Law, § 301; Highways, § 165.

## VENDOR AND PURCHASER.

See Appeal and Error, § 1027; Constitutional Law, § 75; Evidence, §§ 230, 419; Execution, §§ 272, 275; Executors and Administrators, §§ 329-397; Frauds, Statute of, § 18; Homestead, § 203; Judgment, § 251; Logs and Logging, § 3; Municipal Corporations, § 487; Partnership, § 246; Payment, § 86; Railroads, § 72; Remainders, § 16; Sales; Specific Performance.

### II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 54 (Tex.Civ.App.) A vendor of real estate retains the superior title until the purchase money is paid.—*Ivy v. Pugh*, 161 S. W. 939.

§ 79 (Tex.Civ.App.) A deed and a bill of sale of personalty with the grantee's simultaneously executed mortgage and notes to secure payment of the purchase price, construed together, held to show an executory contract for a conveyance of land; the superior title to remain in the grantor until payment of the purchase price.—*Vinson v. W. T. Carter & Bro.*, 161 S. W. 49.

§ 80 (Ky.) Evidence held to show that a sale of land was by the acre, and not in gross, though the deed described the land by adjoining land and public roads, and recited that there were 200 acres, more or less.—*Moreland v. Henry*, 161 S. W. 1105.

### IV. PERFORMANCE OF CONTRACT.

#### (D) Payment of Purchase Money.

§ 175 (Ky.) Where plaintiff understood the purpose of defendant in buying the surface of his land, plaintiff should be compelled to abate the purchase price by the amount necessary to obtain a quitclaim deed from another mining company to whom he had granted inconsistent rights.—*Marrowbone Coal & Coke Co. v. Coleman*, 161 S. W. 238.

### V. RIGHTS AND LIABILITIES OF PARTIES.

#### (A) As to Each Other.

§ 203 (Ky.) A vendee of real property under an oral contract of sale held not liable for the destruction of a cabin on the property which she replaced with a better house.—*Burks v. Douglass*, 161 S. W. 225.

#### (C) Bona Fide Purchasers.

§ 229 (Tex.Civ.App.) Where a purchaser was affected with notice that his grantor acquired title during the life of his wife, he was charged with notice that the property was community.—*Le Blanc v. Jackson*, 161 S. W. 60.

Where a purchaser knew that his grantor had been married, as several of his children joined in the deed, he was bound to take notice that other children of the grantor's wife were

entitled to an interest in their mother's half of community land.—Id.

§ 231 (Mo.) Under Rev. St. 1909, § 2810, relating to notice by record, a purchaser is charged with constructive notice of everything, in prior recorded deeds, which go to make up the chain of title under which he holds.—Garrett v. Wiltse, 161 S. W. 694.

§ 239 (Tex.Civ.App.) The legal title of the purchaser for value not shown to have notice of an outstanding equitable title *held* superior to the equity.—Le Blanc v. Jackson, 161 S. W. 60.

§ 242 (Tex.Civ.App.) Parties asserting an equitable title as against a purchaser for value have the burden of showing that he had notice of all the facts constituting their title.—Le Blanc v. Jackson, 161 S. W. 60.

§ 243 (Mo.) As against a subsequent bona fide purchaser without notice of such declarations, evidence as to a prior grantor's declarations as to the estate intended to be conveyed was not admissible if not actually brought to such subsequent purchaser's notice.—Garrett v. Wiltse, 161 S. W. 694.

## VI. REMEDIES OF VENDOR. —

### (A) Lien and Recovery of Land.

§ 258 (Ky.) A deed providing that in consideration of \$500, secured to be paid by part of a note of \$500 executed to grantee by C. for \$500, "\$240 of which was part of the above consideration," the balance being evidenced by notes of grantee, and retaining a lien for "the unpaid purchase money hereinbefore named," only secured the balance of the price, the \$240, even if the lien was intended to apply to the C. note of \$500.—Arnett v. Howard, 161 S. W. 531.

§ 265 (Tex.Civ.App.) Plaintiff, claiming under a purchaser from a vendee with notice of the vendor's lien and superior title, *held* not entitled to recover against those claiming under the vendor.—Vinson v. W. T. Carter & Bro., 161 S. W. 49.

§ 267 (Tex.Civ.App.) Where defendant gave vendor's lien notes in payment of land and after bankruptcy deposited the amount of the note then due with the payee under an agreement that the deposit should be returned to him in case it was held in the bankruptcy court that the land was not his homestead, the payee's wrongful retention of the deposit after an adjudication adverse to the homestead claim did not constitute payment.—Brown v. Bay City Bank & Trust Co., 161 S. W. 23.

### (B) Actions for Purchase Money.

§ 315 (Tex.Civ.App.) A deed and a bill of sale of personalty with the grantee's simultaneously executed mortgage and notes to secure the payment of the purchase price *held* proof that the purchase money was not fully paid at the time of the conveyance.—Vinson v. W. T. Carter & Bro., 161 S. W. 49.

§ 315 (Tex.Civ.App.) In an action by a vendor for the price, evidence *held* to show performance by the vendor, and that out of the payment to be made by the purchaser to the escrow holder taxes on the land and incumbrances were to be paid, so that the purchaser would acquire a good title.—Fahey v. Benedetti, 161 S. W. 896.

## VII. REMEDIES OF PURCHASER.

### (B) Actions for Breach of Contract.

§ 343 (Ky.) Where a tract of land was represented by the vendor to contain 200 acres, and the sale was not in gross of a body of land, but by the acre, the vendee could recover the value of any deficit in quantity.—Moreland v. Henry, 161 S. W. 1105.

## VENUE.

See Appeal and Error, § 916; Criminal Law, §§ 111-137, 564, 1144, 1150; Trial, § 217.

## II. DOMICILE OR RESIDENCE OF PARTIES.

§ 21 (Tex.Civ.App.) Under Rev. St. 1895, art. 1194, prescribing the venue of actions upon contracts to be performed in any particular county, a consignor of cotton shipped to and paid for by drafts in H. county, could not in the consignee's action to recover an overpayment, plead privilege to be sued in T. county, where he resided.—Theodore Keller Co. v. Mangum, 161 S. W. 19.

Where a written contract between a consignor of cotton and a consignee was to be performed in H. county, so that the consignor could not plead the privilege of being sued in another county, the venue for the consignee's recovery of overpaid freight charges might also lie in H. county, in order to avoid a multiplicity of suits.—Id.

## III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 36 (Ark.) Acts 1909, p. 751, providing that the venue of civil actions shall not be changed unless the court finds that the same is necessary to obtain a fair trial, applies to all civil actions.—St. Louis, I. M. & S. Ry. Co. v. Reilly, 161 S. W. 1052.

§ 42 (Ark.) Under Acts 1909, p. 751 providing that the venue of civil actions shall not be changed unless the judge finds that the same is necessary to secure a fair trial, upon finding that a fair trial may be had in the county of the venue, the judge has no discretion to order a change.—St. Louis, I. M. & S. Ry. Co. v. Reilly, 161 S. W. 1052.

§ 72 (Ark.) While the court has a certain discretion in weighing the evidence on a motion to change the venue because of local prejudice, it cannot arbitrarily refuse a change if the evidence shows that a fair trial cannot be had.—St. Louis, I. M. & S. Ry. Co. v. Reilly, 161 S. W. 1052.

A statement by the judge, when defendant offered to produce 20 or more persons to sign an affidavit supporting the change of venue, that it would do no good, as a request of 200 persons would not compel him to make an order he did not think was correct, was not a refusal to hear more testimony on the question.—Id.

The court has some discretion in determining how many witnesses he will hear on a motion to change the venue because of local prejudice.—Id.

## VERDICT.

See Criminal Law, §§ 753, 857-866, 885; Homicide, § 313; New Trial, §§ 72, 78; Pleading, §§ 403-433; Robbery, § 28; Trial, §§ 178, 349.

## VERIFICATION.

See Divorce, § 105; Injunction, § 122; Pleading, § 301.

## VIGILANT WATCH DOCTRINE.

See Street Railroads, §§ 81, 90.

## VOLUNTARY PAYMENT.

See Payment, § 82.

## VOTERS.

See Elections.

## WAIVER.

See Account, Action on, § 4; Appeal and Error, § 194; Criminal Law, § 1178; Highways, §

88; Insurance, §§ 755, 819, 825; Justices of the Peace, § 174; Parties, § 75; Pleading, §§ 403-433; Sales, § 176; Trial, § 418.

## WARDS.

See Guardian and Ward.

## WAREHOUSEMEN.

See Pledges, § 29.

§ 28 (Mo.App.) A cold storage company, to whom produce stored with it was pledged for advancements, having refused to sell it to customers produced by the pledgor at prices sufficient to pay it, and then sold it for less, is liable for conversion.—Union Cold Storage & Warehouse Co. v. Pitts, 161 S. W. 1182.

## WARNING.

See Master and Servant, §§ 150, 155.

## WARRANT.

See Searches and Seizures.

## WARRANTY.

See Sales, §§ 279, 284, 425-446.

## WATERS AND WATER COURSES.

See Levees; Municipal Corporations, §§ 70, 73, 266, 772; Navigable Waters; Pleading, § 8; Railroads, §§ 108, 114; Trial, § 219.

## II. NATURAL WATER COURSES.

(A) Riparian Rights in General.

§ 38 (Tex.Civ.App.) A depression of the ground in a flat marshy country filled with rank vegetation from a quarter of a mile to a mile in width, with no defined banks and no channel, and through which water only oozes, is not a watercourse.—Wilborn v. Terry, 161 S. W. 83.

## V. SURFACE WATERS.

§ 118 (Tex.Civ.App.) Where a lower landowner prevents surface waters from flowing over his land, thus obstructing natural drainage, though not interfering with the watercourse, he is not liable for injuries caused to the lands of other proprietors upon which the surface waters are thrown back.—Wilborn v. Terry, 161 S. W. 33.

A landowner who erected a dam, thus collecting surface waters in a lake upon his own property and retaining them so that they were thrown back on the land of higher proprietors, is liable for the injury.—Id.

§ 126 (Tex.Civ.App.) In an action for damages for damming a lake so that surface waters were collected and thrown back on plaintiff's land, evidence held insufficient to show that the dam cast water upon plaintiff's land, at most only showing that it prevented the surface water from flowing off as rapidly as before.—Wilborn v. Terry, 161 S. W. 33.

## IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 183 (Ky.) An offer by a city to purchase the property of a water company at a fixed price held not an exercise by it of its option to purchase under a contract with the water company but an offer to make a new contract.—Kenton Water Co. v. City of Covington, 161 S. W. 988.

## WAYS.

See Municipal Corporations, §§ 648, 663, 766-821.

## WEAPONS.

See Robbery, §§ 28, 30.

§ 13 (Tex.Cr.App.) A person who was electioneering on election day, and not properly

conducting himself, held not justified in carrying a pistol, though he had reason to believe from assaults made on others that he was likely to be assaulted.—Tafolla v. State, 161 S. W. 1091.

## WILLS.

See Conversion; Descent and Distribution; Executors and Administrators; Powers; Taxation, §§ 867, 893.

## I. NATURE AND EXTENT OF TESTAMENTARY POWER.

§ 6 (Mo.) An equitable interest, such as a resulting trust, would pass under the beneficiary's will if its terms were sufficient to pass such interest.—Boothe v. Cheek, 161 S. W. 791.

## II. TESTAMENTARY CAPACITY.

§ 47 (Mo.) That testator was old and greatly weakened in mind and body did not justify the court in confining him more closely to conventional methods in distribution.—Turner v. Butler, 161 S. W. 745.

§ 52 (Mo.) The burden is upon the proponent of a will to establish testamentary capacity of the testator by a preponderance of all the evidence.—Turner v. Butler, 161 S. W. 745.

§ 53 (Mo.) Where the issue was as to the testamentary capacity of testator, the court properly excluded questions asked an attorney, with whom testator had advised shortly before executing his will, as to the attorney's reasons for refusing to write the will at that time.—Turner v. Butler, 161 S. W. 745.

## IV. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

§ 104 (Mo.) A will which is so vague that the court cannot by reasonable rules of construction determine testator's intent is void.—Griffith v. Witten, 161 S. W. 708.

A will, though ungrammatical in its construction and showing that testator was illiterate, held not so uncertain or incapable of construction as to be void.—Id.

(F) Mistake, Undue Influence, and Fraud.

§ 156 (Mo.) That testator was old and greatly weakened in mind and body should make the court more careful in its scrutiny of the influences which surrounded him.—Turner v. Butler, 161 S. W. 745.

§ 158 (Mo.) The law does not denounce the influence which a son-in-law may have over his father-in-law, but only the improper use of it.—Turner v. Butler, 161 S. W. 745.

§ 163 (Mo.) When proponents have shown that a will was executed with all the prescribed formalities while the testator was of sound mind, it will then be presumed that it was his free and voluntary act.—Turner v. Butler, 161 S. W. 745.

§ 163 (Mo.) The confidential relation between son and father held to impose on him the burden of overcoming the prima facie case that the will was executed through his undue influence.—Wendling v. Bowden, 161 S. W. 774.

§ 166 (Mo.) That influence of a son-in-law is shown to exist, and that testator gave a large part of his estate to the daughter, the wife of the son-in-law, held not sufficient to establish undue influence.—Turner v. Butler, 161 S. W. 745.

§ 166 (Mo.) Evidence held to sustain a finding that a will was procured through undue influence.—Wendling v. Bowden, 161 S. W. 774.

## V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(B) Actions to Establish or Determine Validity in General.

§ 229 (Ky.) Where testatrix devised life estates in her property and the remainder over to a church, a question raised by her heirs,

that the remainder to the church was void, was not academic, since, if it were void, the heirs would inherit.—*Compton v. Moore*, 161 S. W. 540.

Under Ky. St. § 319, prohibiting any church from taking or holding exceeding 50 acres of land, heirs of testatrix, who had devised to a church 300 acres, held entitled to raise the question, as they, and not the state, were the parties in interest.—*Id.*

#### (I) Hearing or Trial.

§ 324 (Mo.) Evidence, in a will contest, held not sufficient to take to the jury the question whether testator's son-in-law exercised undue influence over testator, respecting the execution of the will.—*Turner v. Butler*, 161 S. W. 745.

§ 329 (Mo.) Where the proponent depended upon the witnesses offered by contestant to prove testamentary capacity, it was not error to refuse to charge that, unless the proponents had proved such capacity by a preponderance of the evidence, the verdict should be against the will.—*Turner v. Butler*, 161 S. W. 745.

### VI. CONSTRUCTION.

#### (A) General Rules.

§ 440 (Mo.) The principal rule in construing wills is to ascertain testator's intent from the whole instrument.—*Griffith v. Witten*, 161 S. W. 708.

§ 449 (Mo.) It is presumed that testator intended to dispose of his entire estate.—*Griffith v. Witten*, 161 S. W. 708.

§ 470 (Mo.) Testator's intention must be ascertained from the four corners of the will.—*Griffith v. Witten*, 161 S. W. 708.

§ 488 (Mo.) If a will is so ambiguous as to make it difficult to ascertain testator's intent from its language, evidence aliunde may be considered.—*Griffith v. Witten*, 161 S. W. 708.

#### (E) Nature of Estates and Interests Created.

§ 601 (Ky.) Where testator bequeathed all his property to his widow, the quality of the estate was not affected by a subsequent provision that she should be his executrix while she remained a widow.—*Murphy v. Murphy*, 161 S. W. 533.

§ 614 (Ky.) A will held to give a niece of testatrix a life estate and thereafter her three brothers a joint life estate.—*Compton v. Moore*, 161 S. W. 540.

#### (F) Vested or Contingent Estates and Interests.

§ 634 (Ky.) Will held to create contingent remainders: First, in the son of the life tenant, provided he outlived his father; second, if he did not, then to the father's three living brothers; and, third, to the children or descendants of such brothers, who would take if, at the time of the death of the life tenant, his son and the three brothers were dead.—*Goff v. Renick*, 161 S. W. 983.

#### (H) Estates in Trust and Powers.

§ 693 (Mo.) Under will giving a wife a life estate with power to sell as she might think best and to her best interest, a conveyance to two of the remaindermen for no consideration paid at the time and upon an inadequate consideration, if any, held beyond her power and void.—*Tallent v. Fitzpatrick*, 161 S. W. 689.

### VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

#### (A) Nature of Title and Rights in General.

§ 742 (Mo.) A conveyance of an interest in land by the sole devisee thereof before probate of the will would take effect upon the subsequent probate, after contest, by relation back,

as of the date of the deed; Rev. St. 1909, § 6313, impliedly recognizing the operative effect of unproved wills in case of actual notice.—*Boothe v. Cheek*, 161 S. W. 791.

#### (G) Debts of Testator and Incumbrances on Property.

§ 839 (Mo.) At common law a devisee or legatee was not liable to the amount of the devised legacy by reason of the testator's liability on a covenant of warranty.—*Armor v. Frey*, 161 S. W. 829.

Where a resident of Georgia conveyed land located in Missouri with covenants of warranty, the Missouri statute, making devisees and legatees liable to the amount of their gifts by reason of a breach of the covenant of warranty, has no effect and cannot be applied against devisees and legatees in the former state.—*Id.*

### WITNESSES.

See Appeal and Error, § 1048; Contempt, § 66; Continuance, § 33; Criminal Law, §§ 308-564, 594-600, 676, 706, 742, 1170-4; Depositions; Evidence; Perjury; Trial, §§ 236, 252; Venue, § 72.

### II. COMPETENCY.

#### (C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 143 (Ky.) Under Civ. Code Prac. § 606, and subsection 7, a creditor who claimed that a debtor had acknowledged his debt and made a new promise is incompetent to testify in an action between his assignee and the debtor's administrator.—*Davis v. Strange*, 161 S. W. 217.

§ 144 (Mo.App.) Under Rev. St. 1909, § 6354, the agent of the living party, who made the contract for such party, is disqualified from testifying in an action to enforce the contract.—*Taylor v. George*, 161 S. W. 1187.

Rev. St. 1909, § 6354, providing that, in actions where one of the original parties to the contract in issue is dead, the other party shall not testify for himself, is both an enabling and disabling statute; the proviso disabling one from testifying on account of the other's death.—*Id.*

The statute should be construed to accomplish its evident purpose of preventing by law one party to a contract from testifying where death has prevented the other from testifying.—*Id.*

#### (D) Confidential Relations and Privileged Communications.

§ 193 (Tex.Cr.App.) In a prosecution for bigamy, evidence that the mother of the first alleged wife saw letters to her from defendant held admissible, if she saw them without the connivance of the wife, but not as to letters sent by the first wife to the district attorney.—*Harris v. State*, 161 S. W. 125.

### III. EXAMINATION.

#### (A) Taking Testimony in General.

§ 257 (Ark.) Where a witness cross-examined by defendant's counsel as to the width of the counter, shelving, etc., in the saloon, refreshed his memory by referring to a memorandum of measurements he had himself made of his own accord, the refusal to permit defendant to have such memorandum submitted to the jury's inspection was not error.—*Bruder v. State*, 161 S. W. 1067.

#### (B) Cross-Examination and Re-Examination.

§ 266½ (Mo.) Where a party who testifies for himself is cross-examined on the details of his life affecting his character, the answers,

unless material to the issues, are conclusive.—*Wendling v. Bowden*, 161 S. W. 774.

§ 268 (Mo.) A question to the prosecuting witness on cross-examination, who had testified that he did not go into the alley where he was robbed with some negro girls, whether he would not deny it, even if it were true, was properly excluded.—*State v. Sydnor*, 161 S. W. 692.

§ 268 (Tex. Cr. App.) Great latitude is permitted in cross-examining witnesses.—*Christian v. State*, 161 S. W. 101.

§ 268 (Tex. Cr. App.) In a prosecution for bigamy, where letters from defendant to the first alleged wife were not introduced, but where her mother was permitted to testify that she had received them, defendant had the right to cross-examine her as to how she knew the letters were written by him.—*Harris v. State*, 161 S. W. 125.

§ 286 (Tex. Cr. App.) Where, in a perjury case, defendant, in questioning a state's witness as to having appeared against a relative of his in the commissioners' court, elicited the fact that other citizens had also appeared for the same purpose, it was not error to permit the state's attorney on redirect to ask about these other citizens.—*Poulter v. State*, 161 S. W. 475.

#### IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

##### (A) In General.

§ 317 (Ark.) It was error to instruct that, if the jury believed any witness to have sworn falsely to any material fact, they might disregard the whole or any part of his testimony it being necessary that it be willfully done.—*Bruder v. State*, 161 S. W. 1067.

##### (B) Character and Conduct of Witness.

§ 336 (Mo.) A party who testifies for himself may be cross-examined on the details of his life affecting his character.—*Wendling v. Bowden*, 161 S. W. 774.

§ 337 (Mo.) It was improper for the prosecuting attorney to ask defendant on cross-examination as to his having been arrested several years before on a similar charge.—*State v. Duff*, 161 S. W. 683.

§ 338 (Ark.) A witness may be impeached by the party against whom he is produced by evidence that his general reputation for truth and morality renders him unworthy of belief.—*Bruder v. State*, 161 S. W. 1067.

§ 349 (Ark.) Where a witness for defendant testified that on the day prior to the killing defendant had no gun and wanted to borrow one because he was afraid to travel from the car line to his house, it was proper to cross-examine him as to whether he had married the keeper of a house of prostitution and had been divorced from her, and as to whether a scar on his face was the result of a fight in her house.—*Bruder v. State*, 161 S. W. 1067.

§ 358 (Tex. Civ. App.) Where a witness is offered attacking the reputation of one of the parties, the party assailed is entitled, on cross-examination, to compel the witness to state the source of the reports upon which he bases his testimony.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

§ 361 (Tex. Civ. App.) Where plaintiff's character was impeached by testimony as to his bad reputation for integrity and truth owing to his failure to pay his debts, plaintiff was entitled to testify as to the reason for his failure.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

##### (D) Inconsistent Statements by Witness.

§ 379 (Ark.) A witness may be impeached by the party against whom he is produced by contradictory evidence by showing that he has made statements differing from his present testimony.—*Bruder v. State*, 161 S. W. 1067.

§ 380 (Ark.) Where a witness at trial gives different testimony from that before the grand jury, the prosecutor, being surprised, may examine the witness as to his testimony taken before the grand jury and question him concerning its correctness.—*Carlton v. State*, 161 S. W. 145.

#### (E) Contradiction and Corroboration of Witness.

§ 410 (Tex. Civ. App.) Where a physician, who testified to examining plaintiff at the time of an injury while working for another railroad company, was contradicted by plaintiff, the contradiction was not such an impeachment as to authorize the introduction of the report by the physician as corroborative evidence.—*Ft. Worth Belt Ry. Co. v. Cabell*, 161 S. W. 1083.

## WOMEN.

See Elections, §§ 60, 65.

## WORDS AND PHRASES.

"Adverse possession."—*Frazier v. Houston Oil Co.* (Tex. Civ. App.) 161 S. W. 20.

"Apparatus."—*Harris v. Townley* (Tex. Civ. App.) 161 S. W. 5.

"Assault."—*Hixson v. Slocum* (Ky.) 161 S. W. 522.

"Battery."—*Hixson v. Slocum* (Ky.) 161 S. W. 522.

"Bill of lading."—*Fourth Nat. Bank v. Nashville, C. & St. L. Ry. Co.* (Tenn.) 161 S. W. 1144.

"Boycott."—*Clarkson v. Laiblan* (Mo. App.) 161 S. W. 660.

"Commerce."—*Interstate Amusement Co. v. Albert* (Tenn.) 161 S. W. 488.

"Confiscated."—*Skelley v. St. Louis & S. F. R. Co.* (Mo. App.) 161 S. W. 877.

"Conspiracy."—*Clarkson v. Laiblan* (Mo. App.) 161 S. W. 660.

"Contiguous."—*International & G. N. R. Co. v. Boles* (Tex. Civ. App.) 161 S. W. 914.

"Cultivated or occupied."—*Storthe v. Smith* (Ark.) 161 S. W. 183.

"Curator."—*Le Blanc v. Jackson* (Tex. Civ. App.) 161 S. W. 60.

"Disease."—*Perry v. Van Matre* (Mo. App.) 161 S. W. 643.

"Doing business."—*Interstate Amusement Co. v. Albert* (Tenn.) 161 S. W. 488.

"Estoppel in pais."—*Citizens' Bank of Senath v. Douglass* (Mo. App.) 161 S. W. 601.

"Excusable homicide."—*Cooper v. State* (Tex. Cr. App.) 161 S. W. 1094.

"First appearance of danger."—*Johnson v. Springfield Traction Co.* (Mo. App.) 161 S. W. 1193.

"F. o. b."—*Burton & Beard v. Nacogdoches Crate & Lumber Co.* (Tex. Civ. App.) 161 S. W. 25.

"Good breeder."—*Perry v. Van Matre* (Mo. App.) 161 S. W. 643.

"Grant, bargain, and sell."—*Laclede Laundry Co. v. Freudenstein* (Mo. App.) 161 S. W. 593.

"Great breeder."—*Perry v. Van Matre* (Mo. App.) 161 S. W. 643.

"Indecent."—*Darnell v. State* (Tex. Cr. App.) 161 S. W. 971.

"Information."—*State v. Williams* (Ark.) 161 S. W. 159.

"Innuendo."—*Skelley v. St. Louis & S. F. R. Co.* (Mo. App.) 161 S. W. 877.

"Interest."—*J. I. Case Threshing Mach. Co. v. Tomlin* (Mo. App.) 161 S. W. 280.

"In the perpetration."—*Christian v. State* (Tex. Cr. App.) 161 S. W. 101.

"Main."—*Key v. State* (Tex. Cr. App.) 161 S. W. 121.

"Maintain."—*State v. Woollen* (Tenn.) 161 S. W. 1006.

"Malicious."—*Key v. State* (Tex. Cr. App.) 161 S. W. 121.



- "Memory."—Key v. State (Tex. Cr. App.) 161 S. W. 121.
- "Municipal corporation."—Board of Com'rs of Tuberculosis Hospital Dist. of Buchanan County v. Peter (Mo.) 161 S. W. 1155.
- "Negligence."—Featherstone v. Kansas City Terminal Ry. Co. (Mo. App.) 161 S. W. 284.
- "Nondelegable."—American Zinc Co. v. Smith (Tenn.) 161 S. W. 494.
- "Novation."—Citizens' Bank of Senath v. Douglass (Mo. App.) 161 S. W. 601.
- "Obscene."—Darnell v. State (Tex. Cr. App.) 161 S. W. 971.
- "Office."—Day v. Sharp (Tenn.) 161 S. W. 994.
- "Pandering."—Boyle v. State (Ark.) 161 S. W. 1049.
- "Passenger."—Farmer v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 161 S. W. 827.
- "Pertinent hypothesis."—Belcher v. State (Tex. Cr. App.) 161 S. W. 459.
- "Printed brief."—Waterman Lumber & Supply Co. v. Holmes (Tex. Civ. App.) 161 S. W. 70.
- "Proximate cause."—International & G. N. R. Co. v. Walters (Tex. Civ. App.) 161 S. W. 916.
- "Public purpose."—Board of Com'rs of Tuberculosis Hospital Dist. of Buchanan County v. Peter (Mo.) 161 S. W. 1155.
- "Reasonably safe."—Marquez v. Koch (Mo. App.) 161 S. W. 648.
- "Regular address."—Bange v. Supreme Council Legion of Honor of Missouri (Mo. App.) 161 S. W. 652.
- "Relevancy."—Belcher v. State (Tex. Cr. App.) 161 S. W. 459.
- "School district election."—Stuessy v. City of Louisville (Ky.) 161 S. W. 564.
- "School measure or question."—Stuessy v. City of Louisville (Ky.) 161 S. W. 564.
- "Sovereignty of the soil."—Campbell v. Gibbs (Tex. Civ. App.) 161 S. W. 430.
- "Stare decisis."—Oliver Co. v. Louisville Realty Co. (Ky.) 161 S. W. 570.
- "State officer."—Ex parte Preston (Tex. Cr. App.) 161 S. W. 115.
- "Suit to quiet title."—Armor v. Frey (Mo.) 161 S. W. 829.
- "Trade."—Hammond v. McFarland (Tex. Civ. App.) 161 S. W. 47.
- "Trust."—Crandall v. Scott (Tex. Civ. App.) 161 S. W. 925.
- "Undue influence."—Wing v. Havelik (Mo.) 161 S. W. 732.
- "Value."—Greer v. Orchard (Mo. App.) 161 S. W. 875.
- "Vigilant watch."—Johnson v. Springfield Traction Co. (Mo. App.) 161 S. W. 1193.
- "Vulgar."—Darnell v. State (Tex. Cr. App.) 161 S. W. 971.
- "Water course."—Wilborn v. Terry (Tex. Civ. App.) 161 S. W. 33.
- "Willful."—Key v. State (Tex. Cr. App.) 161 S. W. 121.
- "Withhold."—Fitzpatrick v. Garver (Mo.) 161 S. W. 714.
- "Words of limitation."—Garrett v. Wiltse (Mo.) 161 S. W. 694.
- "Written brief."—Waterman Lumber & Supply Co. v. Holmes (Tex. Civ. App.) 161 S. W. 70.

## WORK AND LABOR.

See Highways, § 118; Mechanics' Liens; Trial, §§ 11, 191, 870.

§ 7 (Mo. App.) There is no presumption that services rendered by a daughter to her aged mother are to be paid for.—Taylor v. George, 161 S. W. 1187.

## WRITS.

See Attachment; Execution; Certiorari; Garnishment; Habeas Corpus; Injunction; Mandamus; Process; Replevin; Searches and Seizures; Sequestration.

Of error, see Appeal and Error; Criminal Law, §§ 1017-1186.

## WRONGFUL DEATH.

See Death.

## WRONGS.

See Torts.

## YEAR.

See Landlord and Tenant.

For cases in Dec. Dig. & Am. Dig. Key No. Series & Indexes see same topic and section (§) NUMBER

\*







# TABLES OF SOUTHWESTERN CASES

IN

## STATE REPORTS

### VOL. 105, ARKANSAS REPORTS

Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.	Ark. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	150	123	90	150	406	194	150	1031	294	151	246	415	151	240	549	151	515
6	150	135	95	150	415	197	150	698	300	150	703	421	151	275	558	151	1014
12	150	133	99	150	398	201	150	710	307	151	254	434	151	1005	575	151	1003
16	150	113	101	150	393	205	151	257	309	151	286	439	151	997	580	151	696
19	150	141	106	150	407	210	151	253	314	151	243	443	151	1012	587	152	129
22	150	116	110	150	560	213	150	858	314	151	281	446	151	998	594	151	994
25	150	112	111	150	413	218	150	860	318	151	284	450	151	1013	598	151	1025
28	150	110	116	150	693	222	150	867	324	151	283	455	151	1007	608	152	140
32	150	114	119	150	566	224	150	861	326	151	244	460	151	995	615	152	160
37	150	128	121	150	563	228	150	1030	331	151	243	462	151	1000	619	152	137
40	150	575	127	150	579	230	150	1035	334	150	868	462	153	1104	626	152	300
44	150	117	130	150	576	233	151	259	340	150	864	467	151	1021	630	152	288
47	150	152	136	150	401	241	150	1028	347	151	706	471	151	1023	638	152	298
50	150	148	140	150	561	243	151	280	353	151	521	477	152	147	641	152	282
53	150	150	146	150	403	247	151	267	356	151	699	485	152	158	646	152	293
58	150	149	152	150	411	254	150	1036	358	151	693	488	152	142	653	151	431
60	150	122	157	150	568	258	150	567	364	151	520	494	152	155	663	152	286
63	150	560	161	150	572	261	150	700	367	151	518	502	152	132	669	152	296
65	150	154	166	150	691	269	150	706	370	150	1033	506	152	145	672	152	295
72	150	119	172	150	690	278	150	863	374	151	992	513	152	153	678	151	435
77	150	391	175	150	695	281	152	281	380	151	269	518	152	150	680	152	284
82	150	416	180	150	157	284	151	255	382	151	262	526	151	691	697*	150	112
86	150	397	190	150	399	290	151	249	406	151	237	533	151	699	697*	150	120

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

### VOL. 105, ARKANSAS REPORTS

	Page		Page
Adcock v. Coker (151 S. W. 253).....	210	C. C. Emerson & Co. v. Stevens Grocer Co. (151 S. W. 1003).....	575
Alf Bennett Lumber Co. v. Walnut Lake Cypress Co. (151 S. W. 275).....	421	Central R. Co. of Arkansas v. Lindley (151 S. W. 246).....	294
Apple v. Apple (152 S. W. 296).....	669	Chas. F. Luehrmann Hardwood Lumber Co. v. Zearing (150 S. W. 138).....	*697
Arkansas Natural Gas Co. v. Miller (152 S. W. 147).....	477	Chicago, R. I. & P. R. Co. v. Pratt (162 S. W. 1199).....	699
Attridge v. Smith (152 S. W. 300).....	626	Clay County v. Bank of Knobel (151 S. W. 1013).....	450
Bailey v. State (150 S. W. 1030).....	228	Clouston v. Maingault (150 S. W. 858).....	213
Bankers' Surety Co. v. William Miller & Sons Co. (150 S. W. 570).....	*697	Coleman v. Floyd (150 S. W. 703).....	300
Banks v. State (150 S. W. 133).....	*697	Cooley v. Ksir (151 S. W. 254).....	307
Barrentine v. Henry Wrape Co. (152 S. W. 158).....	485	Crandell v. City of Harrison (150 S. W. 560).....	110
Beal-Doyle Dry Goods Co. v. Beller (150 S. W. 1033).....	370	Crane v. Ft. Smith Light & Traction Co. (162 S. W. 1199).....	698
Bedford v. Bedford (152 S. W. 129).....	587	Cumbe v. St. Louis, I. M. & S. R. Co. (151 S. W. 237).....	406
Bell v. Bell (150 S. W. 1031).....	194	Cumbe v. St. Louis, I. M. & S. R. Co. (151 S. W. 240).....	415
Bennett Lumber Co. v. Walnut Lake Cypress Co. (151 S. W. 275).....	421	Deane v. Moore (151 S. W. 286).....	309
Biederman v. Parker (150 S. W. 397).....	86	Delight Lumber Co. v. Henderson (150 S. W. 868).....	334
Birones v. State (150 S. W. 416).....	82	Denton v. Mammoth Spring Electric Light & Power Co. (150 S. W. 572).....	161
Blagg v. Fry (151 S. W. 699).....	356	Dickerson v. State (150 S. W. 119).....	72
Board of Imp. of Pav. Dist. No. 7 of City of Ft. Smith v. Brun (150 S. W. 154).....	65	Doniphan Lumber Co. v. Fix (151 S. W. 996).....	*698
Bobo v. State (151 S. W. 1000; 153 S. W. 1104).....	462	Douglass v. State (150 S. W. 860).....	218
Borah v. Borah (150 S. W. 112).....	*697		
Burnett v. Turner (151 S. W. 249).....	290		
Carmical v. Arkansas Lumber Co. (152 S. W. 286).....	663		

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

## 105 ARK.—Continued.

	Page		Page
Ederheimer v. Carson Dry Goods Co. (152 S. W. 142).....	488	McCarroll v. Red Diamond Clothing Co. (151 S. W. 1012).....	443
Edwards v. Bond (151 S. W. 243).....	314	McCord v. Welch (150 S. W. 566).....	119
Emerson v. Stevens Grocer Co. (151 S. W. 1003).....	575	McCray v. Cox (150 S. W. 152).....	47
Equitable Powder Mfg. Co. v. St. Louis & S. F. R. Co. (150 S. W. 1028).....	*697	McDonald v. Ft. Smith & W. R. Co. (150 S. W. 135).....	5
Farmers' Bank v. Johnson (150 S. W. 401).....	136	McPherson v. Consolidated Casualty Co. of Arkansas (151 S. W. 283).....	324
Federal Life Ins. Co. v. Terral (162 S. W. 1190).....	698	Manhattan Const. Co. v. Pratt (150 S. W. 697).....	*697
Fellheimer v. Higgins (151 S. W. 991).....	*698	Manhattan Zinc Min. Co. v. Brown (162 S. W. 1199).....	698
Ferrell v. Keel (151 S. W. 269).....	380	Marshall v. Patterson (150 S. W. 694).....	*698
Finn v. Culberhouse (150 S. W. 698).....	197	Marshall Bank v. Turney (150 S. W. 693).....	116
Fletcher v. Freeman-Smith Lumber Co. (150 S. W. 1035).....	230	Medlock v. Owen (151 S. W. 995).....	460
Fletcher v. Josephs (152 S. W. 293).....	646	Metropolitan Life Ins. Co. v. Johnson (150 S. W. 393).....	101
Florence Cotton Oil Co. v. Anglin (152 S. W. 295).....	672	Miller v. Henry (150 S. W. 700).....	261
Fordyce v. Vickers (150 S. W. 402).....	*697	Miller v. Mattison (150 S. W. 710).....	201
Fred v. Asbury (152 S. W. 155).....	494	Miller v. Plummer (152 S. W. 288).....	630
Freeo Val. R. Co. v. Hodges (151 S. W. 281).....	314	Milwee v. Board of Directors of Horatio School Dist. (150 S. W. 391).....	77
Friedman v. Schleuter (151 S. W. 696).....	580	Mitchell v. Chicago, R. I. & P. R. Co. (151 S. W. 520).....	364
French v. State (162 S. W. 1199).....	609	Monk v. State (150 S. W. 133).....	12
Fullerton v. Henry Wrape Co. (151 S. W. 1005).....	434	Moore v. Olsson (150 S. W. 1028).....	241
Galloway v. Darby (151 S. W. 1014).....	558	Morton v. Davis (150 S. W. 117).....	44
Gardner v. McAuley (151 S. W. 997).....	439	Motley v. State (152 S. W. 140).....	608
George Knapp & Co. v. Wilks (151 S. W. 280).....	243	Moulton v. State (152 S. W. 132).....	502
Goodrich v. Bagnell Timber Co. (150 S. W. 406).....	90	National Packing Co. v. Boullion (151 S. W. 244).....	326
Grand Lodge, A. O. U. W. of Arkansas v. Dreher (151 S. W. 435).....	676	Norman v. Cammack (150 S. W. 563).....	121
Groves v. Keene (150 S. W. 575).....	40	Oak Leaf Mill Co. v. Littleton (151 S. W. 262).....	392
Hare v. Sisters of Mercy of Female Academy of Ft. Smith (151 S. W. 515).....	549	Oglesby v. City of Ft. Smith (152 S. W. 145).....	506
Hayden v. Hayden (150 S. W. 415).....	95	Outcault Advertising Co. v. Bradley (150 S. W. 148).....	50
H. D. Williams Cooperage Co. v. Clark (150 S. W. 568).....	157	Pennewell v. State (150 S. W. 114).....	32
Hearin v. Union Sawmill Co. (151 S. W. 1007).....	455	Publishers: George Knapp & Co. v. Wilks (151 S. W. 280).....	243
Henderson v. E. W. Emerson Co. (151 S. W. 251).....	*697	Ramsey v. St. Louis, I. M. & S. R. Co. (151 S. W. 288).....	*698
Holdaway, Ex parte (150 S. W. 123).....	1	Reece v. Leslie (150 S. W. 579).....	127
Hooker v. Southwestern Imp. Ass'n (150 S. W. 398).....	99	Reeves v. Moore (151 S. W. 1025).....	598
Incorporated Town of Marshall v. Patterson (150 S. W. 694).....	*698	Richardson v. Cohen (150 S. W. 574).....	*697
Jacks v. Greenhaw (152 S. W. 160).....	615	River, Rail & Harbor Const. Co. v. Goodwin (151 S. W. 267).....	247
Jenkins v. Quick (151 S. W. 1021).....	467	Roberts Cotton Oil Co. v. Grady (150 S. W. 150).....	53
Johnston v. Nuqua (151 S. W. 693).....	358	St. Louis, I. M. & S. R. Co. v. Baker (162 S. W. 1199).....	699
Johnston v. Pennington (150 S. W. 863).....	278	St. Louis, I. M. & S. R. Co. v. Brogan (151 S. W. 690).....	533
Jones v. State (152 S. W. 161).....	*698	St. Louis, I. M. & S. R. Co. v. Chamberlain (150 S. W. 157).....	180
J. W. Finn & Co. v. Culberhouse (150 S. W. 698).....	197	St. Louis, I. M. & S. R. Co. v. Jacks (151 S. W. 706).....	347
Kansas City Southern R. Co. v. Harris (151 S. W. 992).....	374	St. Louis, I. M. & S. R. Co. v. Loyd (150 S. W. 864).....	340
Keith v. Smith (162 S. W. 1199).....	699	St. Louis, I. M. & S. R. Co. v. McMillan (150 S. W. 112).....	25
Keith v. Wheeler (151 S. W. 284).....	318	St. Louis, I. M. & S. R. Co. v. Steed (151 S. W. 257).....	205
Kenyon Printing & Mfg. Co. v. Crosby (150 S. W. 567).....	258	St. Louis, I. M. & S. R. Co. v. Swaim (150 W. 861).....	224
Keopple v. Delight Lumber Co. (151 S. W. 259).....	233	St. Louis, I. M. & S. R. Co. v. Uhless (162 S. W. 1199).....	699
Kightlinger v. State (150 S. W. 690).....	172	St. Louis, I. M. & S. R. Co. v. Waters (152 S. W. 137).....	619
King v. Rannals (162 S. W. 1199).....	699	St. Louis, I. M. & S. R. Co. v. Williams (151 S. W. 243).....	331
Knapp & Co. v. Wilks (151 S. W. 280).....	243	St. Louis, I. M. & S. R. Co. v. Wright (150 S. W. 706).....	269
Koen v. Miller (150 S. W. 411).....	152	St. Louis & S. F. R. Co. v. Malone (150 S. W. 116).....	22
Kress Co. v. Moscowitz (152 S. W. 298).....	638	St. Louis & S. F. R. Co. v. Newman (150 S. W. 560).....	63
Laser v. Forbes (150 S. W. 691).....	166		
Little v. Arkansas Nat. Bank (152 S. W. 281).....	281		
Luehrmann Hardwood Lumber Co. v. Zearring (150 S. W. 138).....	*697		

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

105 ARK.—Continued.		Page			Page
St. Louis & S. F. R. Co. v. Newman (151 S. W. 255).....		284	Terrell v. Eagle (162 S. W. 1199).....		699
Savage v. Craig (150 S. W. 146).....	*697		Thomas v. Jackson (151 S. W. 521).....		353
School Dist. No. 22 of Poinsett County v. Castell (150 S. W. 407).....		106	United States Bedding Co. v. Andre (150 S. W. 413).....		111
S. H. Kress Co. v. Moscovitz (152 S. W. 298).....		638	United States Exp. Co. v. Long (150 S. W. 576).....		130
Simmons, Ex parte (150 S. W. 141).....		19	Villines v. State (151 S. W. 1023).....		471
Simms v. State (150 S. W. 113).....		16	Wales-Riggs Plantations v. Caston (152 S. W. 282).....		641
Sims v. St. John (152 S. W. 284).....		680	Wales-Riggs Plantations v. Dye (151 S. W. 998).....		446
Skaggs v. Johnson (150 S. W. 1036).....		254	West v. State (150 S. W. 695).....		175
Skeen v. Ellis (152 S. W. 153).....		513	White v. State (152 S. W. 163).....	*698	
Smith v. Mack (151 S. W. 431).....		653	Wilkerson v. State (151 S. W. 518).....		367
Smith v. State (150 S. W. 149).....		58	Williams v. State (150 S. W. 579).....	*697	
Spann v. Spann (150 S. W. 409).....	*697		Williams v. State (151 S. W. 1011).....	*698	
Speer Hardware Co. v. Bruce (150 S. W. 403).....		146	Williams Cooperage Co. v. Clark (150 S. W. 568).....		157
Stewart v. Fleming (150 S. W. 128).....		37	Williamson v. King (150 S. W. 395).....	*697	
Stubblefield v. Planters' Fire Ins. Co. (150 S. W. 120).....	*697		Winn, Ex parte (150 S. W. 399).....		190
Stubblefield v. Stubblefield (151 S. W. 994).....		594	Wortz v. Ft. Smith Biscuit Co. (151 S. W. 691).....		526
Stuttgart & R. B. R. Co. v. Byrum (162 S. W. 1199).....		698	Wright v. State (151 S. W. 990).....	*698	
Supreme Royal Circle of Friends of the World v. Morrison (150 S. W. 561).....		140	Wyandotte & S. E. R. Co. v. Pierce (162 S. W. 1199).....		699
Tally v. State (150 S. W. 110).....		28	Zaccanti v. State (150 S. W. 122).....		60
Taylor v. Union Sawmill Co. (152 S. W. 150).....		518			
Temple v. Culp (150 S. W. 867).....		222			

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

\*Reported in full in the Southwestern Reporter; not reported in full in Arkansas Reports.

## VOL. 156, KENTUCKY REPORTS

Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.	Ky. Rep.	S.W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	160	509	126	160	757	257	160	926	371	160	1078	487	161	522	617
6	160	777	131	160	811	260	160	1037	375	161	1198	490	161	227	623
18	160	756	141	160	771	262	160	1038	376	161	204	493	161	229	628
20	160	776	149	160	725	263	160	943	383	161	208	495	161	214	667
24	160	754	156	160	917	267	160	923	386	161	211	498	161	523	664
27	160	759	161	160	792	270	160	1043	393	161	203	503	161	220	669
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33	160	723	173	160	807	282	160	1038	397	160	1077	513	161	566	674
37	160	751	183	160	933	288	160	1034	400	161	209	523	161	564	677
44	160	798	189	160	924	296	160	1041	408	161	222	536	161	512	685
57	160	733	191	160	949	299	160	1042	410	161	246	539	161	552	690
66	160	803	194	160	950	301	160	1050	420	161	217	541	161	512	693
74	160	914	197	160	931	304	160	1054	425	161	238	542	161	533	695
78	160	761	202	160	952	309	160	1068	428	160	1060	544	161	540	699
83	160	788	203	160	936	315	160	1067	431	161	228	550	161	557	702
86	160	783	205	160	928	319	160	1069	434	161	506	557	161	543	708
91	160	795	212	160	1048	323	160	1067	439	161	239	569	161	988	712
96	160	771	218	160	953	326	160	1075	452	161	216	580	161	549	714
98	160	785	222	160	942	330	160	1061	455	161	510	588	161	983	717
100	160	782	224	160	952	336	160	1061	458	161	531	597	161	980	721
103	160	748	226	160	920	337	160	1064	462	161	225	599	161	980	723
110	160	790	231	160	937	342	160	1071	465	161	518	606	161	530	730
114	160	769	240	160	945	351	160	1062	475	161	534	609	161	554	736
118	160	786	249	160	1032	356	161	230	483	161	236	615	161	553	741
123	160	746	255	160	919	369	160	1066							

## VOL. 156, KENTUCKY REPORTS

Adams v. Button (161 S. W. 1100).....	693	Benge's Adm'r v. Eversole (160 S. W. 911).....	131
Alexander v. Grinstead (160 S. W. 1069).....	319	Bickel Co. v. National Surety Co. (161 S. W. 1113).....	695
Allen v. Louisville & N. R. Co. (161 S. W. 203).....	395	Board of Council of City of Frankfort v. Kirby (161 S. W. 1115).....	741
Arctic Ice Co. v. Franklin Electric & Ice Co.'s Assignee (160 S. W. 1075).....	326	Board of Health of Covington v. Kollman (160 S. W. 1052).....	351
Arnett v. Howard (161 S. W. 531).....	458	Bradley v. Lexington Tobacco Hogshend Co. (162 S. W. 83).....	813
Baker v. Bowman & Cockrell (160 S. W. 1038).....	262	Brentlinger v. Louisville R. Co. (161 S. W. 1107).....	685
Barclay's Trustee v. Commonwealth (161 S. W. 510).....	455	Bridge's Son v. Kelly (160 S. W. 771).....	96
Bassett v. Lush (161 S. W. 227).....	490	Broadus v. Grinstead (160 S. W. 1069).....	319
Bauer v. Illinois Cent. R. Co. (160 S. W. 933).....	183	Burks v. Douglass (161 S. W. 225).....	462
Beavers' Adm'r v. Ashlock (160 S. W. 785).....	98	Burton v. Cowles' Adm'r (160 S. W. 782).....	100

156 KY.—Continued.		Page		Page
Calhoun v. Alexander (161 S. W. 980) ..	597	Garvey v. Garvey (161 S. W. 526) .....	664	
Casey v. Newport Rolling Mill Co. (161 S. W. 528) .....	623	Gesser v. John B. McLane & Co. (161 S. W. 1118) .....	743	
Cave Hill Cemetery Co. v. Gosnell (161 S. W. 980) .....	599	Goff v. Renick (161 S. W. 983) .....	588	
Central City Foundry & Machine Co. v. Illinois Cent. R. Co. (162 S. W. 81) ..	759	Gooch v. Collins (160 S. W. 1038) .....	282	
Chenault v. Yates (160 S. W. 925) .....	280	Gott v. Berea College (161 S. W. 204) ..	376	
Chesapeake & O. R. Co. v. Burton (161 S. W. 1116) .....	736	Grainger v. Jenkins (160 S. W. 926) ..	257	
Chesapeake & O. R. Co. v. Weddington's Adm'r (161 S. W. 208) .....	383	Grinstead v. Monroe County (160 S. W. 1041) .....	296	
Chesapeake & O. R. Co. v. Williams (160 S. W. 769) .....	114	Harbison-Walker Refractories Co. v. McFarland's Adm'r (160 S. W. 798) .....	44	
Chesbrough v. Vizard Inv. Co. (160 S. W. 725) .....	149	Haynes v. Strunk (160 S. W. 756) .....	18	
Christian-Todd Tel. Co. v. Commonwealth (161 S. W. 543) .....	557	Helm v. Cincinnati, N. O. & T. P. R. Co. (160 S. W. 945) .....	240	
Cincinnati, N. O. & T. P. R. Co. v. Goldston (161 S. W. 246) .....	410	Helm v. Commonwealth (162 S. W. 94) ..	751	
Cincinnati, N. O. & T. P. R. Co. v. Winningham's Adm'r (161 S. W. 506) .....	434	Henry Bickel Co. v. National Surety Co. (161 S. W. 1113) .....	695	
City of Covington v. Westbay (162 S. W. 91) .....	839	Hibbard v. Estridge (160 S. W. 746) .....	122	
City of Henderson v. Connell (161 S. W. 1121) .....	730	Hixson v. Slocum (161 S. W. 522) .....	487	
City of Hopkinsville v. Jarrett (162 S. W. 85) .....	777	Hobbs v. Commonwealth (162 S. W. 104) ..	847	
City of Lancaster v. Pope (160 S. W. 509) ..	1	Holzbog v. Bakrow (160 S. W. 792) .....	161	
City of Louisville v. Louisville R. Co. (160 S. W. 771) .....	141	Hopewell v. Appleby (160 S. W. 1037) ..	260	
City of Newport v. Merkel Bros. Co. (161 S. W. 549) .....	580	Horn v. Grinstead (160 S. W. 1069) .....	319	
City of Newport v. South Covington & C. St. R. Co. (161 S. W. 222) .....	403	Hurst v. Duff (160 S. W. 953) .....	218	
City of Oakdale v. Sanders' Ex'r (160 S. W. 952) .....	224	Illinois Cent. R. Co. v. Covington (160 S. W. 754) .....	24	
Commonwealth v. McCandless (162 S. W. 79) .....	793	Keeton v. Alexander (160 S. W. 761) .....	78	
Commonwealth v. Mutual Loan & Trust Co. (160 S. W. 1042) .....	209	Kenton Water Co. v. City of Covington (161 S. W. 988) .....	569	
Commonwealth v. Saylor (160 S. W. 1032) ..	249	Knights of Maccabees of the World v. Shields (160 S. W. 1043) .....	270	
Compton v. Moore (161 S. W. 540) .....	544	Landers v. Cincinnati, N. O. & T. P. R. Co. (160 S. W. 1050) .....	301	
Conrad's Ex'r v. Conrad (160 S. W. 937) ..	231	Le Moyne v. Meadors (162 S. W. 526) .....	832	
Cooke-Jellico Coal Co. v. Richardson's Adm'r (161 S. W. 537) .....	617	Lewis v. Commonwealth (160 S. W. 1061) ..	336	
Cornett v. Commonwealth (162 S. W. 112) ..	795	Lexington & E. R. Co. v. Baker (161 S. W. 228) .....	431	
Croninger v. Bethel Grove Camp Ground Ass'n (161 S. W. 230) .....	356	Loughridge v. Chenoweth's Ex'r (160 S. W. 783) .....	86	
Cullins v. Williams (160 S. W. 733) .....	57	Louisville, H. & St. L. R. Co. v. Lyons (160 S. W. 942) .....	222	
Cumberland Co. v. Kelly (160 S. W. 1077) ..	397	Louisville, H. & St. L. R. Co. v. Wilson's Ex'r (161 S. W. 513) .....	657	
Cumberland R. Co. v. Baird (160 S. W. 919) .....	255	Louisville Property Co. v. Lawson (160 S. W. 1034) .....	288	
Cumberland Telephone & Telegraph Co. v. Magness' Adm'r (160 S. W. 1061) .....	330	Louisville R. Co. v. Wiggington (161 S. W. 209) .....	400	
Cumberland Telephone & Telegraph Co. v. Sutton (160 S. W. 949) .....	191	Louisville & I. R. Co. v. Kraft (160 S. W. 803) .....	66	
Cunningham's Adm'r v. Central Kentucky Traction Co. (160 S. W. 767) .....	30	Louisville & I. R. Co. v. Kraft (161 S. W. 993) .....	671	
Davis v. Strange (161 S. W. 217) .....	420	Louisville & N. R. Co. v. Crowe (160 S. W. 759) .....	27	
Derrington v. Childers (161 S. W. 216) .....	452	Louisville & N. R. Co. v. Gamble's Adm'r (160 S. W. 795) .....	91	
Dixie Fire Ins. Co. v. A. Layne & Bro. (161 S. W. 530) .....	606	Louisville & N. R. Co. v. Miller (162 S. W. 73) .....	677	
East Tennessee Tel. Co. v. Paris Electric Co. (162 S. W. 530) .....	762	Louisville & N. R. Co. v. Moore (161 S. W. 1129) .....	708	
Elsey v. Lamkin (162 S. W. 106) .....	836	Louisville & N. R. Co. v. Stewart's Adm'r (161 S. W. 557) .....	550	
Employers' Indemnity Co. of Philadelphia v. Kelly Coal Co. (160 S. W. 914) .....	74	Louisville & N. R. Co. v. Strange's Adm'r (161 S. W. 239) .....	439	
Farnsley's Adm'r v. Philadelphia Life Ins. Co. (161 S. W. 1111) .....	699	McCormack v. Louisville & N. R. Co. (161 S. W. 518) .....	465	
Ferrell v. Bauer Cooperage Co. (161 S. W. 1120) .....	749	McCreary v. Speer (162 S. W. 99) .....	783	
First Nat. Bank of Louisville v. Doherty (161 S. W. 211) .....	386	McDowell v. Edwards' Adm'r (161 S. W. 534) .....	475	
Fish v. Welch's Adm'r (161 S. W. 512) .....	541	Magness' Adm'r v. Cumberland Telephone & Telegraph Co. (160 S. W. 1061) .....	330	
Flynn v. Barnes (161 S. W. 523) .....	498	Marcum v. Marcum (161 S. W. 516) .....	669	
Ford v. Commonwealth (160 S. W. 1080) ..	428	Marrowbone Coal & Coke Co. v. Coleman (161 S. W. 238) .....	425	
Foreman v. Lloyd (162 S. W. 83) .....	772	Marshall's Adm'r v. Marshall (160 S. W. 775) .....	20	
France v. Chesapeake & O. R. Co. (160 S. W. 757) .....	126	Mason v. Commonwealth (161 S. W. 229) ..	493	
Gahren, Dodge & Maltby v. Farmers' Bank of Estill County (161 S. W. 1127) .....	717	Masonic Life Ass'n v. Robinson (160 S. W. 1078) .....	371	
		Mattingly's Ex'r v. Brents (162 S. W. 109) ..	844	
		Miller v. Miller (160 S. W. 923) .....	267	
		Moreland v. Henry (161 S. W. 1105) .....	712	



## 156 KY.—Continued.

	Page		Page
Morgan v. Chamberlain (160 S. W. 1066)...	369	Shackelford v. Walker (160 S. W. 807)....	173
Mount v. Fourth Street Bank (161 S. W. 220) .....	503	Shepard v. Browning (160 S. W. 950)....	194
Muir v. Edelen (160 S. W. 1048).....	212	Shepherd v. Bank of Montreal (161 S. W. 214) .....	495
Murphy v. Murphy (161 S. W. 533).....	542	Singer Sewing Mach. Co. v. Dyer (160 S. W. 917) .....	156
Murray v. Walker (161 S. W. 512).....	536	Smith v. Cox's Committee (160 S. W. 786) .....	118
Nantz v. Sizemore (161 S. W. 552).....	539	Smith v. Wathen (162 S. W. 88).....	820
Nashville, C. & St. L. R. Co. v. Banks (161 S. W. 554).....	609	Southern Bitulithic Co. v. DeTreville (161 S. W. 560).....	513
National Co-Op. Burial Ass'n v. Aul's Adm'r (161 S. W. 1123).....	750	Southern R. Co. in Kentucky v. Thacker's Adm'r (161 S. W. 236).....	483
O'Daly v. City of Louisville (162 S. W. 79) .....	815	Southern Ry. in Kentucky v. Owen (162 S. W. 110) .....	827
Oliver Co. v. Louisville Realty Co. (161 S. W. 570) .....	628	Spalding v. City of Lebanon (160 S. W. 751) .....	87
Paducah Light & Power Co. v. Parkman's Adm'r (160 S. W. 931).....	197	Stearns Coal & Lumber Co. v. Tuggle (161 S. W. 1112).....	714
Partin v. American Ass'n (160 S. W. 1057) .....	323	Stuessy v. City of Louisville (161 S. W. 564) .....	523
Peterson v. Peterson (160 S. W. 952).....	202	Summers v. Carpenter (160 S. W. 1064)...	337
Pickergill v. Nelson Creek Coal Co. (160 S. W. 936) .....	203	Taulbee v. Lewis & Chambers (161 S. W. 1100) .....	721
Procter v. Louisville & N. R. Co. (161 S. W. 518) .....	465	Taylor v. Riney (161 S. W. 203).....	393
Purdy's Adm'r v. Evans (160 S. W. 1071)...	342	Thomas v. Kentucky Trust & Security Co. (160 S. W. 1037).....	260
Ramsey v. Utica Deposit Bank (160 S. W. 943) .....	263	Union Light, Heat & Power Co. v. Lake-man (160 S. W. 723).....	33
Raum v. Board of Council of City of Dan-ville (161 S. W. 1198).....	375	United States Fidelity & Guaranty Co. v. Levering's Adm'r (160 S. W. 790).....	110
Reese Lumber Co. v. Licking Coal & Lum-ber Co. (161 S. W. 1124).....	723	Victoria Limestone Co. v. Hinton (161 S. W. 1109) .....	674
Rehm-Zeisher Co. v. F. G. Walker Co. (160 S. W. 777) .....	6	Wathen v. Smith (162 S. W. 88).....	820
Richards v. Barber Asphalt Pav. Co. (161 S. W. 1105).....	690	Weakley v. Meriwether (160 S. W. 1054)...	304
Richardson v. Grinstead (160 S. W. 1069) .....	319	White Sewing Mach. Co. v. Mahoney (162 S. W. 80).....	805
Riddell v. Childers (160 S. W. 1067).....	315	Williams v. Harth (161 S. W. 1102).....	702
Riddell v. Grinstead (160 S. W. 1069).....	319	Williamson's Adm'r v. Blue Grass Fluor-spar Co. (160 S. W. 920).....	226
Roberts v. Brotherhood of Locomotive Fire-men & Enginemen (160 S. W. 924).....	189	Wiltshire's Adm'r v. Kister (160 S. W. 743) .....	168
Romans v. McGinnis (160 S. W. 928).....	205	Winlock v. Munday (162 S. W. 76).....	806
Rose v. Commonwealth (162 S. W. 107)...	817	Wright v. Monroe Lumber Co. (160 S. W. 788) .....	83
Rowe v. Alexander (161 S. W. 508).....	507	Yenawine v. Tycrete-Concrete Products Co. (161 S. W. 1127).....	747
Salmon v. Martin (160 S. W. 1058).....	309		
Sams v. Gray (161 S. W. 553).....	615		
S. B. Reese Lumber Co. v. Licking Coal & Lumber Co. (161 S. W. 1124).....	723		
Schwartz v. Boswell (160 S. W. 748).....	103		

## VOL. 172, MISSOURI APPEAL REPORTS

Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	154	843	104	154	448	203	157	880	299	157	964	404	158
12	154	869	107	157	970	214	157	865	309	157	972	412	158
18	154	463	118	157	1019	220	157	887	318	157	1001	420	158
24	154	450	125	157	835	229	157	967	334	157	1016	426	158
33	154	444	132	157	967	241	157	1046	344	158	74	436	158
40	154	821	141	157	675	255	157	667	352	157	971	470	158
51	154	1135	162	157	883	261	157	893	356	157	890	479	157
61	154	449	174	157	1061	272	157	827	369	157	857	489	158
64	154	808	186	157	823	278	158	397	376	157	848	495	158
90	154	886	191	157	842	286	157	984	384	158	437	502	158
108	154	871	197	157	809	292	157	992	391	158	406	516	158

## VOL. 172, MISSOURI APPEAL REPORTS

	Page		Page
A. Graf Distilling Co. v. Wilson (156 S. W. 23) .....	612	Israel v. United Rya. Co. of St. Louis (155 S. W. 1002) .....	656
Barr v. Hays (155 S. W. 1095) .....	591	Johnson v. Kansas City Bolt & Nut Co. (157 S. W. 685) .....	214
Bartschat v. Downey (155 S. W. 880) .....	632	Jones v. Banner (157 S. W. 967) .....	132
Bergman v. Vogt's Adm'r (154 S. W. 449) ..	61	Kerman v. Leeper (157 S. W. 984) .....	286
Biederman v. Interstate Trust & Banking Co. (154 S. W. 843) .....	1	Lambert v. Hodgdon (154 S. W. 450) .....	24
Board of Triplett Tp. ex rel. v. McPhearson (157 S. W. 857) .....	369	Lemp Hunting & Fishing Club v. Cottle (156 S. W. 799) .....	574
Boehm v. American Patriots (154 S. W. 448) .....	104	Lemp Hunting & Fishing Club v. Hackmann (156 S. W. 791) .....	549
Booher v. Trainer (157 S. W. 848) .....	376	Lobach v. Kansas City Southern R. Co. (158 S. W. 397) .....	278
Bowles v. Troll (154 S. W. 871) .....	102	McMenamy v. Scullin-Gallagher Iron & Steel Co. (155 S. W. 1116) .....	678
Brant v. Glore (158 S. W. 453) .....	420	McWilliams v. Missouri Pac. R. Co. (157 S. W. 1001) .....	318
Britt v. Crebo (158 S. W. 65) .....	426	Market & Fulton Nat. Bank v. Ettenson's Estate (158 S. W. 448) .....	404
Burnett v. Atchison, T. & S. F. R. Co. (154 S. W. 1135) .....	51	Matthews v. Stephenson (157 S. W. 887) ..	220
Byerley v. Metropolitan St. R. Co. (158 S. W. 413) .....	470	Miles v. Central Coal & Coke Co. (157 S. W. 867) .....	229
Clair v. Supreme Council of Royal Arcanum (155 S. W. 892) .....	709	Monarch Metal Weather-Strip Co. v. Han- ick (155 S. W. 858) .....	680
Commerce Trust Co. v. White (158 S. W. 457) .....	537	Moon v. Brown (158 S. W. 79) .....	516
Cunningham v. St. Louis & S. F. R. Co. (155 S. W. 871) .....	590	Mullins v. Everett (157 S. W. 823) .....	186
Danciger Bros. v. American Exp. Co. (158 S. W. 466) .....	391	Parker-Washington Co. v. Meriwether (158 S. W. 74) .....	344
Dierks & Sons Lumber Co. v. Pearman (157 S. W. 970) .....	107	Paxton v. Bonner (157 S. W. 986) .....	479
Dooley v. Welch (158 S. W. 454) .....	528	Porter v. Hetherington (158 S. W. 469) ..	502
Easter v. Brotherhood of American Yeomen (157 S. W. 992) .....	292	Purcell v. Merrick (158 S. W. 478) .....	412
Fisher v. Oliver (154 S. W. 453) .....	18	Ranck v. Merrill (158 S. W. 425) .....	489
Fisher v. Seitz (157 S. W. 883) .....	162	Reinhart Grocery Co. v. Knuckles (155 S. W. 1105) .....	627
Gee v. Leaver (157 S. W. 842) .....	191	Rodgers v. National Council Junior Order United American Mechanics of United States (155 S. W. 874) .....	719
Gentry v. Wabash R. Co. (156 S. W. 27) ..	638	Rowe v. Hammond (157 S. W. 880) .....	203
Graf Distilling Co. v. Wilson (156 S. W. 23) .....	612	St. Louis Billposting Co. v. Stanton (154 S. W. 821) .....	40
Graham Paper Co. v. Sheridan Pub. Co. (158 S. W. 92) .....	495	Schafer v. Ostmann (155 S. W. 1102) .....	602
Grant v. Kansas City Southern R. Co. (157 S. W. 1016) .....	334	Scheidler v. Missouri Boiler & Sheet Iron Works (155 S. W. 897) .....	688
Hagener v. Pulitzer Pub. Co. (158 S. W. 54) ..	436	Sharon v. American Fidelity Co. (157 S. W. 972) .....	309
Harms v. Fidelity & Casualty Co. of New York (157 S. W. 1046) .....	241	Simrall v. American Multigraph Sales Co. (158 S. W. 437) .....	384
Harris v. Quincy, O. & K. C. R. Co. (157 S. W. 893) .....	261	Singleton v. Kansas City Base Ball & Exhibition Co. (157 S. W. 964) .....	299
Hewitt v. Western Union Tel. Co. (157 S. W. 827) .....	272	Southwest Nat. Bank v. House (157 S. W. 809) .....	197
Hudspeth v. St. Louis & S. F. R. Co. (155 S. W. 868) .....	579	Spangler v. Ridgeley Protective Ass'n (157 S. W. 687) .....	255
Iba v. Chicago, B. & Q. R. Co. (157 S. W. 675) .....	141	State v. Davidson (157 S. W. 890) .....	356

172 MO. APP.—Continued.		Page		Page
State Bank of Freeport v. Cape Girardeau & C. R. Co. (155 S. W. 1111).....	662		Troll v. Prudential Ins. Co. of America (154 S. W. 809).....	12
Sterling Silver Mfg. Co. v. Worrell (154 S. W. 866).....	90		Vivion v. Chicago & A. R. Co. (157 S. W. 971).....	352
Stout v. Kansas City Terminal R. Co. (157 S. W. 1019).....	113		Voris v. Chicago, M. & St. P. R. Co. (157 S. W. 835).....	125
Thompson v. Langan (154 S. W. 808).....	64		Weaver v. Rudasill (154 S. W. 444).....	33
Timmerman v. Frankel (157 S. W. 1051)...	174		Western Stoneware Co. v. Pike County Mineral Springs Co. (155 S. W. 1083)...	696

## VOL. 127, TENNESSEE (19 CATES) REPORTS

Tenn. Rep.	S. W. Rep.	Tenn. Rep.	S. W. Rep.	Tenn. Rep.	S. W. Rep.	Tenn. Rep.	S. W. Rep.	Tenn. Rep.	S. W. Rep.	Tenn. Rep.	S. W. Rep.	Tenn. Rep.	S. W. Rep.	Tenn. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	151	411	77	153	59	167	154	530	312	154	1146	393	155	158	521
8	151	1030	90	153	479	173	154	536	324	155	129	412	155	167	535
32	150	418	96	153	483	184	154	531	327	155	130	426	155	166	557
36	152	1032	107	153	838	205	154	965	330	155	131	429	155	388	561
40	152	1029	118	153	481	220	154	957	340	155	135	437	155	165	566
45	152	1035	126	153	840	248	154	1141	357	155	133	441	155	142	571
54	152	1034	133	153	842	267	154	969	363	155	139	501	155	388	575
58	152	1037	142	153	844	282	154	1149	376	155	170	504	152	1031	662
63	152	1033	154	153	1120	292	154	1151	387	155	163	509	156	189	665
68	152	1038													

## VOL. 127, TENNESSEE (19 CATES) REPORTS

Agee v. Saunders (157 S. W. 64).....	680	Keith v. Funding Board of State of Tennessee (155 S. W. 142).....	441
Barnes v. Redmond (152 S. W. 1035).....	45	Keith v. State (152 S. W. 1029).....	40
Beatty v. Schenck (152 S. W. 1033).....	63	Landis v. White Bros. (152 S. W. 1031)...	504
Bennett v. Nashville Trust Co. (153 S. W. 840).....	126	McKennon v. McFall (155 S. W. 158).....	393
Brasfield v. Town of Milan (155 S. W. 926).....	561	Mahon v. State (150 S. W. 458).....	535
Byrns v. Gallatin Turnpike Co. (155 S. W. 130).....	327	Martin v. State (155 S. W. 129).....	324
Campbell County v. Wright (151 S. W. 411).....	1	Mattix v. Swepston (155 S. W. 928).....	693
Citizens' Bank v. H. A. Klyce Co. (156 S. W. 1083).....	609	Memphis St. R. Co. v. Caviness (157 S. W. 63).....	571
Citizens' Nat. Life Ins. Co. v. Witherspoon (155 S. W. 139).....	303	Meredith v. American Nat. Bank of Sparta (153 S. W. 479).....	90
City of Nashville v. Singer & Johnson Fertilizer Co. (153 S. W. 838).....	107	Meredith v. Dibrell (155 S. W. 163).....	387
Cooper & Keys v. Bell (153 S. W. 844).....	142	Meredith v. First Nat. Bank of Tullahoma (152 S. W. 1038).....	68
Crenshaw v. Knight's Estate (156 S. W. 468).....	708	Myers v. Northcutt (152 S. W. 1034).....	54
Cumberland Lodge, No. 8, E. & A. M. v. City of Nashville (154 S. W. 1141).....	248	Nashville v. Singer & Johnson Fertilizer Co. (153 S. W. 838).....	107
Cumberland Telephone & Telegraph Co. v. Hartley (154 S. W. 531).....	184	Nashville, C. & St. L. R. Co. v. Davis (154 S. W. 530).....	167
Daly v. Sumpter Drug Co. (155 S. W. 167).....	412	Nashville, C. & St. L. R. Co. v. Wade (153 S. W. 1120).....	154
Davis v. Home Ins. Co. (155 S. W. 131)...	330	Norman v. State (155 S. W. 135).....	340
Dunn v. State (154 S. W. 969).....	267	Norris v. State (155 S. W. 165).....	437
Eakin v. Riddle (155 S. W. 166).....	426	Puryear v. Nashville, C. & St. L. R. Co. (153 S. W. 842).....	133
Eason v. Gaines (156 S. W. 1084).....	662	Reelfoot Lake Case (State ex rel. v. West Tennessee Land Co., 158 S. W. 746)....	575
Farmer v. City of Nashville (156 S. W. 189).....	509	Sanders v. Riddick (156 S. W. 464).....	701
First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville (154 S. W. 965).....	205	Shaller v. Garrett (156 S. W. 1084).....	665
Ford v. Hurt (155 S. W. 927).....	537	Smithson v. State (155 S. W. 133).....	357
Forest Hill Cemetery Co. v. Creath (157 S. W. 412).....	686	Southern Ice & Coal Co. v. Alley (154 S. W. 536).....	173
Freddo v. State (155 S. W. 170).....	376	Southern R. Co. v. Cumberland Telephone & Telegraph Co. (156 S. W. 853).....	566
Gleason v. Prudential Fire Ins. Co. (151 S. W. 1030).....	8	State v. Stephens (154 S. W. 1149).....	282
Goodman v. Goodman (155 S. W. 388).....	501	State v. Wheeler (152 S. W. 1037).....	58
Hamon v. Foust (150 S. W. 418).....	32	State ex rel. v. Hebert (154 S. W. 957)....	220
Hawkins v. Hubbell & Houser (154 S. W. 1146).....	312	State ex rel. v. Nashville Baseball Club (154 S. W. 1151).....	292
Independent Order of Foresters v. Cunningham (156 S. W. 192).....	521	State ex rel. v. West Tennessee Land Co. (158 S. W. 740).....	575
		Temple v. State (155 S. W. 388).....	429

127 TENN.—Continued.		Page		Page
Tennessee Cent. R. Co. v. Binkley (153 S. W. 59) .....		77	Vaulx v. Buntin (153 S. W. 481) .....	118
Turney v. Mobile & O. R. Co. (156 S. W. 1085) .....		673	Watts v. Gordon (153 S. W. 483) .....	96
United States Fidelity & Guaranty Co. v. People's Bank (157 S. W. 414) .....		720	White v. McMath & Johnston (156 S. W. 470) .....	713
			Wood v. Sewanee Coal, Coke & Land Co. (152 S. W. 1032) .....	36

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# TENNESSEE CASES IN THIS VOLUME

(161 SOUTHWESTERN REPORTER)

	Page		Page
Adams v. Chattanooga Co. (Tenn.).....	1131	Jones v. State (Tenn.).....	1016
Albert, Interstate Amusement Co. v. (Tenn.) .....	488	Knaff, Harrison v. (Tenn.).....	1003
American Zinc Co. v. Smith (Tenn.).....	494	Nashville, C. & St. L. R. Co., Fourth Nat. Bank v. (Tenn.) .....	1144
Baird v. Smith (Tenn.).....	492	Noe v. Morristown (Tenn.).....	485
Carolina, C. & O. Ry. v. Shewalter (Tenn.).....	1136	Sharp, Day v. (Tenn.).....	994
Chattanooga Co., Adams v. (Tenn.).....	1131	Shewalter, Carolina, C. & O. Ry. v. (Tenn.).....	1136
City of Chattanooga, Doyle v. (Tenn.)....	997	Shipp v. State (Tenn.).....	1017
City of Chattanooga v. Southern R. Co. (Tenn.) .....	1000	Smith, American Zinc Co. v. (Tenn.).....	494
Day v. Sharp (Tenn.).....	994	Smith, Baird v. (Tenn.) .....	492
Doyle v. Chattanooga (Tenn.).....	997	Southern R. Co., City of Chattanooga v. (Tenn.) .....	1000
Fourth Nat. Bank v. Nashville, C. & St. L. R. Co. (Tenn.).....	1144	State, Jones v. (Tenn.).....	1016
Harrison v. Knaff (Tenn.).....	1003	State, Shipp v. (Tenn.).....	1017
Interstate Amusement Co. v. Albert (Tenn.) .....	488	State v. Woollen (Tenn.).....	1006
		Town of Morristown, Noe v. (Tenn.).....	485
		Woollen, State v. (Tenn.) .....	1006

